

State of New Jersey  
Department of Education  
225 West State Street  
P.O. Box 2019  
Trenton, N.J. 08625

**NEW JERSEY**  
**SCHOOL LAW DECISIONS**  
**Indexed**

January 1, 1976 to December 31, 1976

**vol. 2**

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**In the Matter of the Annual School Election Held in the  
School District of the Town of Nutley, Essex County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The Board of Education of the Town of Nutley, Essex County, hereinafter "Board," conducted its annual school election on March 9, 1976. Rosanne Policastro, an unsuccessful candidate for membership on the Board, hereinafter "complainant," filed a letter complaint alleging election campaign irregularities by and on behalf of one of the successful candidates. The Commissioner of Education directed his representative to conduct an inquiry into the allegations on April 15, 1976 at the office of the Essex County Superintendent of Schools. The report of the representative is as follows:

Complainant alleges that the Mothers' Club, hereinafter "Club," of Yantacaw School, one of eight schools under the direction of the Board, was allowed to prepare on school facilities and distribute through school pupils the following flyer: (C-1)

**"MOTHERS' CLUB**

**TUESDAY**

**"JANUARY 13—1:00 P.M. REFRESHMENTS  
"BRING YOUR FRIENDS AND NEIGHBORS  
"MARILYN WIGHTMAN, BOARD OF EDUCATION CANDIDATE  
OF THE WOMANS (sic) CAMPAIGN COMMITTEE WILL SPEAK.**

**"[A PERSON] WILL DEMONSTRATE MAKING-UP FOR "A NEW  
YOU."**

The judge of election assigned to one of two polling places established by the Board at Yantacaw School testified through personal knowledge by virtue of his age that the Women's Campaign Committee (C-2) referred to, *ante*, was founded in 1935. It is a combined effort of eleven separate women's clubs or organizations operating in the Town of Nutley to secure election for its selected candidates and includes clubs and organizations such as the Nutley Branch of the American Association of University Women, Catholic Daughters of America, Grace Church Women's Guild, Sisterhood of Temple B'nai Israel, Vincent Methodist Church Women, St. Paul's Church Women's Guild, and the Yantacaw School Mothers' Club. It is also observed that the Mothers' Club of the Board's Washington School also participates in the Women's Campaign Committee.

The collective testimony of the campaign manager and the secretary of the Women's Campaign Committee establishes that Candidate Wightman did, in fact, speak at the meeting conducted by the Club at the Yantacaw School on January 13, 1976. Candidate Wightman testified that she delivered a campaign speech to approximately twenty-five to thirty people who were in attendance. The

collective testimony of the president of the Club and the Yantacaw School principal establishes that the campaign flyer (C-1) was prepared on the school's mimeograph machine and distributed by the Yantacaw School pupils. The president of the Club testified that approximately 520 flyers (C-1) were prepared and distributed in this fashion. The president also testified that the practice of having pupils take home this kind of flyer (C-1) has been in effect at the Yantacaw School since at least 1959. The president testified that since the Women's Campaign Committee decided to endorse Candidate Wightman, the Club determined to invite Candidate Wightman to speak at its January meeting. It is observed that the invitation for Candidate Wightman to speak was extended to the exclusion of all other candidates.

The principal of Yantacaw School, who has held that position for three years, testified that the Club is an organization of approximately fifty mothers. The Club performs ancillary services for the school on a year-round basis in a manner similar to parent-teacher associations. The principal testified that the flyer (C-1) was prepared on the school's mimeograph machine, which was donated to the school by the Club. The principal testified that while he normally approves notices that are to be sent home with pupils, in this instance he did not. The principal explained that he was not aware of the flyers (C-1) until the pupils had already taken them home.

The Board Secretary testified that while the Board has established policies in regard to the rental of its buildings or equipment, he is not aware of any written policy in regard to the kinds of notices, flyers, or memoranda which may be distributed by its pupils.

The representative observes that the Board established seven polling places for its recent election. Two of the seven polling places were established at the Yantacaw School. Complainant prepared a chart (C-3) which attempts to establish that Candidate Wightman received the highest number of votes among the candidates at both polling places established at the Yantacaw School. The chart shows that Candidate Wightman placed fourth in four of the polling places and first in one polling place. It appears that complainant argues that Candidate Wightman placed first at the Yantacaw School polling places by virtue of the flyer (C-1) and the fact that she, Candidate Wightman, spoke at the meeting on January 13, 1976. Complainant alleges that she was placed at a disadvantage by these circumstances.

The representative observes that the flyer (C-1) controverted herein is the kind of campaign literature specifically prohibited for distribution by school pupils. *N.J.S.A.* 18A:42-4 states in unambiguous fashion that:

"No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or

grounds, nor shall any pupil be requested or directed by an official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.”

The representative observes that the Club, on behalf of its selected candidate, was allowed to use the school’s equipment for the preparation of the flyer. (C-1) The fact that the Club donated the mimeograph machine to the school is immaterial. The machine is the property of the Board. It may not be used to favor or oppose the candidacy of any person to membership on the Board to the exclusion of all other candidates. The guidance offered by the New Jersey Supreme Court in *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, 13 N.J. 172 (1953) is applicable herein. There, the Court held:

“\*\*\*The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint.\*\*\*” (at p. 181)

While the Court was considering the question of a board using public funds to endorse its own money proposal before its electorate, the situation herein is analogous. It is a disservice to the Board’s total constituency to allow its facilities or equipment to be used in any fashion to advocate one candidate’s election to the total exclusion of the remaining candidates.

The representative finds no merit in complainant’s graph (C-3) and corresponding argument that Candidate Wightman received the highest total vote of the Yantacaw School due solely to the flyer (C-1) or her speech. Complainant fails to consider the voters’ personal preference for candidates as a variable which remains unknown, but which could be decisive.

This concludes the report of the Commissioner’s representative.

\* \* \* \*

The Commissioner has reviewed the report of his representative and concurs with the findings of fact and conclusions set forth therein.

*N.J.S.A.* 18A:42-4 clearly prohibits the use of pupils for the distribution of campaign materials as controverted herein. The Board is directed to develop a written policy in regard to the kinds of notes, flyers, and memoranda which may be distributed by pupils in each of its eight schools. Such policy must be developed consistent with law and submitted to the Essex County Superintendent of Schools by October 1, 1976.

The Commissioner cautions this Board that anything less than strict compliance with the statutory requirements cannot be tolerated. See *In the Matter*

*of the Recount of Ballots Cast at the Annual School Election in the Borough of Fort Lee, Bergen County, 1959-60 S.L.D. 120. While the evidence herein supports the claim that pupils were used to distribute the flyer (C-1) and that Candidate Wightman, on the one occasion, received preferential treatment by being allowed to address a group of persons to the exclusion of the other candidates, such deficiencies do not constitute sufficient reason to set aside the will of the electorate by vitiating the results of the election. The Commissioner has consistently declined to set aside contested school elections absent clear and convincing proof that the irregularities improperly affected the results of the election. In the Matter of the Annual School Election in the School District of Voorhees Township, Camden County, 1968 S.L.D. 70 See also Application of Wene, 26 N.J. Super. 363 (Law Div. 1958), aff'd 13 N.J. 185 (1953); Sharrock v. Keansburg, 15 N.J. Super. 11 (App. Div. 1951); Love v. Freeholders, 35 N.J.L. 269 (Sup. Ct. 1871); In the Matter of the Annual School Election of the Township of Jefferson, Morris County, 1960-61 S.L.D. 181.*

With the exception of the directive to the Board hereinbefore issued, the complaints are dismissed.

COMMISSIONER OF EDUCATION

June 16, 1976

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, June 16, 1976

For the Complainant-Appellant, Mrs. Rosanne Policastro, *Pro Se*

For the Nutley Board of Education, Smith, Kramer & Morrison (David H. Posner, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the additional statement that continued violation of the law will lead to the invalidation of future elections.

Daniel Gaby and Bryant George dissented in this matter.  
Katherine K. Neuberger and E. Constance Montgomery abstained.

September 8, 1976

Frank T. Gambatese,

*Petitioner,*

v.

Board of Education of the Borough of West Paterson,  
Vito De Prenda, Benjamin Desmond, Rudolph Filko  
and Margaret Filko, Passaic County,

*Respondents.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Fontanella, Shashaty, Leonard, Cozine & Harris (James M. Shashaty, Esq., of Counsel)

For the Respondents, John G. Thevos, Esq., of Counsel

Petitioner is a member of the West Paterson Board of Education, hereinafter "Board," who seeks to have an action of the Board set aside. The contested action was one to employ the spouse of one of its members. Petitioner alleges that such employment constitutes a conflict of interest in direct contravention of *N.J.S.A. 18A: 12-2* and is therefore improper and illegal. The Board denies the allegations set forth and asserts that its action in regard to the complained employment is in all respects proper and legal. The Board seeks Summary Judgment in its favor, which is opposed by petitioner.

This matter is referred for adjudication to the Commissioner of Education on the pleadings, stipulation of facts, exhibits, affidavits and Briefs of counsel in support of their respective positions.

The uncontroverted facts of the matter are as follows:

The Board conducted a special meeting on June 11, 1975, which was attended by seven of its nine members. At the meeting the Board determined, *inter alia*, to offer employment as a teaching staff member for 1975-76 to one Margaret Filko, hereinafter "teacher." The teacher's husband, Rudolph Filko, is a member of the Board and he was one of the seven members present at this meeting. The minutes (J-1) of the meeting establish that the result of the roll call vote to offer employment to the teacher stood at five ayes and two nays. One of the affirmative votes was cast by the teacher's husband. (J-1, at p. 6) The minutes also establish that immediately upon the close of the roll call vote, petitioner informed his fellow Board members that in his judgment a conflict of interest existed with respect to the teacher's employment because her husband cast one of the five votes necessary for her employment. (J-1, at p. 6)

The Commissioner notices that the instant Petition of Appeal was filed on June 26, 1975, some fifteen days after the special meeting of the Board on June 11, 1975, *post*.

Thereafter, the Board conducted its regular monthly meeting on July 1, 1975, which again was attended by only seven of its members including petitioner. However, one of the two members absent from this meeting was Board member Filko. While the minutes of this meeting are not before the Commissioner, an affidavit of the Board Secretary (R-1) establishes that the Board adopted two resolutions on July 1, 1975, which are relevant to the instant matter. First, the Board by a vote of six ayes and one abstention determined to rescind its June 11, 1975 resolution, *ante*, by which it offered employment for the 1975-76 school year to the teacher. (R-1, at p. 2) Next, the Board, by a roll call vote of five ayes and two nays determined to offer employment to the teacher for the 1975-76 school year. (R-1, at p. 3) The Commissioner observes that the teacher's husband was not present at this meeting; consequently, his vote was not one of the five ayes cast as complained by petitioner with respect to the June 11, 1975 meeting, *ante*.

The affidavit (R-1) of the Board Secretary attests to the fact that an employment contract was offered to the teacher subsequent to the Board's resolution of July 1, 1975.

The Board anchors its Motion for Summary Judgment in its favor on what it asserts to be its "curative" action of its June 11, 1975 determination taken at the meeting subsequently conducted on July 1, 1975. The Board contends that even if the teacher's husband should not have participated in the voting on June 11, 1975, with respect to his spouse's employment, its subsequent action to rescind the original offer of employment to the teacher and then offer her employment thereafter without her husband's vote, cures any ill which may have existed. The Board cites *In the Matter of the Election of Dorothy Bayless to the Board of Education of Lawrence Township Mercer County*, 1974 S.L.D. 595, reversed State Board of Education 603, in support of its view that its employment action of July 1, 1975, is consistent with the Doctrine of Abstention set forth therein.

It is observed that in its determination to reverse the Commissioner in *Bayless, supra*, the State Board of Education set forth its view that no conflict of interest existed provided that the board member in question who had a spouse employed by the board upon which he/she sat did not participate in voting on any matter which directly involved such spouse.

Petitioner, to the contrary, argues that the existing employment of the teacher is in direct violation of *N.J.S.A.* 18A:12-2. The Commissioner observes that the statute of reference provides that a board member shall not be "interested directly or indirectly in any contract with or claim against the board." Petitioner also cites *Bayless, supra*, with specific reference to the meeting of June 11, 1975, wherein the teacher's husband did participate in the voting of his spouse's employment. Petitioner asserts that because of that participation the teacher's husband violated the Doctrine of Abstention set forth by the State Board in its reversal of the Commissioner's holding in *Bayless, supra*, the action itself is null and void. Furthermore, petitioner argues that it is this action which must be declared invalid by virtue of the teacher's husband's participation in the voting. Since this is so, petitioner argues, the Board's attempt to rescind this

action at its meeting of July, 1, 1975, is improper because a board may not rescind a final action taken at a previous meeting.

The Commissioner has reviewed the several cases cited by petitioner with respect to his assertion that a conflict of interest exists herein, including *First National Bank of Fort Lee vs. Englewood Cliffs*, 123 N.J.L. 590 (Sup. Ct. 1940); *Thomas v. Board of Education of Morris Township*, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

Additionally, petitioner contends that so long as the teacher's husband is a member of the Board, she may not be employed by it because of the inherent conflict of interest. Petitioner cites *Bayless, supra*, and *Shirley Smiecinski v. Board of Education of the Township of Hanover, Morris County*, 1975 S.L.D. 478 in support of the view that a spouse of a board member may not be employed by the board.

The issue before the Commissioner for adjudication may be succinctly stated: May the spouse or relative of a board member be employed by that board. The Commissioner is aware of no authority, statutory or otherwise, nor has any been cited to him, that would preclude a spouse or a relative, who is otherwise qualified, from being employed by that board.

The existing pertinent case law in this regard is the holding by the State Board in *Bayless, supra*. There, it was held by the State Board that if a board member abstained from voting on matters directly affecting his/her spouse no conflict of interest would exist. While the Commissioner is aware that each case alleging a conflict of interest must be decided on its own merits, the matter is too analogous to *Bayless* to draw a distinction and enter a contrary finding.

Petitioner's reliance on *Smiecinski, supra*, is misplaced. There, the Commissioner upheld a policy adopted by the Hanover Board of Education with respect to the non-employment of persons as substitute teachers who were relatives of its members. Thus, the issue was not primarily an alleged conflict of interest as opposed to whether or not the Board had the authority to adopt such a policy. The Commissioner held that the board did have such authority.

Finally, the Commissioner finds petitioner's argument that the Board lacked the authority to rescind its June 11, 1975 resolution, offering employment to the teacher, at its regular meeting of July 1, 1975 is without merit. It is the Commissioner's judgment that the Board was within its legal authority to invalidate its earlier action particularly in view of the circumstances hereinbefore set forth.

The Commissioner also finds that the Board's rescinding resolution of July 1, 1975, was taken in good faith with respect to the second resolution employing said teacher for the 1975-76 academic school year which subsequently resulted in a contractual agreement effected between the Board and the teacher for the period set forth above. While the Commissioner finds no necessity to comment on the wisdom or legality of Board member Filko's decision to vote in favor of his wife's employment at the June 11, 1975 Board meeting, he is

constrained to advise board members who sit on boards of education that the State Board's holding in *Bayless, supra*, with respect to the Doctrine of Abstention as it pertains to board members whose spouses are employed by the boards on which they serve, is controlling in such instances. Such actions may properly be held up to severe scrutiny and possible challenge by the public.

The Commissioner finds no basis to intervene. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 29, 1976

William C. Dooner, Jr.,

*Petitioner,*

*v.*

Board of Education of the Toms River School District, Ocean County,

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, William C. Dooner, Jr., *Pro Se*

For the Respondent, Milton Gelzer, Esq.

Petitioner, formerly enrolled as a pupil in the Toms River School District, Ocean County, alleges that the Board of Education of the Toms River School District, hereinafter "Board," in concert with its administrative officers, improperly withheld and failed to award him a high school diploma. Petitioner seeks relief in the form of an Order from the Commissioner of Education which would require the Board to award him the diploma. The Board denies the allegations and asserts that petitioner was not awarded a diploma because he failed to meet its established academic requirements. The Board also filed a Motion to Dismiss the Petition, with supporting Brief, grounded on petitioner's failure to state a cause of action. Petitioner filed a Brief in opposition thereto and demands a plenary hearing.

The matter is before the Commissioner for adjudication on the pleadings, exhibits and Briefs of the respective parties.

The Commissioner is constrained to observe that the matter herein was originally filed on July 8, 1974. Petitioner, who represents himself, failed to name the Board as a party respondent. The Commissioner's representative

assigned to the matter properly directed petitioner to immediately amend his pleadings so that the Board would be named as party respondent. Thereafter, the Commissioner's representative requested the Amended Petition on August 28, 1974, and again on March 12, 1975. The Amended Petition was finally filed on July 2, 1975. Subsequent to the joining of the issues through the filing of the Board's Answer on September 11, 1975, a conference of counsel was held on October 16, 1975. In the meantime, the Board filed a letter memorandum on October 9, 1975 which it thereafter considered to be its Brief in support of the Motion to Dismiss. Petitioner agreed at the conference of counsel held on October 16, 1975, to, *inter alia*, file his Brief in opposition to the Motion to Dismiss by December 1, 1975. Petitioner, subsequent to his failure to file his Brief by that date, on December 16, 1975, requested an extension of time until May 1976 to file his opposing Brief. Thereafter, petitioner by letter dated January 6, 1976, demanded that the Board produce the minutes of its meeting conducted on February 19, 1974, which, the Commissioner observes it did on February 4, 1976. The Commissioner also observes that the Board had conducted a closed meeting on February 19, 1974, which, prior to the enactment of *c. 231, L. 1975 (Open Public Meetings Act)* was proper. It is also observed that the propriety of a closed meeting has been upheld by the Courts and the Commissioner in prior matters. It has also been upheld that a board of education is required to take official action at its public meetings. *Cullum v. Board of Education of North Bergen*, 15 N.J. 285, 294 (1954); *Tolliver et al. v. Metuchen Board of Education*, 1970 S.L.D. 415

In any event, upon receipt of the regular minutes of the meeting conducted by the Board on February 19, 1974, petitioner then demanded the "minutes" of the closed meeting held that same day. The Commissioner observes that on prior occasions it has been held a board of education could take no official action at a closed or executive meeting. It follows that written recollections, or as petitioner contends herein "minutes," of what occurred at those meetings were not binding on the board or individual members. *Tolliver, supra; Theodore Seamans, et al. v. Board of Education of the Township of Woodbridge, Middlesex County*, 1968 S.L.D. 1 The Board stated it did not maintain minutes of its closed meetings, a position which petitioner vigorously opposed by letter dated February 5, 1976. Furthermore, petitioner filed a Motion for Extended Discovery which was denied by the Commissioner's representative by letter dated March 11, 1976. Petitioner thereafter filed his Brief on March 16, 1976, in opposition to the Board's Motion to Dismiss. Finally, notwithstanding the earlier stated position of the Board that it did not maintain minutes of its closed meeting held on February 19, 1974, the Board submitted on May 24, 1976, what is purported to be "\*\*\*\*a reconstruction of the minutes from the Executive session of [February 19, 1974] \*\*\*." (C-1) The Commissioner observes that while this written recollection of what may have occurred at the closed meeting was submitted, such a statement does not constitute minutes of a meeting by which a board of education is bound.

The pertinent facts of the instant matter are as follows. Petitioner was a pupil enrolled in his twelfth year at the Toms River High School North, hereinafter "high school," during the 1972-73 academic school year. Petitioner was not awarded a diploma during that year's commencement exercises. The Board

maintains that petitioner was not awarded his diploma because he failed to successfully complete the required course of United States History II, hereinafter "course." Petitioner asserts that he was informed he would not receive his diploma on June 15, 1973, the last day of school, because of his alleged failure of the course. Petitioner's claim herein is grounded on two premises: (1) that because he allegedly had not been informed of his possible failure of the course by the school authorities prior to June 15, 1973, he is automatically entitled to a passing grade regardless of his achievement, and (2) had the teacher of the course utilized a different grading system he would have passed the course.

Petitioner, with respect to his first claim, asserts that the teacher had, in fact, notified other twelfth grade pupils in writing during the 1972-73 academic year that they were in danger of failing the course. Consequently petitioner concludes that because he received no written warning with respect to his alleged failing performance, he was subjected to improper discrimination. Petitioner anchors his claim that because of the failure of the teacher or other school authorities to properly notify him in writing of his unsatisfactory performance in the course he deserves a passing grade, on a provision of the teachers' handbook (C-2) which states, *inter alia*,

\*\*\*

"At the approximate mid-point of each marking period, Unsatisfactory Reports are to be issued for students who are FAILING A GIVEN SUBJECT OR WHO ARE BORDERLINE CASES.\*\*\*"

"A student who fails any subject, for which an Unsatisfactory Report has NOT been issued, will receive FULL credit for the course\*\*\*."

*(Emphasis in text.)*

Petitioner, with respect to the second premise upon which he presses his claim, asserts that had the teacher of the course utilized a weighted letter grading system, as opposed to the numerical marking system used, he would have received a passing grade. Petitioner complains that throughout his high school career only the teacher of this course utilized a numerical marking system and further complains that the teacher did utilize a weighted letter grading system with other pupils in the course.

The Board, in its Answer, admits the existence of that provision of the teachers' handbook (C-2, *ante*) which allows for a pupil to receive full credit for a course, even though the pupil's performance is unsatisfactory, if the pupil is not notified in writing of his/her unsatisfactory performance. The Board, however, asserts that such provision is an administrative directive to teaching staff members which is designed to encourage teachers to advise their pupils of possible failure. The Board asserts that petitioner, who reached his eighteenth birthday on February 27, 1973, and became emancipated, instructed the administration, including the principal, the vice-principal, as well as the teacher and the Board's attendance officer, that thereafter he chose not to have any reports or other school-related documents sent to his parents. Thus, the Board explains, school authorities adhered to his wishes and, in this regard, the teacher informed petitioner orally of his possible failure during March, April and May, 1973. The

Board also admits that petitioner was notified on June 15, 1973, he was not to receive his diploma for failure of the course.

The Board also contends that the teacher advised petitioner that unless his school attendance became more regular, he would be in jeopardy of failing the course. The Board filed petitioner's attendance record (C-3) for the 1972-73 academic year which shows that petitioner was absent a total of seventy-two days, and late to school a total of thirty-five days. In each instance of absence or tardiness, the Board asserts, petitioner wrote his own excuse.

The Board maintains that the teacher afforded petitioner the opportunity to take a make-up test which, if successfully passed, would have permitted him to pass the course and receive his diploma. The test was administered on June 16, 1973, and petitioner received a failing grade. Moreover, the Board explains that it has consistently advised petitioner that he would be awarded a diploma if he presented evidence of successful completion of a United States History II course from an accredited high school or from its own school. The Commissioner observes that petitioner was so notified on at least two occasions; once by letter (C-6) dated June 19, 1973, and again by letter (C-7) dated October 29, 1973.

The Commissioner has reviewed petitioner's scholastic achievement for 1972-73 (C-4) which shows that petitioner did, in fact, receive a failing grade for United States History II.

The Board denies the allegation that the teacher of the course utilized a weighted letter grading system for pupils other than petitioner. The Board asserts that petitioner's unsatisfactory performance in the course is the cause of his failing grade, and not the result of a marking system.

The Commissioner notices that petitioner, by letter (C-5) dated January 6, 1976, denied receiving oral advice from his teacher that he might fail, and further complained that if his attendance record was adjudged to be poor he should have been so notified.

The Commissioner has reviewed the pleadings, exhibits and a document (C-8) which purports to be an affidavit. However, the document is not executed by the alleged affiant nor is it properly witnessed. The Commissioner finds that the sole issue for adjudication is whether by virtue of the provision of the teachers' handbook (C-2, *ante*) which allows a pupil full credit, though his/her achievement is unsatisfactory, if the pupil is not notified in writing of unsatisfactory progress, must be awarded a diploma. The Commissioner finds that the record herein amply supports the Board's determination not to award petitioner a diploma by virtue of his performance and attendance record which resulted in his failing grade for United States History II.

Firstly, the Commissioner notices that *N.J.S.A.* 18A:35-1 requires boards of education to have as part of their curriculum a two-year course of study in the history of the United States which must be satisfactorily completed by each pupil. *N.J.S.A.* 18A:35-2 sets forth the nature and purpose of the legislative

requirements for the two-year course. Furthermore, *N.J.A.C.* 6:27-1.3 sets forth the requirement of the State Board of Education with respect to the approval process of a local board of education's curriculum. Each pupil must successfully complete required courses of the board's curriculum in order to be graduated. The State Board's requirements with respect to graduation are set forth at *N.J.A.C.* 6:27-1.4.

The Commissioner finds that that portion of the teachers' handbook (C-2, *ante*) which requires credit to be given pupils, otherwise deficient in achievement, because of a failure to notify them in writing of a possible failure, is contrary to the intent of *N.J.S.A.* 18A:35-1, and *N.J.A.C.* 6:27-1.3 and 1.4. Local boards of education are charged with the responsibility to provide a thorough and efficient public school education to its pupils. *N.J. Constitution*, Article VIII, Section IV Inherent in that responsibility is the requirement to prepare its pupils for their proper role in society. To hold, as petitioner argues, that he is to be awarded a passing grade, though he did not achieve a passing grade, would be to conclude that the Legislature intended that its requirement for pupils to study United States history for two years may be altered by a local administrative directive. Clearly, that is not the intent of the Legislature. The Commissioner so holds.

The Commissioner finds and determines that the provision of the teachers' handbook (C-2, *ante*) controverted herein is *ultra vires* and is hereby set aside. The Commissioner also finds and determines that petitioner failed the required course and therefore may not be awarded a high school diploma by the Board until he presents evidence of successful completion of that requirement.

The Commissioner finds no justiciable issue raised in the pleadings or supporting letters or documents of petitioner. Therefore, the Board's Motion is granted and the Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

June 29, 1976

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

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on March 9, 1976 in the School District of the Borough of Dunellen were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
J. Gerald North	360	4	364
Evelyn Hamrah	311	3	314
Ronald J. Bond	223	1	224
Joyce O'Hara	217	1	218
James J. Nally	210	1	211
John J. Kolibachuk	206	4	210
James J. Mechler	175	2	177
Andrew Horun	175	-0-	175

Pursuant to a letter request from Candidate O'Hara, hereinafter "complainant," dated March 10, 1976, the Commissioner of Education directed an authorized representative to conduct an inquiry into alleged irregularities by the election workers with respect to the operation of the voting machine located at the Dunellen High School polling place on the day of the election.

An inquiry into the instant matter was conducted by the Commissioner's representative on March 30, 1976 at the office of the Middlesex County Superintendent of Schools. The report of the Commissioner's representative is as follows:

Complainant requests that the Commissioner set aside the results of the annual school election held on March 9, 1976 on the following grounds:

"First: The voting machine at Dunellen High School covering Districts 1, 3, 4 & 6 at 5:35 pm became inoperable\*\*\* approximately three quarters of an hour. Citizens who were waiting in line could not cast their vote. They were informed that men had been sent for from New Brunswick\*\*\* to effect repairs to the [voting] machine. They [election officials] could not tell the people how long they would have to remain waiting. These people requested permission to cast their vote in writing. They were informed [by the election officials] that this could not be done.

"Secondly: the Clerks of the Election allowed a gentleman from town who came in to cast his vote to step forward and repair the machine. When the [repair] men arrived from New Brunswick they found that the [voting]

machine was indeed in operation—but, not through their intervention or that of a Clerk of the Election.\*\*\*”

Complainant and another candidate for the Board, Mr. James Mechler, testified at the inquiry in support of the above allegations. Copies of two letters were also offered into evidence in support of these allegations. These letters (C-1; C-2) were purportedly written by two voters who complained to the Commissioner and to Mr. George Bloom, Jr., in the New Jersey Department of State with respect to the conduct of the election at the Dunellen High School polling place.

The Commissioner’s representative finds that the testimony of complainant and Candidate Mechler reveals that neither of these witnesses was present at the polling place during the period of time in question when the alleged election violations were committed by the school election officials. Consequently, their testimony is essentially grounded on information related to them by persons who claimed to be present during the time the alleged incident occurred. Their testimony is also grounded on their on-site investigation of the instant matter conducted subsequent to its occurrence on the day the school election was held.

Complainant further alleged at the inquiry that approximately twenty voters left the polling place when the voting machine malfunctioned. Complainant contends that many of these voters did not return to the polls because of inclement weather [snow] on the day of the election and were thereby improperly denied an opportunity to cast their votes.

The Commissioner’s representative finds that the testimony of the school election officials with respect to the first category of complainant’s allegations generally confirms the sequence of events that occurred when the voting machine became inoperative.

a) A voting machine failed to operate on two occasions between 5:30 and 6:00 p.m. on the day of the election.

b) The judge of election called the Middlesex County Board of Elections and requested assistance of the County repair technicians.

c) The voters waiting at the polls were informed by the election officials that the County technicians were being dispatched to effect repairs on the voting machine. Consequently, the balloting would be interrupted until the voting machine was repaired.

d) Requests by the voters to use paper ballots were denied by the judge of election.

The judge of election testified that interim paper balloting could not be conducted by virtue of the fact that the polling place was not properly equipped nor supplied with paper ballots. Consequently, these requests could not be effectuated.

The Commissioner's representative finds that the testimony contained in the record of the inquiry does not conclusively support complainant's allegation with respect to the number of voters who were denied an opportunity to cast their ballots during the time [5:30 to 6:05 p.m.] the sole voting machine at the Dunellen High School polling place was inoperative. The only factual evidence in this regard was offered by the clerk of election when she testified that four voters' names were crossed off the poll list and their voting authority slips voided when they left the polling place after the voting machine malfunctioned. Her testimony further reveals that three of these voters returned to the polls after the voting machine was repaired. This testimony is supported by a review of the poll list (C-5) which reflects that three of the four names crossed from the poll list were re-entered on subsequent pages of the same list. Further confirmation of this fact is contained on the Statement of Result (C-3) of the election and verified by the school election officials.

Finally, the Commissioner's representative notices that while it is permissible for boards of education to use paper ballots during instances when voting machines malfunction during any election (*N.J.S.A. 19:48-7*), school election officials are normally instructed by local boards of education to contact the appropriate county board of election for technical assistance when a voting machine malfunctions.

The Commissioner's representative finds that the school election officials acted promptly and also within the scope of their authority when they contacted the Middlesex County Board of Elections for technical assistance in the instant matter.

The second category of complainant's charges develops from the first and the Commissioner's representative finds that the testimony of the judge of election and a clerk of election confirms complainant's assertions with two notable exceptions:

a) The judge of election and a clerk of election testified that the person who assisted them was acknowledged to be a municipal election worker, experienced in the operation of voting machines.

b) The person in question did not physically effect any repair to the voting machine but, rather, he provided the clerk of election with verbal instructions which enabled her to make the machine operate after she followed the required procedures to manually release the jammed voting lever.

Further testimony in this regard by the clerk of election reveals that she was able to release the voting machine lever without assistance when it subsequently jammed a second time. The clerk of election explained that when the County repair technicians arrived at the polling place shortly after 6:00 p.m., the voting machine was in operation and continued to function without further difficulty.

The explanation offered by the clerk of election for the voting machine failure in these two instances is grounded on the assessment given her by the

repair technicians. The repair technicians informed her that the voting machine failure in each of the instances cited above occurred when a voter entered the voting booth to cast his ballot and neglected to manually push the voting machine lever from its left-hand position completely over to the right-hand position, prior to depressing the individual voting levers on the machine. Consequently, when the voting lever was manually released by the election official, the public counter advanced on the machine, without recording the votes cast by each of these voters.

The Commissioner's representative observes that a notation to this effect is recorded on the Statement of Result (C-3) by the election official.

The Commissioner's representative finds that the school election officials did, in fact, permit an unauthorized person to assist in resolving the problem with the voting machine. The record of the testimony fails to indicate that the person in question physically effected repairs to the voting machine.

In conclusion, the Commissioner's representative finds the outcome of the election did, in fact, express the will of the electorate, notwithstanding the allegations lodged by complainant herein. Accordingly, he recommends that the Commissioner so find and determine.

\* \* \* \*

The Commissioner has reviewed the report of his representative in the instant matter.

The Commissioner finds that it is unfortunate that the combination of circumstances herein was such as to generate a conclusion that had conditions been otherwise, the outcome of the election would have been different. The evidence does not support such a conclusion. The Commissioner is deeply concerned that in many school elections only a small percentage of the qualified voters cast their ballots on matters vitally affecting the welfare of the pupils of this State. To that extent no voter should be discouraged from exercising his/her franchise. In the instant matter, the Commissioner finds it regrettable that the malfunction of the voting machine, coupled with the inclement weather on the day of the school election, may have discouraged an undetermined number of voters from casting their ballots

While the Commissioner can appreciate the sense of urgency experienced by the school election officials in trying to effect repairs to the voting machine in question, he cannot condone the manner in which assistance was provided to them by an unauthorized person.

In this regard the Commissioner directs the Board to instruct the school election officials to be guided by the statutory provisions of *N.J.S.A. 19:48-7* which supplement the public school election laws in *N.J.S.A. 18A:14-1 et seq.* The provisions of this statute read as follows:

“\*\*\*If any voting machine being used in any election district shall, during the time the polls are open, become damaged so as to render it inoperative in whole or in part, the election officers shall immediately give notice thereof to the county board of elections or the superintendent of elections or the municipal clerk, as the case may be, having custody of voting machines, and such county board of elections or such superintendent of elections or such municipal clerk, as the case may be, shall cause any person or persons employed or appointed pursuant to section 19:48-6 of this Title to substitute a machine in perfect mechanical order for the damaged machine. At the close of the polls the records of both machines shall be taken and the votes shown on their counters shall be added together in ascertaining and determining the results of the election. Unofficial ballots made as nearly as possible in the form of the official ballot may be used, received by the election officers and placed by them in a ballot box in such case to be provided as now required by law, and counted with the votes registered on the voting machines. The result shall be declared the same as though there had been no accident to the voting machine. The ballots thus voted shall be preserved and returned as herein directed with a certificate or statement setting forth how and why the same were voted.\*\*\*”

Additionally, it is the Commissioner's considered opinion that in instances where there is only one voting machine stationed in a polling place during a school election, it is imperative for a local board of education to be prepared to implement an alternative method in order to facilitate the voting process when the voting machine malfunctions.

Accordingly, in future school elections the Commissioner strongly urges local boards of education to utilize either of the following interim procedures to accommodate the voters:

- a) The school election officials should be prepared to issue paper ballots printed in advance during such emergencies; or,
- b) A spare voting machine should be stationed at the polling place and placed in operation in the event that the voting machine in use malfunctions.

Having found no sufficient basis to intervene or to vitiate the school election in the instant matter, the Commissioner adopts the findings of his representative and determines that the outcome of the annual school election held in the Borough of Dunellen on March 9, 1976, stands as previously reported.

COMMISSIONER OF EDUCATION

June 29, 1976

**Twilla Coombs,**

*Petitioner,*

v.

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

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Twilla Coombs, *Pro Se*

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

Petitioner was employed as a school bus driver from January 1974 through June 1975 by the Board of Education of the Township of Plumsted, hereinafter "Board." She alleges that the termination of her employment by the Board was procedurally defective, unreasonable, and should be set aside. Conversely, the Board argues that its action terminating petitioner as a regular school bus driver was legal and a sound exercise of its discretionary powers.

The matter comes before the Commissioner of Education for Summary Judgment in the form of Briefs, a stipulation of facts, and exhibits entered into evidence at a conference of counsel on February 5, 1976. The relevant facts are as follows:

Petitioner was employed as a school bus driver under contract from January 1974 to June 1974. (R-2) Thereafter, she served without contract as an occasional substitute driver from September 1974 through January 1975, except that during that period she was a regular once-per-week driver on the schools' "chorus run." From February 1975 through June 1975 petitioner served as a substitute driver without contract for a regular driver who was absent during all of that period. During this period she was compensated according to the scheduled fee basis for substitute bus drivers. (Conference of Counsel Memorandum of February 5, 1976) On July 21, 1975, the principal notified petitioner in writing that the Board would not consider her for regular employment as a school bus driver for the 1975-76 school year, but that she was free to submit her name for consideration as a substitute driver. (R-1) She refused such employment.

In a letter dated July 25, 1975, petitioner asked the Board for further consideration in view of her past service to the school. Therein, she alleged that, because of certain misunderstandings not of her making and her complaints to the Superintendent and others over mechanical problems and what she considered a faulty and unsafe steering mechanism on her bus, the Superintendent had unfairly refused to recommend her as a regular driver. Petitioner also asked to be advised of the reasons why the Board had not reemployed her. (R-4)

On July 31, 1975, petitioner was advised by the Board Secretary that she should confer further with the Superintendent and, in the event she was still not satisfied, that she might appear before the Board for a conference. (P-1) Petitioner met with the Superintendent but was not satisfied. She appeared before the Board on August 25 and asked for reasons for her non-reemployment. On August 27 the Board issued a statement of reasons for non-reemployment as follows:

“The Board of Education has not offered you employment as school bus driver upon the recommendation of our Superintendent and Principal, who have advised that the combination of lack of a cooperative attitude and unacceptable performance of duties on your part did not make it possible for them to give the Board a favorable report on you.” (P-2)

The Petition of Appeal was filed by petitioner on October 19, 1975 and on October 20, 1975, the Board amplified with greater specificity its reasons for not reemploying petitioner as follows:

“\*\*\*During the occasion of your past employment as a bus driver you were the source of frequent complaints concerning the mechanical condition of the bus assigned to you which complaints were not well-founded, you requested an unauthorized person not in the employ of the Board to inspect your assigned bus, you disregarded the approved organizational chart to register your complaints direct with a single member of the Board, and you demonstrated a disregard for pupil discipline on or about April 19, 1975 by removing your child \*\*\* from the detention class of \*\*\* of the teaching staff.

“The above indicated to the Board your lack of cooperation and unacceptable performance of duties.

“You are advised that you may meet with the Board at 8:00 P.M. on October 22, 1975 at the school if you desire to be heard further concerning the above reasons for your not being re-employed by the Board.” (R-3)

Petitioner did not appear before the Board on October 22, nor is there evidence that either she or the Board sought an alternate date for such an appearance.

Petitioner asserts that neither the Board nor its agents have presented supporting evidence or proven the reasons given for her nonrenewal of employment. She states that the appearance which she was granted before the Board on August 25 was neither fair nor impartial since members of the Board did not question her. She alleges that she was entitled to reemployment by reason of seniority arising from her services as a driver. (Petitioner's Brief, at p. 1)

Petitioner calls attention to the fact that the Board's letter of October 20 giving greater specificity of reasons for non-reemployment postdated the filing of her Petition of Appeal by over four weeks. She further states that she could not attend the meeting of the Board on October 22 on two days' notice because

of her previous commitment to direct a scout troop that evening. Petitioner avers that her removal of her child from school detention was the act of a parent, in no way related to her performance as a driver. (*Id.*, at pp. 2-3) Similarly, petitioner protests that her furnishing one Board member with bus condition reports was at that Board member's direction and not intended as an insubordinate act contrary to the organizational flow of responsibility. (*Id.*, at p. 2)

Petitioner asserts that her complaints of mechanical defects in her bus were in the best interests of pupil safety and that the fact that she allowed an unauthorized mechanic, (her husband) to look at, but not work on, the steering column of her bus was not unreasonable.

For the above reasons petitioner prays for an order of the Commissioner directing the Board to expunge from her records any derogatory remarks or unsatisfactory references which would adversely affect her employment elsewhere as a school bus driver. She further seeks an order directing that she be reinstated with lost salary and attendant emoluments.

In the Board's view petitioner was at the time of her notice of non-reemployment serving without benefit of contract. The Board contends that:

“\*\*\*The law is well settled in New Jersey “\*\*\*that in the absence of a contract, an employment, unless otherwise specified, is generally at will and subject to termination with or without cause.’ *Jorgensen vs. Pennsylvania Railroad Co.*, 25 N.J. 541, 554 (1948); *Hinde vs. Morrison Steel Co.*, 92 N.J. Super. 75 (*App. Div.* 1966).\*\*\*” (Respondent's Brief, at pp. 1-2)

The Board contends that it had good cause for not reemploying petitioner but that, even without cause, under New Jersey law, petitioner was subject to dismissal. (*Id.*, at p. 2) The Board grounds this contention on the fact that petitioner's only contract had expired by its own terms during June 1974 and was not thereafter renewed. The Board maintains that petitioner was afforded but refused the opportunity to apply for continued employment as a substitute in July 1975. It is further contended that although the Board was under no obligation to furnish petitioner with a statement of reasons why she was not considered for employment as a regular driver, she was provided not only these reasons but a number of opportunities to discuss them with the Superintendent and the Board. The Board contends that she now has her answer and the matter should be dismissed as groundless. (*Id.*, at pp. 3-4)

Finally, the Board avers that the Commissioner's authority to determine disputes pursuant to *N.J.S.A.* 18A:6-9 does not extend to the employment of nontenured, part-time school bus drivers for the reason that no education laws relate to their employment except for licensing, identification, etc. (*Id.*, at p. 5) For this additional reason the Board maintains that the Petition of Appeal should be dismissed.

The Commissioner has reviewed and considered both the documents in evidence and the pleadings and has carefully weighed the arguments set forth in

the respective Briefs and petitioner's Reply Brief. Respondent's contention that the Commissioner is without jurisdiction in the matter is without merit. The matter is brought within the aegis of the Commissioner by *N.J.S.A. 18A:11-1* which provides, *inter alia*, that education boards shall:

“\*\*\*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\*\*\*; and

“\*\*\*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.”

It is only by authority of the education laws that the Board, as a quasi-municipal body, may employ personnel, including regular and substitute school bus drivers. The argument that the Commissioner lacks jurisdiction in the matter is without merit.

The Commissioner, however, finds no evidence in the record to support petitioner's contention that she was, by reason of seniority, entitled to employment by the Board as a regular driver. She had served under contract from January 1974 through June 1974 which contract expired by its own terms in June 1974. She then served as an occasional substitute driver from September 1974 through January 1975 and thereafter as a regular substitute for an absent driver until June 1975. During the entire 1974-75 school year she served without benefit of contract. Nor was such contract required by law for a substitute school bus driver. Petitioner alleges that the Board was obligated to employ her because of her seniority as a school bus driver. A careful search of the record fails to reveal evidence that the Board had at any time adopted any such written or unwritten policy. Absent such a policy, the Board was under no obligation to reemploy petitioner but was free to exercise its broad discretionary power as to whom it should employ. *N.J.S.A. 18A:11-1*

The Board has done nothing it was not empowered to do. Its determination as an administrative agency is entitled to a presumption of correctness, absent a showing of illegality, arbitrariness, capriciousness, unreasonableness or bad faith. *Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40 (*App. Div.* 1962) In such matters the Commissioner will not substitute his judgment for that of a board. *John J. Kane v. Board of Education of the City of Hoboken, Hudson County*, 1975 *S.L.D.* 12

In the judgment of the Commissioner, petitioner has failed to prove that the Board's determination was tainted by any impropriety. Accordingly, petitioner's prayer for reinstatement as a regular school bus driver with lost pay and emoluments is denied.

However, the Commissioner finds insufficient evidence that the Board has, within the factual context of her employment, sufficiently investigated the

matter to establish beyond a doubt that she in fact exhibited an habitual uncooperative attitude and/or unacceptable performance of duties as a driver, therefore, should such phrases exist on the recorded evaluations of petitioner, the Board and its agents are directed to expunge them therefrom and to refrain from using such terms in references which they may be called upon to furnish to other school districts in which petitioner may seek employment as a school bus driver. *Salvador R. Flores v. Board of Education of the City of Trenton, Mercer County*, 1974 S.L.D. 269, aff'd State Board of Education 275 There is nothing within the record to indicate that petitioner was not a competent, careful school bus driver who maintained proper discipline on her bus. Accordingly, she should not by reason of the dispute engendered herein be barred by the use of such phrases from obtaining employment elsewhere. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972)

To this limited extent petitioner is granted the relief which she seeks. In all other points the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 29, 1976

Andrew Kozak,

*Petitioner,*

v.

Board of Education of the Township of Waterford, Camden County,

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Maressa, Neutze, Daidone & Wade (John D. Wade, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of the Township of Waterford, Camden County, hereinafter "Board," alleges that the Board's refusal to reemploy him is a denial of his right to due process and the applicable law. Petitioner alleges also that the Board has violated his right to freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution and to rights guaranteed by the Constitution of the State of New Jersey. Briefs were filed in this matter prior to the hearing which was conducted on July 29, 1975, and October 16, 1975 in the Agricultural

Extension Building, Mount Holly, before a hearing examiner appointed by the Commissioner of Education. Several exhibits were offered in evidence and the Board submitted a letter statement in lieu of Brief subsequent to the hearing. The report of the hearing examiner follows:

Petitioner was employed as a third grade teacher for the academic years 1972-73 and 1973-74. During a faculty meeting in October 1973, the subject of Title III grants of money for certain approved projects was broached. Petitioner had an interest in a project which he believed would qualify for such a grant and he testified that he was encouraged to develop his idea and later present it to the Board. (Tr. I-3, 8) Petitioner contends that he spent more than sixty hours of his time and energy in developing a Title III proposal which was rejected by the Board, whereupon he became upset and angry and wrote out a resignation letter effective at the end of the academic year. The Board holds that petitioner resigned his position; therefore, there is no relief to which he is entitled. Petitioner asserts, however, that he made a timely and effective rescission of his resignation which the Board refused to consider.

In the hearing examiner's judgment, petitioner resigned his position and his resignation was properly accepted by the Board; therefore, none of the other complaints set forth in the Petition of Appeal deserve consideration herein. The reasons for this conclusion are as follows:

On December 5, 1973, petitioner met with the Board in a private session and discussed his proposal with the Board for approximately one hour. (Tr. I-10) Sometime prior to that meeting, petitioner met with his principal who stated that he could not give petitioner's proposal his administrative support. The Board then met in public session on December 6, 1973, and a motion to accept and process petitioner's Title III proposal as submitted was defeated (Exhibit F) whereupon petitioner, who was in attendance at the meeting, got up, walked out of the meeting room and into his classroom (Tr. I-16) and wrote the following resignation letter:

“As of June 31 (sic), 1974 I will terminate my employment in your school system. I have put a lot [of] commitment and caring into my profession. I love the students and people of Waterford Township, but I cannot continue working for the betterment of our education system without the support of the Board of Education. I am truly (sic) sorry that you people do not share the same feelings for the students of our schools. It is with deep hurt and regret that I will leave Waterford Township schools. I've met and worked with many wonderful people, but it is easy to see that the Board does not care about its duty to provide the best possible education for its students.” (Exhibit A)

Petitioner testified that during the ongoing meeting of the Board he walked back to the meeting room “\*\*\*threw [the resignation letter] on the table and walked out.” Petitioner then went to his home. The principal testified that before petitioner left the building he approached him and tried to talk petitioner out of resigning. He testified that petitioner replied that he didn't want to work in the district any more. (Tr. I-138) Petitioner testified that the

principal called him that same evening at home and told him that one of the Board members had fought hard to keep the Board from voting on the resignation, but that they would do so at the next regular meeting and if he wanted to change his mind he should notify the Board in writing. (Tr. I-26-27) Petitioner replied that he did not want to rescind his resignation. The next morning, a board member approached petitioner outside his classroom in the school building and asked him to rescind his resignation and petitioner replied that he was not going to change his mind. (Tr. I-28-29)

Petitioner testified further that as president of the Waterford Township Teachers' Association he met with the Board's negotiating committee on the evening of December 11, 1973 at the home of a Board member whom he considered a friend. Petitioner testified that he told the three members of that committee that he felt uneasy negotiating for his fellow teachers since he would not be returning for the coming school year. The host said:

“\*\*\*[W]hy don't you rescind it as soon as possible. The sooner you do it, the better it would be. You never know what those [expletive deleted] are going to do at the Board meeting that they have [scheduled].\*\*\*”

(Tr. I-30)

Although warned about a scheduled Board meeting for the evening of December 12 by the Board member host, petitioner testified that he was not told that the Board was going to act on his resignation. However, he admitted that he was advised to act quickly if he wanted to change his mind, and he testified that he was warned for his own benefit that he should rescind the resignation as soon as possible. (Tr. I-31-32, 57-58, 87) The Board member who advised him to rescind his resignation as soon as possible testified in petitioner's behalf that he knew two days before the Board meeting scheduled for December 12, 1973, that the two agenda items to be considered were the energy crisis and petitioner's letter of resignation. Nevertheless, he testified that he did not tell petitioner that his letter of resignation would be discussed at the meeting (Tr. II-7, 22-23) and petitioner testified that he was taking a personal day on the twelfth and he would “\*\*\*put it in on Thursday.” (Tr. I-31) Thursday was the day *after* the Board meeting scheduled for Wednesday, December 12, 1973.

Petitioner testified that he did in fact take a personal day on December 12, 1973; however, he went to his school that morning and wrote the letter (Exhibit B) which he gave to his principal and said:

“Here's a letter rescinding my resignation to you. Make sure the board of education gets it and he said that he would make sure that they would, and he was glad things were happening this way\*\*\*.” (Tr. I-33)

Petitioner knew, therefore, that the Board was going to meet that evening.

The principal denies that the word rescind was ever used by petitioner and he testified that petitioner handed a letter (Exhibit B) to him in a sealed envelope and told him to see to it that the Board received the letter. (Tr. I-142) Later that day, the principal learned about the contents of the letter through the

Board Secretary and attempted unsuccessfully to contact petitioner about the meeting that evening; however, he did get in touch with another teacher, a close personal friend of petitioner, in a further attempt to reach him prior to the Board meeting. Petitioner's friend asked the principal if he could address the Board on behalf of petitioner. His request was granted and he spoke to the Board about petitioner's qualifications as a dedicated teacher in the school district. (Tr. I-101-104)

After examining the testimony of petitioner and the Board member in whose home the negotiating committee meeting was held on December 11, 1973, the hearing examiner finds it inconceivable that petitioner was not made aware that his resignation letter would be discussed by the Board at its scheduled meeting on December 12. The record shows that he was cautioned on December 11, 1973 to rescind his letter as soon as possible and he made a trip to the school on the morning of December 12, 1973 to hand the letter (Exhibit B) to his principal and to tell him to make sure that the Board received it; nevertheless, he maintains that he was unaware of the purpose of that scheduled meeting on the evening of December 12, 1973. In fact, the host Board member, *ante*, testified that he told petitioner that the Board "\*\*\*\*might act upon your resignation." (Tr. II-7)

The exact wording of Exhibit B is germane in deciding the dispute herein; therefore, it is quoted in its entirety as follows:

"December 12, 1973

"Waterford Township Board of Education:

"Before my resignation is acted upon I would like the opportunity to discuss this matter with the Board of Education. The time that I submitted my resignation I was very hurt and frustrated. Please afford me the chance to reconsider my decision."

(Signed)

"Andrew J. Kozak"  
(Exhibit B)

Nowhere in petitioner's letter did he state that he wished to rescind his resignation; therefore, the Board voted seven to two to accept his resignation. (Exhibit G) Further, one Board member testified that he thought petitioner wanted the Board to reconsider his Title III proposal and that his letter (Exhibit B) was unclear. Petitioner testified also that he considered the letter a request to speak to the Board. (Tr. I-122, 126) This same Board member voted *not* to accept petitioner's resignation. (Exhibit G) The Board member who spoke to petitioner outside his classroom the morning after he submitted his resignation letter and who tried to convince petitioner to rescind, testified that he did not consider Exhibit B to be a rescinding letter. He testified that when he spoke to petitioner at the school on December 7, 1973, petitioner berated the Board and that since petitioner did not appear at the Board meeting on December 12, 1973, he

concluded that petitioner was requesting another opportunity to speak to the Board to berate them and to tell some of them that they were not capable of being Board members. (Tr. II-43-46)

The hearing examiner notices that had the letter (Exhibit B) stated "I hereby rescind my resignation" or other such direct statement there would have been no need to address the Board on that subject. Further, the Petition of Appeal in this matter was filed on July 18, 1974, more than seven months after the Board action of December 12, 1973 about which petitioner now complains. The record shows that petitioner was aware that the Board had acted on his letter of resignation as early as December 14, 1973, but he waited another seven months to appeal that action to the Commissioner. (Tr. I-68-69) (See also Exhibit D.) The record reveals also that petitioner spoke again to the Board at a meeting on January 16, 1974 at which time he chided the Board for its failure to accept his Title III proposal and stated that the Board should not have accepted his resignation letter without first allowing him to address the Board as he requested in his letter. (Exhibit B) Petitioner also addressed the need for other teaching staff specialists in the school district and he asked the president of the Board to resign at the meeting. (Exhibit E) The record shows also that petitioner had some teacher friends at his home on December 9, 1973, and he was advised by them that it was not a good idea to resign since he did not have a definite job in mind for the coming school year. (Tr. I-87) Petitioner further testified, with respect to his request to speak to the Board (Exhibit B) as follows:

\*\*\*I would like the opportunity to discuss this matter with the board of education. I was making it clear to them that before they acted on it, I would like to speak to them.\*\*\* (Tr. I-63)

It must be noticed that if the letter in question had been rescinded, there would not have been a need for the Board to act on it in any manner except to recognize that it had been rescinded.

In summary, the hearing examiner finds the following:

1. Petitioner handed the Board his written letter of resignation on December 6, 1973, effective June 30, 1974. (Exhibit B)
2. The administrative principal called his home later that same evening and tried to convince him to rescind his resignation.
3. A Board member spoke to him outside his classroom in the school on the next morning, December 7, 1973, and asked him to rescind his resignation. He refused.
4. Some teacher friends advised him on December 9, 1973, that he had not taken a prudent course of action.
5. A Board member advised petitioner on December 11, 1973, that the Board was going to meet on December 12, 1973, and that petitioner should get his rescission letter in as soon as possible.

6. Petitioner failed to appear at the Board meeting on December 12, 1973; however, he stated that he did not know that his resignation letter would be acted on at that time.

7. After the Board action accepting his resignation, petitioner waited more than seven months to appeal that action to the Commissioner of Education.

Regarding resignations, 78 *C.J.S.* 1101, 1102 reads in part as follows:

“A teacher’s contract of employment may be terminated by his resignation, but the resignation, in order to be effective, must be offered by the teacher with intent to terminate his employment, to the board or officer having the power to remove or dismiss, and it must be accepted strictly in accordance with the terms of the offer by the board having power to accept, acting as a board.\*\*\* The resignation may be accepted to take effect at a future date\*\*\*.

“The resignation may be withdrawn at any time before it is accepted, but after the resignation has been accepted it is effective as against a subsequent attempt to withdraw or offer to serve, even though the teacher attempts to withdraw before the effective date of his resignation.\*\*\*”

It is well established that a resignation may be withdrawn before it is accepted. In *F. Rupert Belles v. Wayne Township Board of Education*, 1938 *S.L.D.* 556 (1933), the Commissioner quoted from Anson in “Principles of the Law of Contract,” 4th American Edition at page 34 as follows:

“\*\*\*Acceptance is to offer what a lighted match is to a train of gun powder. It produces something which cannot be recalled or undone.\*\*\*”  
(at 557)

See also *Roy S. Austin v. Board of Education of the Township of Mahway, Bergen County*, 1955 *S.L.D.* 98; *Florence S. Evaul v. Board of Education of the City of Camden, Camden County*, 1959-60 *S.L.D.* 60, aff’d State Board of Education 64, aff’d 65 *N.J. Super.* 68 (*App. Div.* 1961), reversed 35 *N.J.* 244 (1961). In *Evaul*, the Court commented in part as follows:

“\*\*\*Although the record does not disclose any conduct by the school officials which amounts to duress, *cf. Rubenstein v. Rubenstein*, 20 *N.J.* 359 (1956); \*\*\*we think that the peculiar circumstances of this case require the reinstatement of the appellant on equitable principles. It was an extraordinary concatenation of events which resulted in a loss to appellant of her tenure, seniority and pension rights acquired during twenty-five years of service. First, there were the disturbing incidents of March 13, 1959, which led to the submission of her resignation. The unpleasant and emotional meeting with her department head was shortly followed by the unanticipated and tempestuous confrontation in the Principal’s office. It is reasonable to suppose that the anxiety and distress engendered by these incidents reached a climax when her subsequent

efforts to confer with the Principal and the President of the School Board were frustrated. It is clear to us that the submission of her resignation was an impetuous act prompted by her understandably distraught condition. The emotionally-charged words she used in her note of resignation bear this out. Second, linked to the above chain of events, was the fortuitous circumstance that a special meeting of the school board had, unknown to her, previously been scheduled for a few hours after she wrote her resignation. But for that happenstance, her attempted rescission on March 15, 1959, would have been effective.\*\*\*” (35 *N.J.* at 249)

In the hearing examiner’s judgment the matter herein is distinguishable from *Evaul, supra*, not only from the standpoint of the very limited number of years of service by petitioner when he resigned (less than a year and one-half) and his lack of any seniority, but also by the fact that he had several opportunities to reconsider his resignation for six days prior to its acceptance by the Board and he failed to take effective action. Petitioner also claims that he was not notified by the Board that his resignation letter would be considered at its meeting on December 12, 1973; however, the hearing examiner knows of no law, rule or prior decision which requires that notice be served on a person who has submitted a letter of resignation.

Finally, petitioner’s allegation that his constitutional rights have been violated cannot be supported by the record. The fact is that he voluntarily submitted his resignation. He was not pressured or even asked for it. In compliance with *N.J.S.A.* 18A: 27-10, 11, and 12, petitioner was notified in writing by letter dated March 22, 1974, that he would not be offered a contract of employment for the 1974-75 academic year. Therefore, his 1973-74 contract expired by its own terms on June 30, 1974, and there is no further relief to which petitioner is entitled.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by petitioner pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner finds and determines that petitioner resigned his teaching position on December 6, 1973, effective June 30, 1974, and that the Board accepted his resignation at its scheduled meeting on December 12, 1973.

Although petitioner contends that his letter to the Board dated December 12, 1973 (Exhibit B), altered his resignation letter in such a manner that it was in fact a rescission of his resignation letter (Exhibit A), the record discloses otherwise. Petitioner had ample opportunity for six days prior to the Board meeting on December 12, 1973, in which to affirmatively rescind or withdraw his resignation letter. The record discloses also that he was asked to rescind the resignation by several persons including Board members and his friends; however, he did not do so. Even if it could be determined that petitioner’s request (Exhibit B) to meet with the Board prior to its action was to tell the Board

verbally that he was rescinding the letter, he did not deem it important enough to attend the Board meeting on December 12, 1973 to protect his interest in his teaching position. Nor did petitioner instruct any of his friends or associates or any Board member to speak in his behalf at that meeting. Petitioner objects to the hearing examiner's failure to determine the conflicting truthfulness of his testimony and that of principal's wherein petitioner testified that he told the principal that his letter (Exhibit B) was a rescission letter, and the principal testified only that petitioner told him to see that the Board received his letter. Regarding this exception to the hearing examiner's report, the record discloses that the principal did in fact learn of the contents of the letter (Exhibit B) prior to the Board meeting and made an attempt to contact petitioner about that meeting on the evening of December 12, 1973. When he failed to reach petitioner, the principal did contact a close personal friend of petitioner's who was also unable to contact petitioner prior to the Board meeting. The principal also requested and received permission to have petitioner's friend address the Board on petitioner's behalf prior to its action on his resignation letter, *ante*.

Even if it could be held that the letter (Exhibit B) was a proper letter rescinding his resignation letter, the Board notified petitioner by letter dated March 22, 1974, pursuant to statute, that he would not be reemployed for the coming school year. If petitioner believed that the action of the Board in accepting his resignation was null and void, he could have requested from the Board a statement of reasons why he was not being reemployed. *Donaldson v. Board of Education of North Wildwood*, 65 N.J. 236 (1974) The record does not reveal that petitioner ever asked the Board for a statement of reasons why he was not reemployed prior to the filing of his Petition of Appeal.

The hearing examiner's summary of findings shows clearly that petitioner had several opportunities and was cautioned by several persons to rescind his resignation among them his administrative principal, at least two Board members, and some teacher friends, yet he failed to take the necessary affirmative action to do so. Petitioner was not pressured for his resignation or even asked for it. Further, unlike *Evaul, supra*, petitioner had ample time to reconsider his resignation and rescind it before the Board acted. He failed to do so and he was not reemployed. The Commissioner finds, for all of the reasons stated above, that petitioner resigned his position effective June 30, 1974.

Accordingly, there is no relief to which petitioner is entitled, and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 29, 1976

**Board of Education of the City of Elizabeth,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Roselle, Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, O'Brien, Daaleman & Liotta (Raymond D. O'Brien, Esq., of Counsel)

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

The Board of Education of the City of Elizabeth, hereinafter "petitioner," demands tuition payment from the Board of Education of the Borough of Roselle, hereinafter "respondent," for "J.D.," a pupil who moved from Elizabeth to Roselle during the 1974-75 academic year, but continued in attendance in the Elizabeth schools until the end of the 1974-75 academic year.

The facts in this matter are stipulated and Briefs have been filed by the litigants; therefore, it is now ripe for Summary Judgment by the Commissioner. The pertinent facts in this matter as recited in the Petition of Appeal read as follows:

"On May 27, 1975, the Board of Education of Elizabeth was informed that [J.D.] who was assigned to a class for the emotionally disturbed at School No. 19 in Elizabeth, New Jersey, since September 1974, has been a resident of Roselle, New Jersey, since November 1, 1974. Apparently, the mother of the student did not inform the Elizabeth Board of Education nor the Roselle Board of Education of this change in residence.

"The Board of Education of Elizabeth allowed [J.D.] to continue in the program at School No. 19 until the end of the 1974-1975 school year because of the few weeks which remained in the school term. However, the Board of Education of Elizabeth expects that the Roselle Board of Education will honor its responsibility to pay [J.D.'s] tuition to Elizabeth which is \$1,836.00. In a letter dated June 3, 1975, the Superintendent of Roselle Public Schools \*\*\*stated that the Roselle Board of Education would not authorize such tuition payment.

"Wherefore, petitioner requests that the Commissioner of Education authorize the payment of [J.D.'s] tuition by the Roselle Board of Education to Elizabeth."

This issue in dispute may be stated succinctly as follows:

Is the Board of Education of the Borough of Roselle responsible for tuition payments for J.D.? (See Conference Agreements.)

The statutory authority for free public schools, *N.J.S.A.* 18A:38-1, reads in pertinent part as follows:

“Public schools shall be free to the following persons over five and under 20 years of age:

- a. Any person who is domiciled within the school district\*\*\*.”

In this regard, there is no question that J.D. has resided in Roselle since November 1, 1974, and was eligible by age and statute to attend its public schools during the 1974-75 academic year.

Respondent states in its Brief that at all times relevant it maintained a proper facility to educate J.D. and that if J.D. had been registered as required by law he would have been provided a proper educational program. Respondent avers that it does not have an obligation to search out all persons who move into its school district (Respondent’s Brief, at pp. 3-4); rather, that burden is placed upon each parent by *N.J.S.A.* 18A: 38-25 which reads as follows:

“Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.”

As stated by our Supreme Court in *State v. Vaughn*, 44 *N.J.* 142 (1965):

“\*\*\*the primary burden of making certain that the child receives a public education has been cast upon the parent or other person in custody and control of the child.\*\*\*” (at p. 145)

The Commissioner so holds. There would be an unwieldy and practically impossible task placed on local boards if they were made responsible for searching out new arrivals in their school districts for the purpose of determining school placement. Further, even if it is held that there was a responsibility to determine the residence of J.D. during the year, such responsibility was not respondent’s alone.

The record herein clearly shows that the parents of J.D. did not present him to the Roselle schools for enrollment, nor did they inform petitioner of their change in residence. (Petitioner’s Brief; Statement of Facts)

There is no suggestion that Roselle could not, or would not, educate J.D.; consequently, there can be no finding that Roselle has not fully discharged its obligations in the matter here considered.

For the above reasons, the Commissioner determines that Roselle is not responsible for the tuition payment to petitioner for J.D. for the 1974-75 academic year. J.D. attended the Elizabeth schools for that academic year and he did not make his change of address known to either petitioner or respondent.

Under the circumstances herein, J.D. is entitled to a free public school education in Roselle as long as he meets the statutory age and residency requirements. However, there is no relief to be granted to the Board of Education of the City of Elizabeth.

Therefore, for the reasons stated herein, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 29, 1976

**Board of Education of the Township of Wall, Monmouth County,**

*Petitioner,*

v.

**Bureau of Pupil Transportation, Division of Field Services,  
New Jersey Department of Education,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Mirne, Nowels, Tumen, Magee & Kirschner (William C. Nowels, Esq., of Counsel)

For the Respondent, William F. Hyland, Attorney General (Jane Sommer, Deputy Attorney General)

The Board of Education of the Township of Wall, hereinafter "Board," contends that its award and execution of contracts providing for pupil transportation were a valid and proper exercise of its authority pursuant to the Local Public Contracts Law, and that the Director of the Bureau of Pupil Transportation, Division of Field Services, State Department of Education hereinafter "Director," should be directed to approve those contract awards now in contention. The Director asserts that the Board has not followed the provisions of the applicable statutes; therefore, there is no relief to which the Board is entitled. Respondent Bureau of Pupil Transportation filed a Notice of Motion for Summary Judgment dismissing the Petition of Appeal on the grounds that it raises no substantial issue of material fact. In support of its Motion, respondent

relies on its Answer, an opinion of the Attorney General made at the request of the Assistant Commissioner of Education in charge of Controversies and Disputes (Exhibit A), and an affidavit of its former Director. The Board filed a letter memorandum in opposition to the Motion for Summary Judgment.

The record reveals that on or about September 27, 1974, the Board received bids for pupil transportation in its school district from Coast Cities School Buses, Inc., for routes designated as A-2, WB-1, C-4, C-6, C-7, C-8, and C-9 for the school year 1974-75. The Coast Cities School Buses, Inc., was the only bidder. The Board avers that the bids were in the amount of \$6,480 per route. The Board tabled these bids for study because it considered them too high and thereafter on November 12, 1974, rejected all bids and adopted a resolution that an emergency existed because of its need to transport pupils. Thereafter, the Board avers that it negotiated for its pupil transportation routes pursuant to *N.J.S.A. 40A:11-5* and accepted offers on the basis of \$3,780 per route. The Board asserts further that it received oral confirmation from the former Director that its action would be approved. (Petition of Appeal, at pp. 1-2)

On May 22, 1975, the Board notified the former Director that on advice of its attorney it had approved that newly negotiated bid and that it believed the award to be legal, proper, and in accordance with the Local Public Contracts Law. (Petitioner's Exhibit B) Thereafter, on June 30, 1975, the Acting Monmouth County Superintendent of Schools approved the transportation contracts for routes P-1, P-2, P-3, A-2, WB-1, C-4, C-6, C-7, C-8, and C-9. (Petitioner's Exhibit A) The former Director then addressed a letter to the Board Secretary on July 17, 1975, which reads in pertinent part as follows:

“\*\*\*School districts may resort to the provisions of *N.J.S.A. 40A:11-6* only where there exists a genuine emergency and may contract for services pursuant to that statute only by the procedures set forth therein and only for a period of time sufficient to permit advertising for bids and awarding for the appropriate long-term contract.”

After receipt of a letter from the Board attorney requesting clarification of his letter, *ante*, the former Director advised by another letter dated August 18, 1975, that he would not change his ruling. The Petition of Appeal followed.

It may be reasonably inferred from a review of the record, that the Board was aware of the disapproval of its contract awards prior to the letter to the former Director dated May 22, 1975 in which its attorney attempted to justify those awards. (Petitioner's Exhibit B) Nevertheless, the Acting County Superintendent approved the contested awards. (Petitioner's Exhibit A) The Commissioner will rely on the opinion of the Attorney General's office regarding this matter now before him.

The question to be addressed by the Commissioner is whether the emergency provisions of *N.J.S.A. 40A:11-6* may be interpreted to excuse a school district from any further responsibility in resubmitting transportation contracts for bids for the school year in question.

Pupil transportation contracts are governed both by the school laws (*N.J.S.A.* 18A:39-1 *et seq.*) and by the Local Public Contracts Law. *N.J.S.A.* 40A:11-2(1)c and 2(2)c Statutes such as these, relating to the same subject matter, are to be construed together in a manner which will give effect to all their provisions. *State v. Green*, 62 *N.J.* 547, 554-5 (1973)

Any pupil transportation contract for an amount exceeding \$2,500 must be advertised for bids (*N.J.S.A.* 18A:39-3) in a fair and competitive manner. *N.J.A.C.* 6:21-15.1 *et seq.* The contract must be accompanied by a surety bond. *N.J.A.C.* 6:21-14.1 The contracting transportation company must provide liability insurance, which must be reflected in a certificate of insurance accompanying the contract. *N.J.S.A.* 18A:39-6; *N.J.A.C.* 6:21-17.1 Every vehicle covered by the contract must have been inspected and approved pursuant to *N.J.S.A.* 18A:39:3B-1 *et seq.* All contracts for transportation must be submitted to the county superintendent for approval by September 1 of the school year to which the contract is to apply. *N.J.A.C.* 6:21-16.1 Therefore, all of the preliminary steps just set forth must be completed before the school year begins. Without the county superintendent's approval, a school transportation contract has no force and effect for purposes of the school laws.

In instances where a school district has left the contract procedure until it is too late to advertise before a school year starts, or has advertised for bids but wishes to reject them all as being excessively high, or for some other reason has not awarded a contract by the time transportation is needed, a board may question the applicability of the bidding requirements of *N.J.S.A.* 18A:39-3 and *N.J.S.A.* 40A:11-4, such as occurred in the matter herein controverted.

In this regard, *N.J.S.A.* 40:11-6 governs the provision of emergency services or supplies without a contract as follows:

*“Any such purchase, contract or agreement may be made, negotiated or awarded for a contracting party without public advertising for bids and bidding therefor notwithstanding that the cost or contract price will exceed \$2,500.00, when an emergency requires the immediate delivery of the articles or the performance of the service and when prior to the making of such purchase, contract or agreement or after the same, it is specifically authorized to be so made, negotiated or awarded by resolution, adoption by the affirmative vote of 2/3 of the full membership of the governing body of the contract unit, for or on behalf of which the same is made, negotiated or awarded if the full membership of such governing body consists of more than four members, or of 3/4 of all of the members thereof, if the full membership thereof shall be four members, or of 2/3 of all of the members thereof, if the full membership thereof be three members, provided such resolution describes specifically the circumstances, declares the emergency, and further prescribes the manner in which such purchase, contract or agreement shall be made, negotiated or awarded, which shall be of such character as to be effective to promote free and full competition, whenever competition is practical under the circumstances.”*  
(*Emphasis supplied.*)

The question presented is whether once a school district is faced with an emergency it may resort to *N.J.S.A.* 40A:11-6 alone and permanently avoid statutory bidding requirements.

Competitive bidding is designed to obtain the best economic result for the public. *Greenburg v. Fornicola*, 37 *N.J.* 1, 6 (1962) Its paramount aim is to assure that all bidders bid upon the same thing, and that the public knows clearly what the bidder must give and the municipality receive, for a plainly stated consideration. *Belousofsky v. Board of Education of City of Linden et al.*, 54 *N.J. Super.* 219, 223 (*App. Div.* 1959) In this manner the bidding laws can protect the public interest by keeping costs at a minimum and by preventing fraud. *Board of Education of Asbury Park v. Hock*, 38 *N.J.* 213, 231 (1962)

The bidding statutes as remedial laws must be construed liberally, and any exception to them, such as the emergency provisions of *N.J.S.A.* 40A:11-6, must be read strictly in order not to dilute the remedial effect intended by the Legislature. *Male v. Pompton Lakes Borough Municipal Utilities Authority*, 105 *N.J. Super.* 348, 356 (*Chan. Div.* 1969) *N.J.S.A.* 40A:11-6 is expressly applicable only “\*\*\*when an emergency requires the immediate delivery\*\*\*” of particular services or supplies. It must be viewed as a temporary measure, applicable only until a contract can be advertised for bids and awarded pursuant to the bidding statutes. *If it were not interpreted as a strictly emergency, short-term measure, any contracting unit could avoid the requirements of the bidding statutes permanently simply by refusing to advertise a contract for bids until services or supplies are needed, and then adopting a resolution to permit their emergency purchase without bids.* In this manner school districts could also make themselves eligible for state transportation aid; both state and local funds would therefore be spent without the protection of the public interest that the bidding statutes are designed to provide.

The affidavit filed by the former Director is accepted as evidence that the Board did not receive his oral approval of its action to award the contracts now in contention. In this regard, reference is made to his letter of July 17, 1975 to the Secretary of the Board, *ante*. His affidavit has not been refuted by the Board. Further, the county superintendent’s approval of the contract awards after September 1 of the school year in which the service is to be performed, cannot constitute approval of full state aid in connection with that contract. See *Union County Regional District No. 1 v. Dr. William H. West, Union County Superintendent of Schools, Union County*, 1975 *S.L.D.* 586, modified and affirmed by the State Board of Education 592.

The Commissioner has reviewed his own records regarding the instant matter and finds that the Board has been receiving regular payments of state aid for the disputed transportation contract awards less those amounts for which the Board does not qualify. Specifically, late penalties have been deducted from its state aid payments. (See *Union County Regional District, supra.*) There is no provision for state aid payments to transport pupils who reside less than remote from the school, and state aid moneys have been deducted for unaided riders, that is, certain riders who are not qualified for a bus ride to be supported by the payment of state aid. (Commissioner’s Exhibit D)

The Commissioner finds that the disapproval of the contested contract awards by the former Director was proper since there is no provision in the law to award contracts after negotiations, such as occurred herein. Hereafter, the Board is directed to bid all transportation contracts in strict compliance with the statutory provisions as set forth, *ante*. Further, the Board may expect to be penalized by the withholding of state aid money unless those contracts are submitted to the county superintendent for approval by September 1 of each school year. *Union County Regional District, supra*

The Commissioner finds that petitioner has not been harmed by the administrative directives from the Director of the Bureau of Pupil Transportation and that the only moneys not received by the Board are those moneys which would not have been paid even if the contested contracts had received full approval.

There is no further relief to which petitioner is entitled; therefore, respondent's Motion for Summary Judgment is granted and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 29, 1976

**In the Matter of the Tenure Hearing of George Rhen,  
School District of the Borough of North Caldwell, Essex County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Complainant, Riker, Danzig, Scherer, & Brown (Peter Perretti, Esq., of Counsel)

For the Respondent, Richards and DeMiro (Daniel D. Richards, Esq., of Counsel)

On May 21, 1974, the Board of Education of the Borough of North Caldwell, hereinafter "Board," certified five charges before the Commissioner of Education, pursuant to *N.J.S.A. 18A:6-10 et seq.*, against respondent, a tenured elementary school principal employed by the Board since 1965. These charges, hereinafter set forth, are denied by respondent with the single exception that respondent admits that he was convicted of violation of a nonschool related municipal ordinance in a neighboring community as alleged in Charge No. 4.

At a conference of counsel held on August 14, 1974, it was agreed to delay scheduling a hearing in the matter until a determination was rendered by the Appellate Division of the Superior Court on the appeal by respondent of his

conviction by the Municipal Court and the affirmance thereof by the Essex County Court. The Appellate Court affirmed the lower Courts' decisions, whereupon a second conference of counsel was held on July 25, 1975. It was agreed by the hearing examiner and counsel that the factual context surrounding the conviction of violation of the municipal ordinance would be revealed by the transcript of the Municipal Court's proceedings, entered into evidence as P-9, and not be the subject of additional testimony before the Commissioner.

Hearing was conducted on seven days from January 20, 1976 through May 11, 1976 by a hearing examiner appointed by the Commissioner. Memoranda of Law were filed subsequent thereto. The Board and respondent agreed, in the interests of a timely resolution, to waive a hearing examiner report and the filing of exceptions thereto pursuant to *N.J.A.C. 6:24-1.16*. (Tr. VII-126) The report of the hearing examiner herewith sets forth, *seriatim*, the Board's charges against respondent, the findings of the hearing examiner, and his recommendations to the Commissioner:

*Charges Nos. 1, 2*

The essence of Charge No. 1 is that respondent failed to discharge his responsibilities as principal of the Board's Gould Elementary School because of inability to identify and resolve personnel, educational, discipline, and management problems of the school. It is further charged that an inordinate number of problems pertaining to the operation of the Gould School had to be referred by parents, pupils, and staff members either to the Board or to the Superintendent, who in dealing with those problems was required to perform a significant portion of the functions of the office of the principal. The Board charges, further, that the failure of respondent to discharge his duties could not be remedied by further effort or experience. The thrust of Charge No. 2 is that on a number of occasions respondent "\*\*\*\*intentionally failed to candidly respond to inquiries by the Superintendent and members of the District Board of Education with respect to the Gould School and the operation of the same." (Statement of Written Charge)

Three evaluations by respondent's Superintendent are in evidence. The first is a complimentary document dated March 8, 1971, made on the basis of limited observations. (P-5) No evaluation was produced for the 1971-72 school year. The second, a comprehensive document dated May 31, 1973, characterizes respondent as a conscientious, cooperative, knowledgeable principal possessing admirable personal attributes and vitality. It further states that:

\*\*\*\*He is able to meet frustrations and stress without becoming hostile to teachers, pupils, or other personnel. Although this is an exemplary personal attribute, it contributes much to the difficulties Mr. Rhen encounters in managing Gould School.\*\*\*\* (P-6, at p. 1)

This document further states that respondent, under crowded and sometimes adverse conditions, had consistently recommended "\*\*\*\*organizational structure that makes maximum use of the talents and strengths of all of his personnel, in spite of the fact that several recent assignments have resulted in most disappointing consequences.\*\*\*\*" (P-6, at p. 2)

In regard to his instructional leadership this evaluation describes respondent as extremely astute, with a keen insight into the role of the classroom teacher and one who “\*\*\*follows up every classroom observation with a report to the teacher and a copy of such report to the Superintendent.\*\*\*” (P-6, at p. 2) Respondent was further commended for holding regular staff meetings and having teacher evaluations completed prior to their due date. In this document the Superintendent also commended respondent for his relationship with superiors but criticized him for lack of firmness and overly generous attitudes at times toward subordinates. He was commended highly for his relationships with pupils and his leadership in maintaining attractive buildings and grounds.

In this evaluation, respondent was charged with carrying out certain recommendations to improve the image of Gould School. In this regard he was advised, *inter alia*, to avoid letting his humanistic approach stand in the way of decisiveness, to develop an improved public relations program and to avoid any form of procrastination by meeting problems head on and responding promptly to telephone inquiries by parents.

The Superintendent's third evaluation of respondent was made subsequent to April 23, 1974, the date of his suspension. Therein, the Superintendent reaffirmed respondent's desirable personal qualities and energetic, sincere professional efforts but charged that through procrastination he had failed to achieve the desired goals in school administration, organization and school community relations. It is worthy of note, however, that the Superintendent in that evaluation stated that in spite of respondent's arrest and conviction for violation of a municipal ordinance, *post*, he enjoyed the total support of his staff. The Superintendent expressed therein the view that he believed public reaction to that incident would render respondent “\*\*\*completely ineffective as a school leader.\*\*\*” (P-7, at p. 3)

Called as a witness for the Board, the Superintendent testified that he believed pupils at the Gould School to be more difficult to manage than those at Grandview, the Board's other elementary school, and that this was the result of socioeconomic diversity between the areas served by the two schools. (Tr. IV-38) He stated, however, that he found the academic achievement of the pupils enrolled in the two schools to be similar. He testified that constant “invidious comparisons” were made by the populace in criticism of Gould School, an older, more crowded two-structure school in the business district as contrasted to Grandview, a newer school in a residential area. (Tr. IV-42, 59) He stated that he had not had complaints from the staff of Gould School that respondent was an ineffective principal, but that he perceived respondent as ineffective in improving the public image of Gould School. (Tr. IV-46)

The Superintendent testified that respondent, on occasion, in an attempt to please all parties to a dispute, effected compromises not in the best interests of the school. When asked to give an example of such undesirable compromises, however, the Superintendent was unable to recall a single representative incident. (Tr. III-90) He further testified that he believed respondent had failed to take measures which would have prevented incidents wherein pupils brought knives and “airline” bottles of alcoholic beverages to the school playground with

them at one time. The hearing examiner finds that, although these incidents did occur, they were isolated ones which were promptly handled by respondent with appropriate notice to parents. (Tr. III-91; Tr. V-144; Tr. VII-61-63)

In regard to his ability to evaluate his staff, the Superintendent characterized respondent's reports on subordinates as frequent and

“\*\*\*very insightful.” [H]e knew what was going on. He had the insight to see the kinds of things they were doing as educators and to love them for it or ask [that] they change if they were negative attributes. With one exception his evaluations were always in to me on time. I believe there was one time in 1974 where they, perhaps, came to me on time but he hadn't yet discussed [them] with his own staff.\*\*\*” (Tr. III-97-98)

He testified that on that occasion certain of the evaluation reports were not signed by respondent's teaching staff members prior to their discussion by the Board and that although no dispute arose therefrom, this omission, later corrected by respondent, held potential for problems. (Tr. IV-9)

The Superintendent also testified that he believed certain image problems of the Gould School were attributable to staff members for whose employment respondent had no responsibility. (Tr. III-112) He further stated that, although he believed respondent procrastinated in reaching solutions to problems, he could recall no such instance. (Tr. III-128) Nor could he recall any instance wherein respondent had delayed handling pupil discipline problems. (Tr. IV-74-77)

The Superintendent testified that he had found no problem with respondent in respect to the ordering of outdated instructional materials or failure to order adequate, updated audiovisual machines and supplies. (Tr. IV-103-107)

The Superintendent resigned to assume another position in September 1974, whereupon the Grandview School principal, who had had no previous supervisory responsibility for respondent, was appointed Superintendent, hereinafter “present Superintendent.” He immediately set about, at the Board's direction, to review the program and operation of the Gould School and submitted a written report to the Board. (Tr. II-63) Therein, he stated, *inter alia*, that pupils were using outdated instructional materials, had inadequate supplies and equipment, and were inappropriately grouped. He further informed the Board that teachers were unaccustomed to supervision by the principal, lacked a disciplinary regimen, failed to sign in and sign out, and failed to keep lesson plans. This document further informed the Board that specialists' schedules at Gould School frequently required that a given pupil go directly from one specialist to another, rather than interspersing specialist assignments with basic classes. (P-12)

The present Superintendent, who made these observations five months after respondent was suspended, testified also that he found inadequate supervision of the playground and the lunchroom. (Tr. II-64, 73, 79) He stated that he found teachers at Gould School unfamiliar with the use of certain audiovisual aids, such as the Tach-X and Controlled Reader and that the third grade was not

grouped according to school policy for reading and mathematics instruction. (Tr. II-84-89, 98-99) He further testified that teachers appeared surprised when he appeared in classrooms to observe. However, he was unable to identify a specific teacher who reacted in this manner. (Tr. II-102, 107) He further stated that he learned that one third grade teacher did not have a science laboratory kit, a basic tool of the instructional program. (Tr. II-114) He also testified that he found no evidence of teachers' meetings having been held by respondent and that it appeared that it was the teachers, rather than respondent, who had constructed certain teachers' schedules. (Tr. II-124; Tr. III-63)

The present Superintendent admitted that the majority of his conclusions were grounded on observations of the operation of Gould School five months after respondent was suspended, and were not the result of direct observation or personal investigation of its operation during the prior year. (Tr. III-31, 33, 58) It is noted that, other than the shifting of certain aides to lunchroom and playground supervision, the present Superintendent did not change the instructional schedule he found in operation for the 1974-75 school year. (Tr. III-63)

The Board President testified that the Board had held a number of meetings since 1972 at which dissatisfaction was expressed with the image and management of Gould School. (Tr. I-21-23) He averred that the Board was particularly distressed over second grade parents' displeasure with an instructional plan devised by respondent to accommodate a very large second grade during the 1972-73 school year. (Tr. I-164) He affirmed that it was his opinion that this plan did not make the best use of teaching staff members. (Tr. I-50-55) He testified further regarding a meeting of the Board with respondent at the end of the 1972-73 school year at which respondent was asked to resign. (Tr. I-91-96, 140-141) Respondent, however, chose not to resign but did indicate he would investigate other opportunities for employment during the ensuing school year, the year during which he was suspended. It is noteworthy that no written record was made of this meeting of the Board with respondent.

The Board President expressed further displeasure over the fact that respondent did not notify the Superintendent or the Board of his legal problem relating to Charges Nos. 3, 4, and 5, *post*. (Tr. I-116)

Another Board witness, a part-time teacher at Gould School, testified in regard to a number of incidents in which she alleged that respondent had failed to give her timely notice to attend conferences or to perform assigned duties. (Tr. IV-152, 155-156, 161) She further testified that she believed respondent had not adequately handled a certain discipline problem or fulfilled an alleged promise to reconstruct the art schedule in accord with her wishes. (Tr. V-6, 26) She also testified that it was only after she appealed to the Superintendent that she was provided with an evaluation by respondent in the 1971-72 school year. (Tr. IV-153; Tr. V-26)

The hearing examiner finds little relevance in the testimony of the art teacher to the charges herein. The complaints of a single part-time teacher regarding such isolated incidents over a period of four years, without corroborative testimony of other teachers, even if true, belong in the sphere of inefficiency pursuant to *N.J.S.A.* 18A:6-12 and require that written notice of ninety days be

provided prior to certification of such charges before the Commissioner. No such written notice was given in this instance. Indeed, it appears that there is a virtual absence of the keeping of written records of events surrounding such complaints as are set forth by the Board, herein. In the matter of the missing evaluation of the part-time teacher, there is evidence that prior to that time the Superintendent's predecessor had himself provided part-time roving teachers with such evaluations. Respondent, when directed by the Superintendent to provide such teachers with evaluations, promptly did so. (Tr. VII-43)

Seven full-time teachers from the Gould School who taught under respondent were called as witnesses on his behalf. The hearing examiner finds that their forthright corroborative testimony, when balanced against testimony elicited by the Board and the limited documentary evidence submitted by the Board, leads to the conclusion that the following findings are true in fact:

1. All classes grades K-6 were grouped homogeneously by respondent in accord with school policy. (Tr. V-124-125, 162, 174; Tr. VI-7, 16, 23, 28-29, 31, 39)

2. The Gould School was well equipped with a variety of audiovisual machines and materials and teachers used them and were instructed in their use by respondent or others qualified to instruct. (Tr. V-89-94, 130, 156; Tr. VI-102)

3. The third grade teacher who taught science during 1973-74 in Gould School was provided with a science laboratory kit. (Tr. VI-7-8)

4. Gould School, under respondent's leadership, was supplied with necessary, reasonably updated texts and supplies. (Tr. II-10)

5. The third grade classes were at times scheduled for specialists' instruction for successive periods in the interest of safety. Respondent was concerned that they not unnecessarily be required to cross the street from the church in which they were housed in 1973-74. (Tr. VI-12)

6. Staff morale and pupil morale at Gould School was at reasonably high levels. (Tr. V-108, 146, 177; Tr. VI-14, 33, 106)

7. Teachers were required by respondent to check in and out at Gould School on a daily basis. (Tr. V-96, 132; Tr. VI-17, 30)

8. Teachers at Gould School were required to keep and regularly display their plan books to respondent. (Tr. V-96, 133, 169; Tr. VI-18, 28-29, 102)

9. Teachers were evaluated, counseled and observed by respondent with considerable frequency. (Tr. V-101, 126, 136, 164, 167-168; Tr. VI-25, 98, 105)

10 Respondent regularly conducted staff meetings at Gould School. (Tr. V-111, 176)

11. Respondent was readily approachable and frequently sought out by the Gould School teaching staff for assistance and advice in the instructional program. (Tr. V-126, 130)

It is further found that much of the criticism directed by the Board against respondent concerning the second grade program in 1972-73 was unmerited. The learning disabilities consultant testified that this program was devised by joint consultation of herself, the reading consultant, teachers, respondent, and the Superintendent. She further stated that a full-scale description of schedules and instructional personnel was presented to the Board by respondent and staff members with the full endorsement of the Superintendent. (Tr. VI-43-55) This testimony was corroborated by the Superintendent who avowed that the program was adopted after discussion and approval by the Board to cope with an inordinate influx of pupils in the second grade. (Tr. III-95) In any event, testing results show that the second grade program during the 1972-73 year was an academic success by reason of the fact that, of fifty-seven pupils, thirty-seven read above grade level, nine at grade level and only eleven below grade level at year end. The learning disabilities consultant and the reading specialists both testified that they believed the instructional program to have been an academic success, but a public relations failure. (R-3; Tr. VI-56-57, 90-93)

Respondent testified that he and his staff had called a meeting of parents of second graders early in the school year to explain the details of the instructional program approved by the Board for the 1972-73 school year. After a number of parent complaints were lodged, he again conferred with parents and in concert with the Superintendent, agreed to add aide time to assist teachers and somewhat improve the ratio of pupils to instructional personnel. (Tr. VII-18) The instructional program, thus modified, continued for the remainder of the year with full knowledge of the Board. (R-4; R-6)

The hearing examiner finds no reliable evidence that leads to the conclusion that respondent did not properly instruct his teachers in matters of safety, supervisory responsibilities or administrative procedures. Rather, the opposite appears true as corroborated by documentary evidence and the testimony of numerous Gould School teachers. (R-1, R-2, R-7, R-8, R-9, R-10, R-11)

The hearing examiner finds that the respondent did not fail in any significant degree to identify and resolve personnel, educational, discipline, management and other problems of the school. The hearing examiner is unable to conclude after consideration of the credible evidence that respondent so conducted himself in the office of principal of Gould School that highly inordinate amounts of time were required of the Superintendent to assist with the problems of Gould School. Nor has the Board proven that on any substantive number of occasions respondent failed to candidly respond to inquiries of the Superintendent or the Board or to report to them on educational progress. (R-5) In consideration of the above findings the hearing examiner recommends that the Commissioner dismiss Charges Nos. 1 and 2.

*Charges Nos. 3, 4, 5*

These three charges are set forth and considered by the hearing examiner *in pari materia* as essentially emanating from a single nonschool related incident. It is charged that on October 12, 1973, respondent trespassed on private property and surreptitiously invaded the privacy of occupants of an apartment house in violation of a municipal ordinance. It was further charged that respondent was convicted of violation of the aforesaid municipal ordinance and as a result lost the respect and confidence of many pupils and parents of pupils at the Gould School, thereby further impairing his capacity to serve as a principal.

A careful review of the transcript of the proceedings of the Municipal Court of West Caldwell, Docket No. C-73-227 reveals that respondent was convicted of violation of Municipal Ordinance No. 6-14.17r which forbids trespass and invasion of privacy for no lawful purpose. The factual pattern of respondent's violation was that, in the evening hours, after partaking of a number of cocktails, he approached the rear of a well-lighted apartment house area walking in a disheveled manner and was apprehended by Municipal police after having been observed leaning on the sill of a window of an unlighted room in an unoccupied apartment. (P-9, at pp. 76, 79, 82-83, 101-102) Respondent was convicted on February 7, 1974, and fined \$100. This conviction was affirmed by Essex County Court, Docket No. 43-96 on April 8, 1974 and, upon further appeal, affirmed by the New Jersey Superior Court, Appellate Division, Docket No. A-2264-73. (P-10)

It was after the County Court's affirmance of respondent's conviction that the Superintendent was first made aware by a police officer of respondent's violation. He testified at the hearing that he promptly made the matter known to the Board President and that the Board, after discussing the matter, directed him to suspend respondent, which he did on April 23, 1974. Thereafter, the Board, on May 21, 1974, certified charges pursuant to *N.J.S.A. 18A:6-10 et seq.* and suspended respondent without pay effective May 22, 1974. The Superintendent testified that he believed that respondent's conviction was insufficient to warrant the certification of charges against him, but that it served as a catalyst in convincing the Board that it should do so. (Tr. IV-131-132) He further testified that he felt respondent was remiss in not personally informing him of his legal problem.

The Board President testified similarly that he believed the incident, while insufficient of itself to warrant dismissal, was "\*\*\*the last straw\*\*\*" that precipitated the Board's decision to proceed against respondent when his appeal failed in Essex County Court. (Tr. I-103) He further testified that it was his belief that respondent's conviction "\*\*\*would make it impossible for him to effectively administer that school, to work with the children\*\*\*." (Tr. I-103-104, 114)

It is the finding of the hearing examiner with respect to Charges Nos. 3, 4, and 5 that:

1. Respondent, in fact, trespassed on private property on October 12, 1973 in violation of a municipal ordinance of the Borough of West Caldwell, but

that the evidence produced at the Municipal Court was insufficient to reach a conclusion that he, in fact, invaded the privacy of any dwellers of the apartment house where he was apprehended.

2. Respondent was convicted for violation of Municipal Ordinance No. 6-14.17r which conviction, on appeal, was twice affirmed.

3. This conviction was publicized in the press in North Caldwell which would necessarily cause at least some temporary loss of respect and confidence among residents. It is recommended, however, that the Commissioner determine that respondent's offense, although inexcusable, is insufficient to permanently destroy the respect and confidence of pupils, parents and citizens or render him incapable of serving the Board as an effective principal.

In conclusion, the hearing examiner recommends that the Commissioner determine that the findings hereinbefore set forth are insufficient to require that respondent be dismissed from his tenured position as principal in the School District of North Caldwell. It is further recommended that, in consideration of the aforementioned findings, the Commissioner mould a penalty consisting of an appropriate reduction in salary and direct that the Board reinstate, forthwith, to his position as an elementary school principal.

\* \* \* \*

The Commissioner has carefully reviewed the record of the controverted matter including the charges certified by the Board, the Answer filed by respondent, the exhibits in evidence and the testimony of witnesses.

The hearing examiner has recommended that Charges Nos. 1 and 2 be dismissed. In consideration of the extensive testimony of numerous well-qualified teaching staff members, including classroom teachers, the learning disabilities consultant and the reading specialists who have attested to the diligent and effective educational leadership of respondent, the Commissioner determines that the Board has failed in its proofs in support of these charges. The evidence in the record including the forthright, decisive responses of respondent to questions, supports the conclusion that he has not only exhibited a proper perception of the educational process and the strengths and weaknesses of his teaching staff members, but also actively devised and monitored well-conceived instructional programs oriented to meet the academic needs of pupils in the Gould School. The Commissioner concurs with the recommendation of the hearing examiner. Accordingly, Charges Nos. 1 and 2 are dismissed.

Charges Nos. 3, 4, 5 arise from a single incident which has precipitated respondent's private life into the public view. The Commissioner has frequently expressed himself concerning the responsibilities of teachers and administrators to maintain an exemplary image both in the performance of their official duties and in their private lives as viewed by the public. In this regard, the Commissioner is constrained to restate that which was said *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302*:

“\*\*\*[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.\*\*\*”

(at p. 321)

It was also said *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County, 1971 S.L.D. 284* that:

“\*\*\*A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions \*\*\*must accept the consequences of his actions.\*\*\*” (at p. 296)

Similarly, it was said *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97* that:

“\*\*\*Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully\*\*\*violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.\*\*\*”

(at pp. 98-99)

And, as the State Board of Education said in *George R. Good v. Board of Education of the Township of Union, Union County, 1938 S.L.D 354 (1935)*:

“\*\*\*[The board of education] may reasonably require of one holding the important position of principal of its high school conduct in conformity with commonly accepted ethical standards. He is, in a measure, a guide and pattern for the adolescent boys and girls under his charge. He should teach by example as well as by precept. The inculcation of those qualities and attributes which we call ‘character’ is a responsibility of our schools.\*\*\*” (at p. 359)

The Commissioner determines, however, that such unfortunate publicity as may have affected respondent’s reputation and the public image of the North Caldwell School District in 1974, arising as it does from an isolated incident, is neither permanent nor is it of such magnitude that reasonable men will allow it to destroy a professional career. Respondent, however, is not without blame for his failure to notify the Board in timely fashion of the episode of his arrest and impending court appearance. Such unfortunate matters affecting the public

relations of a school are best handled by forthrightly apprising superior school officers or boards of education of their occurrence in order that undue surprise be averted.

Dismissal in this instance, would be an unreasonably severe penalty. The Commissioner so holds. Nevertheless, it is appropriate that a penalty be exacted in addition to the chagrin and uncertainty which respondent has endured during his lengthy period of suspension. See *In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County*, 1972 S.L.D. 535 wherein it was said:

“\*\*\*[R]espondent has suffered the mental anguish of\*\*\*hearing which could result in the loss of his livelihood. In addition, respondent’s professional reputation has been damaged, and he will be required to exert himself to reestablish his reputation and standing because of his error.\*\*\*”  
(at p. 542)

The Commissioner, in this instance, determines that a reasonable penalty will be the forfeiture of salary for the statutory 120 day period beginning with the date of his suspension by the Board without pay. It is directed, therefore, that the Board reinstate respondent to his position as principal, forthwith, at a rate of compensation in accord with the Board’s salary policy adopted pursuant to *N.J.S.A. 18A:29-4.3*, which would have been in effect for respondent had this litigation not taken place.

COMMISSIONER OF EDUCATION

June 29, 1976

“O. P.,”

*Petitioner,*

v.

**Board of Education of the City of Paterson,  
Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Brenman and Piper (Abraham Brenman, Esq., of Counsel)

For the Respondent, Robert P. Swartz, Esq.

This matter having been opened before the Commissioner of Education by Brenman and Piper (Abraham Brenman, Esq., appearing), counsel for petitioner, on a Notice of Motion for Interim Relief filed December 5, 1975, requesting temporary restraint against the continued expulsion of petitioner from school attendance by the Board of Education of the City of Paterson, hereinafter “Board,” in the presence of Robert P. Swartz, Esq., counsel for the Board; and

The arguments of counsel having been heard and documentary evidence received at an oral argument held on December 10, 1975, the circumstances of the matter are as follows:

On September 22, 1975, petitioner was alleged to have had in his possession on school property twenty-six marijuana cigarettes. Subsequent to a preliminary hearing in the form of an interview, the high school principal suspended petitioner from school attendance for ten days. The principal notified the Board and petitioner’s father on September 23, 1975 (R-1) of petitioner’s suspension for the possession of marijuana. Petitioner complains that at that juncture he did not receive an adversary hearing.

During this initial suspension, the Superintendent of Schools determined to recommend to the Board petitioner’s expulsion from school attendance. Petitioner’s father was advised by letter dated October 2, 1975 (J-1), that the Superintendent would recommend petitioner’s expulsion at the Board meeting to be held on November 6, 1975. Petitioner’s father was also advised that his son had the right to a hearing and to a statement of charges and a statement of the evidence in support of those charges. Petitioner’s father was also advised of his right to counsel. Finally, the Commissioner observes that petitioner’s father, and petitioner himself by letter of the same date (J-2), was advised that petitioner’s initial suspension was continued by the Board until November 6, 1975. The letters to petitioner and his father (J-1; J-2) were over the signature of Board counsel who requested that he be informed whether petitioner elected to exercise his right to a hearing.

The high school principal, by letter (J-3) dated October 6, 1975, advised petitioner's father that on the advice of Board counsel and one named Board member, petitioner was not to return to school until the Board granted such permission.

In the meantime, petitioner obviously retained counsel, the present counsel of record, since by letter dated October 14, 1975 (J-5), Board counsel advised petitioner's counsel that the Superintendent would recommend to the Board that petitioner be suspended for the remainder of the 1975-76 academic year, but that he would be eligible for enrollment for the 1976-77 academic year. Board counsel also advised that the Superintendent recommended that petitioner enroll in an alternative educational program during the remainder of the 1975-76 academic year. Finally, Board counsel concluded his letter by stating:

“\*\*\*Should this [suspension for the remainder of the 1975-76 academic year, petitioner's enrollment in an alternative educational program, and reinstatement for the 1976-77 academic year] not be acceptable to [petitioner] and his parents, this will advise that I will arrange for an immediate hearing before the Board of Education after which the Board of Education will take formal action based upon the recommendation of the Office of the Superintendent.” (J-5)

It is established that petitioner and/or his parents elected not to accept the terms set forth above and chose to demand a hearing by the Board. By letter dated November 6, 1975 (J-4), petitioner was notified that a hearing would be afforded him on November 10, 1975, at 8 p.m. at the Board office. Petitioner was given a statement of charges which alleged:

“That on September 22, 1975, while in the area of Eastside High School during school hours, did have in his possession twenty-six (26) marijuana cigarettes and did attempt to sell them to another student in violation of *N.J.S.A. 18A:37-2*.” (J-6)

The Commissioner observes that the statement of charges does not set forth the nature of the evidence against petitioner nor the names of the witnesses who would testify against him.

In any event, petitioner was afforded a hearing on November 10, 1975 before six members of the Board. It appears that the only witness produced by the Board in support of the charge against petitioner was a security officer in its employ who discovered the marijuana cigarettes in his possession. The Board, as the result of the hearing, found that petitioner did in fact have in his possession twenty-six marijuana cigarettes on September 22, 1975. The Board admits that petitioner's intent to sell was not established.

Petitioner was notified by letter dated November 18, 1975 (J-7), that he was expelled from further school attendance. The resolution (J-8) of the Board by which petitioner was expelled was attached to the letter. The Commissioner observes that neither the letter to petitioner nor the resolution of the Board limit his suspension to the remainder of the 1975-76 academic year.

Petitioner argues that his expulsion from further school attendance is excessively harsh. Furthermore, petitioner argues that the penalty was imposed without the Board first creating a standard by which it would be authorized to determine that expulsion would result if a pupil possessed marijuana. Consequently, petitioner argues that a lesser form of discipline must be enforced.

The Commissioner does not agree that a board must establish a shopping list of infractions with specified disciplines it may then mete out. *N.J.S.A. 18A:37-2* establishes that a board of education may suspend or expel pupils from its schools for cause which it finds to be good cause. The review of a board's suspension or expulsion action takes the form of appellate review. In this context, the Commissioner, absent a showing of impropriety or illegality will not and may not interfere with the actions of a board. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965), *aff'd* 46 *N.J.* 581 (1966)

The Commissioner observes that from the date of petitioner's initial suspension on September 22, 1975 until November 10, 1975, the date of his hearing, forty-nine days elapsed. This amount of time between initial suspension and hearing before the Board is contrary to the ruling of the Court in *R.R. v. Board of Education of Shore Regional High School District*, 109 *N.J. Super.* 337 (*Chan. Div.* 1970) wherein it is required that such hearing occur within twenty days from the date of suspension. The Commissioner does notice, however, that the forty-nine day time lapse herein is largely attributable to respective counsel in agreeing to a date for hearing.

The Commissioner observes that the preliminary hearing, in the form of an interview, afforded petitioner by the high school principal is consistent with the requirements of constitutional due process set forth in *R.R. v. Board of Education of Shore Regional*, *supra*, and in *Goss et al. v. Lopez et al.*, 419 *U.S.* 565 (1975). There is no requirement for a full adversary hearing at that juncture as argued by petitioner.

The Commissioner is constrained to observe that the Superintendent's stated recommendation (J-5) to suspend petitioner for the remainder of the 1975-76 academic year appears to be in conflict with the final action of the Board to expel (J-8) petitioner from further school attendance.

While a board of education need not have standards of punishment as hereinbefore stated, permanent expulsion of petitioner from school attendance for this one infraction, albeit serious, is in the Commissioner's judgment too harsh a penalty. Petitioner is in his twelfth year, approaching graduation, and the Board has produced nothing of merit in his prior school attendance which justified such permanent expulsion. Therefore, the Commissioner will uphold petitioner's suspension for the remainder of the 1975-76 academic year but the Board is directed to enroll petitioner in its schools as a twelfth grade pupil as of September 1976.

To the extent that petitioner is continued on suspension, interim relief is hereby denied. To the extent that permanent expulsion is set aside, petitioner's relief is hereby granted.

COMMISSIONER OF EDUCATION

June 29, 1976

**Anna Gill,**

*Petitioner,*

v.

**Board of Education of the City of Clifton, Passaic County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Balk, Jacobs, Goldberger, Mandell, Seligsohn & O'Connor (Jack Mandell, Esq., of Counsel)

For the Respondent, Sam Monchak, Esq.

Petitioner is employed as a teaching staff member by the Board of Education of the City of Clifton, Passaic County, hereinafter "Board." Petitioner complains that the Board illegally established her salary for the 1974-75 academic year by improperly withholding her salary increment. Petitioner seeks to recover the monetary difference between the amount of compensation she received and the amount she alleges she should have received for 1974-75. The Board denies petitioner's allegations and asserts that it established her 1974-75 salary in a proper and legal manner.

The parties agreed to submit the matter for determination directly to the Commissioner of Education on the pleadings, exhibits, and Briefs.

The uncontroverted facts of the matter are these. Petitioner's academic background and her experience in the employ of the Board is such that her level of compensation for 1973-74 was established according to the maximum step of the bachelor's degree scale of the Board's salary policy. (C-6A) Petitioner received \$15,365 for 1973-74, the maximum salary for persons with her experience and academic training. It is observed that the minutes (C-1) of a Board meeting conducted during November 1973 show that the Board adopted a salary policy (C-6A) for 1974-75 which increased the maximum of its bachelor's degree salary scale to \$16,165. Petitioner, however, received \$15,365 for 1974-75 and now lays claim to the additional \$800 for a total 1974-75 salary of \$16,165 as set forth on the maximum step of the bachelor's degree scale.

At a meeting of the Board conducted on June 26, 1974, the Superintendent of Schools presented his recommendation (C-3A) with respect to the granting of and withholding of salary increments to professional employees of the Board. The Superintendent recommended that five teaching staff members, one of whom was petitioner,

“\*\*\*shall not be awarded a salary increment and/or salary increase for 1974-75 pending final determination and recommendation by the superintendent to the Board of Education.” (C-3A)

The minutes (C-3) of this Board meeting show that the Board adopted the Superintendent's recommendation to deny petitioner a salary increment for 1974-75 “pending final determination by the superintendent to the Board of Education.”

The School Business Administrator advised petitioner by letter dated June 27, 1974, that the Board determined not to grant her a salary increment or increase for the 1974-75 school year “\*\*\*pending final determination and subsequent notification to you.\*\*\*” (C-4) Petitioner was also advised that the salary she received during 1973-74 would be continued into 1974-75 until final disposition was made.

The Commissioner observes that, at this juncture, neither the Board nor the Superintendent specified in writing why a salary increment was to be denied petitioner for 1974-75. The Commissioner also observes that the Board adopted a policy (C-2A) on April 17, 1974 in regard to salary increments. That policy provided that salary increments are not to be considered automatic; rather, they are to be earned through satisfactory performance as adjudged by the Superintendent and as approved by the Board. The policy also provided that the Board could take official action to deny salary increments to any of its professional employees “\*\*\*before or within 90 days after the adoption and approval of such \*\*\* finding of the Superintendent of unsatisfactory service\*\*\*.” (C-2A)

The record shows that subsequent to the commencement of the 1974-75 academic year, petitioner sustained an injury on September 12, 1974, which incapacitated her until October 14, 1974. Petitioner returned to her teaching duties on October 14, remained until October 15, and, as the result of her injury, was incapacitated for the remainder of the 1974-75 academic year.

The parties agree that shortly after October 16, 1974, petitioner was notified by letter that the Board, at its regular meeting held October 16, 1974, determined by a majority vote of its membership to withhold a salary increment from petitioner's 1974-75 salary because of “excessive absenteeism.” (Petition of Appeal, paragraph 10; Board's Answer, paragraph 5) The Commissioner notices that the Board also entered a stipulation at the conference of counsel conducted in this matter on April 29, 1975, that its action controverted herein was taken for the excessive absenteeism of petitioner.

The minutes (C-5A) of the Board meeting held October 16, 1974, show that the Board simply affirmed its own final determination to withhold petitioner's salary increment which had been taken at its committee of the whole meeting on October 9, 1974. (C-5B)

The Commissioner is constrained to observe that the committee of the whole also finally determined on October 9, 1974 to withhold the salary increments of the other four teaching staff members as recommended by the Superintendent on June 26, 1974. That determination was also affirmed by the Board at its regular meeting held October 16, 1974.

Petitioner contends that the words "employment increment" and "adjustment increment" are "words of art" defined specifically by *N.J.S.A.* 18A:29-6 as follows:

\*\*\*\*'Employment increment' shall mean an annual increase of \$250.00 granted to a member for one 'year of employment';

and,

" 'Adjustment increment' shall mean, in addition to an 'employment increment,' an increase of \$150.00 granted annually \*\*\* to bring a member \*\*\* to his place on the salary schedule according to years of employment\*\*\*."

Petitioner asserts that, since she had been on the maximum step of the guide for 1973-74, the salary scale increase may not properly be termed either "employment increment" or "adjustment increment," but must be considered to have been adopted pursuant to *N.J.S.A.* 18A:29-4.1. Petitioner reasons that such salary policies, once adopted, are binding on the Board for a two-year period and are contractual in nature. *Norman A. Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, *aff'd* State Board of Education 29 Petitioner further contends that, absent conditions precisely set forth in the salary policy itself, the Board was contractually bound by the terms of its negotiated agreement to pay petitioner \$16,165 for 1974-75. Petitioner asserts that the Board, being a creature of the State and possessing only those powers delegated to it by the Legislature, is, like the Legislature, prevented by Article I, Section X, of the Constitution of the United States, from acting in such fashion as to impair the terms of a binding contract. It is further argued that the Commissioner has ordered boards of education to compensate their teaching staff members in accord with adopted salary guides. *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County*, 1975 *S.L.D.* 19; *John McAllen, Jr. v. Board of Education of the Borough of North Arlington, Bergen County*, 1975 *S.L.D.* 90, *aff'd* State Board of Education 92

Petitioner prays for an order from the Commissioner declaring that her salary increase was improperly withheld and directing the Board to compensate her at the aforementioned applicable maximum rate for 1974-75 herein controverted.

The Board argues that it has statutory authority, *N.J.S.A.* 18A:29-14, to withhold salary increments for just cause and cites *Westwood Education Association v. Board of Education of the Westwood Regional School District*, aff'd Docket No. A-261-73, New Jersey Superior Court, Appellate Division, June 21, 1974, *cert den.* 66 *N.J.* 313 (1974). The Board contends that in the instant matter petitioner's salary increment was withheld because of excessive absenteeism.

The Board asserts that by exercising its statutory authority to withhold petitioner's salary increment, it has violated no rights otherwise due petitioner by virtue of her tenured employment. The Board avers in this regard that the withholding of a salary increment does not constitute a reduction in salary as contemplated within the purview of *N.J.S.A.* 18A:6-10 and cites *Fraser et al. v. State Board of Education*, 133 *N.J.L.* 15 (*Sup. Ct.* 1945), aff'd 133 *N.J.L.* 597 (*E. & A.* 1946); *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (*App. Div.* 1960); *Offhouse et al. v. State Board of Education*, 131 *N.J.L.* 391 (*Sup. Ct.* 1944); *Newark Teachers Association v. Board of Education of the City of Newark*, 108 *N.J. Super.* 38 (*Law Div.* 1969).

The Board asserts that it did not violate the provisions of *N.J.S.A.* 18A:29-4.1 and cites *Federbush v. Board of Education of Carteret*, 6 *N.J. Super.* 70 (*App. Div.* 1949).

The Commissioner has reviewed petitioner's argument that *Fraser, supra*, and *Offhouse, supra*, are inapplicable in the instant matter. The Commissioner has also reviewed *Greenway v. Board of Education of the City of Camden*, 129 *N.J.L.* 461 (*E. & A.* 1942) and petitioner's position with respect to the *Newark Teachers Association, supra*, a matter cited by the Board.

The Commissioner observes that in *Westwood, supra*, the Court held that:

“\*\*\*[A] local board of education, pursuant to *N.J.S.A.* 18A:29-14, has sole discretion to withhold a member's salary increment for inefficiency or other good cause and that this right is not negotiable under the provisions of *N.J.S.A.* 34:13A-5.3. See *Association of New Jersey State College Faculties v. Dungan*, 64 *N.J.* 338 (1974).

“Appellant, relying upon previous decisions of the Commissioner of Education, contends that *N.J.S.A.* 18A:29-14 has no application to salary schedules in excess of statutory minima, unless the local board first adopts a salary policy pertaining to such increments. We find no basis, statutory or otherwise, for the Commissioner's limiting construction and hold this contention to be without merit. Cf. *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (*App. Div.* 1960)\*\*\*” (Superior Court of New Jersey, Appellate Division, Docket No. A-261-73, June 21, 1974)

*Westwood, supra*, is controlling. Therefore, *Ross, supra*, is in error as are those other Commissioner's decisions which held that a board must insert in its salary schedule a provision stating the procedures and conditions under which it

may withhold an increment. Such cases include, *inter alia*, *Charles Brasher v. Board of Education of the Township of Bernards et al., Somerset County*, 1971 S.L.D. 127; *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County*, 1971 S.L.D. 120. For a history of pertinent cases consult *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County*, 1973 S.L.D. 449.

The Supreme Court of New Jersey stated in *Lullo v. International Association of Fire Fighters*, 55 N.J. 409 (1970) that:

“\*\*\*It is crystal clear that in using the term ‘collective negotiations’ the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee. \*\*\* [P]ublic agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion.\*\*\*” (at p. 440)

Thus, it is clear that “\*\*\*the negotiation privilege may not intrude on the statutory authority or render it a nullity.\*\*\*” *Nancy Weller v. Board of Education of the Borough of Verona, Essex County*, 1973 S.L.D. 513, 523

The New Jersey Superior Court in *Westwood, supra*, makes no distinction as claimed by petitioner that “employment increment” and “adjustment increment” are artful words limited in application to those definitions set forth in *N.J.S.A. 18A:29-6*. Nor will the Commissioner impose such a limitation.

The applicable statute, *N.J.S.A. 18A:29-14*, reads in its entirety as follows:

“Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.”

Consequently, the issue herein is reduced to the question of whether the Board complied with the statutory prescription set forth above.

Petitioner’s salary increment for 1974-75 was effectively withheld from her by action taken by the Board on June 26, 1974. The letter (C-4) sent to her the following day by the School Business Administrator sets forth the action taken but does not set forth “the reasons therefor.” In fact, there is no evidence before the Commissioner that the Board ever advised petitioner of the reason

until it affirmed its own decision on October 16, 1974. In the Commissioner's view, such laxity on the part of the Board is not consistent with the legislative intendment of *N.J.S.A.* 18A:29-14 that the Board advise petitioner within ten days of the action taken and the reasons therefor.

While there is no question that the Board may withhold salary increments by virtue of its authority at *N.J.S.A.* 18A:29-14, it must follow the precise mandate set forth. In the instant matter, the Board failed to do so. Consequently, it is not necessary for the Commissioner to address the validity of the belated reason of absenteeism offered by the Board in support of its controverted action herein.

Accordingly, the Commissioner finds and determines that the Board of Education of the City of Clifton improperly withheld the 1974-75 salary increment of \$800 from Anna Gill. The Board is directed to reimburse Anna Gill the sum of \$800 at its next regularly scheduled pay date.

COMMISSIONER OF EDUCATION

July 8, 1976

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, July 8, 1976

For the Petitioner-Appellee, Balk, Jacobs, Goldberger, Mandell, Seligsohn & O'Connor (Jack Mandell, Esq., of Counsel)

For the Respondent-Appellant, Sam Monchak, Esq.

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

October 6, 1976

Pending before Superior Court of New Jersey

**Mrs. James Dunwoody, Myrtle Brown, Cornelius J. O'Donnell,  
David Rhody, Karen Riffel and Moorestown Education Association,**

*Petitioners,*

v.

**Board of Education of the Township of Moorestown,  
Burlington County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioners, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondent, Moss, Powell & Powers (Edgar E. Moss, II, Esq., of Counsel)

Petitioners are employed as teaching staff members by the Board of Education of the Township of Moorestown, Burlington County, hereinafter "Board," and are members of the Moorestown Education Association, hereinafter "Association." Petitioners complain that the Board has improperly withheld the payment of interest moneys due the Association which moneys resulted from deposits made by the Board on behalf of petitioners pursuant to *N.J.S.A. 18A:29-3*, Summer Payment Plan. The Board denies that its retention of interest earned on such deposits is improper or illegal.

The matter is referred directly to the Commissioner of Education for adjudication on the record, which includes the pleadings, stipulations, exhibits and respective Briefs of the parties.

The Board elected to exercise its permissive authority at *N.J.S.A. 18A:29-3* by providing a summer payment plan, on an optional basis, for its teaching staff members during the 1974-75 academic year. The application form (P-1) circulated among the teaching staff members for participation in such a plan provided, *inter alia*, that the Board Secretary would withhold an amount equal to ten percent of each semimonthly salary payment for those who elected to participate for the academic year 1974-75. Thereafter, the Board would pay the accumulated deductions to the participating teacher in one of three ways: 1) at the conclusion of the 1974-75 academic year, 2) in two equal installments during the 1975 summer months, or 3) in four equal installments during the 1975 summer months. The provisions of the application (P-1) controverted herein, however, are those which provide:

"I [the participating teaching staff member] understand that any interest that may accrue from my monthly deposit will be paid to the Moorestown Education Association [a party petitioner herein] for their (sic) scholarship fund."

And,

“Furthermore, I fully understand that this agreement may *not* be altered by either party during the academic year ending June 30, 1975.”

*(Emphasis in text.)*

It is stipulated by the parties that the Board has had since at least 1968 an unwritten policy by which it did, in fact, forward interest accrued on its plan deposits to the Association. The Board was advised, however, by its auditors as part of the 1973-74 audit report (C-1) that:

\*\*\*

“We [the auditing firm] were informed by the State Department of Education that interest earned on a summer payment payroll account is to be credited to the current fund of the Board of Education. We suggest [to the Board] that this procedure be followed.\*\*\*” (C-1, at p. 9)

Thereafter, the Board, consistent with this advice, has refused to pay interest earned for 1974-75 on petitioners’ summer payment plan deductions to the Association.

The Commissioner notices that *N.J.S.A.* 18A:29-3 provides, in full, as follows:

“Whenever persons employed for an academic year by a board of education shall indicate in writing their desire to participate in a summer payment plan, and such board of education approves such participation, then, and thereupon, the proper disbursing officer of the board of education, under such rules as may be promulgated by the commissioner with the approval of the State board, is hereby empowered and directed to deduct and withhold an amount equal to 10% of each semimonthly or monthly salary installment, from the payments of the salaries made to such employees as shall participate in such plan and the accumulated deductions for any academic year shall be paid to the employee or his estate under such rules as may be established by the board of education in one of the following ways: (1) at the end of the academic year; (2) in one or more installments after the end of the academic year but prior to September 1; (3) upon death or termination of employment if earlier. Such deductions may be deposited by the board of education in an interest bearing account in any financial institution having its principal office in the State of New Jersey.”

The Commissioner also notices that portion of the statute which provides:

“Such deductions may be deposited by the board of education in an interest bearing account in any financial institution having its principal office in the State of New Jersey”

was made part thereof by *L.1970, c.238*, §1. Prior to the passage of this amendment, the statute was silent with respect to the deposit of summer plan deposits in an interest bearing account.

The rules promulgated by the Commissioner and approved by the State Board of Education regarding the implementation of the permissive authority to have a summer payment plan are set forth in *N.J.A.C. 6:3-1.6* and provide, in full, as follows:

“Funds withheld from employees’ salaries for the Summer Payment Plan prescribed by N.J.S.A. 18:5-50.19 [now 18A:29-3], shall be deposited in a separate account in a depository designated by the local board of education, said account to be known as Board of Education of \_\_\_\_\_ Summer Payment Plan Account. Withdrawals from this account shall be made by individual checks payable to the order of employees for the amount withheld from their salaries during the school year. A payment list shall be certified by the president and secretary of the board of education and delivered to the custodian of school moneys of the district.”

Petitioners argue that the application form (P-1) they individually executed to participate in the plan constitutes a contract by agreement between them and the Board. Petitioners assert that the language of the application is clear and requires no interpretation. Simply stated, petitioners demand that the interest earned on the deposits made on their behalf for participation in the plan, less a reasonable amount for administrative costs, be turned over to its designated Association as set forth in the application. Petitioners argue that the Board has no legal basis upon which it may now avoid compliance with the executed agreements set forth in the application. Petitioners contend that a contract which is not void *ab initio* may be enforced if there is no impediment to such enforcement.

Petitioners assert that when they chose to participate in the plan they did so upon a premise that interest moneys earned would be paid to the Association. Petitioners further argue that they could have deposited ten percent of each salary installment in private interest bearing accounts, computed the interest and donated that sum to the Association for its scholarship fund.

Petitioners maintain that the Board is now estopped from claiming interest as its own by equitable principles. Petitioners argue in this regard that the interest belongs either to the individually named petitioners or to the Association by virtue of the provisions of the application. (P-1)

Finally, petitioners contend that while *N.J.S.A. 18A:29-3*, as amended by *L.1970, c.238, § 1*, allows a board to deposit plan deductions in an interest bearing account, neither the statute nor the State Board of Education regulations (*N.J.A.C. 6:3-1.6*) address the issue of a disposition of accrued interest. Consequently, petitioners assert that the provisions of the application (P-1) by which they and the Board entered into an agreement is controlling and that the Board must abide by the terms thereof and pay the interest earned, less administrative costs, to the Association.

The Board asserts that the advice it received from its auditors with respect to crediting interest earned on plan deposits to its current fund was generated by

communication between unnamed members of the State Department of Education and the Municipal Accounts Association during September 1972. The Board explains that subsequent to its being advised of the necessity to credit its own current fund with the interest moneys earned on such plan deposits, it merely adhered to that advice. The Board maintains that for it to take a contrary position and pay the interest earned to the Association would subject it and its individual members to both civil and criminal proceedings for the misuse of public funds.

The Board maintains that if it is inequitable for it to credit interest earned to its current fund in light of the provisions of its application (P-1) and if corrective action is necessary, such correction must be made by the Legislature in the form of enabling legislation.

The Commissioner observes that the issue herein is whether a board of education that elects to establish a summer payment plan pursuant to *N.J.S.A.* 18A:29-3 has authority to pay interest earned on deposits made as a result of salary earnings from those who participate to any one or any entity other than its own current fund. Boards of education are agencies of the State and as such have only those powers specifically granted, necessarily implied or incidental to the authority expressly conferred by the Legislature. *Edwards v. Mayor and Council of Borough of Moonachie*, 3 *N.J.* 17 (1949); *N.J. Good Humor, Inc. v. Bradley Beach*, 124 *N.J.L.* 162 (*E. & A.* 1939) Such powers can neither be increased nor diminished except by the Legislature. *Burke v. Kenny*, 6 *N.J. Super.* 524 (*Law Div.* 1949) In the instant matter, the Board has permissive authority at *N.J.S.A.* 18A:29-3 to make deductions for a summer payment plan. Its authority, however, is limited with respect to the final disbursement of such funds. The statute of reference specifically provides that “\*\*\*the accumulated deductions for any academic year shall be paid to the employee\*\*\*.” (*Emphasis supplied.*) Had the Legislature intended that, by its passage of *L. 1970, c. 238*, § 1, interest earned on such deposits was to be paid to the participating employee, it would have so stated. The Commissioner is mindful of the Court’s admonition regarding statutory construction and interpretation articulated in *Caputo v. Best Foods, Inc.*, 17 *N.J.* 259 (1955):

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

In the instant matter, the Legislature provided *boards of education* with the authority to deposit such plan deposits in an interest bearing account. The Commissioner holds that the Legislature provided such authority to boards of education so that the boards would secure the interest earned thereon.

The Commissioner recognizes the argument of petitioners that they, individually, could have made their own deposits in private interest bearing accounts and donated the accumulated interest to the Association. The Commissioner agrees that petitioners had such an option. In fact, *N.J.S.A.* 40:11-26 allows boards of education to make payroll deductions for employee payments to credit unions. However, there is no authority pursuant to *N.J.S.A.* 18A:29-3 for a board to pay interest earned on plan deductions to the employee or his/her designated recipient. The Commissioner so holds.

The Commissioner observes that on prior occasions he has been called upon to adjudicate the legality of formal agreements entered into between boards of education and local teachers' associations when one of the parties questioned the validity thereof. In such instances, it has been consistently held that the terms of a negotiated agreement do not vitiate nor lessen the responsibility of a board of education pursuant to law. (See *Woodbridge Township Federation of Teachers, Local No. 822, AFL-CIO, AFT v. Board of Education of the Township of Woodbridge, Middlesex County*, 1974 S.L.D. 1201; *Teamsters Local 102, International Brotherhood of Teamsters et al. v. Board of Education of the City of Linden, Union County*, 1974 S.L.D. 1349.) The same principle is equally applicable herein. Interest earned on summer payment plan deposits made by a board of education accrues to that board of education. As such, the moneys became part of the public purse which the board of education must protect. *Joseph G. and Irene R. Hudak v. Board of Education of the Township of East Brunswick, Middlesex County*, 1971 S.L.D. 493

The Commissioner finds and determines that that portion of the Board's application (P-1) for participation in its summer payment plan by which it is to pay interest earned to the Association is *ultra vires* and is hereby set aside.

Accordingly, having found no basis to intervene in the action of the Board of Education of the Township of Moorestown, the Commissioner of Education hereby dismisses the Petition of Appeal.

COMMISSIONER OF EDUCATION

July 8, 1976

## STATE BOARD OF EDUCATION

### DECISION

Decided by the Commissioner of Education, July 8, 1976

For the Petitioners-Appellants, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondent-Appellee, Moss, Powell & Powers (Edgar E. Moss, II, Esq., of Counsel)

The decision of the Commissioner of Education is reversed. The State Board of Education determines that the Moorestown Board of Education is free to make the decision to disburse the accumulated interest funds resulting from its summer payment plan deposits.

November 3, 1976

**Bruce W. Roe, Edward Dorman  
and Kathryn S. Sanders,**

*Petitioners,*

v.

**Board of Education of the Township of Mine Hill,  
Morris County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Maraziti and Maraziti (Joseph J. Maraziti, Esq., of Counsel)

Petitioners, tenured teaching staff members in the employ of the Board of Education of the Township of Mine Hill, hereinafter "Board," allege that the Board illegally abolished or reduced their positions of employment in 1974. They request restoration to the positions and compensation retroactive to the date of the Board's action.

A hearing in this matter was conducted on November 10, 1975 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The instant Petition of Appeal was originally filed in May 1974 but was held in abeyance at petitioners' request for the submission of an amendment and in order that counsel might be secured. Subsequently, a conference of counsel was conducted on April 15, 1975, and thereafter petitioners filed a second amendment to the Petition. There followed an Amended Answer and the hearing noted, *ante*, ensued.

At the hearing testimony was adduced from the three petitioners and from the Board's President. At the hearing's conclusion it was agreed that the principal issue for consideration is whether or not the Board's action to abolish or reduce the positions of petitioners was taken at a legal meeting of the Board. (Tr. 75) Additionally, if such meeting is found to be legally correct, there are questions to be decided with respect to seniority privilege and with the statutory requirement that every school district shall employ a school nurse. *N.J.S.A. 18A:40-1*

The present President of the Board was the only witness called who gave testimony concerned with the meeting at which petitioners' positions were either abolished or altered. He testified that the Board had, for some time prior to the meeting, been engaged with a consultant in a study of its school's operation but that the consultant's report in oral form had not been given to the

Board until the last week of March or the first week of April 1974. (Tr. 23) This report, together with a reduction of \$100,000 in the Board's budget made pursuant to law by the Mine Hill Township Committee, had served as the most important reason for a caucus meeting of the Board on April 8, 1974. (See Tr. 18-20, 23.)

At that meeting, the Board President testified, the Board discussed a variety of proposals concerned with budget reduction and was told by the then President that there would be a special meeting of the Board held at 5:30 p.m. on April 9, 1974. (Tr. 17) He testified further that the time was set in order to accommodate work schedules of Board members (Tr. 18) and that the call for the meeting by the then President was in conformity with the Board's own rules for the calling of meetings in emergencies. (Tr. 33) He testified further that there was an emergency at the time since teachers, by Board agreement, had to be informed of non-reemployment or reduction-in-force decisions on or before April 15 and since a ten day Easter recess was scheduled to begin at 1 p.m. on Thursday, April 11. (Tr. 19, 28)

The Board President testified that the Board did meet in a special meeting on April 9, 1974, and that two newspaper reporters and two members of the general public were present. (Tr. 19, 39) He further testified that all Board members were in attendance and that the controverted reductions in force were approved by a vote of four to one. (Tr. 21) (See also P-1.)

The reductions specifically in contest herein were itemized in the minutes of the April 9, 1974 meeting (P-1) and are summarized as follows:

1. Kathryn Sanders - the one school nurse - reduced from full-time to half-time employment;
2. Bruce Roe - physical education teacher - reduced from full-time employment to employment only three days per week;
3. Edward Dorman - instrumental music teacher - half-time position abolished as part of a reorganization which changed the assignment of the former vocal music teacher to include work in instrumental music.

Each of these petitioners gave brief testimony at the hearing. Petitioner Roe testified that the physical education program of the two elementary schools, grades kindergarten through six, had been changed by the Board's action to provide for organized activity under his supervision only in grades four through six. He testified that regular teachers had assumed responsibility for physical education in grades kindergarten through grade three. (Tr. 60)

Petitioner Dorman testified that he was "senior" to the vocal music teacher but did not possess a certificate other than that to teach instrumental music. (Tr. 67) It is his contention that the position he held from 1967 to 1974 still exists within the assignment of the one full-time music teacher and that the Board could, without additional expense, have continued his services and reduced the vocal music teacher to half-time employment. (Tr. 66)

Petitioner Sanders testified her employment had been changed from that of a full-time nurse to half-time and that, in her absence, improperly certificated personnel were responsible for the performance of a nurse's duties. (Tr. 70) It is her contention that each school district must employ a nurse pursuant to law. *N.J.S.A. 18A:40-1* The statute of reference provides in pertinent part that:

“Every board of education \*\*\* shall employ one or more school nurses \*\*\*.”

The Board contends that a full-time nurse is not required to be employed by the statute and that its other actions controverted herein were legally correct and a proper exercise of discretion.

The hearing examiner has reviewed the limited testimony of the hearing and the documents in evidence and finds no basis for a conclusion that the Board's actions were legally incorrect or that they were otherwise improper as an abuse of discretion. The Board was empowered by *N.J.S.A. 18A:28-9* to make the reductions it made on April 9, 1974. The statute is recited in its entirety as follows:

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

Thus, “reasons of economy” are a legitimate cause for a “reduction in force” and the reason was certainly present herein, a fact not disputed by petitioners. Petitioners' dispute is concerned instead with the technical legal propriety of the meeting of April 9, 1974, and with the specific contentions of Petitioners Dorman and Sanders as noted, *ante*. The hearing examiner's findings of fact and conclusions of law with respect to these contentions are succinctly set forth as follows:

The Board's meeting of April 9, 1974, was a legal meeting of the Board called by the President on April 8, 1974 for the express purpose of effecting necessary economies in school operation. While the call to the April 9 meeting was not technically pursuant to the Board's policy with respect to such meetings (R-1) (*i.e.* a requirement of notice by telephone call, delivery of a printed notice, etc.), there was no need for compliance with such procedure since a better and certainly more efficient method was employed; namely, person-to-person direct notice from the President to each Board member on April 8, 1974. An argument that conformity with the policy (R-1) was required is one which would elevate form over substance. Further, there was clearly an emergency in the circumstances if the Board was to comply with the notice agreement it had executed with its staff.

The hearing examiner further finds and concludes that the abolishment of Petitioner Dorman's position was within the Board's statutory authority (*N.J.S.A.* 18A:28-9) as a reorganization of staff positions and responsibility, and economies effected by it cannot be limited or judged on the basis of salary comparison alone. A smaller staff certainly connotes a saving of many peripheral costs of staff employment—clerical duties with respect to payroll and government requirements, save-harmless insurance costs, etc.

Finally, the hearing examiner finds that the reduction of duties and schedule for Petitioner Sanders was not inappropriate since the statute *N.J.S.A.* 18A:40-1 does not mandate the employment of a full-time nurse in precise terms in each school district of the State and since similar statutes with respect to school employees have traditionally been interpreted to mean that part-time employment is sufficient compliance with the mandate. The same statute that requires the employment of a school nurse also requires the employment of "one or more physicians" but few districts employ a physician full-time. *N.J.S.A.* 18A:40-1 Local boards of education are required to employ a "secretary or school business administrator" but such employee is engaged for part-time work in many small districts. *N.J.S.A.* 18A:16-1

In summation the hearing examiner finds that the Board's controverted actions of April 9, 1974, were taken in good faith. He also concludes that they were legally correct and must stand as proper exercises of the Board's discretion to govern and manage its schools. *N.J.S.A.* 18A:11-1

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by petitioners. Such exceptions are: (1) that there was no emergency sufficient to cause a waiver of the Board's rules with respect to notice of special meetings when on April 8, 1974, in a caucus meeting of the Board, the Board President verbally called for a special meeting of the Board on April 9, 1974, and (2) that the statute *N.J.S.A.* 18A:40-1 mandates the employment of a full-time nurse in each school district.

The Commissioner concurs with the report of the hearing examiner. Due notice of the special meeting to be held on April 9, 1974 was clearly afforded all Board members on April 8, 1974 in conformity with the intent of the State Board rule *N.J.A.C.* 6:3-1.9 and with the Board's own rules.

The State Board rule specifically confers on a board president the privilege of an unilateral decision to call a special meeting of a local board of education. *N.J.A.C.* 6:3-1.9 provides:

"In every school district of the State it shall be the *duty* of the secretary of the board of education to call a special meeting of the *board whenever he is requested by the president of the board to do so*\*\*\*."

(*Emphasis supplied.*)

In the context of this rule a personal "request" by a president of a local board of education for a special meeting delivered personally to each member of the local board cannot be held to be less efficacious as a "call" to the meeting than one delivered by an intermediary, the board secretary, or by written notice or telephone call. The Commissioner so holds.

He holds, further, that the Board's special meeting of April 9, 1974, was called correctly pursuant to law for emergency reasons of budget economy and in good faith and that, with two reporters present, it was certainly a public meeting which conformed to then existing statutory mandate. *N.J.S.A. 18A:10-6*

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.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 15, 1976

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, July 15, 1976

For the Petitioners-Appellants, Saul R. Alexander, Esq.

For the Respondent-Appellee, Maraziti and Maraziti (Joseph J. Maraziti, Jr., Esq., of Counsel)

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

December 1, 1976

**Florence Feit,**

*Petitioner,*

v.

**Board of Education of the Township of Hazlet,  
Monmouth County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Florence Feit, *Pro Se*

For the Respondent, Crowell and Otten (Robert H. Otten, Esq., of Counsel)

Petitioner was employed as a beginning teacher by the Board of Education of Hazlet Township, hereinafter "Board," from September 9, 1974 to June 30, 1975 at the contractual salary of \$8,477, an amount prorated from \$8,650, the first step on the bachelor's degree level of the salary guide. Petitioner received remuneration for her services in the amount of \$4,152 through January 31, 1975 at which time her employment was terminated. Petitioner claims entitlement to \$4,238.50 and requests payment from the Board in the amount of \$86.50, the difference between the two sums.

The matter is submitted to the Commissioner of Education for Summary Judgment on the pleadings, exhibits, relevant facts and Memoranda of Law.

Petitioner's employment by the Board was effectuated by a contract (Exhibit B) for the period September 9, 1974 through June 30, 1975 at a salary of \$8,477 to be paid in nineteen equal semi-monthly installments. Actual payment to petitioner for the period of employment September 9, 1974 to January 31, 1975 was calculated on the basis described in Exhibit F, included herein in its entirety:

"I discussed your questions on your contract with our Superintendent. He said that our payment was correct and that you were paid according to your contract.

"Full year contract from September 3, 1974 = \$8,655.00 (sic)

"Pro rata contract from September 9, 1974 = \$8,477.00

"All payments based on \$8,650.00 or \$865.00 per month

"Monthly salary \$865.00 - 200 days = \$43.25 per day

Worked 16 days in September	\$ 692.00
October	865.00
November	865.00
December	865.00
January	865.00
Total paid through January 31, 1975	\$4,152.00
Balance five months at \$865.00	4,325.00
Per your pro rata contract	\$8,477.00
4 days not worked in September	173.00
Per Base Contract	\$8,650.00

“There is nothing further I can do to explain this to you in any simpler terms. You were paid for your actual time and no further monies are due you.” (Exhibit F)

Petitioner’s counterclaim was based on the following calculation which reads in pertinent part:

“\*\*\*I arrived at this figure by taking the total contract amount of \$8,477.00 and dividing it into equal payments of \$847.70 as follows:

September, 1974	\$847.70 (payable in two installments)
October, 1974	\$847.70 (payable in two installments)
November, 1974	\$847.70 (payable in two installments)
December, 1974	\$847.70 (payable in two installments)
January, 1975	\$847.70 (payable in two installments)
Total	\$4,238.50 (payable in ten installments)

“Since I received only \$4,152.00, I feel entitled to an additional \$86.50 to satisfy the terms of my contract.” (Exhibit P-1)

The Commissioner agrees. The Board by its method of remunerating petitioner was able to balance petitioner’s five month payroll period only because of the fortuitous circumstance of there being twenty employment days for teachers in the month of September. Had there been more or fewer work days in this period the payroll account for petitioner could not have been balanced by this manner of calculation. The Commissioner is constrained to comment on the inaccuracy of designating nineteen equal semi-monthly installments in petitioner’s contract for the period September 9, 1974 through June 30, 1975, when the Board pays monthly and issues two checks, on the 15th and the 30th of each month.

Therefore, for the reasons advanced the Commissioner directs the Board to remit to petitioner the additional sum of \$86.50.

COMMISSIONER OF EDUCATION

July 22, 1976

**Board of Education of the Township of Clark,**

*Petitioner,*

v.

**Township Council of the Township of Clark, Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Pettit, Higgins & Devlin (John P. Higgins, Esq., of Counsel)

For the Respondent, Pisano & Triarsi (Alfonso L. Pisano, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Clark, hereinafter "Board," appeals from an action of the Township Council of the Township of Clark, hereinafter "Council," taken pursuant to *N.J.S.A. 18A:22-37* certifying to the Union County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on December 10, 1975 at the State Department of Education, Trenton, and in the Court House, Freeholder's Room, Elizabeth, on February 3, 1976 before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election, held March 11, 1975, the Board submitted to the electorate proposals to raise \$3,266,019 by local taxation for current expenses of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Township of Clark in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A. 18A:22-37*.

After consultation with the Board, Council made its determinations and certified to the Union County Board of Taxation an amount of \$3,206,019 for current expenses. The pertinent amounts in dispute are shown as follows:

	<b>Current Expense</b>
Board's Proposal	\$3,266,019
Council's Proposal	3,206,109
Amount Reduced	<u>\$ 60,000</u>

The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its need for restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written testimony.

At the hearing, the Board advanced two motions for Summary Judgment in its favor. The first motion stated that Council had been arbitrary in making its reductions. The second motion was that Council had not followed the directive of the hearing examiner in supplying additional information after the first hearing day. The hearing examiner has reviewed the record and finds that Council's reduction was not made arbitrarily. Rather, the general procedure Council followed was pursuant to law and court decisions. (See letter from the Union County Superintendent of Schools, dated May 19, 1975.) Nor does the hearing examiner find that Council did not follow his directive after the first budget hearing. The hearing examiner recommends, therefore, that both motions for Summary Judgment be denied.

As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Program Element*	Item	Board's Proposal	Council's Proposal	Amount Reduced
<b>CURRENT EXPENSE:</b>				
540	Equipment, New	\$ 32,076	\$ 27,576	\$ 4,500
541	Equipment, Replace	23,754	20,354	3,400
410	Supplies	133,919	131,144	2,775
490	Supplies, Other	15,672	15,022	650
430	Library Books	23,235	22,285	950
440	Periodicals	3,669	3,394	275
120	Salaries, Temporary	69,200	64,450	4,750
715-415	Petty Cash	1,350	1,150	200
715-300	Contracted Services	1,500	1,350	150
630-310	Health Services	5,400	5,275	125
322	Travel	4,500	4,225	275
520-319	Professional/Tech. Servs.	6,000	5,400	600
750-300	Contracted Services	6,934	6,084	850
750-520	Buildings (CHK)	7,776	7,076	700
750-520	Buildings (District)	7,200	5,175	2,025
750-520	Buildings (VRS)	15,500	14,650	850
750-530	Grounds (District Wide)	4,550	3,250	1,300
750-530	Grounds (CHK, FRH)	1,442	1,017	425
705-310	Professional Services	2,400	1,700	700
705-640	Dues and Fees	3,500	3,200	300
705-332	Travel/Workshop	4,000	3,700	300
710-415	Petty Cash	3,000	2,550	450

120-116	Outdoor Education	9,325	8,075	1,250
120-120	Cocurricular Activities	19,765	17,365	2,400
540-110	Salaries, Media Coord.	20,155	17,355	2,800
110	Salaries, General	7,850	- 0 -	7,850
110	Salaries, Asst. Prin, (CHK)	4,450	- 0 -	4,450
110	Salaries, Secys.	1,540	- 0 -	1,540
--	Investment Programs	**5,200	- 0 -	5,200
215-370	Tuition, District Wide	6,500	4,680	1,820
220-110	Salaries	15,152	13,842	1,310
220-370	Tuition, District Wide	7,500	6,785	715
240-370	Tuition, District Wide	13,000	10,600	2,400
400	Summer School	15,845	15,470	375
735	Food Services	20,140	18,800	1,340
	TOTALS	\$522,999	\$462,999	\$60,000

\*The Board presented a Planned Program Budget (PPBS), therefore, the items numbered above actually represent the PPBS budget element number.

\*\*The Board made no proposal for this line item.

The Board's budgeting system does not easily lend itself to specific line item reductions and the Board, in fact, did not submit a standard line item summary for evaluation. Council, on the other hand, in 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), recommended the reductions in the table, *ante*. The Court's directive follows:

“\*\*\*The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations 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 sufficient to provide a system of local schools which may fairly 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 forth the governing body's underlying determinations and supporting reasons.\*\*\*” (at pp. 105-106)

And further:

“\*\*\*As in *Booker*, 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' East Brunswick 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.\*\*\** (Emphasis supplied.)

(48 N.J. at 107)

In the instant matter, it must be pointed out that Council's recommended reductions amount to approximately one and eight-tenths percent of the amount proposed by the Board to be raised by local tax levy for current expenses. This reduction is enumerated, *ante*, in thirty-five separate line items and many of them are nominal. Certain specific expenditures proposed by the Board are mandatory or contractual; therefore, the hearing examiner will identify them, *post*, and recommend that they be restored wholly or in part. Other recommendations for restoration of moneys are grounded on the Board's statutory authority to determine its staff and other personnel needs. *N.J.S.A. 18A:11-1* The hearing examiner finds, therefore, that the following moneys are necessary for the operation and maintenance of a thorough and efficient system of the public schools in Clark, and he recommends that they be restored to the budget: 120 Salaries, Temporary; 715-300 Contracted Services; 630-310 Health Services; 520-319 Professional/Technical Services; 750-300 Contracted Services; 705-310 Professional Services; 705-640 Dues and Fees; 116 Outdoor Education; 540-110 Salaries, Media Coordinator; 110 Salaries, Assistant Principal; 110 Salaries, Secretary; 220-110 Salaries.

It must be pointed out that the recommendation for restoration of moneys in these line items is based on prior decisions of the Commissioner regarding salaries, and it has been uniformly held that the right to make salary judgments for teaching staff members and others is that of the board of education. In *Board of Education of the Township of South Brunswick v. Township Committee of the Township of South Brunswick*, 1968 S.L.D. 168, the Commissioner said:

“\*\*\*It is clear that the funds necessary to the implementation of *salary policies* adopted by a board of education must be provided and are not subject to curtailment. *N.J.S. 18A:29-4.1* See also *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park*\*\*\*.”

(Emphasis supplied.) (at p. 172)

Salary policies are clearly to be provided for all of those personnel listed as full-time teaching staff members. This is plainly stated in *N.J.S.A. 18A:29-4.1*:

“A board of education of any district may adopt a salary policy, including salary schedules for *all full-time teaching staff members* \*\*\*. Every school

budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the *governing body of the municipality* or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.” (Emphasis supplied.)

The adoption of a salary policy by a board of education for its employees is not limited to teaching staff members, but extends also to all employees of a board of education eligible to negotiate their salaries pursuant to *N.J.S.A. 34:13A-1 et seq.*

In the hearing examiner’s judgment, the Board had the authority to establish its salary policy on behalf of its employees. Council’s proposals for reducing several aforementioned salary line items fails to show that the salary policies set forth by the Board are excessive or improper.

Further, the Board has adequately documented its need for each of the staff members employed.

Salary policies previously adopted are mandatory. *Board of Education of the City of Newark v. City Council and the Board of School Estimate of the City of Newark, Essex County, 1970 S.L.D. 197*

Regarding the three tuition line items, the hearing examiner finds that the Board has documented its need for the moneys in line item 215-370; however, the Board’s records show that \$715 and \$600 may be reduced from line items 220-370 and 240-370 respectively. (See Exhibit A, at pp. 67, 69-70.)

The burden of proof of necessity to restore budget funds reduced by Council must be borne by the Board, and its determination must be based on necessity, not desirability. As the Court stated in *East Brunswick, supra*:

“\*\*\* if [the Commissioner] 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 \*\*\* then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.\*\*\*” (at p. 107)

In the hearing examiner’s judgment, the Board was unable to sustain this burden for the remaining line items reduced by Council; therefore, he recommends that Council’s reductions be sustained except for the line item labeled Investment Programs. In this line item, the Board made no proposal; therefore, Council’s reduction is based on anticipated revenues and it cannot be sustained. A recapitulation of the hearing examiner’s recommendations follows:

Program Element	Item	Amount of Reduction	Amount Restored	Amount Not Restored
<b>CURRENT EXPENSE:</b>				
540	Equipment, New	\$ 4,500	- 0 -	\$ 4,500
541	Equipment, Replace	3,400	- 0 -	3,400
410	Supplies	2,775	- 0 -	2,775
490	Supplies, Other	650	- 0 -	650
430	Library Books	950	- 0 -	950
440	Periodicals	275	- 0 -	275
120	Salaries, Temporary	4,750	\$ 4,750	- 0 -
715-415	Petty Cash	200	- 0 -	200
715-300	Contracted Services	150	150	- 0 -
630-310	Health Services	125	125	- 0 -
322	Travel	275	- 0 -	275
520-319	Professional/Tech. Servs.	600	600	- 0 -
750-300	Contracted Services	850	850	- 0 -
750-520	Buildings (CHK)	700	- 0 -	700
750-520	Buildings (District)	2,025	- 0 -	2,025
750-520	Buildings (VRS)	850	- 0 -	850
750-530	Grounds (District Wide)	1,300	- 0 -	1,300
750-530	Grounds (CHK, FRH)	425	- 0 -	425
705-310	Professional Services	700	700	- 0 -
705-640	Dues and Fees	300	300	- 0 -
705-332	Travel/Workshop	300	- 0 -	300
710-415	Petty Cash	450	- 0 -	450
120-116	Outdoor Education	1,250	1,250	- 0 -
120-120	Cocurricular Activities	2,400	- 0 -	2,400
540-110	Salaries, Media Coord.	2,800	2,800	- 0 -
110	Salaries, General	7,850	- 0 -	7,850
110	Salaries, Asst. Prin. (CHK)	4,450	4,450	- 0 -
110	Salaries, Secys.	1,540	1,540	- 0 -
--	Investment Programs	* 5,200	- 0 -	- 0 -
215-370	Tuition, District Wide	1,820	- 0 -	1,820
220-110	Salaries	1,310	1,310	- 0 -
220-370	Tuition, District Wide	715	- 0 -	715
240-370	Tuition, District Wide	2,400	1,800	600
400	Summer School	375	- 0 -	375
735	Food Services	1,340	- 0 -	1,340
<b>TOTAL CURRENT EXPENSE</b>		<b>\$60,000</b>	<b>\$20,625</b>	<b>\$34,175</b>

\*No restoration or reduction is recommended. (See explanation, *ante*.)

In summary, the hearing examiner recommends that \$20,625 be restored to the Board's budget for current expense purposes for the 1975-76 school year, and that a reduction in current expenses in the amount of \$34,175 be sustained.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto pursuant to *N.J.A.C. 6:24-1.16*; accordingly, the Commissioner adopts the findings and recommendations of the hearing examiner as his own.

The Commissioner determines that \$20,625 must be added to the amount previously certified by the Township Council of the Township of Clark in order to provide sufficient funds to maintain a thorough and efficient school system. He therefore directs the Union County Board of Taxation to add \$20,625 to the amount previously certified for the current expenses of the school district so that the total amount of the local tax levy for current expenses for 1975-76 shall be \$3,226,644.

COMMISSIONER OF EDUCATION

July 22, 1976

**John Oros,**

*Petitioner,*

*v.*

**Board of Education of the Borough of South Bound Brook,  
Somerset County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent, Rosenhouse, Cutler & Zuckerman (Elaine W. Ballai, Attorney at Law)

Petitioner, a part-time school psychologist in the employ of the Board of Education of the Borough of South Bound Brook, hereinafter "Board," avers he had attained a tenured entitlement to such position in September 1974 and that

a termination of employment notice sent to him by the Board should be determined to be *ultra vires* and rendered a nullity. He further avers that, if such avowal is rejected, the notice afforded him was an exercise of bad faith by the Board and was contrary to the spirit and intent of the statutory mandate that nontenured teaching staff members be notified by April 30 of their employment status in an ensuing year. *N.J.S.A.* 18A:27-10 The Board contends that petitioner had not attained a tenured status when he was notified that his position was to be abolished and his employment terminated and that its actions were legally correct.

A hearing in this matter was conducted on May 29, 1975, and continued on October 21, 1975 by a hearing examiner appointed by the Commissioner of Education at the office of the Somerset County Superintendent of Schools, Somerville. Subsequently, Briefs were filed and case submission was complete on December 10, 1975. The report of the hearing examiner is as follows:

This is another in a long series of cases wherein the Commissioner has been asked to review the duties performed by a teaching staff member in the context of the statutes which comprise the tenure law. *N.J.S.A.* 18A:28-5 *et seq.* Petitioner specifically avers that he has served for the precise periods of employment set forth in each of the subsections a, b and c of *N.J.S.A.* 18A:28-5 and acquired a tenured status in September or October 1974. The statute of reference against which petitioner's employment and service must be measured is recited in pertinent part as follows:

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses 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,<sup>1</sup> after employment in such district or by such board for:

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

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

"(c) the equivalent of more than three academic years within a period of any four consecutive academic years\*\*\*."

<sup>1</sup>Section 18A:6-9 *et seq.*

Petitioner's claim to tenured status under either one or all of subsection a, b, or c of the statute rests entirely on his view of a categorization of his service during just two months, September 1971 and September 1974. His other service as a teaching staff member from October 1, 1971 to September 1, 1974, was clearly that which would accrue toward tenure:

1. Petitioner was employed by specific Board resolution adopted on October 13, 1971 "\*\*\*as School Psychologist effective October 1, 1971 through June 30, 1972 at a salary of \$6,000.00 for two days a week.\*\*\*" (R-7)

2. Petitioner was employed thereafter by specific contracts he executed with the Board for a similar part-time employment for the period July 1 through June 30 in each of the 1972-73, 1973-74 and 1974-75 academic years. (PR-2, 3, 4) Each contract contained a clause which provided for contract termination with "\*\*\*sixty (60) days' notice in writing\*\*\*."

3. Petitioner completed all service pursuant to these contracts on a calendar year basis from October 1, 1971 to at least the first day of September 1974. (Tr. I-86, 163) This was a period of two years and eleven months.

In the interim the Board approved the following resolution at its August 14, 1974 meeting:

"That the Board of Education, South Bound Brook abolish the present position of Part time Psychologist effective September 30, 1974 and that the Board Secretary be directed to notify Dr. John Oros, Psychologist, with a sixty day notice effective August 15, 1974 with actual termination as of September 30, 1974. A roll call vote was taken with the following results: Ayes 7 Nays 0 carried." (PR-5)

Although nowhere stated in the resolution it was evidently understood by petitioner that a full-time psychologist's position was to be established, since on August 26, 1974, he addressed the following letter to the Board:

"I received your letter August 19, 1974 referring to the South Bound Brook Board of Education passing a resolution on August 14 abolishing the present position of Part Time Psychologist.

"Since I am very much interested and love working with the South Bound Brook students and parents, I would like to remain as your psychologist. However the notice of change from Part time Psychologist to full time is rather short. Therefore I am requesting the Board to consider me on a 4 day week basis during the first school semester.

"My reason for requesting a 4 day week at this time is to enable me to make an equitable and smooth transition from other professional obligations." (PR-6)

The Board did not comply with petitioner's request for consideration, however, and petitioner did in fact terminate his services on or before October 1, 1974. (The exact date of effective termination requires a finding of fact.)

Subsequent thereto the Board did not, as it had indicated it would (PR-5), abolish the position of part-time psychologist. (Tr. II-29, 31)

Petitioner's claim that he should be allowed to add the months of September 1971 and September 1974 will now be examined.

Prior to the date of September 1, 1971, petitioner was clearly employed sporadically and on a case by case basis by the Board. (Tr. I-82) His vouchers for compensation were itemizations of the names of pupils who had had "Psychological Examinations Including Reports & Parent Counselling." (P-3) Petitioner testified that subsequent to that date his status changed to that of a regularly employed teaching staff member. He testified that for the first time he attended the orientation day for new teachers in 1971 (Tr. I-80), and during the month of September worked on the same regular two day a week basis that he followed from October 1, 1971 forward. (Tr. I-94) He further contends that in September 1971 his changed status as a regularly employed teaching staff member was reflected in the vouchers he submitted for payment (R-10-11) and in the "pay stubs" he retained.

The vouchers (R-10-11) do differ in format from vouchers submitted by petitioner prior to September 1, 1971, which contained only names of pupils as noted, *ante*. It was the testimony of the Board Secretary that such vouchers were submitted in November 1971 for payment and were applicable to work performed by petitioner in September 1971. (Tr. II-47-48) Voucher R-10 lists amounts for services rendered at \$50 or \$100 for half or full day employment and itemizes the work performed on the dates of September 15, 17, 20, 24 and 27 as:

"Conference & Consultation With Mrs. Utna LDS teacher and Mrs. Thomas R.N.  
Conference. Reviewing records of Students to be examined or re-evaluated. (half-day)  
(All Day) Meeting with Mr. Riley, Superv. of County Child Study Team. . .With Mrs. Utna, Mrs. Thomas and Mr. Pitch, Supt.  
(All Day) Team conferences. Mrs. Utna LDS and Mrs. Thomas, RN  
(All Day) Team Study. (Mrs. J. in ref to testing her three children. No test records available from Somerville Public Schools. Mrs. Utna, LDS and Mrs. Thomas RN. . . Incl three teachers separately."

Voucher R-11 lists the work of September 3 and 13, 1971 for payment at the same compensation listed for R-10 and itemizes these duties:

"Half day. Setting up schedule and reviewing cases as to priority, classification, future placement, needs for satisfying students' educational, psychological, emotional and social 'well being.'  
"All Day. Team meeting . . Mrs. Utna LDS Mrs. Thomas SW, RN. . . In part with Mr. Pitch, Supt. . . Contacts Hunterdon Med. Center . . Ref to two students . . and parents . . Mr. K. and Mr. R."

The pay stubs of reference (PR-7) are also different with respect to payment for R-10 and 11 (September 1971 work) than for work petitioner performed prior to that time. The sequence of payment itemization may be shown as follows:

Pay stub of September 30, 1971 lists total wages of \$500. (Note: Petitioner testified this was for work in July 1971.) (Tr. I-105 *et seq.*) There are no deductions listed.

Pay stub of October 15, 1971	
Total Wages	\$333.30
Social Security Tax	30.33
Pay stub of October 29, 1971	
Total Wages	\$333.30
Social Security Tax	30.33
Withholding Income Tax	45.60
Pay stub of November 15, 1971	
Total Wages	\$333.30
Social Security Tax	17.33
Withholding Income Tax	45.60
Pay stub of November 15, 1971	
Total Wages	\$550.00
Social Security Tax	28.60
Withholding Income Tax	86.70

This latter stub was applicable to September 1971 work performed by petitioner and detailed in R-10 and R-11. It is noted that it contains the same listed deductions as other stubs subsequent to the contractual arrangement which began on October 1, 1971, and does differ from the first stub of reference which, it was testified, was a record for case work performed prior to September 1, 1971.

The former Superintendent of Schools in 1971 testified with respect to petitioner's employment during that month of September 1971 as follows:

Q. "\*\*\*[D]id Dr. Oros' employment relationship change in the 1971-72 school year?"

A. "Yes, it did. He became a two day a week person starting with the beginning of that school year.

Q. "In September of 1971.

A. "Yes.\*\*\*"

(Tr. I-10)

The Superintendent also testified that petitioner had been invited to, and did attend, orientation day for new teachers in 1971. (Tr. I-41) He testified further that petitioner's work in September 1971 on a regular basis had been authorized by the Board as the result of a discussion held "two months prior to September" (Tr. I-46) and that "he was hired as a two day a week employee."

(Tr. I-47) On cross-examination the Superintendent testified that petitioner's name had not been included on State reports of part-time employees in September 1971 (R-1), and that his name did not appear in a school directory. (Tr. I-52-53) He further said that there had been no formal recommendation from him in September 1971 to employ petitioner on a regular basis. (Tr. I-54) (See R-4.)

The Secretary of the Board also testified with respect to petitioner's work status during September 1971 as reflected in the pay vouchers R-10 and R-11. His testimony is excerpted as follows:

Q. "\*\*\*Now, it is true, is it not, that at no time before September of 1971 did he [petitioner] ever submit a voucher like R-10 or R-11 in which he charged not for the examination of children, but charged on the basis of \$50.00 for a half a day and \$100.00 for a full day of work, engaged in a conference, or a meeting, or consultation; isn't that correct?\*\*\*"

A. "That is correct.\*\*\*" (Tr. II-46-47)

Q. "Your testimony is, as I understand it, that the Board said they did not know that Dr. Oros had been working in September, but when it was brought to their attention by Mr. Pitch [Superintendent] the Board felt that the fair thing to do was to pay him for the work that he had performed in September of 1971, is that correct?"

A. "That's right.\*\*\*" (Tr. II-52)

The Board Secretary further testified that the Board was "surprised" by the vouchers R-10 and R-11 which petitioner presented in November for work in September 1971 (Tr. II-54), and he construed them as being "per case" vouchers. (Tr. II-52, 54)

The hearing examiner cannot give credence to this latter testimony since the vouchers R-10 and R-11 reproduced, *ante*, clearly indicate that petitioner performed duties far beyond those of a psychologist employed on a case work basis in September 1971. He set up schedules, reviewed cases for priority, held regular conferences with Child Study Team members, etc., and itemized such work in the vouchers R-10 and R-11. Thus the Board knew, or should have known, in November 1971 that the duties petitioner performed in September 1971, were those of a regularly employed teaching staff member and not those of one employed on a case work basis. The hearing examiner can find no evidence to the contrary.

The evidence leads instead to a conclusion that petitioner's work in September 1971, as a regularly employed part-time psychologist had, as the Superintendent testified, been authorized by informal Board agreement in advance and ratified by the Board on a retroactive basis when it approved in November 1971 the work petitioner performed in September. (See Tr. I-46.) The hearing examiner so finds.

Accordingly, the hearing examiner recommends that petitioner's regular employment during the month of September 1971 be added to the subsequent period of two years, eleven months and that the total period be found to constitute the "three consecutive calendar years" required by the statute (*N.J.S.A.* 18A:28-5) for a tenure accrual.

Such finding, if held to be correct, would obviate the necessity for further findings concerned with:

1. a categorization of petitioner's service in September 1974; and
2. petitioner's complaint that if he is held to be a nontenured teaching staff member, the notice afforded him was not timely and was given in bad faith.

The hearing examiner concludes that such findings are required to be made in order that the report may be complete.

Several witnesses testified that petitioner worked on a regular basis in September 1974. (See Tr. I-88, 148 and Tr. II-18, 58, 65.) Petitioner testified he had worked up to and including September 30, 1974, and had returned for some follow-up work on October 11, 1974. (Tr. I-91-92) He testified further that he worked "no differently" in that month of September than in prior months. (Tr. I-169) The Superintendent also testified that petitioner had worked on the same basis in September 1974, as he had in previous months (Tr. I-147) and that he told petitioner:

"Your services as far as physically showing up in the building and in the district are ended *at the end of the month.*"  
(*Emphasis supplied.*) (Tr. I-148)

He testified further that petitioner's last day in the district was September 27, 1974. (Tr. I-148) A school nurse testified petitioner was present in her school on a "regular basis" during September 1974. (Tr. I-179)

The hearing examiner finds from such testimony that petitioner did indeed serve in his regular part-time assignment during all of the month of September 1974 and that such service, with full compensation, was pursuant to the Board's resolution of August 14, 1974 (PR-5), which specified an "actual termination" of employment "as of September 30, 1974." Accordingly, the hearing examiner recommends that the month of September 1974, be added to petitioner's prior service in an assessment of his entitlement to tenure as a teaching staff member in the Board's employ.

Thus, the findings of the hearing examiner are that petitioner served continuously as a regularly employed part-time teaching staff member for a total period which began on September 1, 1971, and was concluded on or about the date of September 30, 1974. Such findings lead to the conclusion that petitioner had on September 30, 1974, accrued a tenure entitlement pursuant to the statutory prescription (*N.J.S.A.* 18A:28-5) and could not be dismissed from

such employment as the Board purported to do except as provided in law (*N.J.S.A.* 18A:6-10 *et seq.*) or by an abolishment of the position in good faith. As noted, *ante*, there is now no contention by the Board that petitioner's position was in fact abolished. (See also Tr. II-31.) In summary form the hearing examiner's findings are that:

1. Petitioner accrued tenure on the last day of August 1974, because of his completion of regular employment for a period of three calendar years (*N.J.S.A.* 18A:28-5(a)) or, in the alternative,

2. Petitioner accrued tenure on the last day of September 1974 for a period of three calendar years even if it is held that service in September 1971 may not be counted toward tenure. *N.J.S.A.* 18A:28-5(a)

It is also apparent that if petitioner's service in both September 1971 and in September 1974 is adjudged as regular employment, the prescription of the statute's paragraphs (b) and (c) have also been met.

Finally, the hearing examiner concludes that petitioner's purported dismissal "as of September 30, 1974" was illegal, even with an assumption that he was not entitled to tenure, since the Board failed to give timely notice pursuant to law (*N.J.S.A.* 18A:27-10, 11) and petitioner had every right to expect "continued employment" for the 1974-75 academic year. Local boards have the statutory right to abolish positions (*N.J.S.A.* 18A:28-9), but the exercise of such rights must be in good faith. *Arthur Page v. Board of Education of the City of Trenton, Mercer County*, 1975 *S.L.D.* 644 In the instant matter, there is a representation that petitioner's position was abolished. (PR-5) It has, in fact, been continued. (Tr. II-29)

The hearing examiner recommends on the basis of such findings that petitioner be restored to his position retroactive to October 1, 1974 with all the emoluments to which he is entitled subject only to a mitigation of damages.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and it is noted that no exceptions to it have been filed by petitioner or the Board. The Commissioner concurs with the report and determines that the record substantiates all the findings contained therein.

Accordingly, the Commissioner holds that petitioner's service as a teaching staff member entitles him to the protection and status of tenure according to the precise conditions set forth in the statutory prescription. *N.J.S.A.* 18A:28-5 The Commissioner directs, therefore, that petitioner be restored forthwith to his position as part-time psychologist retroactive to the date of his termination by the Board and that he be afforded all emoluments due him subject only to a mitigation of damages.

COMMISSIONER OF EDUCATION

July 22, 1976

**Dee Foster and the Neptune Township Education Association,**

*Petitioners,*

v.

**Board of Education of the Township of Neptune, Monmouth County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, Laird & Wilson (Andrew J. Wilson, Esq., of Counsel)

Petitioner Foster who was employed as a teacher for two academic years by the Board of Education of the Township of Neptune, hereinafter "Board," and was not reemployed for a third year alleges that the nonrenewal of her teaching contract was without a proper basis. She seeks an order from the Commissioner of Education directing the Board to reinstate her together with any salary and emoluments she has accrued pending a determination of this matter. The Board asserts that its determination not to reemploy petitioner was a lawful exercise of its discretionary authority pursuant to Title 18A, Education, and controlling New Jersey decisional law. At a conference before a Commissioner's representative on November 17, 1975, a single issue was framed and the Petition of Appeal was submitted for Summary Judgment by the Commissioner on Briefs, exhibits, and affidavits. The issue is quoted as follows:

"Is petitioner entitled to a hearing before the Commissioner of Education subsequent to her appearance before the Board in which she attempted to convince the Board to change its determination to terminate her employment?"

The record discloses that petitioner had eight years' total experience as a teacher and was employed by the Board for the 1973-74 and 1974-75 academic years as a teacher of physical education and as a coach for the girls' basketball team. (Petition of Appeal; Respondent's Exhibit D and Brief, at p. 1) Petitioner was suspended from her duties as a coach subsequent to an incident involving several team members' drinking intoxicating liquor on a school bus while traveling between Neptune and Long Branch on January 25, 1974, enroute to a basketball game. (Respondent's Brief, at p. 1) Petitioner filed a grievance with the Board asserting, among other things, that the high school principal was without authority to suspend her since her contract was with the Board. (Respondent's Exhibit A) Petitioner's request for reinstatement in her coaching position was denied; however, none of her compensation for that extracurricular activity was withheld. (Respondent's Exhibit B, at p. 3) The summary of findings and recommendations of the Superintendent of Schools dated March 13, 1974 regarding petitioner's grievance reads in part as follows:

“The policy of the Board of Education is explicit with regard to the duties and responsibilities of the Athletic Coach, for it states that the coach ‘shall have *full* control of the team in all matters pertaining to the coaching and disciplining when under the supervision’ and in addition, ‘shall be responsible for, and travel with the team on all trips.’ Even if such were not written into the policy or into a general agreement, it is implicit in any extra curricular position that the faculty members assigned or hired by the Board to fulfill the responsibility are, in fact, responsible for controlling the behavior and the discipline of the team. The inescapable fact is, that 13 members of the Girls Basketball Team admitted to drinking an intoxicant liquor while on the school bus and while travelling the 20 minutes between Neptune and Long Branch High School. The administration contends that the coaches either ignored or failed to fulfill their basic responsibility and that as a result of the lack of control allowed the players too much freedom and that the drinking episode was permitted to occur.

“There are extenuating circumstances, however, which have been brought forth which allow for a tempering of the actions brought against the coaches. The Superintendent supports the contention that the coaches did not fully exercise their responsibility with regard to the conduct on the school bus and therefore, were subject to some disciplinary action. The manner in which the discipline was handled forms the basis for the action in this writer’s mind, since I must, by virtue of the definition of the grievance, confine myself to the incident of January 25, 1974. It is necessary that I find that the Principal and the Athletic Director, after conferring with the Superintendent of Schools did exercise properly, their prerogative by your suspension. In this respect, the request for redress of the suspension by you is denied.

“The allowing of orange juice and the subsequent drinking of the orange juice on the school bus was taken into consideration in reading my final determination, as well as the fact that at least two of the girl players who were questioned indicated that they had no knowledge whatsoever of any drinking going on. These two facts have caused me to temper a final determination. The fact that these situations did exist, however, does not lessen the ultimate responsibility of a coach, namely, that of checking the conduct and the activities from front to back of the bus, and in this respect, I concur with Mr. DeLuca and Mr. Beal that you, as a coach did not totally fulfill your responsibility.”

*(Emphasis in text.)* (Respondent’s Exhibit B, at pp. 4-5)

The Superintendent concluded, however, that because of extenuating circumstances, no penalty would be assessed petitioner and she was told that she would be considered fairly and be given an equal opportunity in any consideration for coaching positions for which she might apply in the future. (Respondent’s Exhibit B) Petitioner was subsequently offered a contract to teach for the 1974-75 academic year. (Respondent’s Exhibit C)

Petitioner asserts that because she was upheld in her grievance, the high school principal established a program calculated to terminate her employment at the end of the 1974-75 academic year. Paragraph six of her Verified Petition of Appeal reads as follows:

“The Board of Education was well aware of the incidents that occurred between the Building Principal and the Petitioner during 1974 and in fact became aware of the attempt by the Building Principal to discriminate against the Petitioner and in fact ratified such action in agreeing to nonrenew your Petitioner for school year 1975/1976. In so doing, the Board acted unlawfully, unreasonably, arbitrarily and have (sic) failed to properly and in a timely fashion nonrenew the Petitioner.” (at p. 3)

Petitioner was notified on April 11, 1975, that she was not being recommended for reemployment and she filed a formal grievance with the building principal. On April 17, 1975, the grievance was filed with the Superintendent and a hearing was held on April 23, 1975 at which time petitioner was represented by a field representative of the New Jersey Education Association and the president and vice-president of the Neptune Township Education Association. That meeting lasted two and one-half hours. (Respondent’s Brief, at p. 2; Exhibit D) Thereafter, the Board determined on April 28, 1975, not to reemploy petitioner for the coming academic year and she was so notified in writing by the Superintendent on April 29, 1975, and given the reasons why she was not reemployed. (Respondent’s Exhibit E)

Subsequently, petitioner met with the Board on June 4, 1975 for the purposes of a “hearing” and to review the grievance. She was represented by an attorney and representatives of the Neptune Township Education Association who presented to the Board petitioner’s position regarding the grievance. (Respondent’s Brief, at p. 3) When the Board determined to deny her grievance the instant Petition of Appeal was filed with the Commissioner.

Petitioner asserts specifically that especially

“\*\*\*in cases where there are allegations of a non-renewal based upon either free speech concepts or labor activity concepts should the teacher be entitled to a plenary hearing before a third person other than the person who is being accused of violating the rights of the teacher.\*\*\*” (Petitioner’s Brief, at p. 8)

The Commissioner finds that the rights of nontenure teachers who are not reemployed are now well established. Prior to June 10, 1974, determinations by boards of education not to reemploy nontenure teachers could be made for any reason or no reason at all. *Zimmerman v. Board of Education of Newark*, 38 N.J. 65 (1962) That law was changed by *Donaldson v. Board of Education of North Wildwood*, 65 N.J. 236 (1974) when the Court mandated for the first time that nontenure teachers be provided a statement of reasons for non-reemployment when requested. In *Donaldson*, the Court discussed the purpose of the statement of reasons in the following language:

“\*\*\*Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in *Drown* (435 F. 2d at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in *Monks* (58 N.J. at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.\*\*\*”

(65 N.J. at 245)

It may be concluded from the above-cited passage that the statement of reasons is essentially for the benefit of the teaching staff member, and the affected individual must be assured of a private informal appearance before the board to discuss such reasons.

In *Donaldson*, the Court cited *George Ruch v. Board of Education of Greater Egg Harbor, Atlantic County*, 1968 S.L.D. 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 S.L.D. 202 in support of an argument that “\*\*\*the fears of tenure impairment and undue burden expressed by those who have thus far insisted on the withholding of reasons\*\*\*” (at p. 248) was an indication of how negligible such fears were. In *Ruch*, as in the matter herein, the Commissioner and the Court were concerned with a subjective judgment made by a local board of education. In *Ruch*, as herein, reasons for nonretention had been afforded a nontenure teacher, although such reasons were not then required, and an adversary hearing was requested to disprove their validity. The Commissioner, however, found no reasons in *Ruch* to order an adversary hearing and said:

“\*\*\*The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.\*\*\*”

(1968 S.L.D., at p. 10)

The Commissioner commented also in *Ruch* as follows:

“\*\*\*A board of education's discretionary authority is not unlimited, however, and it 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)\*\*\*.”

(at p. 9)

In *Barbara Hicks v. Board of Education of Pemberton, Burlington County*, 1975 S.L.D. 332 the Commissioner established that nontenure teachers are entitled to an appearance before boards of education, on request, after receipt of a statement of reasons for non-reemployment. Petitioner has had such an appearance.

In the instant matter there is an allegation of discrimination (see Petition of Appeal, at p. 2) and a further allegation of a violation of petitioner's constitutional rights. (Petitioner's Brief, at p. 8)

The Commissioner has commented previously on teachers' claims that their constitutional rights have been violated. When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.* race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, *and is able to provide adequately detailed specific instances of such allegations*, then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield, Middlesex County*, 1972 S.L.D. 323, *aff'd* State Board of Education 327, reversed and remanded 125 N.J. Super. 131 (*App. Div.* 1973), *aff'd* 64 N.J. 582 (1974), dismissed with prejudice Commissioner of Education November 1, 1974.

The Commissioner has at various times reviewed actions of local boards of education and in certain instances, finding that the protected rights of teaching personnel were violated, has set aside the actions of boards wherein they violated those protected rights of nontenure employees or otherwise abused their discretionary powers. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County*, 1974 S.L.D. 260 and 1975 S.L.D. 191; *North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO and Beth Ann Prudente v. Board of Education of the Township of North Bergen, Hudson County*, 1975 S.L.D. 138

At other times the Commissioner has upheld the actions of boards of education when no abuse of discretion was found. *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood, Cape May County*, 1973 S.L.D. 351, *aff'd* State Board of Education 360, *aff'd* Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975

The discretionary powers of education boards are well recognized by both the Commissioner and the courts. The Commissioner has said in numerous instances that he will not substitute his discretion for that of a board absent a clear showing of bad faith, statutory violation, or violation of constitutional rights.

The Commissioner stated in *John J. Kane v. Board of Education of the City of Hoboken, Hudson County*, 1975 S.L.D. 12 as follows:

“\*\*\*[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The

Commissioner will, however, set aside an action taken by a board of education when it is *affirmatively shown* that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County*, 1973 S.L.D. 167; *James Mosselle v. Board of Education of the City of Newark, Essex County*, 1973 S.L.D. 197; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County*, 1973 S.L.D. 217 affirmed State Board of Education March 6, 1974.\*\*\*” (Emphasis added.) (at p. 16)

See also *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County*, 1975 S.L.D. 168

In *Winston, supra*, the Court stated that:

“\*\*\*It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl*, 63 N.J. 1 (1973)\*\*\*” (125 N.J. Super. at 144)

Nowhere does the record disclose a constitutional deprivation of petitioner’s rights, nor is there any specific allegation of such a showing. Rather, petitioner alleges that the principal did not recommend her for reemployment for improper reasons and that the Board ratified his actions in unlawfully and arbitrarily refusing to reemploy her. (Petition of Appeal, at p. 3)

In the judgment of the Commissioner, the record does not show that petitioner’s termination was based on proscribed reasons, nor has she shown that her due process rights have been violated. On the other hand, the Board notified her pursuant to statute *N.J.S.A. 18A:27-10* that she would not be reemployed for the coming school year; she received with that notice a statement of reasons (Respondent’s Exhibit E); she requested and was given a *Hicks* type appearance in which she was represented. (Petition of Appeal; Respondent’s Brief, at p. 3 and Exhibit D)

Nor does the affidavit filed on behalf of petitioner show a violation of any of petitioner’s rights. In that affidavit a Mrs. “B.T.” states that as a result of a conversation with the high school principal in August 1974, she left his “\*\*\*room with the apprehension that Mrs. Foster was in trouble for the coming year.” She attested also that a “lame duck” member of the Board told her in the fall of 1974 that Mrs. Foster was to be dropped.

The Commissioner is not persuaded that any Board member is a “lame duck” member in the fall of a school year, months before the annual school election. Further, this hearsay attestation, in the Commissioner’s judgment, is valueless. (*N.J.A.C. 6:24-1.11*) The Commissioner’s records disclose that this Board member was an unsuccessful candidate for reelection to the Board at the annual school election in Neptune on March 11, 1975.

The Commissioner finds and determines, therefore, that petitioner has been afforded all her due process rights in accordance with her constitutional

guarantees and that there is no further relief to which she is entitled. Petitioner's contract terminated by its own provisions on June 30, 1975.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 22, 1976

**In the Matter of the Board of Education of the City of Trenton, Mercer County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

It appearing that the Board of Education of the City of Trenton, hereinafter "Board," has ceased payment of tuition for special education programs for handicapped pupils placed in various nonpublic institutions by the Division of Youth and Family Services, hereinafter "DYFS"; and

It appearing that the Board caused these tuition payments to terminate based upon the enactment of *c. 178, L. 1974*, amending *N.J.S.A. 30:4C-2, 26 and 26.1* (Exhibit A, B); and

It appearing that the amendments to these statutes is no more than a change in name from "Bureau of Children's Services" to "Division of Youth and Family Services," and an additional definition included under Section "(M)"; and

It appearing that the matter of payment of tuition for pupils placed by DYFS was decided by the Commissioner of Education in *Board of Education of the Township of Little Egg Harbor v. Boards of Education of the Township of Galloway, City of Atlantic City, Township of Marlboro, Freehold Regional High School District and the Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey*, 1973 *S.L.D.* 324, *aff'd* State Board of Education June 5, 1974, *aff'd* Docket No. A-2936-73, New Jersey Superior Court, Appellate Division, May 16, 1975; and

It appearing that the Commissioner directed the Board to continue the tuition payments to the various nonpublic schools approved by the New Jersey Department of Education under the provisions of Chapter 46, Title 18A, New Jersey Statutes Annotated (Exhibit C); and

It further appearing that the Children's Home of Burlington County has filed a letter complaint with the Commissioner alleging that the Board is in defiance of the Commissioner's directive (Exhibit C); now, therefore,

IT IS ORDERED on this 23rd day of July 1976, that the Board continue to pay approved educational tuition for handicapped pupils, including back payments from the time the payments were unilaterally terminated by the Board.

COMMISSIONER OF EDUCATION

**Green Village Road School Association, Ellen M. Browning,  
Edgar M. Coster, Daniel A. D'Andrea, Loretta Q. Pickens and Frances W. Weller,**  
*Petitioners,*

v.

**Board of Education of the Borough of Madison, Morris County,**  
*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioners, Kerby, Cooper, Schaul & Garvin (Phyllis B. Strauss, Attorney at Law, and Howard S. Mitnick, Esq., of Counsel)

For the Respondent, Smith, Cook, Lambert & Miller (Thomas P. Cook, Esq., of Counsel)

Petitioners include a nonprofit, voluntary association of parents and teachers of pupils enrolled in the Green Village Road School and five individuals who are resident taxpayers and parents of pupils enrolled in the Green Village Road School, a neighborhood elementary school operated by the Board of Education of the Borough of Madison, hereinafter "Board." Petitioners allege that a resolution of the Board adopted September 16, 1975 to close the Green Village Road School as of July 1, 1976, and to authorize its use for other purposes was not only an act of bad faith, but an arbitrary, capricious, and unreasonable exercise of power. They further allege that it was an act contrary to the welfare and safety of the pupils of Madison and violative of the rules of the State Board of Education, the statutes of the State and the Constitutions of both the State of New Jersey and the United States.

Conversely, the Board denies that its act was other than a legal exercise of its discretionary power based on reasoned judgment.

A plenary hearing was conducted on March 29, April 5 and 7, 1976 at the offices of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner of Education. Briefs were submitted subsequent to the hearing. The report of the hearing examiner is as follows:

At the outset of the hearing petitioners moved to amend the agreements reflected in the prehearing conference memorandum of February 26, 1976, wherein it was stated that no depositions would be taken. It was argued that the agreement should be modified to allow petitioners' counsel to depose the Board Secretary to determine his participation in the Board's decision-making process. (Tr. I-4)

The Motion was resisted by the Board on grounds that material and relevant information had been furnished to petitioners in the answers to interrogatories and that the Board Secretary, in any event, was being produced as a witness subject to examination at the hearing. (Tr. I-8) The hearing examiner ruled that the agreement of the prehearing conference not to depose witnesses would stand on the basis that no apparent disadvantage was thereby worked upon petitioners. (Tr. I-10-11) The hearing examiner similarly denied petitioners' Motion to strike from the prehearing conference memorandum an agreement to allow into evidence, subject to cross-examination, affidavits of witnesses called by the Board to testify. (Tr. I-12-17)

Those relevant facts which are uncontroverted are herewith set forth as a contextual background to the dispute:

The Board in 1975-76 operated, in addition to a high school and junior high school, five K-6 neighborhood elementary schools, three of which were peripherally located. The Green Village Road School, hereinafter "GVR," and the 1909 portion of Central Avenue School, hereinafter "Central Avenue," which are centrally located in the Borough of Madison, are the focus of attention in the instant controversy. (R-10) GVR was built in 1949 and enlarged in 1955 while Central Avenue was erected in 1909 and expanded by adding a separate larger building in 1952. The Board has in the past six years experienced a 23.7 percent decline in enrollment in grades K-6 from 1,783 enrolled pupils in September 1970 to an anticipated 1,360 pupils in September 1976. (R-14, Appendix A)

In 1972 the Board requested the Office of Field Research and Studies of the Graduate School of Education, Rutgers University, to prepare a School Facilities Study (P-10), hereinafter "Rutgers Report." Thereafter, in May 1975 the Superintendent, at the Board's direction, presented to the Board a study of district reorganization wherein he listed various alternatives concerning building usage, but affirmatively recommended that GVR, with a capacity of 307 pupils, be closed and pupils redistricted as necessary. (R-1, at pp. 9-16 and Appendix A) The Board minutes reflect that substantial discussion ensued at this meeting as the result of questions from the public. (R-6, at pp. 9-11)

In reaction to the Superintendent's report and at the invitation of the Board President, a Committee of Parents of the Green Village Road Association, hereinafter "Association," conducted extensive studies of their own and reported their findings to the Board on August 1, 1975. Therein they recommended, *inter alia*, that GVR not be closed but that the use of the 1909 portion of Central Avenue be discontinued and the neighborhood school system remain intact. Nevertheless, on September 16, 1975, the Board voted unanimously to

close one elementary school. It then voted 3-2 to close GVR as a K-6 facility effective July 1, 1976. (R-7, at p. 12) Each member of the Board at that time read a prepared statement (R-2) giving the reasons for the vote cast on the question. Thereupon, the Board authorized its Superintendent to make preparations to divert GVR to other educational purposes or to a rental facility. (R-7, at p. 13)

Subsequent to these actions, the Board established a citizens' redistricting committee to report recommended elementary school attendance boundaries for the four elementary schools scheduled to remain open after July 1, 1976. This report, submitted to the Board on January 29, 1976, took into consideration such elements as busing, racial and ethnic balance, class size, safety, and distance to school. (R-9)

Petitioners allege that the Board's determination to continue to use the 1909 portion of Central Avenue is in violation of the rules of the State Board of Education. This allegation is grounded, *inter alia*, on the uncontested fact that mechanical ventilation which once existed therein is no longer operable in any classroom of the 1909 structure. It is uncontested that the Board neither has plans nor intends to reactivate a mechanical ventilation system in the classrooms of that structure. (Tr. III-121, 135) Petitioners argue that mechanical ventilation was required for all instructional rooms when the schoolhouse was built and that its absence now places it in noncompliance with *N.J.S.A. 18A:11-1(d)* which authorizes the Board to "[p]erform 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." (*Emphasis supplied.*) Petitioners further allege that the building has no automatic temperature controls pursuant to the rules of the State Board set forth in Section 802.1 of the *Guide for Schoolhouse Planning and Construction*, hereinafter "*Guide*."

Petitioners cite *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) as supportive of the Board's responsibility to conform to the requirements of the *Guide* in meeting the directives of the State Board. Therein the Court stated:

\*\*\*And the State supervisory agencies have been vested with far reaching powers and duties designed to insure that the facilities and accommodations are being provided and that the constitutional mandate is being discharged.\*\*\*  
(at pp. 103-104)

Petitioners aver that the condition of Central Avenue is in violation of the *Guide* and that the power of the Commissioner should be exercised to retire it from service as an instructional facility. (Petitioners' Brief, at pp. 5-9; Petitioners' Reply Brief, at pp. 14-16)

Petitioners further allege that the Board has embarked upon a haphazard plan of alterations and renovations of Central Avenue at a cost of over \$8,000 without first submitting plans to the State Department of Education pursuant to Section 502.3 of the *Guide* which provides, *inter alia*, that:

“\*\*\*It is recommended \*\*\* that the old portions of such buildings shall be made to conform to the provisions of the *Guide* as far as practicable.

“Boards of education may not make physical changes affecting the plan or the construction and utilities of public school buildings without first having plans prepared and submitted to the State Board of Education for review and approval.\*\*\*”

Petitioners also charge that the Board’s plan is in violation of Article I, para. 5 of the Constitution of the State of New Jersey for failure to take affirmative action to alleviate the racial imbalance which ranges from a high of 15.6 percent minority pupils at Central Avenue to a low of 3 percent at two other elementary schools. In this regard petitioners call attention to the testimony of a member of the Board’s redistricting committee, *ante*, wherein she stated that the closing of Central Avenue would present “\*\*\*a definite possibility of adding a larger number of minority students from Central Avenue to another school.\*\*\*” (Tr. III-52)

Petitioners aver that when confronted with such evidence of racial imbalance the Commissioner must determine whether reasonably feasible steps have been taken to alleviate such imbalance. (Petitioners’ Brief, at pp. 12, 14-17) *Booker v. Board of Education of City of Plainfield*, 45 N.J. 161 (1965); *Joan Byers et al. v. Board of Education of the City of Bridgeton, Cumberland County*, 1966 S.L.D. 15, *aff’d* State Board of Education 1967 S.L.D. 341, *aff’d* New Jersey Superior Court, Appellate Division, 343

Additionally, petitioners charge that the Board denied essential information to its constituents in that it failed to delineate reliable criteria upon which its determination to close a school was to be based. Petitioners assert that options for consideration and comparative data resulting from in-depth studies of those options were not developed by the Board. It is further charged that the Board inappropriately delayed sharing with the public both essential data and the substance of the Superintendent’s report recommending the closing of GVR. (Petitioners’ Brief, at pp. 18-22; Petitioners’ Reply Brief, at pp. 17-18) In this regard petitioners allege that the Board’s public meetings “\*\*\*were not, in fact, forums for democratic participation in the decision making process but were designed only to give an aura of involvement and to polarize the community so that the unaffected majority would concede to the [Board’s] recommendation.\*\*\*” (*Id.*, at p. 22) Petitioners charge that the Board acted in bad faith, abused its discretionary powers and violated the Public School Education Act of 1975, now *N.J.S.A. 18A:7A-1 et seq.*, which states that decisions on essentially local questions should be made democratically and with a maximum of citizen involvement. (Petitioners’ Brief, at pp. 23-24)

Petitioners assert that Central Avenue presents hazards to the health and safety of pupils in that it contains classrooms in the basement more than four feet below grade, a second story auditorium, lavatories only in the basement, and the aforementioned lack of ventilation and automatic temperature controls. Petitioners’ further contentions that unsafe alternate exits exist in Central Avenue, that stairwells are inadequate, and that fire hazards exist is based in part

on the testimony of two expert witnesses: Chief William Comer, an expert in fire safety (Tr. II-83-124), and William Strauss, an architect. (Tr. III-199-212)

Petitioners advance as further evidence of bad faith the undisputed fact that an inspection by the Chief Safety Consultant of the State Department of Education was not made until after the decision on September 16, 1975 by the Board to close GVR. (Petitioners' Brief, at p. 29) They further allege that rooms occupied in the basement level of Central Avenue consisting of an art room, remedial reading room and library are substandard rooms which require approval annually by the County Superintendent, and may not be used by the Board when standard facilities are available at GVR. (*Id.*, at p. 33)

Finally, petitioners declare that the closing of GVR, which is a newer facility with an operable mechanical ventilation system and all standard facilities, while continuing the use of Central Avenue, would deprive pupils of a thorough and efficient education as defined by the Public School Education Act of 1975. Petitioners aver that, in any event, the health and welfare of pupils must supersede considerations of financial savings in making such decisions. (Petitioners' Reply Brief, at pp. 4, 17)

For the foregoing reasons, petitioners pray the Commissioner to set aside the Board's resolution to close GVR as an invalid, unenforceable, arbitrary, capricious and unreasonable act. Petitioners further ask the Commissioner to order that the 1909 portion of Central Avenue be closed by the Board as an instructional facility prior to consideration of the closing of any other elementary school facility and that any such action be taken only after full public hearings and development of a plan providing for "\*\*\*safe, convenient and racially balanced school[s]."

 (Petitioners' Brief, at p. 38; Petitioners' Reply Brief, at pp. 18-19)

Petitioners called as a witness a member of the Association who testified that, in his opinion, the Board had ignored its own criteria, thus misleading both him and others who voluntarily engaged in serious studies at the invitation of the Board. (Tr. I-74-76, 80) He further stated that the Board's decision to close GVR predated the formulation of a redistricting map and other studies which should have been made prior to the making of a decision. (Tr. I-80-96) Additionally, he stated that the Board's decision was based on erroneous information and was unreasonable in that it left too little flexibility to insure a viable educational program for all pupils of the district. (Tr. I-94-98)

Called as a witness by petitioners, the Director of the Bureau of Facility Planning Services of the State Department of Education stated that regulations in the *Guide* do not require the filing of a plan with the Bureau except in the case of "\*\*\*major alterations to buildings or alterations affecting electrical or structural members of the building.\*\*\*"

 (Tr. II-16)

Similarly called as an expert witness by petitioners, the Assistant Fire Chief of the City of Paterson stated that, as a result of a visit to the building on March 10, 1976, it is his opinion that Central Avenue exhibits a number of hazardous conditions which render the building unsafe from a fire protection

and safety viewpoint. (Tr. II-119) Specifics of his written report are set forth in P-8 with pictorial representation in P-9.

Also called as a witness for petitioners, the Director of the Office of Field Research and Studies at Rutgers, who authored the Rutgers Report, stated that his recommendation to the Board in that report to close Central Avenue was made without his having visited the building personally, on the basis of his associate's reporting of renovation needs and in consideration of the fact that it was the oldest school in the district. (Tr. II-131-132) He stated further that Central Avenue has the largest site of any of the Board's elementary schools and that at the time of his 1972 report he had not anticipated a need to close an *entire* elementary school. (Tr. II-128, 133)

The Board's mechanical engineer, who had in a report (P-1) to the Board referred to the boiler in Central Avenue as having a questionable remaining useful life (P-8), testified "\*\*\*\*It's possible [the boiler] could last ten, 15, 20 years. There's no way to really predict that.\*\*\*\*" (Tr. II-145)

Petitioners also called as a witness a professional architect who had inspected Central Avenue. He testified, *inter alia*, that, in his professional opinion, the lack of a mechanical ventilation system not only creates a threat to the health of pupils but increases the hazard of a potential fire since it is unavailable to exhaust noxious gases. (Tr. III-200) He stated further that he believes the exiting of both the auditorium and adjacent classrooms on common stairwell landings constitutes a hazard. He affirmed that it is his professional opinion that Central Avenue should be closed to pupils, absent the correction of these and other deficiencies. (Tr. III-210-211)

The Board's stated position is that, even if the Commissioner's judgment were to differ from that of the Board in respect to the closing of GVR, the Board's judgment must prevail, absent arbitrariness, bad faith or shocking abuse of discretion. (Brief of Respondent, at pp. 2-6) This position is grounded on *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, aff'd State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E. &A.* 1948) wherein it was stated by the Commissioner that:

\*\*\*\*As long as suitable facilities, including proper buildings, are provided, the school board is free to open and close schools without the consent of the Commissioner. \*\*\* The power of the Commissioner \*\*\* can be invoked only when a school building, after an examination, has been found to be unsafe or unsuitable for school purposes.\*\*\*\*  
(1939-49 *S.L.D.* at p. 10)

And,

\*\*\*\*[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.\*\*\*\* (Id., at p. 13)

In further support of its authority to close GVR the Board cites that which was said by the Court in *Boult* as follows:

“\*\*\*The reviewing officer was not empowered to substitute his discretion for that of the local board. The offer of proof, as it is described in the Commissioner’s opinion, amounted to nothing more than an offer to establish that the local board’s determination was based upon erroneous factual material. Discretionary municipal action may not be judicially condemned on that basis.\*\*\*” 136 *N.J.L.* at 523)

Additionally, the Board cites that which was stated by the Commissioner in a case involving the closing of two elementary schools, as follows:

“\*\*\*Thus, the test is whether or not the Board in the instant matter acted ‘within its authority,’ and in ‘good faith’ in the exercise of its discretion. It is not a test at this juncture of a balance of reasons by the Commissioner to determine if he would have reached a decision different from the one the Board reached on December 16, 1974.\*\*\*” (*John J. Caffrey, Jr. et al. v. Board of Education of the Township of Millburn, Essex County, 1975 S.L.D.* 680 (See Brief of Respondent, at pp. 28-30.)

The Board avers that it considered all essential factors and proceeded to its determination to close GVR in a deliberate, fair, and conscientious manner, with good reasons for its actions. (Brief of Respondent, at pp. 5-17) The Board contends that, in such instance, there is a presumption of correctness which must control. *Quinlan v. Board of Education of North Bergen, 73 N.J. Super.* 40, 46 (*App. Div.* 1962); *Boney v. Board of Education of the City of Pleasantville, Atlantic County, 1971 S.L.D.* 579

The Board argues that *N.J.A.C.* 6:22-7.2 requires only “\*\*\*that the old portions of such buildings shall be made to conform to the provisions of the *Guide* as far as practicable\*\*\*” and that the absence of mechanical air ventilation does not render Central Avenue unsafe or unsuitable for use. In this regard, the Board states that it is impracticable to expend at least \$71,500 to install such a system in a building which, if there is a continued decline in enrollment, may be closed in five years. (Brief of Respondent, at pp. 13, 18-20)

Finally, the Board asserts that its minor alterations were not in violation of the *Guide*, and that it has given due consideration to racial balance, health and safety of its pupils, and other relevant criteria. (*Id.*, at pp. 21-28)

The Board President testified at the hearing that, in the face of declining enrollment, the Board had considered various reorganization plans for its elementary schools but had discarded them in favor of maintaining the neighborhood elementary school concept. (Tr. II-148) He stated that when the present Superintendent was appointed in 1974 he was instructed to give highest priority to a study of the district’s diminishing schoolhouse needs and that he did present a thorough, in-depth report thereon to the Board in April 1975. He testified that the Board questioned aspects of this report, but that the Superintendent determined not to change his report which was then formally presented at the Board’s

public meeting on May 20, 1975. (Tr. II-150-152) He affirmed that further public meetings were held on June 17, July 15 and September 2, 1975, that PTA and teachers' groups and community organizations became involved, as did the Madison Borough Planning Board. (Tr. II-153)

The Board President stated that, in his opinion, Central Avenue presents no safety hazard to pupils and that the safety of pupils walking to and from school would be well cared for by the police and crossing guards. (Tr. II-156; Tr. III-27) He testified further that he believes Central Avenue may be the next facility to be closed by the Board, should enrollment continue to decline, but that closing its twelve classrooms at this time would not eliminate the number of classrooms and employees to compensate for a decline of 377 pupils. He testified that studies showed that the closing of Central Avenue would result in a savings of only \$78,000 as compared to an estimated savings of \$200,000 or more by closing all of GVR. He stated further that the Board had given serious consideration to the Association's studies and recommendations and to the matter of racial balance, and educational and health considerations. (Tr. II-176, 182-185; Tr. III-10) He averred that, although the Association's report was by far the most comprehensive received by the Board from community groups, it was the Board's considered opinion that it should close one entire school and that the closing of Central Avenue was not considered by the Board to be a satisfactory solution.

This opinion was similarly stated by those two members of the Board who had voted against the resolution to close GVR. Each of these members testified that she had never seriously considered, and was in fact opposed to, the closing of Central Avenue. (Tr. III-63, 148) One member testified that on the basis of personal observations, she believed Central Avenue to be "\*\*\*\*one of the soundest buildings in the system\*\*\*\*." (Tr. III-63) The two Board members testified that the reason they voted against the resolution to close GVR was that they believed a school on the periphery of the district should be closed. (Tr. III-63, 146)

The Superintendent testified that he had considered, among various alternatives, the closing of Central Avenue but had discarded that approach because of the soundness of the structure with its minimal maintenance problems, its desirability for educational purposes, and the fact that its closing would result in a lesser savings than would the closing of an entire building. (Tr. III-162-165, 172-173, 182) He testified that, with anticipated continued decline in enrollment, the closing of Central Avenue may be a reasonable expedient within five years. (Tr. III-165) In respect to the lack of a mechanical ventilation system the Superintendent testified that:

\*\*\*\*[M]echanical [ventilation] is relatively better than opening the window.\*\*\* I think we have good air flow. The kids are not falling asleep. I'm in the school often.\*\*\*\*  
(Tr. III-198)

The hearing examiner has carefully reviewed and considered the testimony of witnesses at three days of hearing, the exhibits in evidence and the arguments concerning relevant facts and law advanced by the parties and herewith sets

forth his findings of fact and recommendations to the Commissioner beginning with a description of the Central Avenue schoolhouse:

Central Avenue is a poured concrete building in which the basic structure presents a high resistance to fire. (R-16) The basement level consists of an art room, teachers' room, library, remedial reading room, lavatories serving pupils on the first and second floors above, and auxiliary service rooms not occupied by pupils. (P-1) The normal exits from these rooms require that pupils go up steps which are in each instance located about fourteen feet from the room door and which at their highest point approximate the four foot maximum rise allowable for main exits as indicated by section 602.2 of the *Guide*. (Tr. II-68; Tr. III-77) Actual grade outside these rooms is 3 feet, 10 inches above floor level. (Tr. III-100) Alternate emergency exits are provided for each of these rooms in the form of a window marked in red, which swings outward upon release of two latches. (Tr. III-112) To exit, a pupil must reach the level of the window sill which is 43-1/2 inches from the floor. (R-18) A pupil must, in the library, climb over a book shelf (P-11), and in another room must negotiate a counter top which runs parallel along the wall beneath the emergency exit window. It appears, however, that the counter at an intermediate height from the floor is an aid in exiting. Older elementary pupils are capable of opening the emergency windows and exiting without assistance, but younger pupils using these rooms would require assistance. (R-12 e, f, g, h; Tr. III-86, 113, 131)

In any event, obstructions exist which are inconsistent with the concept of an emergency exit. Similarly, the hearing examiner finds it inappropriate to have pupils rely on climbing up exposed live steam pipes which in one or more of these rooms are below the exit window. Accordingly, it is recommended that if this building is to remain in use, the Commissioner direct that all obstructions be removed from the front of these windows with the exception of the flat counter top, *ante*, and that the steam pipes be covered with appropriate nonflammable material which will provide insulation to insure the pupils would not be inhibited from using these exits or be injured in doing so in an emergency.

Although the lower portion of ceiling beams in these rooms is less than the required 9 feet 6 inches, the remaining and larger portions of the ceiling meet the requirements for school rooms as called for by section 603.1 of the current *Guide*. The hearing examiner recommends that the Commissioner determine that this variation in itself is insufficient to require that they be categorized as sub-standard rooms. It must be recognized, however, that each of these rooms, with the exception of the pupil lavatories, has no operational mechanical air exhaust system as required by section 702.1 of the *Guide*.

Central Avenue has five classrooms on the first floor. An auditorium is centrally located on the second floor with two classrooms on either side thereof. These four classrooms have alternate exits directly onto a stairwell landing or into the auditorium itself. The auditorium, in turn, has exits on either side directly onto the stairwell landings. Pursuant to the requirement of the *Guide* that no auditorium on the second floor of a schoolhouse be occupied by more than 200 pupils, the Board has restricted its occupancy to fewer than 200 at any one time. (P-7)

An inspection of Central Avenue on October 3, 1975 by the Chief Safety Consultant of the Facility Planning Services Bureau of the State Department of Education at the Board's request resulted in a report of twenty-four items which he found not to be in compliance with the updated *Guide*. (R-3) The Director of Facility Planning Services clarified that report by stating:

“\*\*\*While the report indicated where the existing building falls short of modern standards, it should be emphasized that the building as presently used is completely in accordance with the safety statutes and regulations which were in effect at the time of the construction. This does not mean that these deficiencies should not be corrected, because it is our position that pupils attending school should be provided the most healthful and safe learning environment possible. The board of education should be encouraged to consider correcting these deficiencies in the near future should they feel that this building fits into their long-range plans. In the meantime, while the building does need to have the improvements outlined in our previous letter, this is to advise you that you may continue to operate the building at this time.\*\*\*” (P-6)

It is noted that after a period of four months had elapsed during which the Board effected certain repairs and renovations to Central Avenue, the Chief Safety Consultant, accompanied by the County Superintendent, made another inspection of Central Avenue and reported that of the original twenty-four recommendations he had made to bring the building up to current standards only the following had not been satisfactorily corrected or plans formulated to correct them:

1. Mechanical ventilation for classrooms and auditorium;
2. Automatic temperature controls;
3. Lavatory facilities on each floor. (P-7)

Some difference of opinion was expressed by members of the Department of Education as to whether a yearly inspection by the County Superintendent was required to approve the basement classrooms of Central Avenue as sub-standard facilities. This was predicated on reference by the Chief Safety Inspector to a letter in the Commissioner's files dated April 6, 1922 where the then Inspector of Buildings was commenting upon a request that the building be approved for high school purposes. The letter stated:

“\*\*\*The rooms which are now being used in the basement are entirely unsatisfactory for class rooms or laboratory purposes and their use should be abandoned at the earliest opportunity.\*\*\*” (C-5)

It is apparent that the then County Superintendent disagreed with this assessment as he had previously written on May 8, 1919, that:

“\*\*\*Three of these [basement] rooms have been used for the purposes specified for a long time \*\*\* for Domestic Science, Laboratory and Typewriting. They seem to answer these purposes very well indeed.

“There is some doubt in my mind whether one of these rooms should be used as a regular class room where children sit all day. It is possible it could be remodeled and made suitable for such purpose.” (C-2)

In any event, a review of his files revealed to the Director of Facility Planning Services no evidence that annual approval of these basement rooms was ever required of the County Superintendent. Therefore, he advised the present County Superintendent by letter on January 13, 1976, as follows:

“\*\*\*As long as previous county superintendents have not been giving annual approval for the basement areas in question, it seems inappropriate for you to begin doing so at this time. However, in future planning by the local school officials, we would advise them not to include the basement areas in their long-range plans.” (C-7)

The County Superintendent notified the Board that he found in his files no record of annual approval of the controverted rooms as substandard. He further advised that:

“\*\*\*Based upon the definition of the need for annual temporary classroom approval by the county superintendent’s office, that is, classrooms not meeting state building codes when they are to be used for the first time, it is my opinion that the three classrooms in question have been in continuous use, therefore, met the original code requirements and would not at this time necessitate an annual approval as temporary classroom facilities.\*\*\*” (R-13)

The hearing examiner has reviewed the documents in evidence including those plans that exist for development of Central Avenue from 1909 and makes the following findings of fact:

1. The basement classrooms originally existed as courts rather than classrooms but were early converted to classrooms and have since been in continuous use until this date. (C-1; C-2; C-4a-g)
2. The basement classrooms and all other classrooms in the building are ventilated solely by air available from windows. The former ventilation ducts to the entire building are capped at the basement ceiling. (Tr. I-38)
3. The exits from the basement classrooms are not such as to present hazards endangering the lives of pupils. In fact, the testimony at the hearing leads to the conclusion that the entire building is typically evacuated during fire drills in a period approximating one minute.
4. The basement rooms are in good condition and exhibit an atmosphere conducive to their use. Of them the Chief Safety Consultant stated that: “\*\*\*the basement space had been modernized more so than some of the areas of the building\*\*\*. I can’t recall any place that I would call a dingy type of atmosphere.\*\*\*” (Tr. II-640)

5. The basement classrooms are utilized by pupils on an occasional basis for classes in art, library and reading. No pupil uses these rooms on a self-contained classroom basis.

6. Classrooms on all floors of Central Avenue are, with the exception of occasional housekeeping problems, well maintained, spacious, attractive, and conducive to learning. (P-9, photographs 1-32; R-12) With the exception of two rooms, which have windows on one side only, each classroom is equipped with operable windows on two sides allowing for cross-ventilation. (R-11; Tr. III-69-70)

7. Stairwell exits are adequate for the present occupancy use as verified by the Chief Safety Inspector. (Tr. II-46-47)

8. The auditorium on the second floor is limited to a maximum of two hundred occupants by the school authorities. This presents no serious disadvantage to a school in which the enrollment capacity in both the 1909 and 1952 sections totals 489. Pupils of such divergent ages need not be taken to an auditorium at one time, in any event. It is found that the use of the auditorium as limited in this manner complies with the *Guide*. It is further apparent that plans are being formulated to provide stairway smoke doors in keeping with the recommendation of the Chief Safety Inspector. (R-3; P-7)

9. Pupil lavatories were not required in 1909 to be constructed on each floor of approved school buildings. No major renovation to this structure has been undertaken in the intervening years which would require that they now be provided on each floor.

10. Automatic temperature controls were not required at the time the building was built, and no subsequent renovation or building program triggered any requirement that they be installed. Thus, their absence does not constitute a violation.

11. The Board both sought and considered available relevant data, as well as input from citizens and organized community groups including petitioners, prior to making its decision on September 16 to close GVR. There is no convincing evidence that the Board's efforts in this regard reconstituted a sham in violation of *N.J.S.A. 18A:7A-1 et seq.*, as charged by petitioners. (Tr. II-152-153, 159, 163, 170; Tr. III-63-65)

12. The Board and its redistricting committee, utilizing the services of a consultant from O.E.E.O., considered seriously the aspect of racial imbalance in its school and adopted a plan which, while it does not effect total racial balance, does promise to reduce the existing imbalance. (Tr. II-182; Tr. III-48) Proposed redistricting boundaries would reduce the elementary school minority enrollment variations from the present 12.6 percent to 10.69 percent in 1976-77 and to 9.96 percent in 1977-78. (R-9, Tables D-1 and D-3)

13. The Board and the redistricting committee have given serious consideration to the safety of pupils on their way to and from school. (Tr. III-58,

92, 147-148; R-9) In this regard the Board has determined to provide busing for children who must negotiate hazardous areas. (Tr. III-148)

In consideration of the above findings, the hearing examiner finds no evidence that the Board acted in an arbitrary, capricious or unreasonable manner or demonstrated bad faith in reaching its decision to close GVR on September 16, 1975. Nor is there a finding of statutory violation of *N.J.S.A. 18A:7A-1 et seq.*, as charged by petitioners. The Board has at some time in the past discontinued the repair and operation of the mechanical ventilation system in Central Avenue. It is found, accordingly, that in this one respect the Board is in non-compliance with both the State Board rules which existed at the time the building was constructed and those now in effect. The hearing examiner leaves to the Commissioner to determine whether this item of noncompliance, or any other fact or combination of facts, is of such importance as to render a nullity the Board's determination to keep open Central Avenue and close GVR.

The hearing examiner finds no necessity to set forth herein the legal aspects as apply to a decision of a Board to close a school. Such legal considerations have been amply set forth in *Mrs. John Engle et al. v. Board of Education of the Township of Cranford, Union County*, 1974 *S.L.D.* 785, aff'd State Board of Education 1975 *S.L.D.* 1085 and *John J. Caffrey, supra*.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has examined the record of the controverted matter, the hearing examiner report and the exceptions thereto filed by respective counsel pursuant to *N.J.A.C. 6:24-1.16*. Therein, petitioners request that the Commissioner disqualify himself from determining the matter. This request is predicated on an assumption that, by a letter dated February 23, 1976 (Petitioners' Exceptions, Exhibit A), the Commissioner, prematurely and without benefit of the plenary hearing which followed, reached a determination in the matter. Petitioners allege that the Commissioner is, therefore, incapable of fair and unbiased treatment of the issues raised herein.

The Commissioner is frequently called upon, in his official capacity as chief executive and administrative officer of the State Department of Education, to answer inquiries by the citizens of the State concerning the exercise by boards of education of their broad statutory discretionary powers. When such response is offered it may not and does not prejudice future considerations of the Commissioner as changes occur or as formerly unknown facts are revealed, as in the plenary hearing herein. The Commissioner, in determining controversies and disputes, is not bound either by his response to such inquiries of citizens or by the oral or written responses of his subordinates. Rather, in his quasi-judicial capacity, he considers and carefully weighs all relevant evidence which is properly offered by the parties or which is independently sought by him or those who serve him as hearing examiners in the Division of Controversies and Disputes. *N.J.A.C. 6:24-1.1 et seq.* In the instant matter the Commissioner has inquired of the hearing examiner and found that he was totally oblivious to the

existence of such a letter. It may be concluded, therefore, that the examiner could not have been prejudiced thereby in his findings of fact.

In any event the letter response which petitioners allege is prejudicial addresses only the legality of the Board's continued operation of the 1909 portion of Central Avenue. No reference is made therein to the closing of GVR, which determination petitioners attack herein as an abuse of the Board's discretionary power. Even when such matters have proceeded to a determination by the Commissioner, they are subject to further review upon the presentation of additional relevant evidence. Such was the case when the Commissioner reversed his earlier decision *In the Matter of the Request of the Board of Education of the Central Regional High School District, Ocean County, to Utilize a School Site*, 1974 S.L.D. 1059.

The letter (Petitioners' Exceptions, Exhibit A) is in no way prejudicial. The Commissioner so holds. Accordingly petitioners' request that the Commissioner disqualify himself and move the matter directly before the State Board of Education is denied.

Petitioners allege in their exceptions that the hearing examiner gave too little weight to the Rutgers Report with its recommendation to close Central Avenue. The Commissioner finds no validity to this exception. The Rutgers Report was properly incorporated by reference in the hearing examiner report. The author of the Rutgers Report testified forthrightly that in 1972 he could foresee no need for the closing of an entire elementary school. (Tr. II-128, 133) When the Board was later faced with the more abrupt decline in pupil enrollment of recent years, it was in no way obligated to act in accord with the Rutgers Report's recommendation. The record is clear, however, that it was properly considered among other reports and data by the Superintendent in arriving at his recommendation. Nor was the Board obligated, as petitioners suggest, to follow the recommendations made by the Association. Petitioners allege further that it is evidential of bad faith that the Board did not implement *in toto* the recommendations of its architect. (Petitioners' Exceptions, at p. 5) The Commissioner knows of no obligation mandated by the Board ordering such a study with cost estimates. Were such obligation to be incurred by the ordering of a study or by an inspection of buildings, the result would be a stifling of procurement of important data necessary to boards of education in making wise decisions concerning building renovation and construction. The Commissioner finds no evidence of bad faith emanating from the Board's use of or refusal to use such relevant data as was ordered by the Board or as was supplied gratuitously by the Association and other citizen groups either prior to or following the decision to close GVR.

Petitioners further except a number of findings of the hearing examiner on grounds that such information was not known to the Board prior to making its decision to close GVR. (Petitioners' Exceptions, at pp. 3, 9-10) While it would have been desirable for the Board to have completed, prior to its decision, all of its subsequent inspections, studies and consultations relating to redistricting, pupil walkways, costs of minor renovations at Central Avenue, class sizes and racial balances, the Board's action may not be voided because of the absence of

some particular information. The Board, in fact, had available on September 16, 1975, a number of studies and substantial relevant data. That these were utilized in sufficient form and amount to reach an intelligent determination is sufficient to negate petitioners' charge of bad faith. The Commissioner so holds.

Petitioners state in the exceptions that the hearing examiner failed to summarize the testimony or make reference to the report of the Chief Safety Consultant of the State Department of Education. This exception is totally without merit as it does not withstand the scrutiny of a careful reading of the examiner's report and its reference to the Chief Safety Consultant's reports which were submitted on two separate occasions and which recommendations, with three exceptions, were carried out by the Board. (R-3, P-7)

The Commissioner has carefully considered the further exception of petitioners wherein it is argued that the testimony of Beverly Graeber, a sociology major and member of the Board, should be given no weight since she is not a qualified expert in the safety of buildings. The Commissioner cannot agree that a member of the Board who has conscientiously visited the schools of the district may not properly testify in such a tribunal. As a member of the Board, albeit no technical expert in such matters as fire safety, she is charged by law with providing safe buildings. Similarly, the administrative officers of the Board, although not required to be experts in building safety, are typically charged with being totally familiar with and maintaining safe buildings. Their testimony may properly be allowed into evidence with that of technically trained experts. This State has a long and enviable record of effective citizen governance and management of the public schools. *Ronnie Abramson v. Board of Education of Colts Neck*, 1975 *S.L.D.* 418, *aff'd* State Board of Education 424.

The Commissioner has carefully considered the remaining stated exceptions of petitioners and finds them to consist primarily of arguments that the hearing examiner should have found that petitioners had proven that Central Avenue is an unsafe and unhealthful facility which should be closed. A careful review of the entire record convinces the Commissioner that Central Avenue is neither an unsafe nor unhealthful facility, nor a facility lacking in aesthetics and the elemental requirements for educating elementary school pupils. The Commissioner finds no merit in the exceptions presented by petitioners and holds as his own the body of findings of the hearing examiner.

The Commissioner now turns to a consideration of the question of whether the Board may continue to operate a facility in which it has allowed the mechanical air ventilation system to become inoperative while at the same time closing GVR, a school in which a mechanical ventilation system is fully operative. The Commissioner is aware that from time to time throughout New Jersey a public school building may be found to be in noncompliance with one or more of the State Board's numerous school building regulations set forth in the *Guide*. These situations are sometimes precipitated by mechanical failure, temporary unavailability of technical service or fabricated components, budget defeats with resulting line item reductions, and other causes. The temporary delays in effecting such repairs or raising funds to accomplish these renovations does not, *ipso facto*, render a school building a substandard facility or one in which a

thorough and efficient system of education may not be conducted. The Commissioner does not find the lack of mechanical air ventilation in Central Avenue to be of such moment to require that it be classified as a substandard building requiring an annual approval by the County Superintendent.

The financial crises of numerous school districts and municipalities have forced them to continue the use of such facilities and to lease facilities which sometimes do not comply with the *Guide's* requirement of mechanical ventilation and/or various other regulations of the State Board. The Commissioner finds no evidence within the record that such crisis has precipitated the single item of noncompliance in Central Avenue. Nevertheless, the Board's cost control goals are commendable, inasmuch as it appears possible that within four years or less the Board may no longer need to utilize Central Avenue as the result of a continually declining enrollment. Under such circumstances, the Commissioner agrees that it would be inefficient and unwise to expend an amount in excess of \$80,000 to renovate the ventilation system.

Although the Board may continue to operate Central Avenue as a school house, it may not continue indefinitely to ignore the reasonable requirement of the State Board to provide mechanical ventilation in all of its operable classrooms. Accordingly, the Commissioner directs the Board to formulate plans within the next year from the phasing out of the use of Central Avenue as a classroom facility or, in the alternative, for the raising of funds and the installation of an approved system of mechanical ventilation in compliance with the *Guide*. Such plans are to be filed with and approved by the Morris County Superintendent of Schools in his capacity as supervising officer of the public schools of the County, pursuant to *N.J.S.A.* 18A:7-5.

The Commissioner observes in the brief exceptions filed by the Board that preparations are being made to remove obstructions from emergency exit windows in the basement classrooms of Central Avenue and to cover exposed steam pipes with non-flammable material, as recommended by the hearing examiner. The Commissioner directs that these minor renovations be carried out forthwith, since the Board finds it necessary to continue to use the first floor classrooms at Central Avenue during the 1976-77 academic year.

In respect to the Board's determination to close an entire school and its decision to close GVR, the Commissioner finds no flaw that would justify the invalidation of the exercise of discretionary authority vested in the Board by the Legislature, *N.J.S.A.* 18A:11-1 *et seq.*; *Boult, supra* The Board's determination was one of reasoned judgment. Absent a finding of bad faith, statutory violation or arbitrariness, the Commissioner will not substitute his discretion for that of the Board. *Caffrey, supra*; *Engle, supra* Rather, the Board's determination is entitled to a presumption of correctness. *Boney, supra*; *Quinlan, supra* As was held in *Boult, supra*:

“\*\*\*[B]oards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.\*\*\*  
(1939-49 *S.L.D.* at p. 13)

See also *Cecilia Barnes et al. v. Board of Education of the City of Jersey City, Hudson County*, 1961-62 S.L.D. 122, 125 aff'd. State Board of Education, 1963 S.L.D. 240. The New Jersey Supreme Court, commenting upon the functions of administrative bodies, stated the following:

“\*\*\*I desire to make clear that I express no opinion as to the policy employed by the majority in the selection which they made or in the manner in which they made their selection effective. That is their responsibility to those whom they govern. Courts cannot compel governing officials to act wisely, but it can and does compel them to act in good faith. And to say that governing officials must act in good faith is merely equivalent to saying that they must act honestly.\*\*\*” *Peter's Garage, Inc. v. Burlington*, 121 N.J.L. 523, 527 (Sup. Ct. 1939)

Consistent with this frequently enunciated principle of law, and absent a finding of fact which would render improper or invalid the Board's determination to close GVR, the Commissioner finds no merit in the Petition of Appeal and no relief which may properly be afforded to petitioners. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 26, 1976

#### STATE BOARD OF EDUCATION

#### DECISION

Decided by the Commissioner of Education, July 26, 1976

For the Petitioners-Appellants, Kerby, Cooper, Schaul & Garvin (Phyllis B. Strauss, Attorney at Law, of Counsel)

For the Respondent-Appellee, Smith, Cook, Lambert & Miller (Thomas P. Cook, Esq. of Counsel)

The State Board of Education remands this matter to the Commissioner of Education for (1) an immediate full report of improvements on the safety factors completed to date in this school; (2) recommendations as to immediate needs, further than what has already been done; and (3) recommendations for improvements that would be necessary for a longer term use of the building.

The Petition for Stay of the decision of the Commissioner of Education is denied.

September 8, 1976  
Pending before Superior Court of New Jersey

**Ciro D'Ambrosio,**

*Petitioner,*

v.

**Board of Education of the Borough of Palisades Park and George Iannacone,  
Superintendent, Bergen County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents, Patrick J. Tansey, Esq.

Petitioner, a nontenured teacher in the employ of the Board of Education of the Borough of Palisades Park, hereinafter "Board," avers that the Board's stated reasons for his non-rehire in 1974 were not the true reasons and that the Board's action was arbitrary and capricious. He requests placement in a regular, full-time teaching position retroactive to September 1974 and payment of an appropriate salary. The Board avers that its failure to renew petitioner's contract of employment was attributable to a reorganization of the foreign language department and it requests dismissal of the Petition of Appeal.

A hearing was conducted in this matter on October 7, 1975 by a hearing examiner appointed by the Commissioner of Education at the office of the Bergen County Superintendent of Schools, Wood-Ridge. Thereafter, petitioner filed a Brief. The report of the hearing examiner is as follows:

Petitioner was employed by the Board as a teacher of science and/or Italian for three academic years and completed service under his third contract in June 1974. He taught five class sections of Italian in the 1973-74 academic year.

In the spring of 1974, however, the Board's proposed budget for the 1974-75 academic year was defeated by the voters of the school district in the annual referendum and thereafter petitioner was told by his principal that there might be some "foreign language cutbacks." (Tr. 53) He was also told that if such reductions were made he would not be reemployed. (Tr. 53) Subsequently, petitioner testified, he met on two occasions with the Superintendent of Schools and was told that there would be a reduction in the number of language teachers and that he would not be reappointed. (Tr. 54)

Thereafter, on June 24, 1974, petitioner addressed a letter to the Board and requested a written statement of reasons for the nonrenewal of his contract of employment. (P-4) Such request followed a decision of the Supreme Court of New Jersey in *Mary Donaldson v. Board of Education of North Wildwood*, 65

*N.J.* 236 (June 10, 1974) which held that nontenured teachers were entitled to a statement of reasons upon request when local boards of education failed to re-new contracts of employment.

On July 3, 1974, the Superintendent complied in writing with petitioner's request. His letter of that date is recited in its entirety as follows:

"Thank you for your letter of June 24th. As you know, you were informed in March, in writing, of the fact that you were not reappointed. You were also informed prior to this by your building Principal that you could not be recommended for reappointment by the Superintendent to the Board of Education. You also met with me several times for lengthy discussions at which time the reasons for your non-reappointment were specified. You attested to this in writing in your sample letter sent to me for reference purposes indicating that you understood that there was a change in our foreign language staffing at the High School.

"The Board of Education did not reappoint you acting upon my recommendation because of a need to reorganize our foreign language department and gain a teacher qualified in *both* Italian and Spanish, and also qualified for co-curricular activities (specifically girls' athletics)." (P-5)

Subsequently, the Superintendent did in fact arrange for the employment of a teacher, Miss Abate, certified in both Italian and Spanish and addressed a letter to petitioner's principal on August 28, 1974, wherein he said:

"As we have discussed, Miss Abate is fully certified and qualified to teach both Spanish and Italian. She is to assume those duties for the coming year and is to be available as scheduled by the Department Coordinator, to handle independent study projects in Spanish.

"Specifically, supplemental instruction and literary instruction for students having difficulty in reading and writing Spanish, or for students having the capability to do excellerated (sic) reading in Spanish. This is to be considered as part of her teaching assignment for this year." (R-1)

The Board had formally employed the teacher of reference (Miss Abate) on June 27, 1974, and the minutes of its meeting on that date (R-3) specified that she was to be a "teacher of High School Spanish and Italian."

Petitioner now avers, however, that there was not in fact a reorganization of the language department, that the teacher employed as his replacement has continued to teach only Italian and has not assisted as a coach of an athletic program for girls, and that the true reasons for his non-reemployment were never afforded him. It follows, in petitioner's view, that he was denied procedural due process with respect to the true reasons for his non-rehire and that he should be restored to his employment.

Testimony at the hearing was adduced from petitioner, the Superintendent, the principal of petitioner's school, the Board President, and a foreign language coordinator.

The Superintendent and Board President both testified that reorganization of the foreign language department had in fact been a reason for petitioner's non-reemployment. (Tr. 43-44, 62, 77) The Board had considered the quality of petitioner's teaching among other things and "\*\*\*\*talked about revamping the language department because there was another teacher leaving also.\*\*\*" (Tr. 44) The Superintendent testified that the action with respect to petitioner was prompted by a need to reduce the faculty and he said that they had "\*\*\*\*sought a person with dual certification, Spanish and Italian." (Tr. 63) The Superintendent also testified on cross-examination that although he had had reservations about petitioner's performance as a teacher and had altered an observation report (P-1) to indicate his dissatisfaction (Tr. 70), the reasons he gave petitioner for his non-rehire were the true reasons. (Tr. 76-77)

The foreign language coordinator testified that a second teacher, in addition to petitioner, had been released and that this teacher had taught both Spanish and English classes. (Tr. 24) He testified that Spanish classes had been reduced from 13 to 10 sections in 1974-75 and said that the new teacher had had limited work experience, on a volunteer basis, with pupils studying Spanish. (Tr. 17-18) He testified that she had not, however, taught Spanish classes. (Tr. 16)

The principal testified that he had been made aware that there might be a need for an additional teacher of Spanish (Tr. 32) and that he had communicated this potential need to the Superintendent. (Tr. 33) He also testified that the new teacher had assumed responsibility in the 1975-76 academic year as advisor to the cheerleaders (Tr. 35), and that she still works with individual pupils in Spanish. (Tr. 41)

Petitioner testified that the Superintendent had never visited his class for purposes of supervision (Tr. 52) and argues that this alleged fact renders the Superintendent's alterations of the evaluation report of the coordinator (P-1) as an arbitrary act without foundation. (Note: The Superintendent testified he had visited petitioner's class (Tr. 71) although he had no record of the visit.)

The observation reports of reference (P-1, P-2, P-3, P-8) are generally commendatory of petitioner's teaching although P-1 contains notations by the Superintendent that indicate he thought petitioner should be dismissed. The document R-4 is dated May 4, 1973, and is a record of one visit by the Superintendent to petitioner's school. The document is critical of petitioner's supervision of a study hall period.

Petitioner argues that such testimony and other evidence indicates that the Board and its Superintendent gave petitioner reasons for his non-rehire which were not true in fact and that "\*\*\*\*additional reasons stated at the hearing, were never brought to Petitioner's attention previously in a fashion which would

enable him to respond appropriately.\*\*\*” (Petitioner’s Brief, at p. 9) In petitioner’s view this alleged fact constitutes a denial of due process.

The hearing examiner concurs in part with such avowals since the stated, written reasons afforded petitioner for his non-rehire contain no mention of teaching deficiency. There remains, however, a considerable amount of evidence in support of the validity of the reasons itemized by the Superintendent. (P-5) The Board’s budget had been defeated and a reduction in force which involved two positions did occur. (Tr. 24, 32-33, 43-44, 57, 62, 75, 77) The exigencies of the circumstances demanded consideration of a restructuring of the foreign language department in order that, if required, a teacher certified in both Spanish and Italian might be assigned with flexibility. A teacher was employed in June 1974 (R-3) who possessed such dual certification and was assigned by the Superintendent in August 1974 to assume duties in Spanish and Italian during the 1974-75 academic year. (R-1) This teacher did in fact, although to a limited extent in Spanish, perform such duties in the 1974-75 and 1975-76 academic years and has in the 1975-76 academic year assisted with one extracurricular activity as advisor to the cheerleaders.

Such evidence in support of the Board’s reasons for petitioner’s non-rehire attests, in the hearing examiner’s opinion, to the validity of the major reasons which prompted the Board to act as it did and, accordingly, the hearing examiner recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions thereto filed by petitioner. Such exceptions reiterate the view that the reasons afforded petitioner for his non-reemployment were not the true reasons and seek to impinge the credibility of the testimony of the Superintendent of Schools upon which the hearing examiner relied in part.

The Commissioner concurs with the report of the hearing examiner and with his findings and conclusions. The record indicates that the Board properly exercised its discretion to reorganize and reduce its teaching staff in 1974, communicated this decision to petitioner in a timely manner and afforded him all the due process rights to which he was entitled. *Donaldson, supra*

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 27, 1976

**STATE OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, July 27, 1976

For the Petitioner-Appellant, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents-Appellees, Patrick J. Tansey, Esq.

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

March 2, 1977

**In the Matter of the Board of Education of the City of Trenton, Mercer County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

It appearing that the Board of Education of the City of Trenton, hereinafter "Board," has ceased payment of tuition for special education programs for handicapped pupils placed in various nonpublic institutions by the Division of Youth and Family Services, hereinafter "DYFS"; and

It appearing that the Board caused these tuition payments to terminate based upon the enactment of c. 178, L. 1974, amending *N.J.S.A.* 30:4C-2, 26 and 26.1 (Exhibit A, B); and

It appearing that the amendments to these statutes is no more than a change in name from "Bureau of Children's Services" to "Division of Youth and Family Services," and an additional definition included under Section "(M)"; and

It appearing that the matter of payment of tuition for pupils placed by DYFS was decided by the Commissioner of Education in *Board of Education of the Township of Little Egg Harbor v. Boards of Education of the Township of Galloway, City of Atlantic City, Township of Marlboro, Freehold Regional High School District and the Bureau of Children's Services, Department of Institutions and Agencies, State of New Jersey*, 1973 *S.L.D.* 324, aff'd State Board of Education June 5, 1974, aff'd Docket No. A-2936-73, New Jersey Superior Court, Appellate Division, May 16, 1975; and

It appearing that the Commissioner directed the Board to continue the tuition payments to the various nonpublic schools approved by the New Jersey Department of Education under the provisions of Chapter 46, Title 18A, New Jersey Statutes Annotated (Exhibit C); and

It further appearing that the Children's Home of Burlington County has filed a letter complaint with the Commissioner alleging that the Board is in defiance of the Commissioner's directive (Exhibit C); now, therefore,

IT IS ORDERED on this 23<sup>rd</sup> day of July 1976, that the Board continue to pay approved educational tuition for handicapped pupils, including back payments from the time the payments were unilaterally terminated by the Board.

COMMISSIONER OF EDUCATION

July 23, 1976

**In the Matter of the Tenure Hearing of**

**Charles F. Green,**

**School District of the Warren County Vocational School, Warren County.**

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Complainant Board, Archie Roth, Esq.

For the Respondent, Herr and Fisher (John H. Pursel, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by the Warren County Vocational School Board of Education, hereinafter "Board," (Archie Roth, Esq., appearing) through the certification of tenure charges against its Superintendent, hereinafter "respondent," pursuant to *N.J.S.A. 18A:6-11* (John H. Pursel, Esq., appearing); and

It appearing that respondent has filed a Motion to Dismiss the charges against him for failure of the Board to follow the statutory prescription for the certification of charges and upon the allegation that his rights to due process under the Fifth and Sixth Amendments to the United States Constitution were violated; and

Oral argument of the parties having been heard on June 25, 1976 at the State Department of Education by a representative of the Commissioner, the matter is referred directly to the Commissioner for adjudication on the pleadings, exhibits, and affidavits filed in support of the respective positions of the parties.

Respondent has been employed by the Board as Superintendent for seventeen years. The Board determined at its regular meeting conducted on May 14, 1976 to have

“\*\*\*formal charges prepared by the board attorney to be filed against Mr. Green [respondent] with the Commissioner of Education, and Mr. Green is suspended without pay, effective May 17, 1976.” (C-2)

The Commissioner notices that May 14, 1976, the date when the Board adopted this resolution, was a Friday; respondent was suspended as of the following Monday.

On May 25, 1976, eleven days after the Board adopted its resolution, *ante*, and eight days after respondent was suspended without pay from his duties, four charges of unbecoming conduct were formulated and filed against respondent with the Commissioner. The Board President executed an affidavit (C-3) on May 25, 1976, which accompanied the charges and attested to his belief that the charges are true and sufficient to warrant unspecified discipline.

The Commissioner notices that *N.J.S.A.* 18A:6-11 was recently amended by Chapter 304, Laws of 1975, effective February 7, 1976. The amendment, which also repealed *N.J.S.A.* 18A:6-12 and *N.J.S.A.* 18A:6-15, provides in full as follows:

“Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to *N.J.S.* 18A:6-16, together with a certificate of such determination.

Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereof, 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.”

In the instant matter there is no evidence that the Board ever considered the four charges its attorney had prepared and eventually filed against respondent. The resolution (C-2) which the Board adopted merely instructed its counsel to prepare “tenure charges.” Thus, respondent had not been given a copy of the charges against him prior to a determination being made to file charges against him. When the charges were prepared and presented to the Board, respondent was not given the opportunity to respond to those charges.

The Commissioner observes that the gravamen of Charge One deals with the improper use of school equipment. The fact that the Board had had meetings with respondent as far back as April 1976 with respect to many allegations, one of which dealt with the improper use of school equipment, does not erase the fact that at the time of those meetings no formal charges against him had been made. Charges Two, Three, and Four deal with respondent’s leadership and school management abilities. The record is completely void of any evidence that these charges were ever discussed, much less presented to respondent.

The Commissioner finds and determines that the Board erred in its certification and filing of tenure charges against Charles F. Green for failure to follow the prescription of *N.J.S.A.* 18A:6-11. This being so, there is no need to reach any conclusions dealing with the constitutional issues raised herein by respondent.

Accordingly, the Commissioner hereby directs that Charles F. Green be forthwith reinstated to his position of Superintendent with all remuneration and emoluments he would have received had he not been improperly suspended. Finally, the Commissioner directs that the charges be remanded to the Warren County Vocational School Board of Education for consideration consistent with *N.J.S.A.* 18A:6-11.

COMMISSIONER OF EDUCATION

August 3, 1976

**In the Matter of the Tenure Hearing of**

**Charles F. Green,**

**School District of the Warren County Vocational School, Warren County.**

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Complainant Board, Archie Roth, Esq.

For the Respondent, Herr and Fisher (John H. Pursel, Esq., of Counsel)

This matter having originally been opened before the Commissioner of Education by the Warren County Vocational School Board of Education, hereinafter "Board," (Archie Roth, Esq., appearing) through the certification of tenure charges against its Superintendent, hereinafter "respondent," pursuant to *N.J.S.A.* 18A:6-11 (John H. Pursel, Esq., appearing); and

It appearing that respondent had filed a Motion to Dismiss the charges against him for, *inter alia*, failure of the Board to follow the statutory prescription for the certification of charges; and

It appearing that the Board having failed to comply with the statute of reference, the Commissioner, by way of written decision dated August 3, 1976, directed that the charges be remanded to the Board for consideration consistent with *N.J.S.A.* 18A:6-11 and further directed that respondent be reinstated to his position of employment together with remuneration and any emoluments due him; and

It appearing that the Board now seeks a Stay of the Commissioner's directive with respect to the reinstatement of respondent together with remuneration and emoluments based on what it asserts to be its contemplated action of certifying the tenure charges against him in compliance with *N.J.S.A.* 18A:6-11; therefore

The Commissioner finds and determines that if the Board elects to certify tenure charges against respondent consistent with the provisions of law, it may at that time also elect to suspend respondent from his duties pursuant to *N.J.S.A.* 18A:6-14. The fact remains that the Board improperly suspended respondent from his duties which resulted from its own failure to follow the provisions of *N.J.S.A.* 18A:6-11. Consequently, the Commissioner determines that a contemplated action of the Board with respect to the certification of charges, as in the instant matter, is not sufficient to grant the Board's Motion to Stay. The Commissioner so holds.

Entered on this 26th day of August, 1976.

COMMISSIONER OF EDUCATION

Frances Finkle,

*Petitioner,*

v.

Board of Education of the City of Paterson, Passaic County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Norman S. Rosenthal, Esq.

For the Respondent, Robert P. Swartz, Esq.

Petitioner, a bus contractor, alleges that the Board of Education of the City of Paterson, hereinafter "Board," abrogated a contract she held for the transportation of school pupils without just cause and without a hearing. She requests the Commissioner of Education to reinstitute the contract and to compensate her for loss of income. The Board maintains that its actions were properly grounded and legally correct.

A hearing in this matter was conducted on November 24, 1975 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Pursuant to law the Board advertised on August 29, 1974 for "sealed proposals" for the transportation of certain pupils enrolled in the Department of Special Education. The bids for bus route no. 39 were to be opened on September 10, 1974, and were in fact opened as scheduled. Subsequently, on the same date, the Board approved an award of a contract for route 39 to Town and Country Bus Company, petitioner's company, at a cost of \$13.65 per day. (P-1) The resolution approving the contract was to be effective as of September 16, 1974, and the specifications for the route listed three pupils who were required to be transported. These specifications provided in pertinent part as follows:

- "A. The transportation of one student from his home address in the City of Paterson to the Bergen County Special School, 334 Union Street, Hackensack, New Jersey to arrive at the School no later than 8:45 a.m. and to depart from the School at 2:30 p.m.

“B. The transportation of two students from their home addresses in the City of Paterson to the David Hancock School, 720 Summit Avenue, Hackensack, New Jersey, to arrive at the School no later than 9:15 a.m. and to depart from the School at 2:30 p.m.”

(R-3, at p. 2)

They also provided that the contract period was September 16, 1974 to June 30, 1975 at a cost of \$13.65 per day.

On October 3, 1974, the Board met in regular session and approved a resolution (R-1) which alleged that petitioner had failed to comply “\*\*\*with the terms and conditions of the contract and specifications for the route\*\*\*” and resolved that “\*\*\*the contract between the Board of Education and Town and Country Bus Co. be terminated as of October 15, 1974\*\*\*.” The contract was then awarded to another contractor and the instant Petition of Appeal was filed.

The hearing examiner has concluded that this matter must be decided on the question of whether or not there was procedural fault in the Board’s action to abrogate a valid contract for the transportation of school pupils. He will set forth certain proofs and testimony with respect to the reasons which caused the Board to approve the resolution of contract abrogation (R-1), in order that the whole controversy may be viewed in proper perspective.

At the hearing petitioner testified that she had transported the three pupils as required five days a week during the period September 16 - October 15, 1974. (Tr. 5) She also testified that there were three occasions “\*\*\*where lateness occurred\*\*\*” although she denied receipt “\*\*\*[of] any specifications\*\*\*” with respect to the contract. (Tr. 6) Her explanation of the three late arrivals are contained at Tr. 7-10. Such explanation is summarized from petitioner’s testimony as follows:

1. On the first occasion a driver’s husband had died and late notice required a replacement. (Tr. 7)

2. On the second occasion a pupil was not picked up as scheduled because the driver thought the school was observing a holiday. (Tr. 9)

3. On the third occasion a driver had neglected to notify her of an appointment the driver had made to take a test for a school bus driver’s license. (Tr. 9)

Petitioner testified that upon receipt of notice that her contract would be terminated she attempted to get an explanation from school officials but was never given one. (Tr. 12)

On cross-examination petitioner did admit that she had seen the “bid specification,” as set forth, *ante*. (Tr. 14) One of her drivers testified that, as petitioner maintained, the call to petitioner concerned with the death of the

driver's husband had been placed late at night. (Tr. 31) Another driver testified that she had assumed the school was closed on one occasion because of a holiday. (Tr. 40)

Two school officials testified for the Board. The Director of Special Services testified he had "several" complaints with respect to the transportation of the three pupils on route 39. (Tr. 44) He detailed two of such complaints with respect to a multiply handicapped pupil (Tr. 45-46), and a complaint from the mother of a hearing impaired pupil. (Tr. 47) He testified that he had referred such complaints to the Director of Transportation Services. (Tr. 51)

The Director testified he had had a call on October 10, 1974 from a school official who complained about an alleged failure of petitioner to pick up a pupil. (Tr. 71) (See R-4 and also R-5.) He also testified there were other complaints on October 1, 1974 (R-6) from the same school officials and another complaint from the parent of one pupil. (Tr. 72) He testified that "\*\*\*[e]very time\*\*\*" he had a complaint about route 39 he called petitioner (Tr. 77), and in fact spoke with her "\*\*\*eight or nine times.\*\*\*" (Tr. 79) He testified he had not afforded her a hearing prior to October 15, 1974, when the Board took its controverted action to rescind petitioner's contract. (Tr. 83) He further testified that petitioner never requested a hearing from him. (Tr. 85)

The hearing examiner observes, however, that the rules of the State Board of Education do not predicate the requirement that a hearing be afforded bus contractors prior to the time of contract termination on the basis of whether or not there has been a "request" by the contractor for the hearing. The responsibility is instead placed clearly on local boards of education by such rules. *N.J.A.C. 6:21-16.1-16.3* The rules recited in their entirety are as follows:

*N.J.A.C. 6:21-16.1*

"(a) All contracts for transportation or renewals thereof shall be made in triplicate and shall be submitted to the county superintendent for approval on or before September 1 in each year.

"(b) Each contract or renewal thereof shall be accompanied by a certified copy of the minutes of the board of education authorizing the contract.

"(c) If the county superintendent shall approve the contract or renewal, one copy shall be filed with the county superintendent, one with the board of education, and one with the contractor.

"(d) If the county superintendent shall not approve the contract or renewal, it shall be without force or effect.

"Note: All transportation contracts require the approval of the county superintendent regardless of whether State aid is involved."

*N.J.A.C. 6:21-16.2*

“All transportation contracts shall be made on forms prescribed by the Commissioner of Education.”

*N.J.A.C. 6:21-16.3*

“(a) Contracts made pursuant to these rules shall be held to include these rules.

“(b) If any person operating a school bus under contract with a board of education shall fail to comply with any of the rules governing pupil transportation, the board of education shall immediately notify such person in writing of his failure to comply.

“(c) If the violation is repeated, the board of education may require the violator to show cause at a hearing why his failure to comply should not be deemed a breach of contract.

“(d) If, after due notice and hearing, the board of education shall determine that a breach of contract exists, it may call upon the bondsman or surety company, as the case may be, to perform the contract or to reimburse the board for any financial loss resulting from the breach of the contract, and may annul the contract.”

Thus there is a clear requirement for notice “in writing” when a bus contractor has failed to comply with contract specifications. There is also the specific direction that repetition of such failure shall be reason for the local board to set down a hearing at which time the local contractor may be required to “show cause” why he/she should not be held to have breached the contract. It is only after such “due notice and hearing” that the contract may be terminated.

Such requirements were clearly not followed in this case. There was no preliminary notice to petitioner “in writing” that the Board or school administrators believed her to be in breach of contract. There was no notice to petitioner to show cause why the contract should not be terminated. There was instead an action of the Board (R-1) on October 3, 1974 to abruptly abrogate the contract and a letter of October 15, 1974, which notified petitioner of the action.

It is clear that such an action, in the context of the rules of the State Board of Education, *ante*, which are an integral part of the contractual relationship, must be found to be *ultra vires* and a nullity. The hearing examiner so finds.

In the context of this finding the hearing examiner concludes there is no reason to examine merits of the reasons in support of the Board’s action, although the proofs are set forth, *ante*, since in the first instance the responsibility for a *de novo* hearing was with the Board and not the Commissioner or his representative. The finding with respect to procedural fault obviates the necessity for a further determination.

Accordingly, the hearing examiner recommends that the Commissioner determine that a legal contract for the transport of school pupils on route 39 existed between petitioner and the Board for the entire time of the contract period in the academic year 1974-75, and that petitioner is entitled to the full amount of compensation specified in the contract's terms.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by the Board. Such exceptions contest the finding that this matter must be decided on the rules set forth in the administrative code (*N.J.A.C. 6:21 et seq.*) and urge that the hearing examiner should have found whether or not there was "an entire or substantial failure to perform.\*\*\*" (Board's Exceptions, at p. 2) Additionally, the Board avers, *arguendo*, that even assuming the hearing examiner correctly found that a contract between petitioner and the Board existed for all of the 1974-75 academic year, the amount of damages should be limited to the amount of loss sustained by petitioner. In the Board's view:

\*\*\*It is clear that an injured party cannot recover both the profit and expense to which he would be put to make such profit. See 25 *C.J.S. Damages* S. 46.\*\*\*" (Board's Exceptions, at p. 3)

There is no dispute herein with respect to two essential facts. Petitioner and the Board entered into a mutually binding contract for the whole of the 1974-75 academic year. The Board abruptly terminated such contract without notice to petitioner or without affording her an opportunity to be heard on the merits of the charges against her.

Such facts, even if the rules of the State Board designed to insure due process in such instances are set aside, attest to a judgment that there was in this instance, a denial of the fundamental right of due process to petitioner. The Board conclusively presumed that every allegation against petitioner was true in fact and considered none of the mitigating factors which petitioner had an entitlement to advance before the Board and did advance at the hearing, *ante*. A fundamental part of the definition of due process applicable herein is set forth in *Black's Law Dictionary* 590 (rev. 4th ed. 1968) as follows:

\*\*\*Due process of law implies the right of person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or *property*, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. *If any question of fact or liability be conclusively presumed against him, this is not due process of law. Zeigler v. Railroad Co., 58 Ala. 599.\*\*\** (Emphasis supplied.)

The Commissioner has in a number of instances affirmed such principles embedded in the total concept of due process of law. In *Clifford Lawrence v. Board of Education of North Hanover, Burlington County*, 1938 S.L.D. 800 (1933) he was concerned with a decision of a local board which awarded a contract for transportation of school pupils to other than a low bidder without an opportunity for the low bidder to appear at a hearing to determine his responsibility. The Commissioner ultimately awarded the contract to the low bidder and premised his decision on decisions of the courts wherein it has been held:

“\*\*\*If there be an allegation that a bidder is not responsible, he has a right to be heard upon that question and there must be a distinct finding against him, upon proper facts, to justify it.’ *McGovern vs. Board of Works*, 28 Vroom 580.

‘A determination against the responsibility of a bidder is a judicial matter requiring notice to him.’ *Jacobsin et al. vs. Board of Education of the City of Elizabeth*, 64 Atl. 609.

‘That a party whose rights are to be directly affected by judicial action is entitled to have an opportunity afforded him of being heard in relation thereto before action is taken, whenever such action is judicial in its character, is entirely settled in this court.’ *Stanley vs. Passiac*, 60 N.J.L. 392.\*\*\*” (1938 S.L.D. at 801)

(See also *Kenneth C. Massey v. Board of Education of the City of Lambertville*, 1938 S.L.D. 799 (1934); *Case Box Lunch, Inc. v. Board of Education of the City of Trenton, Mercer County*, 1972 S.L.D. 479.)

Thus, the rights of those who bid on public school contracts have been long established. It can hardly be held that those who *hold* contracts have a lesser entitlement and, indeed, it is evident that such entitlement must be one of greater magnitude. The Commissioner so holds.

There remains for consideration the Board’s contention that even a finding against it should result in a lesser award than the full amount of the contract between it and petitioner.

The Commissioner concurs with this contention since the courts have held that plaintiffs in such matters are entitled to the profits of a contractual agreement but not to expenses not incurred. The rationale is set forth in *Gardner v. Rosecliff Realty Co.*, 41 N.J. Super (App. Div. 1956) and in *Holt v. United Security Life Ins. Co.*, 76 N.J.L. 585 (E.&A. 1908).

In *Gardner* the Court said:

“\*\*\*Plaintiffs ask\*\*\*for their out-of-pocket expenses, and also for the profits they would have received if they were entitled to the benefit of the bargain. They cannot have both, for the expenses were incurred in order to earn the profits; and to allow plaintiffs both, would give them a ‘double recovery.’\*\*\*” (at p. 11)

Accordingly, the Commissioner directs the Board to reimburse petitioner for the amount of the contract entitlement which she might have accrued as a profit if the contract had not been abruptly terminated and to make such reimbursement at a time subsequent to receipt, from petitioner, of an affidavit setting forth those expenses she was saved from making by such termination.

COMMISSIONER OF EDUCATION

August 17, 1976

Linda McCorkle,

*Petitioner,*

v.

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

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., and Richard Greenstein, Esq., of Counsel)

For the Respondent, George J. Otlowski, Jr., Esq., of Counsel)

Petitioner, a secondary school teacher in her third academic year of employment, was notified on April 29, 1975 by the Board of Education of the City of South Amboy, hereinafter "Board," that her contract would not be renewed for the ensuing academic year. (R-2) She alleges that the reasons given by the Board for her nonrenewal were a mere pretext given to deny her tenure of employment and that the Board's decision was an arbitrary, unreasonable, abusive, and capricious exercise of its discretionary authority.

The Board denies that its determination not to reemploy petitioner was tainted or in any way improper.

The matter comes before the Commissioner of Education in the form of the pleadings, a Notice of Motion to Dismiss by the Board with supporting Brief, petitioner's Brief in Opposition to the Motion to Dismiss, exhibits marked into evidence and transcript of oral argument conducted before the Commissioner's representative on April 19, 1976 at the State Department of Education, Trenton.

When petitioner requested reasons for her nonrenewal, the Board provided the following statement dated May 8, 1975:

“\*\*\*At its meeting on April 28, 1975 the Board of Education considered the Superintendent’s recommendation concerning your continued employment and wishes to inform you that you will not be offered a contract for next year for the following reasons:

“1. Unsatisfactory classroom performance during the past three years; in particular, failure to provide a consistent program of studies for the children.

“2. Insufficient planning of lessons and projects.

“3. Failure to maintain a high level of instruction, of which you are capable, but only did so when under pressure of contract renewal or observation. This made your classroom performance sporadic and inconsistent.

“4. Your attitude toward school policy relevant to excusing students and recording cuts as required.

“5. Punctuality to class was sporadic.

“The evaluations, both written and oral, which you have received during the past two years detail these reasons.”\*\*\*” (R-3)

Petitioner requested and was granted an informal appearance before the Board. At this appearance on June 30, 1975, petitioner, eight pupils, one parent and three teaching staff members spoke on her behalf before the Board. Nevertheless, the Board, after further deliberation, notified petitioner on August 6, 1975, that its determination not to reemploy her remained unchanged. (R-4)

The Board argues in support of its Motion to Dismiss that it has adhered precisely to the procedures required by the Court in *Donaldson v. Board of Education of North Wildwood*, 65 N.J. 236 (1974) and enumerated by the Commissioner in *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 S.L.D. 332. The Board maintains that it has acted in accord with the evaluations and recommendations of its administrators and that these are entitled to due consideration within the context of *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District Atlantic County*, 1968 S.L.D. 7, dismissed State Board of Education 11, aff’d New Jersey Superior Court, Appellate Division, 1969 S.L.D. 202 wherein it was said that:

“\*\*\*Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective.”\*\*\*” (at p. 10)

The Board further argues that the Amended Petition of Appeal herein consists simply of a general denial of the reasons given for nonrenewal and that mere generalized allegations do not present a justiciable issue which would merit an adversary proceeding before the Commissioner. (Tr. 7)

The Board avers that, absent a showing of statutory violation or violation of petitioner's constitutional rights, if a general denial of reasons given by the Board were to be considered a basis for an adversary proceeding, there would, in effect, be no distinction between tenure and nontenure teachers. (Respondent's Brief, at p. 4; Tr. 4, 7-9) Accordingly, the Board contends that the merits of the pleadings are deficient and moves for dismissal of the Petition and Amended Petition. *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County*, 1975 S.L.D. 848

Conversely, petitioner asserts that the Board's alleged reasons for nonrenewal are untrue and that a plenary hearing is required to determine the actual facts surrounding the controversy. Therefore, it is argued that the Motion to Dismiss is inappropriate for the reasons that a genuine issue of material fact is in doubt. *Frederick J. Procopio, Jr. v. Board of Education of the City of Wildwood, Cape May County*, 1975 S.L.D. 805, aff'd State Board of Education April 17, 1976 (Petitioner's Brief, at pp. 3, 9)

Petitioner alleges that the Board's reasons for nonrenewal are not substantiated by credible evidence and seeks a hearing before the Commissioner to prove the truthfulness of her allegations. (*Id.*, at p. 6) In support thereof she states that there is a glaring disparity between the earlier evaluations of the principal which she characterizes as positive and favorable as contrasted to that of his January 16, 1975 evaluation which was critical of her teaching performance. (*Id.*, at pp. 6-7, 9) Petitioner contends that such disparity demands that a hearing be held to reveal the arbitrariness, capriciousness, and unreasonableness of the Board's determination. (Tr. 22; P-3) In this regard petitioner avers that the instant matter bears strong resemblance to *Ruch, supra*, wherein it was stated by the Commissioner that a board's employment practices may not be based on:

“\*\*\*frivolous, capricious or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny.\*\*\*” (at p. 10)

Petitioner further alleges that earlier evaluations which were favorable to her were destroyed or no longer exist and that only by a hearing can she demonstrate the truthfulness of her allegations. (Petitioner's Brief, at p. 10) Petitioner argues that to deny a hearing would be to deny her constitutional rights of due process. In this regard petitioner cites, *inter alia*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Allstate Insurance Company v. Fioravanti*, 299 A. 2d 585 (Supreme Court of Pennsylvania, 1973); *Pennsylvania R.R. Company v. New Jersey State Aviation Commission*, 2 N.J. 64 (1949); *Tancredi v. Tancredi*, 101 N.J. Super. 259 (App. Div. 1968).

The Commissioner, having carefully reviewed the exhibits and the arguments set forth by the litigants, proceeds to consider them in the light of the growing body of decisional law relating to the nonrenewal of nontenured teaching staff members.

Of the three written evaluation and observation reports in evidence, those of the Superintendent dated October 26, 1972 (P-1), and of the principal dated September 16, 1974 (P-2), contain both commendatory remarks and criticisms of techniques used by petitioner. The final evaluation report of the principal dated January 16, 1975, was, indeed, highly critical of petitioner's classroom organization, control and teaching techniques not only for that lesson but for others throughout the 1975-76 school year. (R-1)

Petitioner denies the truthfulness of numerous of the criticism directed against her, not only in these evaluations, but in the reasons for her nonrenewal provided by the Board. (R-3) In a similar case, *Donald Banchik v. Board of Education of the City of New Brunswick, Middlesex County*, 1976 S.L.D. 78, a nontenured principal advanced precisely the same allegations as does petitioner herein. Namely, that the reasons advanced by the Board were lacking in specificity and were indicative of an abuse of discretion, capriciousness, arbitrariness, and unreasonableness. Banchik also alleged that the reasons given by the Board were conclusionary in nature. In this regard, the Commissioner stated that:

“\*\*\*The reasons given are indeed conclusionary but, as such, may not be labeled as improper. The very process of determining whether or not to reemploy a teaching staff member must of necessity be conclusionary in nature. The Commissioner determines that *the statement of reasons given by the Board, ante, is as detailed as may be reasonably expected in such instances*. The reasons specify areas such as leadership in curriculum, discipline, student activities, security, community relations, and cleanliness of building and grounds, in which the Board was dissatisfied with petitioner's performance as principal. All of these broad and important areas are within the scope of responsibility of a principal to whom the Board looks for leadership.\*\*\*”

“The Board has determined that the leadership provided by petitioner was not such as to justify issuing a tenure year contract. Such determination is entitled to a presumption of correctness, absent a showing of capriciousness, arbitrariness, bad faith, statutory violation or violation of constitutionally guaranteed rights. As was said in *Quinlan v. Board of Education of North Bergen*, 73 N.J. Super. 40 (App. Div. 1962):

“\*\*\*When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable.\*\*\*”

(at pp. 46-47)

“See also *Thomas v. Morris Township Board of Education*, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); *Boult and Harris v. Board of Education of Passaic*, 1939-49 S.L.D. 7, aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948).\*\*\*”  
(*Emphasis supplied.*) (at p. 81)

The Commissioner similarly determines in the instant matter that the written statement of reasons given by the Board in the herein controverted matter is sufficient in detail and content to meet the requirement of the Court as set forth in *Donaldson, supra*. It is further evident to the Commissioner that the Board has provided an informal appearance pursuant to *Donaldson, supra*, and *Hicks, supra*. Herein, petitioner and others were given opportunity to speak on her behalf at an informal appearance before the Board. After further consideration the Board remained unconvinced of the wisdom of offering her re-employment.

Petitioner as a nontenure teacher had no property right to continued employment. See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County*, 1975 S.L.D. 699. Nor was she denied procedural due process. The Commissioner so holds.

The Board was empowered by statute to determine whether or not to employ petitioner. *N.J.S.A.* 18A:27-1 *et seq.* It was, however, under no affirmative obligation to do so. The selection of teaching staff members is an area assigned to local boards by the Legislature and has long been recognized by the courts. In *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education Essex County*, 1968 S.L.D. 225, affirmed State Board of Education April 11, 1969, affirmed 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970), the Superior Court stated:

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

Absent a showing of violation of petitioner’s constitutional rights or statutory violation, the Commissioner finds no reason to interpose his judgment for that of the Board in the determination of whether petitioner should be offered reemployment. Petitioner’s contract expired by its own terms and the matter of a successor contract was totally within the purview of the Board. As was said by the Commissioner in *Robert B. Lee v. Board of Education of the Town of Montclair, Essex County*, 1972 S.L.D. 5 wherein a nontenured teaching staff member was not reemployed:

“\*\*\*Under such circumstances and because, without legal compulsion and on its own initiative, the Board publicly stated the reasons for its decision not to renew petitioner’s contract and afforded him the opportunity of a full hearing on the merits thereof, the Commissioner holds that there is no reason for his intervention in this matter. The Board’s actions herein were certainly deliberate and time consuming; naked and unsupported allegations are insufficient to establish grounds for action. *George A. Ruch v. Board of Education of Greater Egg Harbor Regional High School District, Atlantic County*, 1968 S.L.D. 7, 10, affirmed by the State Board of Education, 1968 S.L.D. 11, affirmed by the New Jersey Superior Court,

Appellate Division, March 24, 1969; *John Ruggiero v. Board of Education of Greater Egg Harbor Regional School District*, decided by the Commissioner March 17, 1970; *U.S. Pipe and Foundry Company v. American Arbitration Association*, 67 N.J. Super. 384 (App. Div. 1961)\*\*\*”

(at p. 8)

The Commissioner views as applicable herein and is constrained to reiterate that which was stated in *Ruch, supra*, as follows:

“\*\*\*The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner’s interest, does not open the door automatically to a plenary hearing on the validity of the ‘reasons’ for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. *It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.*\*\*\*”

(*Emphasis supplied.*) (at p. 10)

For those reasons hereinbefore set forth the Commissioner finds for the Board. No plenary hearing is required. The Amended Petition of Appeal is without merit and is dismissed.

COMMISSIONER OF EDUCATION

August 17, 1976

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 17, 1976

For the Petitioner-Appellant, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., and Richard Greenstein, Esq., of Counsel)

For the Respondent-Appellee, George J. Otlowski, Jr., Esq., of Counsel

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

December 1, 1976

**Board of Education of the Township of Cinnaminson,  
in the County of Burlington,**

*Petitioner,*

v.

**Laurie Silver,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

This matter having been opened to the Commissioner at conference of counsel for the respective parties and it appearing: (1) that the petitioner's petition was duly filed with the Commissioner of Education on October 16, 1974, and duly served on respondent on October 16, 1974; (2) that petitioner prays that the Commissioner of Education construe 18A:30-1 as not entitling respondent, a tenured teaching staff member, to the use of her accumulated sick leave during the period in which she may be absent from her duties due to maternity; (3) that respondent has filed an answer to the petition in which she alleges that she filed a complaint with the New Jersey Division on Civil Rights on October 10, 1974 alleging that petitioner's refusal to allow her to utilize accumulated sick leave while she is disabled due to maternity is violative of N.J.S.A. 10:5-12(a); (4) that no copy of the complaint so alleged to have been filed with the Division on Civil Rights has ever been served upon petitioner; (5) that no action has ever been taken upon said complaint, after the alleged filing thereof, by respondent or by the Division on Civil Rights; (6) that petitioner contends that the controversy arises under the School Laws,

specifically 18A:30-1, and should be decided by the Commissioner under the jurisdiction conferred upon him by 18A:6-9 to hear and determine all controversies and disputes arising under the school laws; (7) that respondent contends that the controversy arises under the New Jersey Law against discrimination rather than Title 18A and thus is not one over which the Commissioner of Education has jurisdiction; (8) that respondent requests that the petition be dismissed or, in the alternative, that the Commissioner refrain from determining the same until respondent's complaint is decided by New Jersey Division on Civil Rights;

NOW, THEREFORE, IT IS on this 20th day of March, 1975, ordered and determined that the Commissioner will refrain from exercising his jurisdiction in this proceeding pending action by the Division on Civil Rights.

COMMISSIONER OF EDUCATION

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, March 20, 1975

For the Petitioner-Appellant, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

For the Respondent-Appellee, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

The appeal from the decision of the Commissioner of Education is dismissed without prejudice.

June 26, 1975

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Brown, Connery, Kulp, Wille, Purnell & Green (George Purnell, Esq., of Counsel)

For the Respondent, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Cinnaminson, hereinafter "Board," has been engaged in a controversy with respondent, a tenured teaching staff member in its employ, with respect to her eligibility for sick leave benefits during a period of absence for maternity reasons in 1974. The Board avers that its denial of such benefits during periods of maternity leave is a proper exercise of its discretion pursuant to law. It further avers that the New Jersey sick leave statutes, *N.J.S.A. 18A:30-1 et seq.*, should be construed to be applicable only to disabilities due to illness or injury and that the disabilities of pregnancy or the birth of a child may not be so categorized. It requests a summary judgment to this effect. Respondent maintains that the Board's limitation on sick leave benefits to exclude maternity reasons is a denial of equal protection of law guaranteed by the United States Constitution and a direct violation of Federal statutes and rules.

The dispute is submitted for summary judgment by the Commissioner of Education on a stipulation of essential facts and on Briefs. It was delayed in reaching the present submission by the fact that prior to the time the instant Petition of Appeal was filed by the Board, respondent had advanced a Petition concerned with the same dispute before the Division on Civil Rights. When apprised of this earlier Petition, the Commissioner determined to hold the instant Petition in abeyance until such time as the Civil Rights Division had acted. *Board of Education of Cinnaminson, Burlington County v. Laurie Silver*, decided by the Commissioner March 20, 1975, aff'd State Board of Education June 26, 1975, dismissed Docket No. A-4047-74 New Jersey Superior Court, Appellate Division, March 3, 1976 This latter dismissal was occasioned by the fact that the Commissioner had determined and announced that in the absence of a decision by the Division on Civil Rights he would consider the matter on its merits. Brief submission in the instant matter was completed on April 27, 1976.

The stipulated facts are set forth as follows in summary form as recited by respondent and petitioner.

Respondent has been employed since 1965 as a teaching staff member by the Board and has acquired a tenure status. *N.J.S.A. 18A:28-5* On September 10, 1974, respondent, by letter to the Board's Assistant Superintendent of Schools, requested that the Board allow her to use accumulated sick leave for such time as she expected to be temporarily disabled due to maternity, which time was estimated at six to eight weeks. Respondent was at that time expecting to give birth during the latter part of October 1974. The Board's only reply to respondent's request was a letter dated September 23, 1974 from the Assistant Superintendent to respondent which advised her that she had not, as required by the Board's policy, made a request to the Board for maternity leave in an unpaid status.

Respondent repeated her request by letter under date of September 24, 1974, and on October 3, 1974, the Assistant Superintendent replied in writing. He wrote, *inter alia*, the following:

“\*\*\*Please be advised that it is impossible for you to use your accumulated sick leave for disability since there is no policy of the Board or provision of the Teachers’ Agreement concerning disability leaves.\*\*\*”  
(Schedule D, as annexed to the Petition)

Thereafter, respondent requested and was granted maternity leave without pay by the Board for the period October 28, 1974 to January 5, 1975.

Respondent thereafter gave birth on November 5, 1974, and was discharged from the hospital on November 9, 1974. Her physician stated she could return to work on December 22, 1974 but because of a holiday recess she did not return until January 6, 1975.

The Board has at all times refused respondent’s request to credit accumulated sick leave for the dates of her absence due to pregnancy and she has received no pay or other benefits for any day of the period. (Her entitlement to “sick leave” as of September 4, 1974 was a total of 59½ days.)

Additionally, the Board avers that despite requests for a physician’s certificate of “*actual*” disability, respondent has never tendered such certificate. The Board states that it did receive the following letter from respondent’s physician:

“Mrs. Laurie Silver, a former obstetrical patient of ours, delivered on November 5, 1974. She was discharged from the hospital on 11/9/74. We allow our patients six weeks from their date of discharge to return to work. Therefore, her return to work date was December 22, 1975. (sic) Due to the Christmas holiday, she returned to work on January 6, 1975. “Mrs. Silver was due to deliver on 10/19/75 (sic) therefore, her last day to work should have been September 6th, 1975 (sic). Due to her feeling able to work, she worked until October 28, two weeks before she had the baby.”

(Brief of Petitioner, at p. 2)

(Note: The chronological recital is in error with respect to the due date, expected leave date and return-to-work date. All three dates were actually in 1974.)

This concludes the recital of essential facts.

The issues with respect to such facts were determined at a conference of counsel conducted on January 10, 1975, as follows:

“The principal issue herein is whether or not respondent is entitled to sick leave benefits as provided in law (*N.J.S.A.* 18A). If she is, there are subsidiary determinations to be made:

- (a) The legal standard which establishes the parameters of the entitlement;

- (b) Respondent's specific, delineated entitlement in the circumstances of her application for sick leave."

These issues depend for determination on the interpretation of one principal statute, *N.J.S.A.* 18A:30-1, wherein sick leave is defined. The specific entitlement to sick leave is set forth in *N.J.S.A.* 18A:30-2 as conditioned by 18A:30-4. All three of these statutes are recited in their entirety as follows:

*N.J.S.A.* 18A:30-1

"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 a disease in his or her immediate household."

*(Emphasis supplied.)*

*N.J.S.A.* 18A:30-2

"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."

*N.J.S.A.* 18A:30-4

"In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave."

It is the Board's primary contention that a "disability" attributable to pregnancy or the birth of a child is not a disability within the purview of the law "due to illness or injury" and that the Legislature never intended such construction of the statute. The Board further contends that the Commissioner's function herein is a limited, narrow one; namely "\*\*\*to construe the statute in issue by determining the meaning of the pertinent statutory language." (Board's Brief, at p. 5) The Board's argument is grounded in a series of court decisions which have held that words in a statute are to be given their ordinary meaning in interpreting legislative intent. It cites *Kingsley v. Hawthorne Fabrics, Inc.*, 197 A.2d 673, 41 N.J. 521 (1964); *Duke Power Co. v. Patten*, 118 A.2d 529, 20 N.J. 42, 49 (1955); *State v. Madden*, 294 A.2d 609, 61 N.J. 377 (1972). In the application of these cases to the instant matter, the Board asserts

"\*\*\*that the legislature clearly intended that sick leave was *not* to be granted for *all* disabilities, regardless of cause. If they had so intended, the legislature would not have limited the word 'disability' by adding 'due to illness or injury.'\*\*\*" *(Emphasis in text.)* (Board's Brief, at p. 6)

The Board also maintains that in the absence of prior interpretation of the statute, *N.J.S.A.* 18A:30-1, the Commissioner should take notice that local boards of education have not in the past permitted maternity leave to be classified as sick leave with a corollary salary entitlement. Further, the Board asserts that the standards for interpretation of the statutes involved herein are solely State standards involved with statutory construction and that Federal standards or constitutional rights are not applicable to the required determination. Indeed, the Board avers:

“\*\*\*Should the respondent seek to test the petitioner’s conduct according to Federal standards, she may seek her remedy in the appropriate Federal forum.\*\*\*”  
(Board’s Brief, at p. 10)

Respondent does in fact assert that Federal standards must be employed in any assessment of her entitlement to use sick leave credit for her disability attributable to pregnancy and the birth of her child. Specifically, she cites the Fourteenth Amendment to the United States Constitution, which guarantees equal protection of law, the Civil Rights Act of 1964, as amended, 42 *U.S.C.A.* § 2000(e) *et seq.* and the guidelines for the implementation of such Act promulgated by the Equal Employment Opportunity Commission, hereinafter “EEOC.”

Respondent asserts, with respect to the equal protection argument, that there was no compelling State interest which justified her exclusion from sick leave benefits and that such exclusion, therefore, “\*\*\*has created a distinction based upon sex\*\*\*” in violation of the constitutional principle. (Respondent’s Brief, at p. 5) She cites *Kahn v. Shevin*, 416 *U.S.* 351, 357-8 (1974) in support of this view and avers that the Court’s decision in *Geduldig v. Aiello*, 417 *U.S.* 484 (1974), which would appear to negate the view, is factually distinguishable.

Respondent also places great reliance on the Civil Rights Act of 1964 and the interpretations of the Act by the EEOC. In particular, she cites from the Act:

“It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” (42 *U.S.C.A.* § 2000 e-2(a)(1))

and the definitions pertinent to an “employer.” An employer in the Act is defined as:

“\*\*\*a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person\*\*\*.” (42 *U.S.C.A.* § 2000 e-2(b))

and there is a further definition of “person” in this context as

“\*\*\*one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.” (42 U.S.C.A. § 2000 e-2(a))

Respondent further cites the rules of the EEOC, designed by the Commission to carry out the provisions of the Act, as found at Title 29, Labor, Chapter XIV, Part 1604, as amended (29 C.F.R. 1604):

“Guidelines on Discrimination Because of Sex;

§ 1604.9-Fringe Benefits.

“(a) ‘Fringe benefits,’ as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the ‘head of the household’ or ‘principal wage earner’ in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that ‘head of household’ or ‘principal wage earner’ status bears no relationship to job performance, benefits which are so conditioned will be found a *prima facie* violation of the prohibitions against sex discrimination contained in the Act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) If shall be unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.”

§ 1604.10-*Employment Policies Relating to Pregnancy and Childbirth*  
“(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.”

Additionally respondent cites a number of court decisions which have upheld the validity and applicability of the EEOC Rules to the mandate of the Act and its pertinence to local school districts. *Sale v. Waverly – Shell Rock Board of Education*, 390 *F. Supp.* 784 (*N.D. Iowa* 1975); *Vineyard v. Hollister Elementary School District*, 64 *F.R.D.* 580 (*N.D. Cal.* 1974); *Barbara R. Hutchison v. Lake Oswego School District No. 7 et al.*, 374 *F.Supp.* 1056 (*D. Ore.* 1974), 519 *F.2d* 961 (*C.A. 9*, 1975); *Wetzel v. Liberty Mutual Insurance Co.*, 511 *F.2d* 199 (*C.A. 3*, 1975), *cert. granted* 421 *U.S.* 987 (1975), argued January 19, 1976, decision pending); *Satty v. Nashville Gas Co.*, 522 *F.2d* 850, 854 (*C.A. 6*, 1975); *Holthaus v. Compton and Sons*, 514 *F.2d* 651 (*C.A. 8*, 1975)

Respondent avers that such decisions were based on factual situations

“\*\*\*identical in all material respects to the instant proceedings, [and] the employer was found to be in violation of the Act by refusing to treat disabilities caused by pregnancy in the same manner as it treated those caused by other conditions.\*\*\*” (Respondent’s Brief, at p. 15)

It follows, in respondent's view, that the Commissioner should construe *N.J.S.A.* 18A:30-1 as encompassing all pregnancy and birth related disabilities and that she should be "made whole" for the alleged violation of her legal rights.

The Commissioner has reviewed all such facts and arguments and determines that, as the Board contends, the prime requirement herein is to construe the meaning of the statutory language of *N.J.S.A.* 18A:30-1 and particularly of that section of the statute which describes and defines sick leave as absence attributable to "disability due to illness or injury." Even construed narrowly, however, the Commissioner determines that there is no impediment against construction of the statute to favor respondent. A person with nausea is no less ill because the condition is occasioned by pregnancy rather than another cause. The practical effect of an inability to stand for extended periods of time with comfort is no less an injury than a bad bruise or a broken bone.

Indeed, it may be imagined that this Board and other boards in the State have traditionally interpreted the sick leave provision in this manner, within the context of a continuing service of a teaching staff member or another employee. The difficulty usually arises, however, and has arisen in this instance, when the service is no longer continuous but in fact must be terminated for a rather lengthy period of time. The question is whether the difficulties of this period should also be classified as "illness or injury" for sick leave credit.

The Commissioner determines that they must be if, in conformity with the statutory authority (*N.J.S.A.* 18A:30-4), there is a physician's certificate which specifically attests to the condition as "disabling" prior to the beginning of the ninth month of pregnancy or after a period of one month following the birth of a child, but that, for the orderly conduct of the schools and the general welfare of employees, a less specific certificate of birth expectancy may suffice in the two month interim.

In this latter regard the practical realities are clearly dominant except that, if a teaching staff member or other employee wishes to continue beyond the beginning of the ninth month of pregnancy or to return prior to one month from the birth of a child, it would appear that a specific certificate of fitness would also be advisable from the employee's own physician and/or from the school's medical examiner.

Such determinations are not inconsistent with usual statutory construction. They are clearly consistent with the large number of recent Federal court decisions cited by respondent on the subject of maternity leave which were grounded in the mandate of the Civil Rights Act of 1964 and the EEOC rules pertinent thereto.

As one example there is the decision of the Court in *Hutchison, supra*. There, as here, the teacher notified the school of the necessity for leave for reasons of pregnancy and it was stated the leave would be for a period of only three weeks. The teacher was, in fact, absent for fifteen and one-half working

days, but her request for sick leave credit was refused. The basis for refusal was a school district determination that childbirth was not an "illness or injury." Plaintiff appealed and grounded such appeal in the same Civil Rights Act and rules pertinent thereto as respondent advances in the instant matter.

The District Court in *Hutchison, supra*, found for the plaintiff, determined that since 1972 school districts have been required to meet the mandate of Title VII, Civil Rights Act, and that the school district's distinction:

\*\*\*\*between childbirth-caused disabilities and other medical disabilities is arbitrary and irrational. The distinction serves no legitimate interest of the Board of the School District. It penalizes the female teacher for asserting her right to bear children.\*\*\*\* (374 F.Supp. at 1065)

The Commissioner's determination in the instant matter is the same.

Accordingly, and commensurate with the reasoning set forth, *ante*, the Commissioner directs the Board to afford sick leave credit to respondent for the period of absence prior to the birth of her child and for one month (twenty working days) thereafter. This direction is predicated on a determination that the "physician's certificate" of record suffices for this limited period. The Commissioner holds, however, that in the context of the Board's requests for specific certification of disability the certificate lacks the specificity that is necessary for sick leave credit as otherwise requested beyond such period.

Finally, and for clarity in future similar matters, the Commissioner observes that there may be disagreement between the physician of an employee and a school physician over certification of disability. In such instances the Commissioner recommends that the opinion of a third physician, mutually agreeable to the parties, be sought and that the parties agree to abide by his decision.

Except as specifically applied to respondent the directions set forth, *ante*, are to be regarded as prospective in scope. Respondent's complaint and the instant Petition were promptly advanced and the delay is not attributable to either party.

COMMISSIONER OF EDUCATION

August 17, 1976

Pending before the State Board of Education

**James V. Kochman and Keansburg Teachers Association,**  
*Petitioners,*

*v.*

**Board of Education of the Borough of Keansburg, Monmouth County,**  
*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, Healy & Falk (Patrick D. Healy, Esq., of Counsel)

Petitioner, a tenured teacher employed by the Board of Education of the Borough of Keansburg, hereinafter "Board," avers that the Board has improperly deducted nine sick leave days from his record. He requests reinstatement of nine sick leave days or, in the alternative, payment of full salary for such days. Petitioner is joined in his Petition of Appeal by the Keansburg Teachers Association. The Board maintains that its action in deducting nine sick leave days from the record of entitlement of petitioner was just and proper and further maintains that the Keansburg Teachers Association has no standing in this matter and moves that the Petition in its entirety be dismissed.

A conference in this matter was conducted on March 8, 1976 in Trenton by a hearing examiner appointed by the Commissioner of Education. The parties agreed at that time to submit the matter for Summary Judgment by the Commissioner on a stipulation of facts and the filing of Briefs.

A brief recitation of the relevant material facts is essential for an understanding of the matter controverted herein.

Petitioner on February 8, 1973, met with an accident arising out of and in the course of his employment by the Board and as a result of injuries sustained in this accident he was absent from work for fourteen consecutive working days from February 9, 1973 through March 3, 1973. Petitioner was issued a check for temporary disability compensation under the Workmen's Compensation Laws of New Jersey. Petitioner retained this check for nearly one year. (Respondent's Brief, at p. 1) Subsequent to petitioner's endorsement of this check (Respondent's Brief, Exhibit D), the Board reinstated petitioner's sick leave time for this period of his compensable disability.

Thereafter "\*\*\*as a result of the injuries \*\*\* and \*\*\* the necessity to obtain medical treatment\*\*\*" petitioner was absent from work in 1973 on March 7, 21, 28, April 12, May 3, 31 and October 4, 23, and also on January 24, 1974. (Petition of Appeal, at p. 2)

The Board “\*\*\*receiving no verification of \*\*\* these visits \*\*\* deducted the absences of Petitioner as sick days\*\*\*.” (Respondent’s Brief, at p. 2) The Board further relies on the language of the Order Approving Settlement of July 29, 1973, issued by Judge Seymour M. Stadtmayer to buttress its determination that the number of compensable sick days as fourteen was a final one.

Petitioner relies on the provisions of *N.J.S.A.* 18A:30-2.1 “\*\*\*that those days could not be legally considered sick days and charged against sick leave\*\*\*.” (Petitioner’s Brief, at p. 3)

The Commissioner agrees. *N.J.S.A.* 18A:30-2.1 provides:

“Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury *caused by an accident arising out of and in the course of his employment*, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year *without having such absence charged to the annual sick leave or the accumulated sick leave* provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen’s Compensation of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen’s compensation award made for temporary disability.” *(Emphasis added.)*

The Board’s allegation that it did not receive verification of or authority for the contested nine days is without merit. The affidavit of the physician who treated petitioner is rendered herein in its entirety:

“THEODORE POTRUCH, M.D., of full age, being duly sworn according to law upon his oath deposes and says:

“1. This is to certify that I am a licensed medical doctor of the State of New Jersey.

“2. My offices are located at 279 Third Avenue, Long Branch, New Jersey and I treated Mr. James V. Kochman as a result of injuries sustained in an accident on February 8, 1973.

“3. In addition to being absent for a period of time directly after the accident, he lost the following additional days:

“1973: March 7, 21, 28; April 12; May 3, 31; October 4, 23;

“1974: January 24;

“4. It is my professional opinion that the loss was directly attributable to the sequalae (sic) of the accident of February 8, 1973.” (C-1)

The affidavit, affirming as it does “\*\*\*that the loss [of days] was directly attributable to the sequalae (sic) of the accident of February 8, 1973” stands uncontested and uncontroverted by any evidence from the Board. Absent the showing of any contravening credible evidence and for the reasons emphasized in *N.J.S.A.* 18A:30-2.1, the Commissioner therefore directs the Keansburg Board of Education to add nine sick leave days to petitioner’s credit of unused leave for personal illness. The Commissioner agrees with the Board’s view that the Keansburg Teachers Association has no standing in the instant matter. No relief for the Keansburg Teachers Association has been requested nor can any relief be afforded; therefore this portion of the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 18, 1976

Vincent L. De Chiaro,

*Petitioner,*

v.

Board of Education of the Morris School District, Morris County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Vincent L. De Chiaro, *Pro Se*

For the Respondent, Meyner, Landis & Verdon (Jeffrey L. Reiner, Esq., of Counsel)

Petitioner commenced employment for the Township of Morris Board of Education, hereinafter "Township Board," in September 1967 and continues to be employed by the Morris School District Board of Education, hereinafter "Morris Board." Petitioner, on December 15, 1975, moved for Summary Judgment by the Commissioner of Education to enjoin the Morris Board to retroactively compensate him in the amount of \$1,900 for employment by the Township Board for the school years 1967-68, 1968-69, and 1969-70. The Morris Board on March 12, 1976, moved to dismiss the Petition of Appeal. Oral argument was heard on the Motion on March 18, 1976 in Trenton by a representative of the Commissioner. This matter is before the Commissioner for determination on the record.

The essential facts are not in dispute. Petitioner was first employed by the Township Board in September 1967 as a school social worker at the rate of \$9,900, the thirteenth step on the master's degree level of the salary guide, based upon petitioner's possession of a M.S.W. degree. He was subsequently reemployed by the Township Board in 1969 and 1970 at the fourteenth and fifteenth steps, respectively, of the master's degree level of the salary guide.

The Township Board in 1969 employed another social worker who possessed the same M.S.W. degree and who was placed on the MA+30 degree level of the then existing guide. Petitioner, upon his request in 1970, was placed for the school year 1971-72 on the MA+30 level of the 1971 salary guide. The Morris Township Board of Education (Township Board) in 1972 merged with the Morristown School District and became the combined Morris School District (Morris Board) which continued to employ petitioner.

Petitioner claims entitlement to the following salary amount due to the failure of the Township Board to initially place him on the MA+30 level of the salary guide:

Year	Salary Received	Salary Due	Difference
1967-68	\$ 9,900	\$10,400	\$ 500
1968-69	11,025	11,625	600
1969-70	12,350	13,150	800
		Total	\$1,900

Petitioner cites *Albert DeRenzo v. Board of Education of the City of Passaic, Passaic County*, 1973 S.L.D. 236 to offset any defense of laches by the Morris Board. He further depends on *Mitchell v. Alfred Hoffman* (Tr. 19) and, on *N.J.S.A. 18A:13-50* “\*\*\*that regional districts shall be subject to all the contracts, debts, and other obligations of each dissolving district.\*\*\*” (Petitioner’s Brief – P-2)

The Morris Board in argument cites *N.J.S.A. 18A:29-9* as follows:

“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 Morris Board also cites *Cole v. Board of Education of Trenton*, 122 N.J.L. 585 (*Sup. Ct.* 1939).

The Morris Board further applies the six year statute of limitations of *N.J.S.A. 29:14-1*:

“Every action at law for\*\*\*recovery upon a contractual claim or liability, express or implied, not under seal\*\*\*shall be commenced within 6 years next after the cause of any such action shall have accrued.”

The Morris Board argues the equitable bar of laches citing *Cole v. Brandle*, 127 N.J. Eq. 31 (*E. & A.* 1940); *Bahr v. Breeze Corps., Inc.*, 126 N.J. Eq. 124, 128 (*Ch.* 1939); *Marjon v. Altman*, 120 N.J.L. 16 (*Sup. Ct.* 1938); *Smock v. Atlantic Casualty Ins. Co.*, 25 N.J. Super. 324 (*App. Div.* 1953) and the recent Commissioner of Education decisions of *Blanche Beisswenger et al. v. Board of Education of the City of Englewood, Bergen County*, 1972 S.L.D. 444, aff’d State Board of Education November 1, 1972 and *Robert Quay et al. v. Board of Education of the Township of Haddon, Camden County*, 1976 S.L.D. 118.

The Commissioner finds that no credible evidence was offered showing that petitioner had made claim to the Township Board for change of status for which he now seeks relief. (Tr. 20-21)

The Commissioner observes that in 1967 petitioner was employed by the Township Board for the school year 1967-68 at the agreed step of the master’s degree level of the salary guide and was advanced accordingly at this level for the school years 1968-69 and 1969-70. Petitioner in 1970 asked for and received placement on the MA+30 level of the salary guide for the school year

1971-72. Petitioner offered no credible evidence to show that he, at that time, requested of the Township Board the retroactive compensation for which he now lays claim. The Commissioner opines that there would have been a logical and appropriate time for such claim to be made if at all.

There are two issues of law having paramount impact on this matter before the Commissioner. *N.J.S.A.* 18A:29-9 governs initial salaries and provides:

“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.”

Petitioner agreed with the Township Board as to his initial salary placement as evidenced by the employment contracts between petitioner and the Township Board for the respective school years 1967-68, 1968-69 and 1969-70. (C-1; C-2; C-3) All evidence shows that these agreements were knowingly and voluntarily consummated by the parties concerned. No claim is made that the Township Board made any misrepresentation to petitioner at that time or that it acted improperly. Therefore, the Commissioner finds no basis for the intervention of his judgment in this claim founded in and triggered by, as it is, an initiating event of nine years ago.

The Commissioner further concludes that petitioner’s delay in making an effective protest warrants a finding of laches. In *Dorothy Elowitch v. Bayonne Board of Education, Hudson County*, 1967 *S.L.D.* 78, aff’d State Board of Education 86, aff’d N.J. Superior Court, Appellate Division, 1968 *S.L.D.* 260, the Commissioner stated:

“\*\*\*Justice Heher said in the case of *Marjon v. Altman*, 120 *N.J.L.* 16 at page 18:

“While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. \*\*\**Taylor v. Bayonne*, 57 *N.J.L.* 376; *Glori v. Board of Police Commissioners*, 72 *Id.* 131; *Drill v. Bowden*, 4 *N.J. Mis. R.* 326; *Oliver v. New Jersey State Highway Commission*, 9 *Id.* 186; *McMichael v. South Amboy*, 14 *Id.* 183.’\*\*\*”

(1967 *S.L.D.* at p. 85)

The Commissioner has examined the arguments in support of the Motion to Dismiss. For the reasons enunciated, *ante*, the Motion is granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 18, 1976

Mary Ann McCormack, Robert R. Yundzel, and Elwyn F. Spangler,  
*Petitioners,*

v.

Boards of Education of the Northern Highlands Regional High School District  
or the Borough of Fair Lawn, Bergen County,  
*Respondents.*

## COMMISSIONER OF EDUCATION

### DECISION

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

For the Respondent Fair Lawn Board, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

For the Respondent Northern Highlands Regional Board, Scafuro & Gianni (Albert O. Scafuro, Esq., of Counsel)

Petitioners, nontenure teachers in the employ of the Boards of Education of the Borough of Fair Lawn or of the Northern Highlands Regional High School District, hereinafter "Boards," allege that decisions of the Boards not to renew their contracts of employment for the 1975-76 academic year were improperly founded, arbitrary and capricious actions. They request a hearing before the Commissioner of Education to prove the allegations. The Boards aver they have legally terminated petitioners' employment and that there is no relief the Commissioner can or should afford.

The original Petitions of Appeal in these matters were filed on or about the date of July 10, 1975, and the Answers thereto were filed on or about the date of August 15, 1975. The Petitions were delayed in reaching the Commissioner for consideration, however, because of a letter from the Assistant Commissioner of Education, Division of Controversies and Disputes, to petitioners on July 23, 1975, which combined the three Petitions "\*\*\*for the purpose of hearing oral argument on the Commissioner's own Motion to Dismiss.\*\*\*" The letter indicated that the Motion was predicated on a determination that the Petitions were inadequate in the context of the parameters for the presentation of such controversies set forth in *Mary C. Donaldson v. Board of Education of the City of North Wildwood, Cape May County*, 65 N.J. 236 (1974) and *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 S.L.D. 332. The letter said, *inter alia*:

"It is our position that teaching staff members must provide adequately detailed specific instances of allegations that a local board of education was arbitrary, capricious or abused its discretion.

“From your letter of July 9, 1975, we conclude that you do not intend to file revised petitions of appeal in these three matters in order to set forth specific allegations showing instances to support the argument that the Boards were arbitrary. Accordingly, we will combine these three cases for the purpose of hearing oral argument on the Commissioner’s own Motion to Dismiss.”

Oral argument on such Motion was conducted on December 11, 1975 at the State Department of Education, Trenton. Subsequent thereto petitioners did file Amended Petitions of Appeal and the Boards filed Amended Answers. Briefs and/or Memoranda of Law were also filed in support of or opposed to consideration of the Amended Petitions by the Commissioner.

Thus, the matter for consideration herein is whether or not the Petitions, even as amended, are properly presented for adjudication as controversies under the school law. The basic facts are not in dispute and are set forth separately for each petitioner as follows:

Petitioner McCormack was employed by the Regional Board as a certificated teacher of mathematics for the 1972-73, 1973-74 and 1974-75 academic years. In March 1975 the Board resolved not to renew her contract for the ensuing year and informed her of such resolve prior to April 30, 1975. Subsequently she requested a statement of reasons from the Board and a “meeting” to discuss its decision. On May 19, 1975, the Superintendent of Schools, in response to Petitioner McCormack’s request, wrote to her and said:

“The Board of Education did not renew your contract because the majority of the members of the Board felt that they could get a better teacher.”  
(Exhibit A to Petition of Appeal)

Subsequently on June 9, 1975, Petitioner McCormack requested a further statement of reasons and a “meeting” with the Board. On June 26, 1975, the Superintendent reiterated the original statement of reason in a second letter and also said:

“Nothing in our contract, nor anything in the law, requires the Board of Education to grant a hearing, and as in cases of other teachers the hearing was denied.”  
(Exhibit B to Petition of Appeal)

(While such letter clearly denied a “hearing” to petitioner, it is unclear that she asked for one *per se*. The Answer to the Amended Petition of Appeal admits that it was a “meeting” that had been requested.)

It is stipulated that the Board’s decision with respect to nonrenewal of Petitioner McCormack’s contract was one it made against the recommendation and advice of school administrators. (Tr. 36) The recommendations petitioner received from such administrators subsequent to the notification controverted herein may be classified as laudatory. (Exhibits C, D and E to Petition of Appeal) The Amended Petition further avers that there was no indication in the years of

petitioner's service that she lacked in competence and that all cases of her evaluation reports had been marked as satisfactory. Such avowal is not specifically denied in the Amended Answer although there is a general denial that, as petitioner alleged in paragraph seven of the Petition, the reasons provided by the Board were "without foundation" or "wholly unsupported."

Petitioner requests an order reinstating her to her position and for compensation appropriate to it. She further requests dismissal of the Motion to Dismiss her Petition and a hearing on her principal complaint that in the circumstances of her service and the record pertinent thereto the Board's action was arbitrary and capricious.

Petitioner Yundzel's Petition is similar in all important respects, except one, to Petitioner McCormack's. He was notified in timely manner of the Board's decision to nonrenew his contract. He requested reasons and a hearing before the Board and was ultimately given the same reason for non-reemployment as the Board gave Petitioner McCormack and was denied a "hearing".

He was, however, initially informed on May 5, 1975, that the reason for his non-reemployment was attributable to "\*\*\*\*staff reductions necessitated by the budget defeat\*\*\*\*." (Exhibit A to Petition of Appeal) He now avers that such reason was false and that his position has been filled. The Board maintains that a budget defeat had indeed prompted such notices in the first instance but that subsequently certain nontenure teachers had been reemployed. It further maintains that the specific reason it subsequently afforded Petitioner Yundzel on May 23, 1975 for his nonrenewal — the Board believed it "could get a better teacher" — was the correct one.

Finally, with respect to Petitioner Yundzel, it is stipulated that he had requested a hearing before the Board and that such request was contained in a letter to the Board dated May 27, 1975. The request was denied on June 2, 1975.

Petitioner Spangler was employed by the Fair Lawn Board for the same three year period as recited for the other petitioners and was informed on or about April 29, 1975, that his contract would not be renewed for the ensuing year. He requested a statement of reasons on May 7, 1975, and received it on or about May 20 in a letter from the Secretary to the Board. The letter is recited in its entirety as follows:

"In accordance with your correspondence of April 17th and May 7th, 1975, you have requested that the Board of Education of the Borough of Fair Lawn provide reasons for its determination not to offer you a contract for the 1975-76 School Year.

"To the extent that it is humanly possible, may we assure you that the Board of Education has endeavored to arrive at a fair and proper assessment of your position in light of the needs and best interest of the Fair Lawn School System. Initially, may we state that we are fully aware that the Superintendent of Schools and your immediate superior have recommended your re-employment and have accorded this very important

element considerable consideration in our deliberations. It is evident, however, that the Board of Education disagrees with its administrative staff in this regard and has elected not to offer you a contract that would, in fact, provide tenure in this school system.

“Upon consideration of your communication to the Superintendent of Schools dated October 29, 1974, the recommendations of the administrative staff and your immediate supervisor, the informal conference attended by you with the Board of Education, the comments of parents and students in your classrooms during your period of employment, reveal at least to this Board inadequate classroom performance in one vital aspect. It appears that there is a rather consistent inability on your part to place the various functions of the music teacher in proper perspective. In the judgment of the Board your performance in the classroom indicates that you have neglected to a considerable extent your basic function as a classroom teacher in order to devote an inordinate amount of time to special functions. For example, while your enthusiasm in becoming involved in the preparation and production of major musical shows is commendable, you permitted this collateral function to virtually monopolize your time and to reach such proportions so as to undermine your principal function of being a classroom teacher. It is, so to speak, an example of the tail wagging the dog. We consider, despite the accolades of your immediate superiors, that one of the most important ingredients of a teacher in the vocal music department is a sense of balance, in order that the overall needs of all students are served. You indicated in your correspondence to the Superintendent that competitiveness for the casting of music productions necessarily causes concomitant disappointments and criticisms by youngsters who do not successfully attain roles in the \*\*\* [cast]. We disagree. In our judgment, we believe that a vocal music instructor should be able to conduct a musical show, specialties, and other various collateral activities, always keeping these in proper context, however, so as to be certain not to erode his basic classroom functions. It is our judgment that by the nature of your correspondence and our conversation with you and the events that have transpired that your philosophy is inconsistent with the above and that it is not reasonable to anticipate that you would be willing or able to reconcile your approach to the expectations of the Board.

“Furthermore, your responses, at the informal meeting with the Board, to the several complaints set forth in the memorandum submitted by one of the trustees, a copy of which has been forwarded to you, were considered unsatisfactory by the Board.

“It is our sincere hope that these comments will be taken in the spirit in which they are set forth and perhaps, to some extent, the suggestions will help you in attaining these skills in any further teaching role that you may fulfill. We, of course, wish you the best of success.” (A-1)

Subsequently, it is stipulated, Petitioner Spangler requested an informal appearance before the Board which was granted on June 9, 1975. Thereafter on

June 18, 1975, the Board reiterated its previous decision not to reemploy him. Petitioner, however, continues his challenge of that decision. He avers the reasons which the Board stated prompted it “\*\*\*are wholly unsupported by a basis in uncontested fact, either in the statement of reasons itself or in the teacher’s file\*\*\*” and he lists a number of favorable evaluations of his work in support of an assertion that the reasons are “false and fraudulent.” (See paragraphs 8 and 9, Petition of Appeal.)

Thus, in summary of the basic facts of the three Petitions, it may be said:

1. Each of the petitioners had been in the employ of their respective Boards for three years.
2. Each of them received timely notice in April 1975 pursuant to law (*N.J.S.A.* 18A:27-10) that his/her contract would not be renewed.
3. All petitioners requested a statement of reasons which prompted the decision to nonrenew their respective contracts and received them.
4. All petitioners requested a hearing or a meeting or appearance with the respective Boards but only Petitioner Spangler was granted an appearance.
5. All petitioners were recommended by their professional superiors for a continuance of their employments.
6. Petitioners McCormack and Yundzel received reasons for their nonrenewal which were subjective in nature. Petitioner Spangler received a reason for his non-reemployment which indicated the Board concluded there was an incompatible philosophical difference between its philosophy of teaching and that of petitioner.
7. All petitioners aver the reasons for this non-reemployment were not founded in responsible fact and that the decisions based thereon were thus arbitrary and capricious and should be set aside.
8. There is no allegation herein that the Boards’ decisions were grounded in proscribed reasons of racial or ethnic background, exercise of free speech, etc., or the result of bias.

Thus the question for decision is whether or not such Petitions in their original or amended versions present specific allegations of unreasonableness, arbitrariness or capriciousness to warrant the direction by the Commissioner of a plenary hearing.

Petitioners aver that they are entitled to the “benefit of the doubt” with respect to a Motion of Dismiss and that their Petitions have fully complied with the requirements for the filing of such Petitions. They cite *Donaldson, supra*, and *Hicks, supra*, in support of this avowal. They further aver that they have “\*\*\*factually alleged that the reasons provided by the Board of Education are

wholly unsupported in fact, and a hearing is necessary to allow them to prove it.\*\*\*” (Petitioners’ Brief, at p. 6) They maintain that such a hearing will enable the Commissioner to decide whether each Board “\*\*\*had substantial evidence before it upon which its decision was based.” (Petitioners’ Brief, at p. 9)

The Fair Lawn Board asserts that the Amended Petition of Petitioner Spangler is no more precise than the original in its citation of specific instances of arbitrary or capricious abuse of discretion and it stipulates again that it disagreed with its own administrators when it refused to renew Petitioner Spangler’s contract. It argues that there is “nothing but the blanket assertion” that it acted arbitrarily and capriciously in so doing and that such assertion is contrary to the direction of *Hicks, supra*. In summary the Board asserts:

“The contention [of petitioner] is that the Board simply has no right to make such a subjective determination and that the Petitioner desires a full dress hearing to prove that the Board cannot conclude such a determination as to what it expects from a music teacher.\*\*\*”

(Respondent’s Supplemental Memorandum of Law, at p. 6)

It states this is precisely not what the Board has the burden to establish and cites *Donaldson, supra*, wherein the Court said:

“\*\*\*If he is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, when he asks, he be told why. Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him\*\*\*.” (65 N.J. at 245)

The Northern Highlands Regional Board also relies on *Donaldson, supra*, for an avowal that a decision of a local board to nonrenew the contract of a non-tenure teacher may be grounded on many valid reasons other than unsatisfactory classroom or professional performance. It otherwise relies on the arguments advanced by the Fair Lawn Board. (See Tr. 11, 37.)

The Commissioner has reviewed all such facts and arguments and the two sets of three Petitions and finds that contrary to the direction of *Hicks, supra*, the Petitions fail to provide “adequately detailed specific instances” subject to proof by petitioners of allegations of arbitrary, capricious actions by the Boards. There is only the allegation that the Boards’ reasons lack a factual base and a demand that they be allowed to prove this allegation.

Such a demand presents great difficulty since in essence the proof required by accession to it would put the burden of proof upon the Boards and not on petitioners. In substance the Boards, as in a charge against a tenure teacher, would be required to produce factual support for a conclusionary reason or one basically

subjective in nature and not subject to such proofs. The statement that the Northern Regional Board “felt” it could get a better teacher is admittedly not precise. It leaves much to be desired if assistance to teaching staff members is, as the Court indicated in *Donaldson* it should be, a human consideration which should be provided at the point of employment termination. Nevertheless, the Court recognized in *Donaldson* that there are many reasons for such decisions and that a statement of reasons by local boards of education “\*\*\*would in no wise curb the breadth of the board’s discretionary authority to decide whether any particular teacher should or should not be reengaged.\*\*\*”

(at pp. 245-246)

Such authority is similarly not impinged when, as stipulated, petitioners’ evaluation reports made by school administrators were favorable. As the Commissioner said in *Donald Banchik v. Board of Education of the City of New Brunswick, Middlesex County*, 1976 *S.L.D.* 78:

“\*\*\*[P]etitioner’s assertion that he performed his duties well as principal and that he adduced testimony to that effect from others at the informal appearance, provides insufficient reason to direct that the Board’s determination be reviewed at a plenary hearing. While the Board could have been more specific in stating its reasons for non-reemployment, it was under no obligation to do so. The reasons given, related as they are to the broad areas of responsibility of a principal, are not frivolous and are entitled to a presumption of correctness. Absent a detailed listing of specific instances wherein the Board acted arbitrarily, capriciously or unreasonably, the Commissioner will not direct that the Board’s determination be subjected to further review. As was said in *Boult, supra* [*Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, aff’d 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff’d, 136 *N.J.L.* 521 (*E. & A.* 1948)]

“\*\*\*It 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.\*\*\*” (1939-49 *S.L.D.* at p. 13)\*\*\*” (at p. 82)

The facts in the instant matter attest to the correctness of a basically similar determination. Petitioners, as nontenure teachers, were notified in timely fashion by their Boards that their contracts would not be renewed. Subsequently they asked for and received the reasons for such nonrenewal and although the reasons, particularly with respect to Petitioners McCormack and Yundzel, were subjective in nature they are not *per se* rendered inadequate by that fact. Nor are they inadequate in the context of the instant Petitions since such Petitions fail to detail specific instances of arbitrary or frivolous actions which should necessitate a plenary hearing before the Commissioner.

There remains the due process direction of the Court in *Donaldson, supra*; that upon request nontenure teachers whose contracts fail renewal should be granted an “appearance” before the local board of education. While such an appearance was granted to Petitioner Spangler, it was denied to Petitioners

McCormack and Yundzel, even though in Petitioner Yundzel's case he had requested a meeting with the Board and such request had been within the time parameter (ten days from receipt of reasons) set forth in *Hicks, supra*, on May 6, 1975. Although an appearance may now be too long delayed to have the possibility of fruitfulness, it must nevertheless be afforded at least to Petitioner Yundzel and the Commissioner directs that he be offered this opportunity by the Board.

In all other respects the Petitions are dismissed.

COMMISSIONER OF EDUCATION

August 20, 1976  
Pending before State Board of Education

**Gregory Cordano,**

*Petitioner,*

v.

**Board of Education of the Township of Weehawken, Hudson County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

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

For the Respondent, Le Roy D. Safro, Esq.

Petitioner avers that he has been employed since 1968 by the Board of Education of the Township of Weehawken, hereinafter "Board," and has acquired a tenure status. He further avers he was notified in April 1975 that his position had been abolished and that his services would no longer be required. Petitioner asserts, however, that his position was not in fact abolished, rather, the functions and duties he once performed were merely assigned to other teaching staff members, and that he is qualified and capable to teach the Board's newly designated courses. He contends, therefore, that his termination is violative of his constitutional, statutory, and common rights, and that he was denied due process, equal protection of the laws, the right of a hearing, and confrontation and opportunity to present evidence on his own behalf. Petitioners pray for reinstatement with all of the rights which he would have had if he had not been terminated.

The Board admits that petitioner holds appropriate certification for a teacher of industrial arts and that he was notified in April 1975 that his position

had been abolished and that his services would no longer be required. However, the Board denies the remainder of petitioner's allegations.

A conference was held between counsel and a hearing examiner appointed by the Commissioner of Education, at which time it was disclosed that:

1. The Board approved a resolution abolishing the industrial arts position which petitioner formerly held and that petitioner was thereafter so notified. (Board minutes, April 8, 1975)

2. At the request of the Board, the Commissioner rendered an advisory opinion concerning petitioner's status which opinion established that he was properly certificated as an industrial arts teacher.

3. The Board established a program, Technology for Children (T4C), in conjunction with the Division of Vocational Education, State Department of Education.

4. This program is taught by regular classroom teachers and is not a specific subject matter offering which requires the expertise of a teacher certified in industrial arts.

The Board thereafter filed a Notice of Motion for Judgment on the pleadings and documents admitted at the conference, stating that no material issue of fact is raised by the pleadings and that the Commissioner should, therefore, rule in its favor.

The Commissioner has examined the pleadings, the documents relied on and discussed at the conference, and the Commissioner's own records with respect to the T4C program which was initiated and fostered by the Division of Vocational Education. The Commissioner concludes, after a review of the pleadings and the aforementioned records, that this matter is ready for decision as the Board requests.

The authority for the Board to abolish positions is statutory. *N.J.S.A. 18A:28-9 et seq.* Petitioner does not contest this authority nor does he offer proof that the Board's action was made in bad faith. The Commissioner's own records show that the T4C program is conducted by classroom teachers at the elementary level and that it is sponsored by the Department's Division of Vocational Education. Further, petitioner states that he holds an appropriate certificate to teach industrial arts. That certificate does not, however, qualify petitioner to teach T4C in a classroom setting in an elementary school. Finally, there is no offer of proof of a violation of any of petitioner's rights other than his bare allegations as set forth in his Petition of Appeal.

The Commissioner is convinced from his review of this record, that petitioner has failed to state a claim upon which relief may be granted, therefore, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 31, 1976

**John Hyun,**

*Petitioner,*

v.

**Board of Education of the Borough of Wharton, Morris County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Saul Alexander, Esq.

For the Respondent, Fullerton & Porfido (Eugene Porfido, Esq., of Counsel)

Petitioner is a tenured instrumental music teacher in the employ of the Board of Education of the Borough of Wharton, hereinafter "Board." He protests an action of the Board reducing his employment from five days per week to three days per week with a corresponding reduction in salary. The Board denies that its action reducing petitioner's employment and salary was in any way improper.

The matter is submitted to the Commissioner of Education for Summary Judgment in the form of the pleadings, a stipulation of facts and attached exhibits.

Petitioner was the sole instrumental music instructor for the Board from September 1969 through June 1975. On April 3, 1975, the Board issued a letter of intent to employ petitioner for the ensuing school year. At the time the letter of intent to employ was issued to petitioner, the Board was in litigation in the case of *Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County*, 1975 S.L.D. 737. In that dispute the hearing examiner filed his report on July 8, 1975. Therein, it was found that Popovich who was the Board's only other music teacher and who possessed identical teacher of music certification to that of petitioner herein, had served the Board uninterruptedly for a greater number of years than had petitioner. The hearing examiner recommended that the Commissioner determine that, within that factual context, Popovich

was certified and had seniority rights to continue in full-time employment as a teacher of either choral music, instrumental music or both. The report further recommended that the Commissioner direct the Board to restore Popovich to a full-time teaching position.

Upon receipt of the aforementioned hearing examiner report, the Board promptly advised petitioner of the recommendations therein. Thereafter, on September 3, 1975, the Board passed a resolution and noticed petitioner that his employment would be reduced from five days per week to three days per week with corresponding reduction in salary, such reductions to become effective in ninety days. (Exhibits C, D) The Superintendent in September and October advised petitioner that Popovich was being assigned a full-time position to teach both choral and instrumental music and that only three days of instruction remained for assignment to petitioner. The Superintendent further instructed petitioner that during the ninety day period while he remained on full-time employment and salary, he was to utilize two days a week to assist Popovich in effectuating a transition of duties connected with the instrumental music program.

On October 7, 1975, the Commissioner rendered his opinion and ordered that Popovich be reinstated within the scope of her certification to a full-time position for "\*\*\*\*as long as a full-time position is maintained in her category and as long as she performs acceptably those duties to which she is assigned.\*\*\*\*" (*Popovich, supra*, at p. ) Petitioner was promptly informed of the Commissioner's determination and of the Board's continuing resolve to reduce his employment and salary effective December 1, 1975. (Exhibit E) However, by mutual agreement and without prejudice full employment and salary prorated at \$14,423 per year was extended to petitioner until December 31, 1975. Thereafter, petitioner worked three days per week and was paid on a pro rata basis of \$8,645 per year. (Exhibit F) At no time did the Board pass a formal resolution abolishing petitioner's full-time position. Petitioner protested the Board's action and refused to sign an agreement to accept reduction of employment and salary.

Petitioner charges that the Board's action reducing his working days and salary was in violation of his tenure rights and the provision of *N.J.S.A.* 18A:28-5 which states, *inter alia*, that tenured teaching staff members "\*\*\*\*shall not be \*\*\* 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 [*N.J.S.A.* 18A:6-9 *et seq.*]\*\*\*." Petitioner argues that the Board's failure to abolish petitioner's full-time position and to create in its place a new part-time position renders its action illegal and invalid. Petitioner argues further that such a reduction in work load as contemplated by the Board must be negotiated and may not be viewed as the Board's sole prerogative.

Petitioner argues further that he held a property interest in his full-time employment which entitles him to compensation for at least the entire 1975-76 school year. He similarly avers that timely notice was not afforded, thus rendering the Board's act arbitrary. Finally, he reasons that the Board had made or should have made budgetary provision to employ him at full salary for the entire

school year, and that the reduction of his employment was not in good faith. For these reasons petitioner prays for an order of the Commissioner directing the Board to restore him to his former full-time position and to pay him the difference between the salary he actually received and that which he would have received had he remained a full-time teacher.

The Board admits that it did not formally abolish petitioner's full-time position and create in its place a part-time position but holds that the actions it did take, as hereinbefore set forth, were a reasonable exercise of its statutory discretionary powers and in the public interest.

The Commissioner has carefully reviewed the pleadings, the exhibits in evidence and the decisional law relevant to the controverted matter. In *Mildred Wexler v. Board of Education of the Borough of Hawthorne, Passaic County*, 1976 S.L.D. 309, aff'd State Board of Education 314, the Hawthorne Board of Education by formal resolution reduced from full time to half time the employment of its French teacher. That resolution was in all essential aspects similar to the action taken by the Board, herein, in that it did not formally abolish the full-time position which had existed. Similarly, the arguments of law advanced by *Wexler* were essentially identical to those advanced by petitioner, herein, with the sole exception that *Wexler* sought (but was denied) to move the matter to a plenary hearing. Of the reduction in staff effectuated in *Wexler*, the Commissioner stated:

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

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

(at p. 195)

“Herein, the Commissioner finds no evidence that the Board’s act was one of subterfuge or designed to compel a resignation as charged by petitioner. Rather, the resolution’s clear and open phraseology reveals an intent on the Board’s part to reduce its teaching staff by one half of one teacher in the field of French as a result of declining voluntary enrollment in that subject.

“The Commissioner agrees that the Board, when confronted with the fact that three classes in French averaging thirteen pupils each would suffice, was obligated to reduce its teaching staff in that sector. The Commissioner, in recognition of the language of *N.J.S.A. 18A:28-9*, opines that the proper way to effectuate such a change would have been to abolish the full-time position and establish in its place the part-time position, to which petitioner was entitled by reason of her seniority rights. However, the Commissioner finds that the Board’s resolution by its clear and unambiguous language reveals an intent which comports with the intent of the

Legislature as set forth in *N.J.S.A.* 18A:28-9 which places no limitation on the time when a board of education may effectuate a reduction in teaching staff for reasons of economy or other good cause. Accordingly, the Commissioner holds that the Board's July 8, 1975 resolution is legal and valid.\*\*\*" (Emphasis in text.) (at p. )

And,

“\*\*\*Absent a finding that the Board acted in violation of the statutes, or in an arbitrary, capricious manner, or was motivated by bad faith, the Commissioner, for the reasons hereinbefore set forth, determines that such procedural defect as is found in the resolution of July 8, 1975, is insufficient to render the Board's action null and void. Accordingly, absent a showing of impropriety, the Board's action is entitled to a presumption of correctness. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E. & A.* 1948) The arguments of the Board in support of the Motion to Dismiss must prevail.\*\*\*” (at pp. 313-314)

Without question, the Board in effecting a reduction in staff, herein, should have abolished petitioner's full-time position and established in its place a part-time position. Such defect, however, is insufficient to render the Board's action null and void. The Commissioner, finding in the instant controversy no evidence of subterfuge on the part of the Board, but rather an open, forthright and timely advisement of petitioner of its need and intention to act to reduce staff in the public interest and in compliance with law, determines that the matter is rendered *stare decisis* by *Wexler, supra*. The Commissioner, perceiving no bad faith or arbitrary action on the part of the Board, determines that the Board, in a reasonable exercise of its discretionary authority, effected a reduction in staff in accord with its reduced instructional needs and that such reduction was in the public interest.

Accordingly, Summary Judgment is rendered in favor of the Board. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 31, 1976

**George Marotta,**

*Petitioner,*

v.

**Board of Education of the Borough of Sayreville, Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, Casper P. Boehm, Jr., Esq.

Petitioner, who has been employed for twenty years as a teaching staff member by the Board of Education of the Borough of Sayreville, hereinafter "Board," alleges that the Board's abolishment of his position as mathematics coordinator and his reassignment to a classroom teaching position were acts of reprisal which violated his constitutional right of freedom of expression.

The Board denies that its action was in any way improper, illegal or violative of petitioner's constitutional rights.

A hearing was conducted on October 6 and 7, 1975 at the East Brunswick Vocational School, 112 Rues Lane, East Brunswick, by a hearing examiner appointed by the Commissioner of Education. The undisputed facts surrounding the controverted matter are as follows:

Petitioner served the Board as full-time non-teaching mathematics coordinator for both its elementary and secondary schools from September 1966 through January 21, 1975, with the exception of the 1969-70 school year when he was assigned as a vice-principal and the 1972-73 school year when he was granted a sabbatical leave. On January 21, 1975, the Board voted to abolish the position of mathematics coordinator effective January 31, 1975, and to transfer petitioner to a secondary school mathematics teaching position effective February 3, 1975. (R-9) Petitioner, who received a \$725 stipend in addition to his salary as delineated in the negotiated agreement (R-8), was paid both his salary and that stipend in full for the 1974-75 school year. (Tr. II-31) He continues to teach without benefit of a stipend during the 1975-76 school year.

Petitioner alleged that the Board's action abolishing his position of mathematics coordinator was not a *bona fide* reduction in force but was taken primarily to chill and stifle expressions critical to the actions of the Board and its agents. He further charged that the abolishment of his position was a subterfuge to penalize him for his candid criticism of the Board's salary policies which he had caused to be published in a letter to the editor of a local newspaper. This

letter, which indicated that the stipend paid to the language arts coordinator or to petitioner as mathematics coordinator was less than that paid to any one of six head athletic coaches at level two on the negotiated guide, stated the following:

“Whereas the ‘Letter to the Editor’ appearing \*\*\*on January 13, 1975 refers to sex-related discriminatory salary practices in public school athletic positions, we in the academics experience no such frustrations. The mathematics coordinator (male) and the language arts coordinator (female) receive equal pay for equal responsibilities. Instead, we are the victims of a distorted set of social values. The following, abstracted from our present salary schedule, reflects the importance placed upon various positions in the educational world.

	STEP 1	STEP 2
Football Coach (Head)	\$975	\$1400
Basketball Coach (Head)	700	1050
Baseball Coach (Head)	700	1050
Wrestling Coach (Head)	525	900
Soccer Coach (Head)	575	1000
Spr. Track Coach (Head)	525	850

Mathematics Coordinator (all seasons) – After 7 yrs. \$725

“We, in the academics, abide by the same rules. We also try to ‘win every game.’ But our cries, falling on deaf ears, become fainter than those from the mute fans in the sports’ stadium” (P-1)

Petitioner stated that he mailed this letter to the newspaper on Tuesday, January 14, 1975 with copies posted on the same date to each member of the Board. (Tr. I-98-100) He further stated that neither the Superintendent’s letter dated January 15, 1976 (R-2), nor the Superintendent’s rescheduling of his duties as mathematics coordinator dated January 6, 1975 (R-7), indicated that on those dates the Superintendent had any intention of recommending the abolishment of his position. (Petitioner’s Brief, at p. 2)

Petitioner testified that he was never made aware of any unfavorable evaluation of his performance as a coordinator nor that he was advised prior to January 21 that there was any contemplation of abolishing his position. He testified that at 10:00 a.m. on that day he was given an ultimatum by the Superintendent to either resign that very morning as mathematics coordinator or the position would be abolished by the Board that evening. (Tr. I-21) Petitioner argues that such precipitate notice in the middle of the school year, related to him in a hostile and threatening manner, could not have been part of a considered plan of reorganization but was, rather, an act of reprisal against him for criticizing the Board in the aforementioned letter. (*Id.*, at pp. 4-5)

Petitioner avers that such an action of reprisal may only be construed to be an abridgement of his constitutional right of freedom of expression and cites

in this regard *Donaldson v. Board of Education of the City of North Wildwood*, 65 N.J. 236 (1974); *Pickering v. Board of Education of the Township High School District 205, Will County, Ill.*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972). Petitioner urges that such a contextual pattern requires that the Commissioner determine that his freedom of expression was abridged. He prays the Commissioner to direct the Board to reinstate him to his former position as mathematics coordinator and make him whole for any damage or monetary loss.

Conversely, the Board argues that petitioner's letter played no significant part in the decision by the Board to abolish the position of mathematics coordinator. Rather, the Board states that the Superintendent had long considered a plan of reorganization which would eliminate both the mathematics and the language arts coordinators and establish instead a director of elementary education and numerous curriculum study committees. The Board states that the resignation of a secondary mathematics instructor, effective January 1975, provided opportunity to take the first step of such reorganization by transferring petitioner, a tenured employee, into the vacancy thus created. (Respondent's Brief, at p. 3) The Board further states that it anticipates the retirement of its only other subject coordinator within a short period of time and that no replacement is planned for that position. (*Id.*, at p. 3)

The Board maintains that the Superintendent recommended and the Board decided at its caucus meeting on January 14 that petitioner's position should be abolished and that he be transferred to the high school teaching vacancy. The Board further states that no consideration of petitioner's letter was given at either its caucus meeting or the official meeting of January 21 when the position was abolished. Thus, the Board argues that petitioner has failed to prove that the controverted letter was a factor in either the recommendation of the Superintendent, the discussion by the Board or its action abolishing the position of coordinator of mathematics. Accordingly, the Board moves for the dismissal of the Petition of Appeal on grounds that its action was a sound exercise in discretion pursuant to its statutory authority set forth in *N.J.S.A. 18A:28-9*.

The hearing examiner has carefully considered the testimony of witnesses at the hearing, the exhibits in evidence, the pleadings, and the Briefs of counsel. He finds the record to be totally devoid of proof that petitioner's letter or the publishing of that letter in a newspaper in any way influenced the Board or its Superintendent to act in reprisal against his exercise of constitutionally guaranteed freedom of expression.

This finding is grounded on the forthright testimony of the Superintendent wherein he testified that such matters as stipends are all determined by negotiations and that "\*\*\*\*this letter meant nothing to me; nothing at all.\*\*\*\*" (Tr. I-169) He further testified that at the Board's caucus meeting on January 16 "\*\*\*\*there was no reference to that letter at all that evening.\*\*\*\*" (Tr. I-171) It is also grounded on the testimony of the Superintendent wherein he stated that he had advised the Board approximately a year earlier that he favored abolishment of the subject coordinators' positions and the creation of the

position of a director of elementary education. (Tr. I-157, 173) The testimony of the Superintendent in this regard is amply corroborated by that of members of the Board and the assistant superintendent who testified that such a recommendation had indeed been made on more than one occasion at an earlier time by the Superintendent. These same persons testified that the Board did not discuss petitioner's letter or consider it to be of any significance. (Tr. II-42-43, 45, 88, 91, 95-96, 101, 105-107)

The Superintendent testified that, since the establishment of the positions of subject coordinators, a Rutgers report had recommended that curriculum committees be formed to initiate and coordinate curricular changes. He stated that numerous such committees have been established consisting of principals, teachers and parents and that it is his opinion that they have largely supplanted the necessity for subject coordinators. (Tr. I-155) This viewpoint was shared by four of the Board's elementary principals and the assistant superintendent who testified that they found the committee system to be more effective than the services of the coordinators in curriculum development. (Tr. II-49, 59-60, 66, 76, 85)

The hearing examiner concludes that the Superintendent noted that a vacancy had occurred suitable to petitioner's teaching skills and recommended to the Board that it begin the piecemeal implementation of his proposed staff reorganization by abolishing petitioner's position as coordinator and transferring him to the teaching vacancy. When the Board concurred in caucus meeting, the Superintendent gave petitioner opportunity to resign if he so chose. When he did not, the Superintendent placed the abolishment of the position and the transfer on the Board's agenda. Thereafter, the Board acted in accord with the Superintendent's recommendation on January 21. The end result of the Board's action was one of reduction in staff taken legally, pursuant to its authority under *N.J.S.A.* 18A:28-9.

Absent a finding that the Board acted in reprisal against petitioner's exercise of expression or a showing of bad faith or other impropriety on the part of the Board, the hearing examiner recommends, first, that the Commissioner determine that petitioner has failed to sustain his burden of proof and, second, that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record of the controverted matter including the testimony elicited from witnesses, the Briefs, the exhibits in evidence and the exceptions filed by petitioner pursuant to *N.J.A.C.* 6:24-1.16.

Petitioner takes exception to the finding of the hearing examiner that the record is devoid of proof that petitioner's published letter motivated the Board or the Superintendent to act in reprisal against his exercise of free expression.

A careful review of the record convinces the Commissioner that, on January 16, 1975 at a caucus meeting and prior to the publishing of the letter, the Board considered the Superintendent's proposal to abolish petitioner's position. Thereafter, on January 21, the Board, with no discussion whatsoever of the controverted letter, acted affirmatively on the Superintendent's recommendation to abolish the position. Such action, absent proof of bad faith or illegality, was within the discretionary judgment of the Board pursuant to *N.J.S.A.* 18A:28-9, which 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 of change in the administrative or supervisory organization of the district \*\*\*.”  
(Emphasis supplied.)

It is argued in the exceptions that the Superintendent's animated conversation with petitioner on January 21, the date of publication of his letter in the newspaper, does not comport with the hearing examiner's finding that the Superintendent did not act in reprisal against petitioner. The Commissioner's review of the testimony of the hearing, however, causes him to affirm this and all other findings of the hearing examiner. Petitioner himself testified that, at his meeting with the Superintendent on January 21, no mention was made of the letter. Petitioner further testified that he had no knowledge that either the Board or the Superintendent had read the published letter prior to abolishing his position as mathematics coordinator. (Tr. I-102)

Petitioner's mere surmise that his published letter must have antagonized the Board and the Superintendent does not constitute proof that the Superintendent or the Board acted illegally or in reprisal. Criticism by subordinates of school policy or administrative practice does not, *ipso facto*, create grounds for setting aside the official acts of administrators or boards of education, absent proof of impropriety, statutory violation or abrogation of constitutional rights.

The Commissioner is constrained to comment upon the matter of the constitutional rights of free speech of teaching staff members. It was said by the United States Supreme Court in *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969) that:

“\*\*\*It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate. This has been the unmistakable holding of this Court for almost 50 years.\*\*\*”  
(at p. 506)

It was similarly enunciated by the Court in *River Dell Education Association v. River Dell Board of Education*, 122 N.J. Super. 350 (Law Div. 1973) that:

“\*\*\*[A] teacher's statements, wherever made, are to be given no less opportunity for issuance than those of any other citizen.\*\*\*”  
(at p. 355)

The Commissioner in his powers of review pursuant to *N.J.S.A.* 18A:6-10 *et seq.* has assiduously guarded the protected constitutional rights of teaching staff members by setting aside the actions of boards when it has been proven that these rights have been violated. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County*, 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976; *North Bergen Federation of Teachers, Local 1060 AFL-CIO and Raymond Farley v. Board of Education of the Township of North Bergen, Hudson County*, 1975 *S.L.D.* 138 In other instances, when proof was insufficient, the acts of boards have been affirmed. *Long Branch Education Association and William Cook v. Board of Education of the City of Long Branch, Monmouth County*, 1975 *S.L.D.* 1029, aff'd State Board of Education May 5, 1976

The record herein, however, is barren of proof that either the Superintendent or the Board acted in reprisal against petitioner for causing a critical letter to be printed. Absent such proof, petitioner's charges that his constitutionally protected freedom of expression was violated is wholly without merit.

Accordingly, respondent's Motion to Dismiss the Petition of Appeal, made at the conclusion of petitioner's case and held in abeyance for action of the Commissioner, is granted.

COMMISSIONER OF EDUCATION

August 31, 1976

**In the Matter of the Tenure Hearing of**

**John Martz,**

**School District of the Township of Franklin, Somerset County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complaint Board, Graham, Yurasko, Golden & Lintner (Jack L. Lintner, Esq., of Counsel)

For the Respondent, John Martz, *Pro Se*

Charges of inefficiency were certified to the Commissioner of Education on January 16, 1975 by the Board of Education of the Township of Franklin, Somerset County, hereinafter "Board," against John Martz, hereinafter "respondent," a teacher with a tenure status in its employ. Respondent denies the charges against him and seeks immediate reinstatement to his position of employment from which he was suspended.

Eight days of hearings were conducted in the matter commencing on May 9 and concluding on October 22, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Board certified to the Commissioner the following five charges of inefficiency against respondent:

*"CHARGE I:* Failure to plan and actively teach a class as observed by the principal, department chairman and students.

*"CHARGE II:* Continued excessive absence from school.

*"CHARGE III:* Failure to prepare lesson plans for substitute teachers during the times of his absence.

*"CHARGE IV:* Failure to provide a documented record of adequate lesson plans associated with his teaching responsibilities.

*"CHARGE V:* Mr. Martz continued to perform inefficiently as charged in Charges I-IV during the 90 day period, which was allowed him in order to correct and overcome said inefficiencies. The 90 day period began on September 4, 1974 and included meetings on October 18, 1974 and November 13, 1974 with Mr. Martz's department chairman and

principal in order to assist Mr. Martz to correct and overcome his inefficiencies. Notwithstanding the 90 day period of time and conferences of October 18th and November 13th, Mr. Martz continued to perform in an inefficient manner as charged in Charges I-IV.”

Though the first charge is not precise on its face with respect to what is meant by “actively teach” the Board asserts that the charge, *in toto*, incorporates an allegation of inefficiency with respect to respondent’s “\*\*\*general teaching [ability and/or effectiveness] and grading [for purposes of achievement levels] of students.\*\*\*” (Tr. I-41) Furthermore, the department chairman, who is the Board’s chief witness in support of the charges against respondent, testified that for a teacher to “actively teach” presupposes that the teacher “\*\*\*has a prepared [written] lesson [plan, on a daily basis].\*\*\*” (Tr. II-57; Tr. III-96) The high school principal, who was also called to testify in support of the charges, explained that the first charge alleged that by virtue of respondent’s failure to prepare and submit weekly lesson plans, he, respondent, failed to “actively teach.” (Tr. VI-76)

Consequently, the hearing examiner concludes that the gravamen of the charges is that respondent failed to prepare a daily and/or weekly lesson plan, in writing, for submission to his department chairman which, it is alleged, resulted in his inferior teaching. This being so, the hearing examiner will consolidate Charge I with Charge IV for purposes of his report. Moreover, because the issue of plans for substitute teachers is inextricably intertwined with the total question of planning, Charge III shall be considered *in pari materia* with Charges I and IV. In addition, the hearing examiner also concludes that the Board alleged in Charge I that respondent failed to maintain appropriate records of his pupils’ achievements for the subsequent assignment of grades.

With respect to Charges II and V, the hearing examiner finds that the evidence adduced by the Board, with respect to Charges I, III and IV, also deals with the allegation of absence and tardiness. Consequently, Charges I through IV will be considered together. The hearing examiner observes that the substantive content of Charge V asserts that respondent failed to correct his alleged inefficiencies as set forth in the first four charges. In the hearing examiner’s view, an independent determination on Charge V is not necessary.

Respondent has been employed by the Board for thirteen years and was assigned to teach five classes of United States History which involves approximately 100 pupils. (Tr. I-118) By virtue of his teaching assignment, respondent was a member of the high school’s social studies department whose chairman has been employed by the Board for eight years, the last three of which he has held the position of social studies department chairman. (Tr. I-10) The department chairman possesses a standard teacher’s certificate for social studies (Tr. I-11), and there are thirteen teachers assigned to his department. (Tr. I-118) The department chairman also has teaching responsibilities. (Tr. III-112) Respondent, as a member of the social studies department, was responsible to the department chairman who, in turn, was responsible to the principal. (Tr. I-38) The specific responsibility of the department chairman, according to his

job description (P-11), is to assist the principal in assisting the teachers in the respective departments. To this end, the department chairman is to provide leadership, coordination, and innovation in curriculum planning and development, supervision, administrative duties, and other assignments given him by the principal.

The department chairman testified that written lesson plan requirements on a daily and yearly basis (P-2), as well as written requirements for teachers to have lesson plans available for substitute teachers (P-3; P-4) and requirements for teachers to follow with respect to the grading of pupils' achievement levels (P-1), are set forth in the teachers' handbook. (Tr. I-14, 19, 22, 24) The substitute teacher plans, aside from the weekly plans, are drawn up by the teacher before an absence. (Tr. I-25) The principal testified that these policies (P-1; P-2; P-3; P-4) are administrative policies, and the principal corroborated the department chairman's testimony that each faculty member had been given a copy of the handbook. (Tr. I-34-35; Tr. VI-23-24)

The hearing examiner observes that the lesson plan policy (P-2) requires each teacher to prepare detailed daily lesson plans at least one week in advance, in addition to a more general overview of the entire course of study for the school year. The detailed daily lesson plans were to be set forth in a "Plan Book-Register" (P-23) and kept in the upper right drawer of the teacher's desk or in his mailbox. In addition, the Plan Book-Register contains a section (Register) in which teachers are expected to record the names of pupils by sections or periods, and specific grades and their attendance records.

The department chairman testified that when regular teachers are to be absent they are required by policy (P-3) to have their Plan Book-Register available for use by the substitute teacher and to have a prepared lesson plan. (Tr. I-27; P-3) In fact, substitute teachers are advised by substitute teacher policy (P-4) that the lesson plans for the specific class they are assigned are located in the teacher's desk drawer or mailbox.

The department chairman testified that the necessity for written lesson plans was discussed at departmental meetings he conducted. (Tr. I-36) Another social studies teacher, a colleague of respondent's and a member of the social studies department, corroborated that the subject of lesson plans was discussed at departmental meetings and he further explained that the instructions received were that lesson plans were to reflect "\*\*\*a sketchy outline of what [the teacher] intended to during that week.\*\*\*" (Tr. V-61) Another person who was employed by the Board as a permanent substitute teacher and who attended social studies departmental meetings during 1973-74 and the fall of 1974, testified that the necessity for lesson plans was discussed at the meetings she attended. (Tr. V-81)

The record, including documentary evidence, establishes that respondent was notified of his alleged inefficiencies by letter (J-1) dated June 7, 1974 from the Superintendent of Schools. Prior to that time the department chairman had complained of respondent's failure to have his lesson plans available and the

plans he did leave were unacceptable. Additionally, the department chairman had complained, prior to June 7, 1974, of respondent's failure to record grades and of respondent's personal attendance and tardiness record with respect to his reporting to school.

Specifically, on November 1, 1973, the department chairman addressed a memorandum (P-5) to respondent and to the high school principal which advised that respondent had been absent from school on October 11, 16, 23, and November 1, 1973. Of the four days absent, the department chairman states that respondent failed to leave lesson plans for the substitute teacher three of those days.

On November 19, 1973, the department chairman submitted a memorandum (P-6) to the high school principal which states that respondent was absent on November 7 and 8, 1973, and that his plans for the two days were identical and were not sufficient for two days. The chairman also asserts that respondent returned to school ill on November 9; that respondent was absent on November 19; that his plans were not acceptable for November 13 and 14; that on November 14, 1973, respondent's recording of grades was incomplete; and that on November 19, 1973, respondent went home ill from school.

Another memorandum (P-7) was submitted to the principal by the department chairman on December 5, 1973 in which complaints were set forth with respect to respondent's performance. The department chairman stated that respondent had been absent from school on November 7, 8, 12, 13, 14, ½ day on November 19 as was earlier reported in his memorandum (P-6) of November 19, 1973. In his memorandum (P-7) of December 5, 1973, the department chairman also noted that respondent had been absent on November 20, 21, 26, 27, 28, 29, and 30. The department chairman also faulted respondent for failure to have plans for substitute teachers on any of the referenced dates he was absent, beginning with November 7 and ending with November 30, 1973. However, the hearing examiner observes that in his memorandum of November 19, 1973 (P-6) the department chairman complained that the plans left by respondent for the substitute teacher on November 13 and 14 were identical and, consequently, insufficient for two days.

The department chairman, in his memorandum (P-7) on December 5, 1973, also complained that respondent failed to submit his pupils' grades which were due on November 13, 1973 for the first marking period. While the grades were turned in on November 21, the department chairman explained that the grades were received too late to be entered in the IBM computer which prints the schools' report cards. Consequently, none of respondents' pupils received grades for his courses for the first semester of the 1973-74 academic year. (Tr. I-47, 49-50)

In the series of memoranda submitted to the principal by the department chairman in regard to respondent's performance, the next in chronological order was one (P-8) dated March 14, 1974, which was critical of the content of respondent's bulletin boards. However, there is nothing in the Board's statement

of charges which alleges inefficient or improper conduct on respondent's part with respect to bulletin boards.

During the period of time prior to June 7, 1974, when respondent was notified (J-1) of his alleged inefficiencies, the department chairman, in addition to his specific written complaints regarding respondent's performance, also observed and prepared evaluations on respondent's classroom teaching performance. On April 3, 1974, the department chairman went to respondent's class to observe. However, respondent requested him to return the next day which the department chairman agreed to do. The department chairman did note this request on an evaluation form (P-9) dated April 3, 1974. It is also observed that the department chairman made the recommendation that respondent review the policies in regard to planning, classroom procedure, bases for pupil evaluation, interpersonal relationships, and personal qualities. (P-9) With the exceptions of planning and bases for pupil evaluation, the record is void of explanation in regard to the other three areas referred to by the department chairman.

The department chairman returned to respondent's class the following day, April 4, 1974, observed his class, and prepared an evaluation. (P-10) This evaluation of respondent's teaching performance must be considered favorable inasmuch as the department chairman asserted that the pupils were prepared, respondent asked relevant questions, pupils' abilities were demonstrated, and respondent provided leadership to the class.

On April 25, 1974, the department chairman submitted a memorandum (P-15) to the principal in which he complained of respondent's performance in regard to his failure to have his plan book with him on April 22, 1974. The department chairman also brought to the principal's attention the fact that both he and respondent had a pupil in their classes who was absent from school thirty of the forty-five possible days during a marking period. Respondent gave the pupil a passing grade and the department chairman wanted an explanation. Respondent allegedly explained that the pupil often did work at Rutgers University Library and further asserted that she "\*\*\*\*probably had gotten (sic) more education there [at the Library] than from being in his [respondent's] class.\*\*\*" (P-15, at p. 2) The hearing examiner observes that the department chairman assigned a failing grade to the pupil (Tr. I-74) and he further concludes that respondent's explanation with respect to why he assigned a passing grade to her did not satisfy the department chairman.

In his memorandum (P-15) of April 25, 1974, the department chairman reported to the principal that respondent refused to meet with him on April 23, 1974 unless the principal was also to be present. The memorandum (P-15) established that such meeting did occur on April 25, 1974. The topics discussed at that meeting included, *inter alia*, the pupil who was absent for thirty of forty-five possible days yet received a passing grade from respondent, respondent's absences from school, his tardiness, and his lesson plans.

According to the conclusion of the department chairman's memorandum (P-15), the principal instructed respondent to maintain up-to-date lesson plans. The principal also advised respondent that he should not expect him, the principal, to be present every time the department chairman wished to speak with him. (P-15, at p. 2)

The department chairman addressed a memorandum (P-16) to the principal and to the Superintendent of Schools on May 15, 1974 in which he cited respondent's refusal to meet with him on that day as requested. The department chairman explained that he wanted to meet with respondent to discuss reports he failed to fill out when he was absent from school (Tr. I-27); why he reported late to school on May 15 and why he left early on another day; his failure to maintain up-to-date plan books and his failure to leave his plans on May 13, 1974, when he was absent; and to discuss, in the department chairman's view, "\*\*\*why his [respondent's] classes seemed to be doing very little but listening to some unrelated records.\*\*\*" (P-16, at p. 1) The hearing examiner observes that respondent was required to report to school at 7:45 a.m. (Tr. III-8) and sign in. (Tr. I-85) The day ended at 3:00 p.m. (Tr. I-84) and teachers were expected to sign out. (Tr. III-118) The last period of the day, from 2:07 p.m. to 3:00 p.m., was used for pupils to secure individual help from teachers. The period was referred to as the P.M. session or activity period. If no pupils appeared by 2:30 p.m., teachers were free to leave their classrooms but could not leave the building until the regular sign-out time of 3:00 p.m. (Tr. I-84)

At this juncture, the hearing examiner observes that the department chairman's conclusion, *ante*, with respect to respondent's classes doing very little is not supported by way of testimony or documentary evidence thus far. The first evaluation (P-10), as previously reported, was favorable. A second evaluation of respondent was prepared by the department chairman on May 22, 1974. It is observed, however, that it is alleged by the department chairman in a memorandum (P-12) submitted to the principal on May 21, 1974 that respondent was absent from school on May 21, 1974. This apparent conflict is not resolved by the documentary evidence or by way of testimony herein. He testified that he went to observe respondent on May 21, 1974. Respondent allegedly explained that he was not prepared and requested the department chairman to return the next day. The department chairman did return the next day and his evaluation was that respondent provided a "good lecture" to his pupils. (Tr. I-65) The department chairman did question, however, whether the pupils were taking sufficient notes. (Tr. I-65) The department chairman's testimony that he concluded respondent's teaching performance was inadequate by virtue of what he had observed of respondent's classes while passing in the corridors (Tr. I-57) is not sufficient, in the hearing examiner's view, to contradict the two formal evaluations as hereinbefore recited.

On May 21, 1974, the day before the last evaluation of respondent, the department chairman sent another memorandum (P-12) to the principal in which respondent's continued tardiness on March 28, 29, April 17, 24, and May 10, 1974 was discussed. The department chairman also reported that on April

16, 1974 respondent could not be located after 1:37 p.m. and that when respondent was absent from school on May 6, 13, 20, and 21 he failed to leave lesson plans.

Again on June 6, 1974, the department chairman submitted two memoranda (P-13; P-14) to the principal in regard to respondent's tardiness. In one (P-13) the department chairman stated that respondent reported late to school on May 28, 29, June 3, 4, 5, and 6. The other memorandum (P-14) indicated there was little improvement in respondent's tardiness in reporting to school. The last two paragraphs, the contents of which shall be discussed, *post*, are reproduced here in full:

“\*\*\*Mr. Martz [respondent] still thinks that I am trying to harass him when I request from him materials that are required of all teachers in the department – example: final exams, lesson plans.

“[Respondent] has also made several derogatory statements about me to other members of the staff.” (P-14)

The last paragraph is recited not to establish the validity of the allegation; rather, it is recited to fairly set forth the atmosphere existing between the department chairman and respondent during the ninety days allowed respondent to correct his alleged inefficiencies.

It is this set of circumstances during the 1973-74 academic year which led to respondent being notified by letter (J-1) from the Superintendent of Schools on June 7, 1974 of his alleged inefficiencies. Respondent was notified of the following inefficiencies:

“1. Failure to plan and actively teach your class as observed by the principal, department chairman and a student.

“2. Repeated tardiness after numerous warnings, whereby you have been notified of said tardiness several times with the objective to cure the same.

“3. Absenting from the school building without following the rules and regulations governing the Franklin Township School System for such absences. Excessive absenteeism from work.

“4. Failure to prepare lesson plans for substitute teachers during the times of absences.” (J-1)

The Superintendent also advised respondent that he would be granted ninety days from September 4, 1974 to correct his alleged inefficiencies or tenure charges would be filed. Respondent was also directed to meet with the principal and with the department chairman to discuss the allegations and “\*\*\*to arrive at a manner and means by which you will have an opportunity to correct and overcome the [alleged inefficiencies].\*\*\*” (J-1, at p. 2)

Prior to the meeting held on June 13, 1974, the department chairman submitted another memorandum (P-17) to the principal on June 12, 1974 which stated that on June 6, 1974, respondent left school for the day at 1:10 p.m., the time he was scheduled to teach a class. The department chairman also reported that respondent was absent on June 7; that on June 10 he reported late to school and left school before the sign-out time; and that on June 11 he left school before the sign-out time.

In anticipation of the June 13 meeting of the department chairman, the principal, and respondent, the department chairman submitted, at the direction of the Superintendent, his views (J-4) to the principal with respect to assistance to be provided respondent. Standards were also established by which respondent's performance was expected to improve.

The principal accepted (J-2) the department chairman's suggestions at the meeting held on June 13, 1974, and adopted them as his own. Respondent was given a copy of the department chairman's recommendations and respondent's only comment, according to the department chairman, was that he would respond to the suggestions

“\*\*\*as soon as I [respondent] have conferred with my attorney and upon his determination as to whether or not a response is necessary at this time.”  
(J-2, at p. 2)

According to the department chairman's suggestions (J-4), hereinafter “plan,” for respondent's improvement and the standards by which his improvement would be measured, respondent was expected to:

1. Submit weekly lesson plans on the Friday before the week in question. The plans were to provide:

- A. The detail of the lesson.
- B. The objectives of the lesson.
- C. The procedures to be used to accomplish the objectives.
- D. The materials used to accomplish the objectives.

The plan provided that respondent would set forth sufficient plans to cover an entire period of forty-two minutes, that he would utilize a variety of teaching methods, that a weekly testing program would be implemented by respondent for purposes of establishing grades. The grading procedure to be implemented by respondent, as differentiated from the adopted grading policy (P-1, *ante*), was to be submitted to the principal and to the department chairman for approval the first full school week in September 1974.

The plan also provided that a regular schedule of class observations would be conducted by the department chairman, principal, and vice-principal in an effort to assist respondent. Respondent was expected to sign in upon his arrival at school and sign out when he left for the day. Respondent was assigned tutorial duty during the last period of the day in his classroom. He was also

expected to leave the Plan Book-Register, as well as up-to-date lesson plans for substitute teachers, each day in his desk; and it was agreed that if conferences were to be conducted between the department chairman and respondent a third person, designated by the principal, would be present.

Subsequent to the commencement of the 1974-75 academic year, the department chairman prepared and submitted a memorandum (P-19) on October 1, 1974 to the principal with respect to respondent's attendance and tardiness. The department chairman stated that as of October 1, 1974, respondent reported to school fifteen of the sixteen possible days that school was in session. He also stated that respondent failed to report for the P.M. session, *ante*, on September 10, 11, 12, 13, 16, 19, 20, 24, 25, 27, 30 and October 1. It is also reported that respondent failed to sign out during the week of September 20, 1974, and that "\*\*\*\*he [respondent] has been frequently late to his classes.\*\*\*\*" (P-19)

On October 3, 1974, the high school vice-principal observed respondent's class and prepared an evaluation. (P-33) The vice-principal reported that he had observed a lesson in which the pupils had a reading assignment. Consequently, he testified he could not evaluate any teaching-learning situation. He did report, however, that respondent's plans were not present in his classroom, as required. (Tr. VII-40) Respondent informed him that his plans were at home. As part of his evaluation, the vice-principal suggested that respondent's lesson plans should be kept in his room, and that tests should be administered at regular intervals to gauge pupil progress. The vice-principal reported that as of October 3, 1974, no tests had been administered to the pupils. (P-23, at p. 2)

The hearing examiner observes that the vice-principal did not discuss his evaluation with respondent, although respondent did receive a copy. (Tr. VII-35, 41)

The department chairman, by way of memorandum (P-22) dated October 8, 1974, addressed to the principal, stated that respondent had failed to improve his performance according to the plan, *ante*, set forth at the June 13, 1974 meeting. Specifically, the department chairman stated that, while respondent had submitted weekly lesson plans for the first two weeks of September 1974, no plans were submitted for the last week of September or the first week of October. (P-22) (Tr. I-88) Furthermore, the department chairman asserted that the lesson plans submitted by respondent failed to set forth a detailed lesson, objectives, procedures, and materials needed, as specified in the plan of June 13, 1974. Finally, in his memorandum (P-22) the department chairman informed the principal that respondent failed to use a variety of teaching methods; failed to provide sufficient plans for a 42-minute class period; failed to conduct weekly tests; and failed to leave his Plan Book-Register in his desk on a daily basis. Specifically, respondent's substitute plans were inadequate on September 23, October 4 and 7, and no substitute plan was available for October 8, 1974. Obviously, respondent was absent from school on those days. The department chairman then reiterated the statements of his earlier memorandum (P-19); namely that respondent was absent from the P.M. session on the days

beginning with September 10 and concluding on October 1, 1974. Respondent was also absent from the P.M. session on October 2, 1974.

On October 14, 1974, the department chairman reported to the principal in memorandum (P-24) that respondent had been absent from school on October 4, 7, 8, 9, 10, 11, and 14. He asserted that the plans left by respondent on October 4 and 7 were unacceptable and that he had received no plans from him since October 7, 1974.

The department chairman testified that a meeting occurred on October 15, 1974, with respondent, the principal, the vice-principal, and himself. (Tr. I-97-98) The purpose of the meeting was to discuss respondent's failure to abide by the requirements and standards of the plan which was presented on June 13, 1974. (Tr. I-98) Subsequent to the meeting, the department chairman prepared a memorandum (P-34) for the principal with respect to what was discussed at the meeting. (Tr. I-99)

In this memorandum (P-34), with respect to the meeting of October 15, 1974, the department chairman stated that respondent's failure to maintain timely lesson plans was discussed. The department chairman asserted that respondent admitted he had not completely complied with the lesson plan requirement. The department chairman also stated that respondent asserted that on one occasion he handed in his lesson plans on a Friday, but did not receive them back from the department chairman the following Monday as required. (Tr. II-145) The department chairman explained in the memorandum (P-34) that he had failed to return the plan book to respondent because it slipped his mind.

The department chairman also asserted (P-34) that respondent stated he was confused as to the detail required in his lesson plans. The department chairman averred that he had supplied respondent with a "detailed outline" to help him in this regard. The hearing examiner observes that the "detailed outline" (P-26) is a xeroxed copy extracted from "\*\*\*a book on teaching \*\*\* methods of social studies.\*\*\*" (Tr. I-119) In response to the specific question addressed to the department chairman from the hearing examiner of

"What other kind of assistance did you give to Mr. Martz [other than (P-26)] regarding lesson plans specifically?"

the department chairman responded:

"I suggested [to respondent] that many of the plans were inadequate, that the students had come to me complaining that the class was too rigid. I suggested that he try a variety of methods, that all students were [not] able to cope with straight lecture. The fact that students had come to me and complained there was nothing going on in the class, and I suggested that maybe he could attempt to bring a variety of methods in and treat the students in a more friendly manner, which he indicated he would do.\*\*\*" (Tr. I-119-120)

The hearing examiner cites this testimony here because of the seriousness of complaints by pupils to a department chairman with respect to a specific teacher. The four-page extract (P-26, *ante*) was discussed in the department chairman's memorandum (P-34) in regard to the meeting of October 15, 1974. Consequently, in that context the hearing examiner concludes that the pupils complained to the department chairman prior to October 15 with respect to respondent. Yet, the department chairman, who by any reasonable measure must be viewed as the originator of the charges herein, did not go to respondent's classroom to observe and evaluate until November 19, 1974. Thereafter, he observed and evaluated respondent two days later, on November 21, 1974. (Tr. III-40) These were the only two occasions the department chairman observed and evaluated respondent's actual teaching performance during his ninety day probationary period. In the hearing examiner's view, two observations and evaluations during a ninety day period hardly constituted a "regular schedule of class observations" by the department chairman as set forth in the plan of June 13, 1974.

In any event, the memorandum (P-34) prepared by the department chairman with respect to the meeting of October 15, discloses that respondent admitted his plans were not available for the vice-principal for the evaluation (P-33) on October 3, 1974. Finally, the department chairman asserted that respondent admitted not having a current record of his pupils' grades at the time of this meeting.

On November 12, 1974, the person who had also served as vice-principal at the high school testified that he observed and evaluated respondent's teaching performance. Thereafter, he prepared a written evaluation report (P-32), a copy of which was given respondent. (Tr. VII-15) Again, respondent's lesson plans were not available. The vice-principal noticed that he could not judge any relationship between classroom activity and planning because of the absence of plans. (P-32, at p. 3) The vice-principal did not have a follow-up observation of respondent's teaching performance. (Tr. VII-22)

The department chairman sent a memorandum (P-25) to the principal in which he asserted that respondent had failed to submit lesson plans for at least three weeks; that his class register was not current; and that he had failed to leave his plan book in the desk. Further, the department chairman charged that respondent failed to leave his plan book, or substitute plans, when he was absent on October 28, 1974; that respondent was absent from the P.M. session on November 1 and 6; that respondent's substitute plans left for November 11, when he took a personal day, were sketchy; and that on November 12, 1974, he, the department chairman, could not locate either respondent or his pupils during the P.M. session.

On November 18, 1974, respondent submitted his proposal (P-35) for grading procedures to the principal as required by the plan of June 13, 1974. The hearing examiner observes that respondent was directed to submit this proposal during the first full school week in September, some two and one-half months earlier.

While it was reported earlier that the department chairman observed and evaluated respondent on November 19 and 21 respectively, no written evaluations were submitted in support of any findings which may have been made.

By memorandum (P-28) dated November 25, 1974, the department chairman informed the principal that respondent had failed to submit his weekly lesson plans since October 25, 1974; that he had failed to document how his pupils' grades were established for the first marking period; and that he had failed to adequately plan for his absences on October 7, 14, 28, November 4, 11, 18 and 25.

Finally, on December 20, 1974, in a memorandum (P-20) to the principal the department chairman reiterated and summarized respondent's failings by asserting that respondent, during the ninety day probationary period, had failed to submit weekly lesson plans, failed to provide the detail necessary for the plans, failed to conduct weekly testing of pupils, failed to have adequate substitute plans, and continued to be absent frequently.

The Board elicited testimony from three persons it engaged as substitute teachers, all of whom were assigned at various times to respondent's class during the period of time herein. Each testified that when he/she was assigned to respondent's class, no plans had been left. (Tr. V-43, 53, 55, 79-80)

The Assistant Superintendent of Schools in charge of Personnel testified that he met with respondent, the department chairman, and the principal on November 13, 1974 to inform respondent of his continuing inefficiencies and to offer him assistance to overcome those problems. (Tr. V-24) The Assistant Superintendent testified that respondent viewed his alleged inefficiencies as the direct result of a conflict which existed between him and the department chairman. (Tr. V-28)

The principal testified that he was a personal friend of respondent's and spoke with him many times, with respect to his obligation to fulfill his responsibilities as a teaching staff member. (Tr. VI-13) The principal testified that in his view respondent held, with respect to his grading procedures, that because he, as the teacher, assigned the respective grades to his pupils, the grades, therefore, were correct. (Tr. VI-14) The principal further testified that respondent exhibited a strong dislike for the department chairman to the extent that when he sat in on one meeting with the two of them, it turned into a shouting match. (Tr. VI-20)

The principal testified that the Plan Book-Register (P-23) used by respondent during the fall semester of the 1974-75 academic year, or his ninety day probationary period, showed no grades at all for pupils between September and January 1975. (Tr. VI-57-58) The principal further testified that he attempted to assist respondent on several occasions during his probationary period but was obviously unsuccessful. (Tr. VI-61)

The hearing examiner observes that both the department chairman and the principal testified that there is no question as to respondent's ability to teach and his knowledge of his subject matter. (Tr. II-30, 169; Tr. VI-66) Both, however, also testified that respondent's attitude towards the allegations against him was disregard, hostility, indifference, and totally negative. (Tr. II-41; Tr. V-9; Tr. VI-73) In fact, the principal testified that in his judgment respondent felt his tenure status afforded him the freedom to do as he chose. (Tr. VI-73)

The hearing examiner observes that the principal testified that at no time during the ninety day probationary period did he formally observe and evaluate respondent's teaching performance. (Tr. VI-81-82) He did testify that he observed respondent indirectly by standing in his doorway and looking in. (Tr. VI-81)

Respondent, who represented himself *pro se*, testified that his plan book was sketchy. However, he insisted that his plans were sufficient for a teacher with his experience. (Tr. VII-86, 88) Respondent admitted that he objected to the detailed plans required by the department chairman and that he was aware of the detail expected by the chairman. (Tr. VII-90-92) He averred that such detail was not necessary, even though he was aware of the administrative requirements for lesson plans. (Tr. VII-121, 128)

Respondent testified that he had been submitting weekly lesson plans to the department chairman until the one week they were not returned to him on a Monday. Thus, he reasoned if the plans were not important enough to be returned on the proper day by the department chairman, they were not important enough to be submitted. (Tr. VII-94)

Respondent admitted that while he had agreed to give weekly tests, according to the plan of June 13, 1974, he failed to do so. (Tr. VII-110-111)

Respondent testified that he is a mild diabetic and this condition, coupled with hypertension, was the reason for his absences from school.

The hearing examiner has reviewed the voluminous record herein and finds that, to the degree the Board has charged respondent with inefficiency for failure to maintain and submit to the department chairman a written, detailed weekly lesson plan, the charge has been proven by the weight of the credible testimony. Further, to the degree the Board has alleged respondent to be inefficient by virtue of failing to leave lesson plans for substitute teachers, that charge is found to be proven true. Also, the charge of failing to maintain proper documentation for the assignment of pupil grades, as incorporated in Charge I, *ante*, is found to be true.

There is nothing in the record before the hearing examiner to substantiate a charge that by respondent's failure to prepare detailed lesson plans, or to leave plans for substitute teachers, or to maintain documentary evidence for the assignment of grades his actual teaching performance suffered or that his actual

teaching was or is inefficient. Respondent's teaching performance was observed four times during his ninety day probationary period: once by a vice-principal on October 3, 1974 (P-33); again on November 12, 1974 (P-32) by another vice-principal; and twice in November by the department chairman. None of the evaluations contains any substantive conclusions that respondent's actual teaching is inferior.

The hearing examiner observes with respect to Charge II that respondent is charged with "excessive absences" from school. *N.J.S.A.* 18A:30-2 provides teaching staff members with a minimum of ten sick days per year. *N.J.S.A.* 18A:30-4 specifically authorizes boards of education to request a medical certificate for *any* sick time used. While the record (C-1) herein discloses that respondent was absent a total of twenty-six days during 1973-74 and fourteen and one-half days between September 1974 and January 15, 1975, when he was suspended, there is no support in the record that he was ever requested to submit a medical certificate. In the hearing examiner's view, it would be improper to now find that respondent is inefficient by virtue of his absences when the Board never exercised its authority pursuant to *N.J.S.A.* 18A:30-4 to request a medical certificate.

The record does substantiate that respondent had established a pattern of chronic lateness. However, he is not charged with lateness as a separate inefficiency.

Two other matters remain for discussion. Respondent filed a Motion to Dismiss grounded upon what he perceives to be specious charges. The hearing examiner declined to refer respondent's Motion to the Commissioner for adjudication on the grounds that the charges were not, on their face, specious.

Next, on May 19, 1975, the Board stated it would not oppose respondent's Motion to compel the resumption of his salary payments, less mitigation, pursuant to *N.J.S.A.* 18A:6-14. (Tr. II-4) Respondent had acquired temporary employment during his suspension. However, by letter dated November 17, 1975, respondent informed the hearing examiner that he had voluntarily left his substitute employment. He then requested the hearing examiner to direct the Board to increase his salary benefits to those he normally would have received had he not been suspended. The hearing examiner declined respondent's request on January 13, 1976. The ground for such denial was a conclusion by the hearing examiner that a question concerned with a change in an agreement between two parties for payment of salary, less mitigation, had not been heretofore litigated. Further, no formal Motion to this effect was advanced.

In summary, the hearing examiner finds that respondent failed to maintain and submit to his department chairman a written detailed weekly lesson plan, that respondent failed to provide plans for the substitute teachers who would be assigned to his class when he was absent and that respondent failed to maintain a documented record of pupil grades to justify assigned grades of achievement.

The hearing examiner refers to the Commissioner the question of whether respondent's salary benefits should have been increased when he voluntarily ceased his temporary employment on October 17, 1975.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions and objections filed thereto by the parties.

The Commissioner observes that the hearing examiner recommends the dismissal of Charge II which alleged respondent was excessively absent from school. The Commissioner also observes that the basis for this recommendation was the failure of the Board to exercise its authority pursuant to *N.J.S.A.* 18A:30-4 which provides as follows:

"In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave."

The Board takes exception to this recommendation based on the hearing examiner's concurrent finding that a pattern of chronic lateness by respondent was established. The Board also objects to the hearing examiner's view that while a pattern of chronic lateness was established, lateness *per se* is not a separate charge to be considered because the Board did not certify such a separate charge against respondent. The Board argues that the issue of respondent reporting late to his duties is inherent in the certified charge that respondent was excessively absent from school. Consequently, the Board asserts, the issues of lateness to school and absence from school may not be distinguished from each other as stated by the hearing examiner. Finally, the Board relies on the letter (J-1) dated June 7, 1974 from the Superintendent by which respondent was notified of his alleged inefficiencies and given the prescribed ninety days for correction. The Board asserts that one of the alleged inefficiencies contained in that notice was repeated tardiness. Thus, respondent was fully aware that the issue of his alleged tardiness was a charge against him.

The Commissioner notices in the first instance that the Board did not request, at any time, a physician's note from respondent in regard to his absences from school. The Commissioner further observes that the letter from the Superintendent by which respondent was notified of his alleged inefficiencies does state tardiness as an area of concern. Specifically, respondent was notified, *inter alia*, of the following relevant inefficiencies with respect to Charge II:

\*\*\*

- “2. Repeated tardiness after numerous warnings, whereby you have been notified of said tardiness several times with the objective to cure the same.
- “3. Absenting from the school building\*\*\*. Excessive absenteeism from work.\*\*\*” (J-1)

Obviously, when respondent was notified of his alleged inefficiencies the issue of lateness was, in fact, a separate area of concern over absenteeism. The Board elected to certify the charge of absenteeism alone. Thus, the argument now advanced by the Board, that the issues of lateness and absenteeism may not be separated, falls.

The Commissioner agrees with and adopts as his own the recommendation of the hearing examiner that Charge II be dismissed for failure of the Board to exercise its authority pursuant to *N.J.S.A.* 18A:30-4. In the Commissioner's view, a board of education must first exercise such authority prior to a decision to certify a charge of excessive absenteeism. In the instant matter there is nothing to persuade the Commissioner that the Board or its administrators ever requested an explanation from respondent with respect to his absences. If the subject of Charge II was intended by the Board to establish that respondent was, in fact, directed to explain his absences and that he failed to do so, then the certified charge should have so stated. For these reasons, the Commissioner dismisses Charge II.

Respondent argues that the department chairman, the Board's chief complaining witness against him, does not possess proper certification as a supervisor. Consequently, respondent contends that the department chairman's judgments of him with respect to his performance must be considered improper.

The Commissioner observes that the title "department chairman" is not a title set forth in the New Jersey Administrative Code. The rule, *N.J.A.C.* 6:11-4.1(b), does allow persons who possess regular teachers' certificates with three years of appropriate teaching experience to serve as a teaching principal or teaching supervisor, within the scope of his certificate, in charge of not more than twelve teachers. In the Commissioner's judgment, this rule, historically referred to as the "head teacher" rule, applies only to very small schoolhouses which have a faculty of not more than twelve teachers. Under this rule local boards of education were permitted to designate a teacher as a "head teacher" because it was too costly to employ a school principal.

In *Herbert J. Buehler v. Board of Education of the Township of Ocean, Monmouth County*, 1970 *S.L.D.* 436, aff'd State Board of Education 1971 *S.L.D.* 660, aff'd New Jersey Superior Court, Appellate Division, 1972 *S.L.D.* 664, the Commissioner was similarly concerned with the duties and responsibilities of a teaching staff member appointed to a position of department chairman. The Commissioner held "\*\*\*\*that teachers should not be given

such duties, basically supervisory in nature, unless the assignment is made by the employing board of education and defined succinctly within the framework of a job description or table of organization.\*\*\*” (at p. 442) He further made it clear that staff members assigned such duties shall be required to hold an appropriate supervisor’s certificate when, acting as supervisors, they are “\*\*\*charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel.” (cited from the twentieth edition of “Rules Concerning Teachers Certificates,” at p. 443)

The Commissioner’s determination with respect to the necessity for such certification has not been altered in the interim since *Buehler, supra*. In the instant matter, however, the allegations against respondent by the department chairman rest primarily on the performance of duties by the chairman which were ministerial and not supervisory in nature. The chairman performed such duties, of a routine kind, at the direction of the principal and reported directly to him. In such circumstances the principal maintained his authority for supervision and a supervisor’s certificate was not required for the department chairman. The Commissioner so holds.

This holding is tempered, however, with a caution; namely, that charges against tenured teaching staff members which are concerned with a professional evaluation of teaching performance must of necessity require proof that those who bring them shall possess supervisors’ certificates or be qualified to supervise instruction. A lesser qualification may not, in the Commissioner’s determination, serve as a proper or legal preferment of such charges.

The Board objects to the finding of the hearing examiner that it failed to establish respondent’s actual teaching performance as inefficient. In the Commissioner’s view, that precise finding of the hearing examiner coupled with the Board’s stated objection raises the question whether inefficient performance by a teaching staff member must be limited to inefficient classroom teaching. The Commissioner holds that a teaching staff member may be found inefficient when it is established that any or all assigned duty performances are inefficient. Of course, a charge of inefficiency certified against an employee’s duty performance must not be trivial in nature. The charge must be precise and accompanied by a standard against which the employee’s performance is to be measured. *In the Matter of the Tenure Hearing of Alfred E. Jakucs, School District of the City of Linden, Union County, 1968 S.L.D. 189* It is unreasonable to hold that a teacher’s performance within a classroom is the sole criterion by which the teacher’s performance may be adjudged inefficient. While such performance is significant in establishing quality of performance, it is but one of several criteria by which a teacher’s performance may be evaluated.

In the instant matter, respondent failed to maintain and submit written detailed weekly lesson plans; he failed to provide plans for substitute teachers; and he failed to maintain a documented record of pupil grades. These responsibilities, considered within the context of respondent’s role as a teaching staff member and within the context of his responsibility as a member of the school community, establish that his total performance was inefficient. The Commissioner so holds.

The Commissioner has reviewed the objections and exceptions filed by respondent. In substance, respondent asserts that he was singled out by the department chairman and directed to prepare detailed lesson plans while other teaching staff members were allowed to prepare rough outlines. Respondent asserts that he did maintain proper documentation for the assignment of pupil grades. Finally, respondent complains that the hearing examiner failed to rule on the specific points argued in his two Motions to Dismiss.

The Commissioner finds no procedural or legal defect in the determination of the hearing examiner to proceed to a plenary hearing on the charges. Respondent's Motions to Dismiss fail to set forth persuasive reasons why either Motion, in whole or in part, should be granted.

The Commissioner has spoken on earlier occasions with respect to inefficiency on the part of teaching staff members. In *Georgia B. Wallace v. Board of Education of the Township of Greenwich*, 1938 S.L.D. 491 (1930) it was held that:

“\*\*\*The Tenure of Office Law was enacted to protect efficient teachers. It should not protect the inefficient. The welfare of the pupils is the first consideration in cases of this kind. If inefficiency\*\*\*is shown, the dismissal of a teacher\*\*\*should be affirmed.\*\*\*” (at p. 493)

The same principles articulated in 1930 are equally applicable herein. There is no place in the public schools today for inefficient teachers.

Accordingly, the Commissioner finds and determines that John Martz has forfeited his tenure position as a teaching staff member in the employ of the Board of Education of the Township of Franklin, Somerset County, as of the date of his suspension.

A last matter remains. The benefits available to respondent by *N.J.S.A.* 18A:6-14 are to be afforded him, mitigated only by earnings from substituted employment. The statute is silent with respect to voluntary cessation of substituted employment. The Commissioner observes that the Legislature has stated precisely what it intended. Regular salary payments are to commence for employees who are suspended following the certification of charges, on the 121st day of suspension, mitigated by any sums earned from substituted employment. There is no requirement for a suspended employee to acquire substitute employment. Thus, the voluntary cessation of such employment may not be held to negate the clear intent of the law.

Therefore, the Board of Education of Franklin Township is directed to compensate John Martz the difference between the benefits it provided him subsequent to his termination of substituted employment and his full salary. All benefits pursuant to *N.J.S.A.* 18A:6-14 shall cease as of the date of this decision.

COMMISSIONER OF EDUCATION

September 1, 1976

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, September 1, 1976

For the Petitioner-Appellee, Graham, Yurasko, Golden & Lintner (Jack L. Lintner, Esq., of Counsel)

For the Respondent-Appellant, John Martz, *Pro Se*

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

December 1, 1976

**In the Matter of the Annual School Election**

**Held in the School District of the Town of Kearny, Hudson County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The annual school election was conducted in the Town of Kearny on March 9, 1976, and voters were presented with a list of thirty-three candidates for seats on the Board of Education for one, two and three year terms. The announced winner of a seat for a one year term was Candidate Rosemary Robertson with a total of 692 votes. The candidate with the second highest total of votes for a one year term was Lynne Fernicola with 547 votes.

On March 10, 1976, Candidate Fernicola forwarded a Petition of Appeal to the Commissioner of Education which alleged, *inter alia*, that Candidate Robertson had caused an illegal sample ballot to be printed and distributed and requested an inquiry by the Commissioner.

Pursuant to such request a representative of the Commissioner conducted an inquiry on March 31, 1976 at the office of the Hudson County Superintendent of Schools. The report of the Commissioner's representative is as follows:

This was the first annual school election to be held in Kearny as a Type II school district and announced election results for or against public questions

or for or against candidates for two and three year terms on the Board of Education, hereinafter "Board," are not challenged by this Petition. The challenge by Candidate Fernicola is, instead, against the election of Candidate Robertson to a one year term. Her Petition alleges that prior to the election Candidate Robertson

\*\*\*\*did cause to be printed, photocopies and distributed a portion of an alleged Sample Ballot, which included her name only as a candidate for election to the said School Board and had thereon printed or mimeographed the name of Ralph Borgess, Secretary.\*\*\*"

The Petition further alleges that the name of Ralph Borgess was not printed on the ballot with his consent.

Testimony at the hearing and documents admitted into evidence were pertinent to these principal allegations. The controverted sample ballot (P-1) is headed in the top left-hand corner by a reproduced written signature of Ralph Borgess, identified as "Secretary" and contains a picture identified as "Rosemary Robertson" in a rectangular box with the underlying designation "9E." The ballot (P-1) also contains two slogans and an attribution which are recited as follows:

"Vote the 2R's for the 3R's"

'BACK THE CANDIDATE WHO BACKS THE PEOPLE'

"Paid by Robertson Boosters"

The sample ballot (P-1) is otherwise similar in some respects (column headings, general format) to the ballot strip as it would appear on the voting machines used in the election although no names other than Candidate Robertson and Secretary Borgess appear thereon.

Candidate Fernicola testified at the hearing that she had called the Board Secretary on March 8 or 9, 1976 to complain about the sample ballot (P-1) which contained his signature. (Tr. 22) She further testified that on the day of the election the sample ballot was distributed by "\*\*\*\*children [who] were at the door of the polling district\*\*\*\*" which she said was located approximately thirty feet from the actual polling place but that the signature of Ralph Borgess had been "cut away." (Tr. 23, 25; P-2) Other witnesses also testified that the controverted ballot (P-1) had been distributed close to the polling place. (Tr. 39, 48, 52) One of these witnesses testified that she had complained of such distribution and that election officials had requested the children to leave. (Tr. 40) Another witness testified that Candidate Robertson had "personally handed" one of the sample ballots (P-1) to her on March 6, 1976. (Tr. 42)

The Board Secretary testified that he had not authorized the use of his signature on the sample ballot. (Tr. 27; P-1) He further testified that the signature which did appear thereon was a reproduction of his signature and was similar to one which appeared on the official absentee ballot. (Tr. 28, 37)

Candidate Fernicola avers that such evidence is proof that there were violations by Candidate Robertson of four statutes; namely, *N.J.S.A.* 18A:14-69, 76, 81 and 97. She further avers that a decision in her favor with respect to such allegations should cause the Commissioner to set aside the election of Candidate Robertson and certify the election of the candidate with the second highest total of votes for a one year term. (Tr. 6)

The Commissioner's representative announced at the hearing that the jurisdiction of the State Department of Education and the Commissioner with respect to alleged violations of statutes *N.J.S.A.* 18A:14-64 through 104 was a limited one since all statutes contained therein were within Article 14, Offenses and Penalties, and since only a court of proper jurisdiction may impose the penalties therein prescribed. The representative further stated that he regarded his role as one of screening the allegation for possible referral to the County Prosecutor. As a result of this limited view of the jurisdiction of the Commissioner in such complaints, the Commissioner's representative did not require a defense at the hearing from Candidate Robertson and none was offered. (See Tr. 12-13.)

The statutes cited by Candidate Fernicola are recited in their entirety as follows:

*N.J.S.A.* 18A:14-69

"If any printer employed to print official ballots, or any person engaged in printing the same, shall appropriate to himself or give or deliver or knowingly permit to be taken any of such ballots by any other person than a person duly authorized so to do, or shall print or cause to be printed any official ballot in any other form than that prescribed by the proper officer or officers, according to law, or with any other names thereon, or with the names spelled or the names or printing thereon arranged in any other way than that authorized and directed by this title, the person so offending shall be guilty of a misdemeanor and shall be punished by a fine not exceeding \$1,000.00 or imprisonment not exceeding five years.

"If any person not authorized by the proper officers shall print or make any official or sample ballot provided for in this title, or on or prior to election day shall willfully have in his possession an official ballot without being authorized by this title to have charge or possession thereof, the person so offending shall be guilty of a misdemeanor.

"If any person shall forge or falsely make any ballot or the official endorsement thereof, the person so offending shall be guilty of a misdemeanor and shall be punished by imprisonment for not more than five years."

*N.J.S.A.* 18A:14-76

"If any person shall write, paste or otherwise place upon any official ballot any mark, sign or device of any kind as a distinguishing mark whereby to

indicate to any officer holding any election or any other person how any voter has voted at any election, or if any person shall induce or attempt to induce any voter to write, paste or otherwise place on his ballot any mark, sign or device of any kind, as a distinguishing mark by which to indicate to any such officer or other person how such voter has voted, or shall enter into or attempt to form any agreement or conspiracy with any other person to induce or attempt to induce voters or any voter to so place any distinguishing mark, sign or device on his ballot, whether or not such act be committed or attempted to be committed, such person so offending shall be a disorderly person and shall be punished by a fine not exceeding \$500.00 or imprisonment not exceeding one year, or both.”

*N.J.S.A.* 18A:14-81

“If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person.” (See also 18A:14-104.)

*N.J.S.A.* 18A:14-97

“No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.”

(Note: The penalties for infringement of 18A:14-97 are set forth in 18A:14-104.)

The Commissioner’s representative finds that the *prima facie* evidence of the hearing indicates that there may have been an infringement of the statutory mandates contained in *N.J.S.A.* 18A:14-69, 81 and 97, and he recommends that this report and the documents P-1, P-2, P-3 and PR-1 be forwarded to the Hudson County Prosecutor for review. There is no finding, however, of any evidence that there was a violation of the statute *N.J.S.A.* 18A:14-76.

This concludes the report of the Commissioner’s representative.

\* \* \* \*

The Commissioner has reviewed the report of his representative and concurs with the views and recommendation expressed therein. Accordingly, he directs that a copy of the representative's report and this decision be forwarded to the Hudson County Prosecutor for review.

The Commissioner finds no reason to vitiate this election, the first one conducted in the Town of Kearny as a Type II school district. There is no *prima facie* showing of fraud in the conduct of the election and no evidence that the will of the electorate was thwarted or could not fairly be expressed. As the Commissioner said *In the Matter of the Annual School Election Held in the Borough of Totowa, Passaic County*, 1965 S.L.D. 62, 64;

“\*\*\*It is well established that elections are to be given effect whenever possible, and are not to be set aside unless it can be shown that the irregularities were of such a nature that the will of the people was thwarted, was not properly expressed, or could not be fairly determined.\*\*\*”

(See also *In re Clee*, 119 N.J.L. 310 (*Sup. Ct.* 1938); *In re Wene*, 26 N.J. Super. 363 (*Law Div.* 1953), *aff'd* 13 N.J. 185 (1953).)

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 10, 1976

**In the Matter of the Tenure Hearing of**

**William Lavin,**

**School District of the Lower Camden County Regional High School**

**District Number One, Camden County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board, Maressa, Diadone and Wate (John D. Wade, Esq., of Counsel)

For the Respondent, Hartman, Schlesinger, Schlosser and Faxon (Joel S. Selikoff, Esq., of Counsel)

The Board of Education of the Lower Camden County Regional High School District Number One, hereinafter "Board," certified three charges of unbecoming conduct against William B. Lavin, a teaching staff member in its employ, on June 2, 1975. Subsequent to certifying charges to the Commissioner of Education, the Board suspended respondent from its employ without pay. Respondent denies the allegations set forth herein and demands immediate reinstatement to his position.

Hearings were conducted in this matter on September 29 and October 23, 1975 at the office of the Ocean County Superintendent of Schools, Toms River, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Subsequent to the Board's presentation of evidence in support of its charges, respondent moved to dismiss the allegations against him for failure of the Board to sustain the burden of proof. (Tr. II-5) The Motion to Dismiss was held in abeyance pending respondent's affirmative defense. (Tr. II-6)

Respondent has been employed by the Board for thirteen years, the last six of which he served as chairman of the guidance department. (Tr. II-6)

The facts of the matter as elicited from the testimony and other evidence submitted at the hearing are set forth as follows:

On October 5, 1972, respondent submitted an application to the Superintendent of Schools requesting a sabbatical leave during the academic year

1973-74 (P-1) for the purpose of "Getting certified for School Psychologist." (P-1) The application was received in the office of the Superintendent on October 5, 1972.

The Board policy with respect to the granting of sabbatical leave is set forth in its then existing agreement with the Lower Camden County Regional High School District Number One Education Association, hereinafter "Association." (P-3)

Respondent subsequently forwarded to the Superintendent a list of course work in which he intended to enroll if his request for sabbatical leave was granted. (P-2) Testimony of respondent revealed that the list consisted of course titles of subjects offered by Glassboro State College and Temple University as found in their respective catalogs. (Tr. II-12) The record reveals that an educational program submitted by respondent was received and approved on February 1, 1973.

The Superintendent subsequently presented respondent's application and the proposed list of course work to the Board which approved respondent's request for a sabbatical leave on March 19, 1973. Thereafter respondent was on sabbatical leave for the 1973-74 academic year at Glassboro State College during which time he earned twenty-four graduate academic credits.

In the month of August 1974, respondent returned to his assigned duty in the district. During the latter part of August respondent met informally with the Superintendent who requested that a status report of the sabbatical leave be submitted to the Board. (Tr. II-25-26)

On August 21, 1974, respondent forwarded a letter to the Board, through the Superintendent, which expressed his gratitude for its consideration in affording him a sabbatical leave. Respondent also submitted a brief summary of the courses he had taken and his progress to that date toward certification for the position of school psychologist. (P-2)

On August 26, 1974, the Superintendent submitted a report to the Board wherein he reviewed a section (Sabbatical Leave Article XIII) of the agreement between the Board and the Association. He questioned whether or not respondent had violated the terms of the aforementioned policy. (R-1)

Subsequent to the Superintendent's report, the Board arranged for an appearance of respondent to discuss his sabbatical leave. The minutes of this executive session held on September 16, 1974, reveal that those present included eight members of the Board, the Superintendent, the president of the Association, respondent and counsel for the Board. Counsel for the Board questioned respondent with respect to his past and present employment status in the district, the application for sabbatical leave, respondent's choice of graduate schools for certification as a school psychologist, the academic credit hours earned during the sabbatical leave and respondent's understanding of the sabbatical leave policy as found in Article XIII of the agreement between the Board and the Association. (P-4; Tr. II-34)

At its regular monthly meeting of October 7, 1974, the Board passed a resolution, and subsequently informed respondent by letter dated October 8, 1974, that “\*\*\*a decision was made regarding your failure to live up to the terms of your sabbatical leave agreement for the 1973-1974 school year.\*\*\*” (R-3) This letter further stated that respondent must take an additional nine credit hours of graduate work and an internship to be properly certified as a school psychologist. The letter continues, “\*\*\*these courses will not be reimbursed by the Board of Education and no further employment increment will be granted to you until these terms are met.” (R-3)

Subsequent to the action by the Board and with respect to the letter of October 8, 1974, respondent testified that he met with representatives of the Association for the purpose of initiating a grievance against the Board’s action. (Tr. II-35–38) There followed a letter dated January 2, 1975, addressed to the principal of respondent’s school, in which the Association initiated a grievance in respondent’s behalf alleging discrimination.

The Superintendent testified that the grievance was denied by the principal, the Superintendent and finally by the Board. (Tr. I-24-25) In accordance with the negotiated agreement, the grievance was subsequently scheduled to be heard by an arbitrator on May 12, 1975. Respondent testified, however, that on that date he was informed that the arbitration hearing had been unilaterally canceled by the Board. (Tr. II-46)

On June 2, 1975, the Board, at its regular monthly meeting, certified charges against respondent and on June 3, 1975, transmitted the following charges to the Commissioner:

- “1. Unbecoming conduct in not fulfilling terms of his Sabbatical Leave granted for the 1973-74 school year.
- “2. Misrepresentation and fraudulent presentation of his intentions toward completing the academic work required for certification as a school psychologist.
- “3. Misrepresentation and fraudulent presentation before the Board of Education concerning his academic standing and amount of credits he would need to become certified in the area of school psychologist.”

The issue of the matter controverted herein is the interpretation of the sabbatical leave policy on the part of both parties. The disputed paragraphs of the policy as set forth in the then negotiated agreement between the Board and the Association, identified as Article XIII, Sabbatical Leave, state that:

“E. Reimbursement:

- “1. For purposes of full-time study, reimbursement will be granted at one hundred percent (100%) of the last year’s salary provided the teacher signs a valid contract to return for at least two (2) years of service.

\*\*\*

“G. All of the course work for the graduate program must be completed during the sabbatical year period.” (P-3)

The Superintendent testified with respect to Charge No. 1 that respondent did not live up to the conditions of the policy, *ante*, as set forth in paragraph G. He testified that respondent had failed to comply with the stated purpose on the signed application for the sabbatical leave which read “Getting certified for School Psychologist” (P-1) since he did not complete all of the course work required toward certification as a school psychologist. (P-3) Therefore, the Board preferred Charge No. 1 against respondent. *N.J.A.C.* 6:24-3.1

While no testimony was adduced from members of the Board, the Superintendent testified that it was the Board’s interpretation of paragraph G of the policy, *ante*, which brought forth the action, *sub judice*. (Tr. I-11-15) He testified further that, although the policy was a bilateral agreement negotiated between the Board and the Association, the Board did not elicit an interpretation of the policy from the Association. (Tr. I-76-78)

The Superintendent on cross-examination testified that other teaching staff members in the district had not completed all of the academic course work while on sabbatical leave as required in the policy, *ante*. He further testified that the Board had not withheld salary increments from these individuals nor had it certified charges against them for noncompliance. (Tr. I-60-73)

Respondent avers that he was not engaged in a formal graduate program of studies while enrolled as a full-time student during the course of the sabbatical leave; therefore, he contends that paragraph E of the policy, *ante*, is the controlling factor in the controverted issue. (Tr. I-16, 72-73) Respondent’s graduate school advisor at Glassboro State College testified that a minimum of twelve semester hours of credit constituted a full-time program of graduate studies (Tr. I-116-117) and that respondent was a full-time student during the 1973-74 academic year. (Tr. I-121)

Respondent and the Superintendent both testified that respondent earned twenty-four semester hours of graduate credit while on sabbatical leave. (Tr. I-16, 21; Tr. II-73-75) Respondent’s graduate school advisor further testified that the course work leading toward certification as a school psychologist extended over a two-year period and could not be completed in one academic year. (Tr. I-120)

The Superintendent and respondent both testified that no formal discussions were held between them concerning the nature of the intended sabbatical leave during the course of the initial processing of the application. (Tr. I-6-7, 45-46; Tr. II-10-12) Respondent testified that he had submitted the list of graduate courses he intended to take (P-2) upon the advice and counsel of a teaching staff member then on sabbatical leave from the district. Respondent testified, as did the Superintendent, that no advice was sought of the administration nor was any offered to respondent with respect to the processing of the

application for sabbatical leave. Testimony reveals that neither party initiated discussions with respect to an interpretation of the policy, *ante*, either in whole or in part.

Following the Superintendent's recommendation to the Board and its affirmative action to grant respondent a sabbatical leave, respondent and the Superintendent met in the office of the Superintendent for the purpose of affixing respondent's signature to a sabbatical leave agreement, as prescribed by paragraph E of the policy (P-3), wherein respondent agreed to return to the district to teach for two years following the completion of the sabbatical leave. (P-5; Tr. II-13-14) The Superintendent and respondent both testified that they did not discuss the policy as it related to respondent but rather, whether or not respondent would accept the approved sabbatical leave and whether respondent intended to pursue his academic work at Temple University or Glassboro State College. These two issues were resolved in the spring of 1973 when respondent informed the Superintendent that he had accepted the sabbatical leave and that he would be attending Glassboro State College. (Tr. I-47-48; Tr. II-15)

A careful examination of the record, testimony and the documents presented into evidence reveals that two divergent interpretations of the stated policy, *ante*, existed at the time the sabbatical leave was granted to respondent by the Board. The argument advanced by respondent that he was not engaged in a graduate program of study leading to an advanced degree should not excuse him from meeting his commitment of certification as a school psychologist (P-1) in compliance with paragraph G of the policy. (P-3) It is clear that respondent met all of the remaining provisions of the policy, including paragraph E, by his enrollment as a full-time student.

The record is quite clear that the sections of the policy, *ante*, controverted herein, were not the subject of discussion or interpretation between the two parties until respondent returned from the sabbatical leave. The Superintendent raised the issue in a report to the Board dated August 26, 1974, wherein he stated in part:

“\*\*\*There is a question as to whether the terms of the Sabbatical Leave Policy have been violated [by respondent] in this procedure.\*\*\*”

(R-1)

The Board's authority to establish a policy concerned with sabbatical leave is clear. *N.J.S.A.* 18A:11-1 *et seq.* Such authority to enact rules and regulations embraces the power to administer them. The Commissioner has held that he will not substitute his judgment for that of a board of education in such matters when a board acts in good faith and is not arbitrary, capricious or unreasonable. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, affirmed State Board 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E.&A.* 1948)

It is clear that a stated policy of a board of education must be reasonable. It follows that the interpretation and implementation of that policy must also be

reasonable. Guidelines for interpretation of a policy were set forth in *Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County*, 1973 S.L.D. 102 as follows:

“\*\*\*In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman*, 23 N.J. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State, et al.*, 20 N.J. 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Insurance Company*, 132 N.J.L. 206, 211 (E.&A. 19744); *Bass v. Allen Home Development Company*, 8 N.J. 219, 226 (1951); *Sperry and Hutchinson Company v. Margetts*, 15 N.J. 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (3rd ed. 1943), Section 4502\*\*\*” (at p. 106)

The Board argues that respondent failed to meet the terms of the stated policy inasmuch as he did not complete all of the necessary academic work to become certificated as a school psychologist at the conclusion of the sabbatical leave. The testimony of the Superintendent, wherein he admitted that other teaching staff members were not penalized, raised questions, however, with respect to interpretation and implementation of the policy by school administrators and the Board. (Tr. I-60-73)

The Court held in *Newark Publishers' Association v. Newark Typographical Union*, 22 N.J. 419 (1956) that:

“\*\*\*We are not at liberty to introduce and effectuate some supposed unrevealed intention. The actual intent of the parties is ineffective unless made known in some way in the writing. It is not the real intent but the intent expressed or apparent in the writing that controls.\*\*\*” (at p. 427)

The hearing examiner has examined such facts and arguments and finds that:

1. The Board granted respondent a sabbatical leave pursuant to its negotiated policy with respect to such leave;
2. The policy lacked clarity with respect to the obligations required to be met;
3. Respondent's compliance with the policy in its written form and without oral elaboration by school administrators was not unreasonable and clearly not contrary to the policy's stated provisions;
4. Other teaching staff members were permitted to make a liberal interpretation of the policy which was denied respondent.

These findings are premised on the fact that a board's policies are required to be clear and unambiguous. When they are, the Commissioner has consistently held that he will not substitute his discretion for that of the board absent a clear showing of arbitrary, capricious or unreasonable action. *Boult and Harris, supra*. Thus, the finding herein is that the Board's action was an unreasonable one and one applied specifically to respondent without parallel action to others similarly situated.

In summary, the hearing examiner finds that respondent's compliance with the sabbatical leave policy of the Board was not unreasonable in the context of the policy's stated terms and that, in fact, there was not, as alleged, a fraudulent representation.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record and the report and findings of the hearing examiner and has carefully considered the recommendation expressed therein.

In regard to the Board's absence and leave policies, *ante*, the Commissioner observes that *N.J.S.A.* 18A:11-1 authorizes boards of education, *inter alia*, 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.”

Subsequently, at *N.J.S.A.* 18A:30-7, boards of education are provided authority, *inter alia*:

“\*\*\*to fix either by rule or by individual consideration, the payment of salary in *cases of absence not constituting sick leave*\*\*\*.”  
(*Emphasis supplied.*)

Thus, legislative authority for boards of education to effectuate policies regarding the “management of the public schools” and, in this instance, policies on sabbatical leave, is embodied within the corpus of school law.

The question is whether the Board's policy on sabbatical leave is dispositive of the instant matter. Respondent argues that policy Article XIII, Sabbatical Leave, controls the instant matter and because of the failure of the Board to clarify its interpretation of said policy prior to his taking the leave he is deserving

of all of the conditions as set forth in said policy. The Commissioner agrees. 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. DeSapio*, 11 *N.J.* 308 (1953) This clear maxim applies equally to local board of education policies, as well as to those ordinances adopted by municipalities.

In *Betty Eagle, Robert Coveau, Oliver Vogel, and the Englewood Cliffs Education Association v. Board of Education of the Borough of Englewood Cliffs, Bergen County*, Docket No. L-15025-71 New Jersey Superior Court, Law Division, February 19, 1971, the Court stated in its oral decision:

“\*\*\*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 of 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 instant matter, respondent applied for and was granted a sabbatical leave by the Board. The Superintendent did not question respondent’s application nor did he afford respondent an interpretation of Article XIII of the Board’s policy prior to the submission of the application to the Board. The testimony of respondent and the Superintendent reveals that there was ample opportunity for the Board’s interpretation to be made known to respondent prior to his taking the sabbatical leave. (Tr. I-6-7, 45-46; Tr. II-10-12)

In the Commissioner’s judgment, respondent’s argument that other teaching staff members had not completed all of the required academic course work while on sabbatical leave is convincing. The testimony of the Superintendent that the Board had not, in fact, penalized those other individuals similarly

situated lends credibility to the argument that the Board was unreasonable in its application of the policy to respondent. (Tr. I-60-73) The Commissioner finds, therefore, that respondent met the conditions of the Board's policy as it was applicable to other teaching staff members similarly situated.

The Commissioner directs, therefore, that Respondent Lavin be reinstated as a teacher in the School District of the Lower Camden County Regional High School District Number One and that he be reimbursed for all back pay, privileges and emoluments which he was denied during his suspension, mitigated only by a deduction of those earnings accrued by him during his suspension.

COMMISSIONER OF EDUCATION

September 13, 1976

**Elaine M. Chianese,**

*Petitioner,*

*v.*

**Board of Education of the Township of Bordentown, Burlington County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Kessler, Tutek and Gottlieb (Myron H. Gottlieb, Esq., of Counsel)

Petitioner is a nontenured special education teacher who was employed by the Board of Education of the Township of Bordentown, Burlington County, hereinafter "Board," for three consecutive academic years. She was offered and accepted a contract to teach for a fourth academic year; however, that contract was terminated by the Board. Petitioner prays for reinstatement in her former position, together with any other relief to which she is entitled, on the grounds that her termination was procedurally and statutorily defective.

Five days of hearings were conducted in this matter on October 29 and November 25, 1974, and January 13, 14 and February 5, 1975 in the office of the Burlington County Superintendent of Schools, Mt. Holly, before a hearing examiner appointed by the Commissioner of Education. There were many documents accepted as evidentiary, and Briefs were filed subsequent to the hearing. Certain facts are not in dispute and are set forth in the hearing examiner's report as follows:

1. Petitioner was employed for three consecutive academic years, 1971-72, 1972-73, 1973-74, and was offered and accepted a contract on April 3, 1974 to teach for the academic year 1974-75.

(Petition of Appeal; P-1)

2. Prior to the award of petitioner's fourth contract, the assistant principal, hereinafter "principal," was appointed to the position of administrative principal on February 18, 1974, when his predecessor suddenly resigned.

(Tr. III-85)

3. The principal then served in this new position from February 18, 1974 to June 30, 1974. He, too, resigned later and accepted a new position in another school district beginning July 1, 1974.

(Tr. III-84)

4. The principal met with the Board on February 21, 1974, and was directed to evaluate nontenure personnel for the purpose of considering their continued employment.

(Tr. III-85-87)

5. At a regular meeting of the Board on March 20, 1974, and with the principal's concurrence, petitioner was approved on a list with other teachers to be awarded a contract for the 1974-75 academic year.

(P-17, at p. 97)

6. Petitioner accepted and signed her contract on April 3, 1974.

(P-1)

7. The principal met with the Board on June 5, 1974, and was authorized to seek petitioner's resignation or inform her that he would recommend her termination.

(Tr. III-94-97, 163)

8. On June 6, 1974, petitioner met with the principal in his office as requested, and he told her to resign or he would recommend to the Board that she be terminated.

(Tr. III-101-102, 164-165)

9. At a public meeting of the Board on June 12, 1974, a motion to terminate petitioner on sixty days' notice was tabled so that she could reply to the Board's concerns about her pending termination.

(P-14)

10. A special meeting of the Board was held on June 17, 1974, to consider the termination of petitioner's contract; however, that meeting was adjourned without action in that regard.

(P-15)

11. At a special meeting of the Board on June 24, 1974, the Board voted five to four, resolving to terminate petitioner.

(P-11)

12. This Petition of Appeal was filed on July 15, 1974.

Petitioner testified that she was never observed formally by the learning consultant and never shown the "observation reports" (P-12; P-13) prior to the Board meeting on June 17, 1974, when her termination was being considered.

(Tr. I-69) Nor was she aware of observations conducted in her classroom during the fall of 1972. (Tr. I-70) She testified that her first principal had observed her. (P-9C) The principal who filled that vacated position on February 19, 1974, never observed her during her three years in his school. (Tr. 30-31) Her testimony is that the principal notified her near the end of March or early in April that he had concerns about her provisional certification and that he wanted her to write out reports on each of her pupils stating what she had done with them from September 1973 to that time. (Tr. I-20-22) She testified she replied that the assignment was not fair since the other special education teachers were not given similar assignments. She agreed, however, to do the reports. (Tr. I-23) She testified she submitted these reports to the principal on June 5, 1974. (Tr. III-97) She testified that the principal then stated that they were not the type of reports he wanted and she responded that that was what he asked for and that is how she and other teachers interpreted his request. (Tr. I-28-29; Tr. III-98)

After some discussion of these reports, petitioner testified that her principal said, "I want your resignation by Wednesday. If I don't get it I will fire you." (Tr. I-38) She testified further that she asked for a reason and he said he did not have to give her reasons. Petitioner testified she left his office after telling the principal she would give him her answer "next week." (Tr. I-39) Later that same day, when the principal realized that the Board's agreement with the Peter Muschal Teachers' Association, hereinafter "Association," contained a provision (P-6, VI-B) requiring, *inter alia*, written notice and the right to representation in any meeting pertaining to discontinuing employment or change in salary, he delivered a written notice to petitioner requesting another meeting on June 11, 1974. (P-4) On the advice of Association members, petitioner rejected his offer for another meeting. (P-5) She testified that he had violated the agreement and she would not meet with him again so that he could correct his mistake. (Tr. I-93; Tr. III-103-104) The series of Board meetings followed which ended with petitioner's termination on June 24, 1974.

Petitioner also questions the validity of the vote which terminated her employment. At the special meeting of June 17, 1974, petitioner was represented by counsel and was given approximately one hour and thirty minutes to refute the list of reasons given for her termination which was submitted to the Board and to her by the principal. Two of the Board members who voted on June 24, 1974 to terminate her were not present at the June 17 meeting whereas all four members who voted for renewal were present. Because two members were absent during that presentation on June 17, and in response to petitioner's request on June 19, 1974 (P-10), the Board decided to grant petitioner thirty minutes to address the full complement of Board members prior to its final determination on June 24, 1974. Petitioner argued at that meeting for an adversary hearing, with witnesses and cross-examination privileges and asserted that thirty minutes was insufficient time in which to make her presentation. When it was discovered that the Board would not extend the thirty minutes as she requested, nor permit an adversary hearing, petitioner left the meeting. (Tr. II-109-110)

Petitioner's class assignment as an employee of the Board was made up of twelve special education pupils. A learning consultant in the Board's employ

testified that both principals had directed her to work with petitioner “to help improve the classroom situation.” (Tr. IV-6, 11) The learning consultant evaluated petitioner on September 25 and 27, 1972 (P-12), and sent a controversial “observation report” (P-13) to the then assistant principal on November 27, 1972, criticizing petitioner’s performance. The learning consultant testified that she was sufficiently concerned about what she had observed on many occasions that she asked the assistant principal to go into petitioner’s room and observe her teaching. (Tr. IV-18) Her testimony is that she met with petitioner to discuss how she should improve her teaching. (Tr. IV-18-19, 24-25, 28) She testified that she discussed her two observations (P-12) with petitioner using notes she had made in the classroom (thus confirming petitioner’s testimony that she had not seen the observation reports P-12 and P-13 prior to the Board meeting of June 17, 1974) and that the observation report (P-13) was sent directly to the principal and was never discussed with petitioner. (Tr. IV-47) The learning consultant testified she did not observe petitioner after the fall of 1972. She testified that she had done all that she could do, and that thereafter petitioner’s performance was an administrative problem. (Tr. IV-39, 63) The record shows that the learning consultant was clearly dissatisfied with petitioner’s performance and with the achievements of her pupils and made her position known quite clearly to the assistant principal and to the principal. (P-12; P-13; Tr. IV-14, 18-19, 24-25, 28, 34, 38-48, 60-62)

The principal testified that prior to his appointment as chief school administrator on February 18, 1974, he had been the assistant principal of the school in which petitioner taught from March 15, 1972 to February 18, 1974. (Tr. III-85) The record discloses that petitioner was evaluated by her first principal on March 14, 1972, and that evaluation, in the hearing examiner’s judgment, is positive although several suggestions for improvement were offered. (P-9C) Nevertheless, the record shows that petitioner’s first principal was concerned about her performance during her first year in the district. (P-8; P-9C; Tr. IV-11, 67) The testimony, *ante*, reveals that the learning consultant was so dissatisfied with petitioner’s performance that she stopped observing and writing her evaluations. Her last written evaluations occurred on September 25 and 27, 1972, during the fall of petitioner’s second year. These were followed by the memorandum to the principal on November 27, 1972 (P-13) which complained about petitioner’s performance. Despite these evaluations and discussions concerning petitioner which, according to the principal’s testimony and that of the learning consultant, were held on a regular basis, petitioner was offered a second and, later, a third contract to teach. (Tr. III-87-88; Tr. IV-25-26)

The principal testified that he had only seventeen days after his appointment to recommend renewal or nonrenewal to the Board. (Tr. III-111) He testified that he had “concerns” about petitioner’s performance and expressed those concerns to the Board orally at many Board meetings after his appointment. (Tr. III-89-91) He testified, also, that he was concerned about her provisional certificate and did not think she could be reappointed, because he assumed the provisional certificate was substandard. (Tr. III-145) In April 1974, however, petitioner acquired her standard certificate, so that problem was no longer an issue to be considered.

When asked by the Board at its March 20, 1974 meeting whether petitioner should be offered a contract, the principal testified he was undecided. When pressed for a decision he testified that he recommended her, but his recommendation "was not sincere" and "everybody knew that." (Tr. III-148) He testified later that he did not recommend her for reemployment. (Tr. III-90) The principal testified further as follows:

\*\*\*\*I really felt to make the whole list of appointments and leaving one name out because of uncertainty, in a small school system would make it very obvious that it was Mrs. Chianese who was not being rehired at that time. I was concerned about making such a statement without some real commitment on my part that I felt she should not be reemployed and that her employment was detrimental to the school system at that time.\*\*\*\*  
(Tr. III-89-90)

He testified also that he told petitioner the day before the Board meeting of March 20, 1974, that he would recommend her reemployment with "reservations." (Tr. III-91)

The Board president testified that petitioner's name was included on the list of names for reemployment to avoid embarrassing her. (Tr. V-54-55)

Despite these concerns expressed by the principal and his testimony that he gave an insincere recommendation and later that he gave no recommendation, and irrespective of the fact that petitioner had taught in the district for almost three full academic years, the Board saw fit to award her a fourth consecutive contract.

The principal testified that the Board renewed petitioner's contract, while cognizant of the fact he was not satisfied with her performance, and thus tacitly gave him additional time in which to evaluate her, with the knowledge that she could be terminated on sixty days' notice. (Tr. III-148-151) He testified that he never evaluated petitioner's classroom performance, (Tr. III-92) and corroborated her testimony in this regard.

A Board member testified that he sought a "guaranteed" vote of the Board to terminate petitioner before requesting her resignation. (Tr. II-74)

A fair summary of the testimony and the evidence indicates, therefore, that no one of petitioner's supervisors was satisfied with her performance for any of the years in which she taught. It also indicates that despite this fact she was offered and accepted four consecutive academic year contracts. The last contract, of course, would have resulted in the accrual of a tenured status if she served at any time during the 1974-75 school year. *Canfield v. Board of Education of Pine Hill Borough*, 97 N.J. Super. 483 (App. Div. 1967), reversed 51 N.J. 400 (1968) This is not to suggest that a Board may not terminate a teacher after awarding a contract; however, the record shows in the instant matter that the Board knew or should have known prior to April 30, 1974, whether it would or would not offer her a contract.

The relevant statutes, *N.J.S.A.* 18A:27-10, 11 and 12, are recited in their entirety as follows:

*N.J.S.A.* 18A:27-10

“On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

“a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

“b. A written notice that such employment will not be offered.”

*N.J.S.A.* 18A:27-11

“Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.”

*N.J.S.A.* 18A:27-12

“If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.”

Thus, the statutes now provide for automatic renewal of nontenure teacher contracts where notice in writing is not given on or before April 30.

The Commissioner commented in *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County*, 1975 *S.L.D.* 93 as follows:

“\*\*\*The primary purpose of these statutes is to provide teachers with timely notice when they are not going to be reemployed so that they may seek employment elsewhere. When local boards of education waited until the months of May or June, or later, to notify teaching staff members that they would not be reemployed, this late action created a hardship for those employees. The new statutes remedied that situation by providing for notice by April 30 of each academic year, sixty days prior to the expiration of standard teacher contracts on June 30.\*\*\*” (at p. 95)

*Donaldson v. Board of Education of North Wildwood*, 65 N.J. 236 (1974) mandated for the first time that nontenured teachers be provided with a statement of reasons for non-reemployment. In *Donaldson, supra*, the Court said:

“\*\*\*The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or ‘other just cause.’ N.J.S.A. 18A:28-5. *The board’s determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board \*\*\* may conclude that tenure should not be granted.\*\*\**” (Emphasis added.) (65 N.J. at 240-241)

In the instant matter which developed prior to *Donaldson*, the Board became aware of the requirement for the affording of “reasons” for the non-reemployment of a nontenure teacher and gave them to petitioner although such requirement may not have been required in these circumstances. *Joan Sherman v. Malcolm Conner and Board of Education of the Borough of Spotswood*, Docket No. A-2122-73, New Jersey Superior Court, Appellate Division, January 28, 1975; *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood, Cape May County*, 1973 S.L.D. 351, affirmed State Board of Education 1973 S.L.D. 360, affirmed Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975

Nevertheless, the hearing examiner notices that many of the “reasons” for petitioner’s termination (P-8) were founded in events which occurred prior to her third year of employment, and the great majority of all the reasons given occurred *before* she was awarded her fourth contract. Under these circumstances, it is clear that the timely notice of a non-reemployment referred to by the Commissioner, *ante*, was not afforded to petitioner and instead she was offered employment for the academic year 1974-75.

Petitioner’s request for a full adversary hearing before the Board cannot, in the judgment of the hearing examiner, be supported. She was given an opportunity on June 24, 1974 to address the Board for thirty minutes and she was represented by counsel. She left that meeting when she could not secure an adversary hearing and the extended time she requested. She has now had an adversary hearing before the Commissioner, and therefore, at this juncture she cannot argue that she has been denied due process. *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1974 S.L.D. 332; *John Gish v. Board of Education of the Borough of Paramus, Bergen County*, 1974 S.L.D. 1150, aff’d State Board 1975 S.L.D. 1085

The hearing examiner finds no bad faith exhibited by the Board or the principal in this matter. Rather, a series of judgments were made which were grounded on false assumptions. The principal and the Board assumed that they were providing more opportunity to petitioner to prove her worth as a teacher by extending her the fourth employment contract. The Board then assumed it

could terminate that contract without further obligation to petitioner, if she failed to prove her worth, without violating any of her rights. The Board member in the vanguard of seeking due process for petitioner testified that there was no bad faith shown by the Board. (Tr. II-117, 137) He testified that the Board conducted free and open discussions concerning her termination. (Tr. II-129-130)

The hearing examiner concurs with that unrefuted testimony and finds that the Board voted five to four to terminate petitioner's employment after due deliberation and consideration which it deemed to be proper.

In summary, the hearing examiner finds as follows:

1. The Board was aware in February, March and April 1974 that its principal expressed concerns about petitioner and at best he could perceive her only as a marginally effective teacher in terms of reemployment.
2. Irrespective of those concerns, the Board awarded petitioner a contract for the 1974-75 academic year.
3. The Board's action on June 24, 1974, to terminate petitioner's employment was in violation of her vested right to a contract in that the Board knew or should have known prior to April 30, 1974, whether or not it should reemploy her. She had been in the district two years and eight months at that time.
4. Since petitioner had acquired a vested right to her fourth contract, such contract was illegally terminated after April 30, 1974 in violation of *N.J.S.A.* 18A:27-10.
5. There is no element of bad faith exhibited by the Board or the principal.

The hearing examiner recommends, therefore, that petitioner be awarded her full salary for the 1974-75 academic year plus any emoluments due her pursuant to the agreement between the Association and the Board (P-6), mitigated by other moneys earned by her during that academic year.

The hearing examiner cannot conclude that petitioner is entitled to re-employment and to tenure. *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962); *Canfield, supra*; *Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (*E.&A.* 1941)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions filed thereto by petitioner pursuant to *N.J.A.C.* 6:24-1.16.

There are now several decisions by the Commissioner, the State Board of Education, and the courts which are dispositive of the rights of nontenure teachers who are not offered contracts of reemployment for the coming academic year. A compendium of relevant decisions concerning the non-reemployment of nontenure teachers would include the following:

*Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County*, 1974 S.L.D. 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County*, 1974 S.L.D. 396; *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County*, 1975 S.L.D. 93, aff'd State Board of Education 98, aff'd Docket No. A 3214-74 New Jersey Superior Court, Appellate Division, April 21, 1976); *George Mazawey v. Board of Education of the City of Union, Hudson County*, 1975 S.L.D. 285; *Marilyn Frignoca v. Board of Education of the Northern Regional High School District, Bergen County*, 1975 S.L.D. 303; *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County*, 1975 S.L.D. 848; *Hicks, supra*.

Regarding petitioner's demand for an adversary hearing before the Board, the Commissioner notices the language in *Donaldson, supra*, wherein the Court stated that:

“\*\*\*a timely request for informal appearance before the board should ordinarily be granted even though no formal hearing is undertaken.\*\*\*”  
(*Emphasis ours.*) (65 N.J. at 246)

In *Hicks, supra*, the Commissioner commented that the purpose of granting a private “informal appearance” before a board to a nontenured teaching staff member is to provide an opportunity for the teaching staff member to dissuade the board from its determination not to offer reemployment. It is essential that the written statement of reasons, if requested, be furnished prior to the requested appearance before the board. This is so because the affected teaching staff member will undoubtedly desire to offer a refutation of those reasons. The nontenured teaching staff member's informal appearance before the board is definitely not an adversary proceeding. The purpose is not for the board to prove its reasons. Instead, the purpose is to permit the affected individual to convince the members of the board that they have made an incorrect determination by not offering reemployment. While the Commissioner is of the opinion that some latitude must be permitted to the affected staff member in the attempt to be persuasive to the board, he must caution that the proceeding is not intended to be protracted. Local education boards will find it necessary to exercise discretion regarding the reasonable length of time of the proceeding, depending upon specific circumstances in each instance.

The procedure whereby a teaching staff member is afforded an informal appearance before a local board of education is not unfamiliar. See *Gish, supra*. Thus, it is well established that the informal appearance to which nontenured teachers are entitled on request is not to be an adversary procedure. The Commissioner so holds.

Petitioner takes exception to the fact that she was not given an opportunity to prove the Board's "charges" were in error. There are no charges against petitioner such as are required to be filed by statute in the termination of employment of tenure teachers. *N.J.S.A.* 18A:6-10 *et seq.* Here we are concerned only with a statement requested by petitioner setting forth the reasons why she was not reemployed.

In the instant matter, petitioner cites *Board of Regents of State Colleges v. Roth*, 408 *U.S.* 564, 92 *S.Ct.* 2701, 33 *L.Ed.2d* 548 (1972) as grounds for her claim to procedural due process. In *Roth* the respondent was employed as assistant professor of political science at Wisconsin State University, Oshkosh, for the fixed term of one academic year. He was subsequently informed that he would not be reemployed for the next academic year. Roth had no tenure rights to continued employment, since Wisconsin statutory law required a State University teacher to have four years of continuous employment in order to acquire a tenure status. In the case of nontenured teachers, the decision with respect to employment was left to the unfettered discretion of University officials, and no reason for non-reemployment needed to be given, nor was any review or appeal process provided.

Roth attacked the University's failure to reemploy him on the grounds that the true reason for the determination was to punish him for certain statements critical of the University, in violation of his right to freedom of speech. Also, Roth claimed that the failure to give him any reason for non-reemployment and a hearing violated his due process rights. The District Court granted summary judgment for Respondent Roth on the procedural issue and ordered the University to provide him with reasons and a hearing. The Court of Appeals affirmed with one judge dissenting. The only issue before the Supreme Court was whether Roth had a constitutional right to a statement of reasons and a hearing on the University's decision not to reemploy him for another year. The Court held that he did not.

In its opinion in *Roth, supra*, the Court reviewed its prior decisions defining the terms liberty and property as used in the Fourteenth Amendment. The Court stated that, although "liberty" is broadly construed,

\*\*\*It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another.\*\*\*  
(92 *S.Ct.* at 2708)

The Court held with respect to Roth's argument of deprivation of property that:

\*\*\*To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.\*\*\*  
(92 *S.Ct.* at 2709)

Accordingly, for the reasons set forth above and the decisions cited and quoted in this text, the Commissioner determines that petitioner has been afforded the elements of due process.

The statutes do not require that the determination to terminate employment of a nontenure teacher be made by a majority roll call vote of the full membership of the board as petitioner suggests. Nevertheless, the full Board was seated on June 24, 1974, when it made its determination to terminate petitioner. See *Iris Sachs v. Board of Education of the Township of the East Windsor Regional School District et al., Mercer County*, 1976 S.L.D. 170. Petitioner's argument that the full Board did not hear her presentation on June 17, 1974, does not alter the fact that she was offered the opportunity to address the full Board on June 24, 1974. Petitioner refused to do so because she could not have the adversary proceeding she demanded, nor was she offered the same amount of time she was afforded on June 17.

The discretionary powers of education boards are well recognized by both the Commissioner and the courts. The Commissioner has said in numerous instances that he will not substitute his discretion for that of a board absent a clear showing of bad faith, statutory violation, or violation of constitutional rights.

It was said in *John J. Kane v. Board of Education of the City of Hoboken, Hudson County*, 1975 S.L.D. 12 that:

“\*\*\*[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County*, 1973 S.L.D. 167; *James Mosselle v. Board of Education of the City of Newark, Essex County*, 1973 S.L.D. 197, aff'd State Board of Education January 9, 1974; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County*, 1973 S.L.D. 217, affirmed State Board of Education March 6, 1974.\*\*\*” (at p. 16)

See also *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County*, 1975 S.L.D. 168.

In *Board of Education, East Brunswick Township v. Township Council, East Brunswick*, 48 N.J. 94 (1966), the Supreme Court stated that:

“\*\*\*[T]he Commissioner's responsibility was to make independent determinations giving due weight, of course, to the lower findings and the measures of discretion vested below.\*\*\*”  
(*Emphasis supplied.*) (48 N.J. at 106)

“\*\*\*As Justice Hall pointed out in *Botkin v. Mayor and Borough Council of Borough of Westwood, supra*, [52 N.J. Super. 416 (App. Div.)], appeal

dismissed 28 *N.J.* 218 (1958)] a board of education \*\*\* is an independent governmental entity\*\*\*.” (48 *N.J.* at 107-108)

Nevertheless, under certain circumstances the Commissioner is obliged to make a determination of fact arising from the record below. Thus, in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional School District, Atlantic County*, 1968 *S.L.D.* 7, dismissed State Board of Education 11, affirmed New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202, the Commissioner commented that:

“\*\*\*[B]oards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny.\*\*\*” (1968 *S.L.D.*, at p. 10)

Herein, there is no showing of violation of protected constitutional or statutory rights as in *Rockenstein, supra*, or *North Bergen, supra*. The instant matter bears strong resemblance to *Ruch, supra* in that petitioner, like Ruch, takes strong exception to the validity of her supervisory evaluations.

Finally, the instant matter is distinguishable from *Arthur L. Page v. Board of Education of the City of Trenton et al., Mercer County*, 1973 *S.L.D.* 704, aff'd/remanded State Board of Education 1974 *S.L.D.* 1416, decision on remand 1975 *S.L.D.* 644, aff'd State Board of Education January 7, 1976 and *John M. Rainey v. Board of Education of the City of Trenton, Mercer County*, 1974 *S.L.D.* 647 which are cited in petitioner's exceptions. Page and Rainey were offered and accepted contracts of employment for the ensuing calendar year, after which their positions were abolished. The Commissioner determined in both those matters that the action of the board was “frivolous” and not in good faith and reinstated those petitioners. Because of these distinctions, the Commissioner finds *Page* and *Rainey* inapplicable to the instant matter.

For all of the reasons expressed herein, the Commissioner adopts the findings and recommendations of the hearing examiner as his own. Therefore, the Board of Education of the Township of Bordentown, Burlington County, is directed to pay petitioner her full salary for the academic year 1974-75 plus any emoluments to which she would have been entitled, mitigated by any moneys earned by her during the 1974-75 academic year.

Except for this relief, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 13, 1976  
Pending before State Board of Education

**In the Matter of the Tenure Hearing of**

**Consuelo Garcia Lefakis,**

**School District of the Borough of Midland Park, Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For Petitioner, Podesta, Myers & Crammond (John H. Crammond, Esq., of Counsel)

For the Respondent, Balk, Jacobs, Goldberger, Mandell, Seligsohn & O'Connor (Jack Mandell, Esq., of Counsel)

Respondent, a tenured secondary school teacher in the employ of the Board of Education of the Borough of Midland Park, hereinafter "Board," was suspended without pay on January 13, 1975 by the Board pursuant to *N.J.S.A. 18A:6-10 et seq.*, upon the certification of three charges of unbecoming conduct preferred against respondent by the Superintendent of Schools. The Board believes these charges sufficient, if true in fact, to warrant a dismissal or reduction in salary. Respondent denies that there is truth to any of the three charges.

These charges, hereinafter set forth in detail, are, in essence, that respondent was unjustifiably absent from her teaching post on three occasions for four days, twenty-seven days and four days, respectively, and that she gave the agents of the Board false and misleading reasons for her absences.

Seven days of hearing were conducted at the office of the Morris County Superintendent of Schools from December 2, 1975 to April 15, 1976 by a hearing examiner appointed by the Commissioner of Education. Briefs were subsequently filed by the parties. The hearing examiner herewith sets forth a succinct summarization of such contentions of the respective litigants as are found in the Briefs:

The Board contends that by a preponderance of the believable evidence it has proven that respondent knowingly and intentionally not only absented herself from her teaching post on three separate occasions but also misrepresented and/or falsified the reasons for those absences. The Board characterizes petitioner's actions as blatant, wrongful and unbecoming conduct justifying dismissal from her tenured position. (Brief of Petitioner, at pp. 3-4, 10) The Board reasons that it may be inferred from the fact that petitioner elicited no testimony other than her own at the hearing that her claims are largely untrue and that the testimony of others would have been damaging to her case. *Michaels v. Brookchester, Inc.*, 26 *N.J.* 379 (1958)

The Board cites *In the Matter of the Tenure Hearing of William Megnin, School District of Wayne, Passaic County*, 1973 S.L.D. 641, wherein a principal was found to have been absent without leave and without notifying his superiors but was restored to his post by the Commissioner with a limited financial penalty in consideration of understandable exigencies which he encountered in traveling to his home from Florida. The Board, in the instant matter, argues that respondent had no such justifiable cause or excuse for her absences of thirty-nine working days over a period from February 1974 to January 1975. The Board contends that her unjustified absences constitute an abuse of her public trust and employment clearly differentiated from that of Megnin. (Brief of Petitioner, at pp. 5-7)

The Board further characterizes the reasons for her absences given by respondent to her employer as willful, intentional misrepresentations and avers that they constitute unprofessional and unbecoming conduct warranting her dismissal. In this regard it is contended that it is inconceivable that the numerous persons who testified for the Board at the hearing would tell untruths under oath. The Board asserts that petitioner's alleged misrepresentations constituted a serious breach of her duty to "\*\*\*\* manifest a high order of professional, ethical and moral standards\*\*\*." (*Id.*, at p. 9) *In the Matter of the Tenure Hearing of Peter J. Deer, Board of Education of Palisades Park, Bergen County*, 1975 S.L.D. 752; *In the Matter of the Tenure Hearing of Michael A. Pitch, School District of South Bound Brook, Somerset County*, 1974 S.L.D. 1176, aff'd State Board April 2, 1975, rem. N.J. Superior Court, Appellate Division, September 11, 1975, decision on remand November 25, 1975, aff'd Docket No. A-2671-74 New Jersey Superior Court, Appellate Division, April 2, 1976 Accordingly, the Board seeks an order of the Commissioner directing that she be dismissed.

Respondent argues that the case law cited by the Board is inapposite. She states that she was under no compulsion to produce witnesses other than herself and contends that the accusations of the Board are irresponsible. (Brief of Respondent, at pp. 28-29) Petitioner argues that in *Megnin, supra*, the principal was censured for not notifying his superiors of his absence, whereas she notified her superiors in each of her absences. Respondent argues further that *Deer, supra*, and *Pitch, supra*, are also inapplicable since they were found to have misrepresented their academic credentials, whereas the Board, herein, has made no such charge against her. (Brief of Respondent, at pp. 30-31)

Respondent contends that witnesses produced by the Board were motivated by bias and prejudice. In this regard, respondent calls attention to the fact that the principal had testified against her on charges previously certified by the Board which charges the Commissioner dismissed on Motion and restored her to her teaching position without penalty. *In the Matter of the Tenure Hearing of Consuelo Garcia, School District of Midland Park, Bergen County*, 1970 S.L.D. 435 Respondent contends that the record shows that the principal thereafter spoke to her in a brusque, harsh manner and acted at numerous times against her in a biased manner. (Brief of Respondent, at pp. 32-34)

Respondent similarly contends that the Superintendent, having assumed his post in the summer of 1974, became hostile and prejudiced against her when

he was alerted by others to the fact that charges had previously been certified against her. Respondent contends that he thereafter “\*\*\*demonstrated an irrational attitude of hostility toward her without just grounds or before sufficient knowledge.\*\*\*” (*Id.*, at pp. 35-36, 43-45)

Respondent argues that the Board has failed to sustain its burden of proof in regard to any one of the three charges and submits that they should be dismissed. (*Id.*, at pp. 37-51) Respondent objects to the admission of certain testimony. Finally, it is contended that certain aspects of Greek law in respect to marriage, as apply to Charge No. 3, *post*, are unknown, and that without such knowledge the Commissioner is ill equipped to render a determination on that charge. (*Id.*, at pp. 50-51)

The findings of fact and recommendations of the hearing examiner are as follows:

#### CHARGE NO. 1

“That [respondent] did intentionally and knowingly absent herself without justifiable cause or excuse from her professional responsibilities and duties as a teacher in the Midland Park School District for the period from February 25, 1974 through February 28, 1974 \*\*\* for personal or other reasons, and did claim that the reason for said absence was illness and/or hospitalization when she knew that said claims were substantially untrue, false and misleading and not supported by the facts.”

Respondent’s principal testified that on February 20, 1974, during the winter vacation, his secretary called to his attention that respondent had left detailed lesson plans in her mailbox for the five school days following the vacation. He stated that he found it unusual that plans should be projected for a period ten days in advance and that he made copies of those plans and returned the originals to the mailbox. (Tr. V-42-46; P-28)

The vice-principal testified that on the same date respondent called to advise him that she was very sick with bronchitis and would be unable to teach from February 25 through March 1. He stated that he told respondent that he could not understand how she could know that she would be ill up to ten days in advance and that she should contact him again on Sunday, February 24, prior to the reopening of school. (Tr. II-57-58) He stated further that when she did not do so, he attempted to call her at home but learned that her telephone was temporarily disconnected. (Tr. IV-62)

The principal testified that when he learned that efforts to contact respondent proved fruitless, he feared for her safety since she lived alone, and requested the police to visit her residence. He stated that he learned from the police that she was apparently not at home, whereupon he directed a telegram to her parents in California seeking information. (Tr. V-53, 73-75) The vice-principal, however, stated that he was contacted by telephone at his home by respondent on Wednesday, February 27 and advised that she was still ill but would be back at her teaching post by March 1. (Tr. IV-65-66)

The principal testified that, when respondent reported for work and was asked to explain her absence, she advised him she had been ill, under a doctor's care and in the hospital. (Tr. V-59) He testified further that he required that she produce a doctor's report which she did, dated March 2, 1974. (Tr. V-63-64) This report, now in evidence, states that respondent had been disabled since February 12 and was treated for "\*\*\*influenza with chest and abdomen involved in inflammatory congestive changes.\*\*\*" (P-30) The principal averred that, in spite of the doctor's statement, he believed her absence to have been contrived (Tr. V-103) and so advised the then Superintendent in writing recommending that her salary be withheld. (P-31)

Respondent testified that she was ordered by her doctor to go home and remain in bed and that, other than a brief stay with a friend and visits to her doctor, she did remain at home during her illness. (Tr. VI-72-75) Respondent stated that, in accord with her department chairman's directive, it was her custom prior to vacation periods to leave detailed lesson plans for several days in advance. (Tr. VI-69-71) She denied that she ever stated that she had been in the hospital and further testified that, after a conference with the principal and the then Superintendent, she was paid and charged with use of sick leave for the four days of her absence. (Tr. VI-83-84) Respondent stated further that the reason she had had her telephone disconnected was that she had been receiving numerous obscene telephone calls. (Tr. VII-14)

The hearing examiner takes note that a complaint concerning the factual context surrounding Charge No. 1 was filed by respondent with the Division on Civil Rights, Department of Law and Public Safety, Docket No. EB35WE-8867, and that a Finding of Probable Cause was issued. (R-3) However, no public hearing was ever held in the matter by the Division on Civil Rights. (P-41 ; Tr. VII-86) Accordingly, no summary of that litigation would be in order.

After carefully weighing and balancing the testimony elicited at the hearing and the documentary evidence concerning this charge, the hearing examiner finds that the Board has failed to produce a preponderance of creditable evidence in proof of Charge No. 1. This finding is grounded on the clear language of Dr. Patella's letter in evidence (P-30) which states that respondent was disabled during the controverted period of her absence. Absent proof that the communication was not a reliable document, it must be credited as authentic.

The sole finding of fault on respondent's part is that she did not comply with the vice-principal's reasonable direction to contact him regarding her health on February 24. This dereliction was not made part of the charge and merits no further attention herein. Nor is there need to deal with respondent's charge that the principal was biased against her, since the above finding is grounded on unrelated aspects.

Accordingly, it is recommended that the Commissioner grant respondent's renewed Motion to Dismiss Charge No. 1. (Tr. VII-86-87)

CHARGE NO. 2

“That [respondent] did intentionally and knowingly absent herself without justifiable cause or excuse from her professional responsibilities and duties as a teacher\*\*\*from September 3, 1974 through October 9, 1974, a total of 27 school days, for personal or other reasons, and did claim that the reasons for said absence were illness and/or hospitalization in Greece when she knew that such claims were substantially untrue, false and misleading and not supported by the facts.”

At the outset of the hearing, respondent moved that the testimony of Dr. William Melachrinis, a physician who had treated respondent in Athens, Greece, during 1974, not be permitted for the reasons that it would violate the confidentiality of the patient-physician relationship as protected by *N.J.S.A. 2A:84A-22.2* which provides as follows:

“Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician’s duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.”

This Motion was procedurally denied by the hearing examiner on grounds that respondent, herself, by a telegram to Dr. Melachrinis had authorized the release of medical information to the Board as follows:

“URGENTLY REQUEST MEDICAL LETTER OF ILLNESS AUGUST 24 TO OCTOBER 8, 1974 OF GASTROENTERITIS BRONCHITIS IMPETIGO BE SENT TO ME IMMEDIATELY *SUBMITTANCE TO SCHOOL.*”  
(*Emphasis added.*) (P-9)

Denial of the Motion was further grounded on the testimony of the Superintendent that he had received medical information from respondent in a letter from Dr. Melachrinis (P-5) and that the Superintendent was authorized by respondent herself to contact Dr. Melachrinis for purposes of verifying her illness which she alleged had caused her to be absent twenty-seven days in September and October 1974. (Tr. I-56, 97-98)

Respondent was in fact absent from her teaching post from September 3 through October 9, 1974, and was in Greece during this period. The Superintendent testified that he received a telegram from respondent on August 30, 1974 which stated "DETAINED ILLNESS GREECE RETURN SEPTEMBER 5." (P-11) He testified that on September 11 he received a letter from respondent requesting, *inter alia*, that her absence be charged against sick leave and that, if required, her doctor would attest to her illness. (P-12) The Superintendent testified that he thereupon directed respondent's principal to advise her that she should return with a medical report verifying her illness. (Tr. II-74) Such a letter was sent to respondent by the principal. (P-4) The Superintendent stated that he, thereafter, received a telegram from respondent on September 30 advising that she would return to school on October 3. (Tr. II-75; P-13) He stated, however, that she in fact returned to school on October 10 and that when she was asked for documentation confirming her illness, she produced only a prescription for drugs dated October 8, 1974 (P-14), and advised him that she had been unable to procure a medical report from her physician as he had been out of his office fighting an epidemic elsewhere in Greece. (Tr. II-78-79; 85-87) He testified that she also advised him that she had suffered from gastroenteritis, upper respiratory problems and impetigo while in Athens and on the island of Mykonos and had been treated a number of times by Dr. Melachrinos at his office, in the hospital and at her place of residence in Athens from late August until her return to the United States. (Tr. II-80-81; Tr. III-58)

The Superintendent stated that both he and the Board notified respondent that a medical report verifying her illness would be required prior to release of her salary and that she must procure a medical report that she was free from impetigo prior to her return to the classroom. (Tr. II-85-89; P-17) He testified that respondent presented him a letter from her personal physician stating that she was free from infectious disease and that following a brief treatment for impetigo by the Board's physician she was returned to her teaching duties on October 17. (P-15; P-16; P-17)

The Superintendent testified that respondent gave him a letter from Dr. Melachrinos dated October 14 which stated that she had been diagnosed by him as having gastroenteritis, impetigo and bronchitis and that she was "\*\*\*\*at home and in bed from August 24 to October 8, 1974." (P-5) He further testified that, with respondent's consent, he contacted Dr. Melachrinos by telephone on October 24 and thereafter posed a number of written questions (P-6) to which Dr. Melachrinos responded, *inter alia*, on November 12 that respondent was his patient, had visited his office only on the date of October 8, 1974, and had advised him on that date that she had been home in bed for five or six weeks. He further testified that Dr. Melachrinos informed him that he had never attended or treated her except on the one occasion at his office on October 8. (P-7) The Superintendent stated that he considered this information insufficient to validate her absence and that he again met with respondent who denied that the Doctor's information in P-7 was factual. (Tr. II-76, 106; Tr. III-28, 33, 42, 53)

The Superintendent testified that when he made further inquiries respecting respondent's claims that she had been treated at a clinic on Mykonos, at a hospital, or at the American Embassy in Athens, he was unable to verify that she had been treated at those places. (Tr. I-59; Tr. II-100)

The hearing examiner is unable to conclude that respondent has proven that the Superintendent was biased, hostile or irrational. The demeanor of the Superintendent, the even tenor of his testimony, and that which he wrote in documents now in evidence convinces the hearing examiner that he acted in a reasonable and unprejudiced manner in executing his professional responsibilities.

Dr. Melachrinos, called as a witness for the Board, testified that, when respondent appeared for the first time at his office in Athens on October 8, she complained of respiratory and abdominal distress and told him that she planned to be married. (Tr. I-110) He stated that he took her medical history, examined her, diagnosed her condition as heretofore set forth in P-5, treated an impetigous lesion, issued a prescription for drugs, and administered a VDRL test as a preliminary to her forthcoming marriage. (Tr. I-112-118, 146; P-8) The Doctor attested that at no time did he visit her at a hospital or at her home. (Tr. III-128) He further declared that at no time during his medical practice in Athens had he been away from his office to treat an epidemic elsewhere in Greece. (Tr. I-131) Dr. Melachrinos also stated that, although he had received no written request from respondent to release her medical information to the Superintendent, he saw no breach of medical ethics in having done so but that he felt that he was merely doing a duty for his patient. (Tr. II-31-35) He further affirmed that, in his opinion, respondent was not so ill when she visited his office that she could not travel. (Tr. II-43)

Respondent testified that while in Greece she had become ill while on a two day visit to Mykonos in August and that a prescription provided at a clinic there and later by a pharmacist in Athens had failed to relieve severe diarrhea. (Tr. VI-89, 92-96) She testified that she went to the American Embassy to procure the name of a responsible physician and that Dr. Melachrinos was recommended. She affirmed that when she visited his office about the middle of September she received neither an examination nor a prescription but was advised to return for a full examination, which she did at the end of the month. (Tr. VI-96-98) She stated further that Dr. Melachrinos treated her approximately three times, thereafter, at his office. (Tr. VII-32, 52)

Respondent testified further that the reason she did not communicate again with her superiors until September 30 was that fighting on Cyprus and the bombing of a passenger plane in Athens had virtually disrupted normal means of communication. She testified, however, that she was successful in contacting her education association representative by telephone during that period. (Tr. VI-95; Tr. VII-39, 50-51) Respondent testified that she did not recall having ever notified the Superintendent that she was hospitalized in Greece. (Tr. VII-65)

Respondent moved for dismissal of Charge No. 2 at the end of the Board's case on grounds that the record shows that respondent was too ill to return to

her position, was unfit to teach by reason of active infectious impetigo and that the Board had failed to prove that the reasons she gave were untrue. (Tr. VI-44-48) This Motion was denied by the hearing examiner on grounds that a *prima facie* case had been presented by the Board. (Tr. VI-65-66)

The hearing examiner has carefully reviewed and weighed the exhibits, the testimony of witnesses and the arguments of counsel in regard to Charge No. 2 and finds that the Board has established a preponderance of creditable evidence in proof of the charge that respondent was absent from her post of duty for invalid reasons for a twenty-seven day period in September and October 1974, and that she gave substantially false and misleading reasons to her employer when she stated that she was absent because of illness for that entire period of time.

The hearing examiner finds it incredible that a mature, educated teacher who was confined to her room and continuously sick from respiratory infection, diarrhea, vomiting, and numerous other complaints would delay procuring an examination by a medical doctor from August 20 until late in September. (Tr. VII-55-56) Respondent's uncorroborated testimony that she was treated a number of times by Dr. Malachrinos is directly contrary to his testimony that he saw her on but one occasion, October 8, the day before her departure from Greece. Nor does respondent offer documentary proof or testimony to corroborate her claims. By contrast, the creditable evidence consists of Dr. Malachrinos' testimony as corroborated by the Superintendent, the School Business Administrator (Tr.VI-39-41), and the exhibits in evidence.

Accordingly, the hearing examiner finds that respondent misrepresented the reason for her twenty-seven day absence as illness. It is recommended that the Commissioner determine that such misrepresentation constitutes unbecoming conduct which warrants a reduction of salary or dismissal. It should be further noted by the Commissioner that respondent was not paid for the aforementioned twenty-seven days. (Tr. III-75)

### CHARGE NO. 3

"That [respondent] did intentionally and knowingly absent herself without justifiable cause or excuse from her professional responsibilities and duties as a teacher \*\*\*from January 2, 1975 through January 7, 1975, a total of four school days, for personal or other reasons and did claim that the reason for said absence was the unavailability of air transportation from Athens, Greece when she knew that said claims were substantially untrue, false and misleading and not supported by the facts."

The uncontested facts surrounding this charge are that respondent was absent from school a total of four days, that she spent her Christmas and New Year holidays in Athens, Greece, that she was married to Dimitrios Lefakis during her visit to Greece, that Olympic Airlines was on strike for a period including January 1 through January 7, and that respondent returned to the United States on a TWA flight on January 7, 1975, and to her teaching post the following day.

Respondent moved for dismissal of Charge No. 3 at the conclusion of the Board's case. This Motion was denied by the hearing examiner on the basis that a *prima facie* case had been presented by the Board. (Tr. VI-65-66)

The Superintendent testified that in December 1974 he had denied respondent's request for emergency medical leave for January 2, 3, 1975. (Tr. II-118-120; P-19; P-20) He stated that on January 2, 1975, he received a telegram from respondent in Athens dated January 1, which stated that her return was delayed because of transportation problems. (Tr. III-124; P-21) He stated that he was further informed that respondent had notified the vice-principal by telephone on January 1 that her flight had been canceled and that she would return to school on January 6. (P-22) The Superintendent stated further that he was thereafter notified that on January 5 the vice-principal had received another overseas call from respondent stating that she was unable to return on January 6 because of the Olympic Airlines strike but that she had booked passage on January 7 for a TWA flight. (P-27)

The Superintendent stated that upon her return from Greece respondent met with him in regard to her absence but that, when he set up a subsequent meeting, she declined in writing stating that she would do so only with "counsel and legal representatives present." (P-23; P-33) He testified, however, that he did meet with her soon thereafter and advised her that the Board was preparing to file tenure charges against her. (Tr. II-132) The Superintendent also related that on January 2 he had contacted agents of Olympic Airlines who verified that a strike had caused the airlines to cancel flights out of Athens, but that he was told by agents of TWA that direct flights with available passage were leaving Athens daily at that time. (Tr. II-138-146; Tr. III-78-80)

Respondent testified that she flew to Athens with an Olympic Airlines ticket but that she was placed on a TWA flight because of the strike. (Tr. VI-112) She averred that she was married in a church ceremony on December 28, 1974. Respondent, on direct examination, stated that an earlier civil registry ceremony was held on December 26. On cross-examination, however, she stated that the two ceremonies were held on successive days, December 27 and 28. (Tr. VI-113; Tr. VII-74) When confronted with a translation of the marriage registration which she had submitted as part of her answer to interrogatories, she averred that the translation and the original contained numerous errors, the most noteworthy of which was the stated date of her marriage, January 3, 1975. Respondent asserted that she was not married on that date but on December 28, 1974. (P-40; Tr. VII-77-80) Respondent offered no additional documentary evidence in support of this claim, or in support of her announced reasons for her delayed return.

The hearing examiner has carefully reviewed the testimony of witnesses at the hearing and documents in evidence and makes the following finding of fact in regard to Charge No. 3:

The weight of credible evidence leads to the conclusion that respondent, without the prior approval of her employer, remained in Greece during days that her school was in session in order to be married on January 3, 1975, but that she

gave as a reason for her delayed return that she was unable to procure air passage. The hearing examiner finds that, as charged by the Board, the reason she gave was false, misleading, and unsupported by the facts. This finding is grounded on the forthright testimony of the Superintendent as corroborated by the vice-principal and on the documentary evidence submitted by respondent herself to the Board in evidence of her marriage. (P-39; P-40) Surely, had such an important document been in error as to the date of the ceremony, there was ample time since February 1975 for respondent or her husband, who is a Greek citizen, to procure a corrected document. Nor did respondent, who knew she was under her employer's close scrutiny because of two prior absences within less than a year, procure and produce documentary evidence in support of her claim that air passage suddenly became unavailable to her.

In consideration of the above finding, the hearing examiner recommends that the Commissioner determine that respondent's action in absenting herself without leave and giving to the Board false and misleading reasons unsupported by the facts constitutes unbecoming conduct sufficient to justify a reduction in salary or dismissal pursuant to *N.J.S.A. 18A:6-10 et seq.*

In summary, the hearing examiner finds that, in regard to Charge No. 1, the Board has failed in its proofs and recommends that the Commissioner dismiss that charge. He further finds that the Board has carried its burden of proof in respect to Charges Nos. 2 and 3 and recommends that the Commissioner determine that respondent, in those two instances, exhibited conduct unbecoming a teacher. The hearing examiner leaves to the Commissioner the determination of an appropriate penalty in these circumstances.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has carefully reviewed the pleadings, Briefs, testimony elicited at the seven days of hearing, hearing examiner's report and the exceptions thereto filed pursuant to *N.J.A.C. 6:24-1.16*.

The Board avers that the hearing examiner's reliance on the letter of Dr. Patella is misplaced, absent proof of the authenticity of its contents. (Petitioner's Exceptions, at pp. 1-4) The Commissioner cannot agree. The record is clear that the then Superintendent and the Board, after reviewing the matter, authorized that respondent be paid for the days she was absent in February 1974. (Tr. V-106; Tr. VI-83) Such payment would have been an improper expenditure of public funds without convincing evidence that petitioner had been ill. Although it is proper at this time for the Board to raise the allegation that it was deceived by information presented by respondent, the proof of such alleged deception, in a tenure hearing, is a burden upon the petitioning Board. *N.J.S.A. 18A:6-10 et seq.* A thorough review of the evidence relevant to Charge No. 1 convinces the Commissioner that the Board has failed to present the quantum of proof needed to support a conclusion that Charge No. 1 is true in fact. Accordingly, Charge No. 1 is dismissed.

Respondent takes exception, *inter alia*, to the hearing examiner's statement that her testimony that she received medical treatment a number of times was uncorroborated. Respondent avers that this statement is inconsistent with the hearing examiner's own ruling at Tr. VI-41 that corroborative testimony from the School Business Administrator was not required. (Respondent's Exceptions, at pp. 2-3)

The Commissioner notices that it was at the suggestion and with the full agreement of respondent's attorney that such corroborative testimony was omitted on the representation that it would be repetitive. (Tr. VI-40-41) Accordingly, the exception is without merit.

Respondent further states that with respect to Charge No. 3 the hearing examiner's conclusion must be stricken for the reason that the examiner allegedly placed the burden of proof upon respondent rather than upon petitioner. (Respondent's Exceptions, at p. 6) The Commissioner finds no merit in this statement of exception. The hearing examiner delineated in his report concerning both Charges Nos. 2 and 3 that testimony and evidence upon which he based his findings that the charges proven by the Board were true. The hearing examiner's report is in no way indicative that the examiner improperly shifted a burden of proof upon respondent. When a strong *prima facie* case is presented in a tenure hearing against a tenured teaching staff member, as herein, it must be recognized that more is required in defense than a mere verbal denial of the proofs by the respondent, unless by demeanor and persuasive testimony the trier of fact is firmly convinced of the veracity of the respondent. In the instant matter, respondent was unsuccessful in such an effort.

Respondent further excepts the report of the hearing examiner for the reason that he did not forthrightly deal with Greek law as it applies to the matter of respondent's marriage to a Greek citizen. *Miele v. Miele*, 25 N.J. Super. 220 (Chan. Div. 1953) The Commissioner, similarly, finds no merit in this exception. In the matter under litigation the critical aspect is not whether or not respondent was officially married but whether she was absent for insufficient reason from her teaching post and in connection therewith falsified and misrepresented to the Board and its administrative officers the reasons for her absences.

The Commissioner has carefully considered the arguments of law and the exceptions of respondent in light of the evidence before him and concludes that the Board has presented a preponderance of credible evidence in proof of the validity of Charges Nos. 2 and 3. The Commissioner so holds. It is further determined that respondent's willful absenting of herself from her post of duty and giving false reasons to her employer for her absences from September 3, 1974 through October 9, 1974 and from January 2, 1975 through January 7, 1975 constitutes gross and unbecoming conduct within the contemplation of N.J.S.A. 18A:6-10 *et seq.*

The Commissioner is constrained to reiterate and emphasize that which he said *In the Matter of the Tenure Hearing of Ronald Puorro, School District of*

*the Township of Hillside, Union County*, 1974 *S.L.D.* 755, aff'd. State Board of Education March 5, 1975 as follows:

“\*\*\*[T]he Commissioner finds it reprehensible for any teaching staff member to leave his assigned post of duty, and those pupils entrusted to his care, without a proper authorization\*\*\*.” (at p. 762)

A thorough and efficient system of free public schools as mandated by the New Jersey Constitution demands that a board's regular certificated teachers be at their teaching posts during all possible days that school is open. As was said *In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County*, 1966 *S.L.D.* 77; aff'd State Board of Education 106; aff'd New Jersey Superior Court, Appellate Division, 1967 *S.L.D.* 351;

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

Similarly, the Commissioner has said *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County*, 1974 *S.L.D.* 97 that:

“\*\*\*Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.\*\*\*” (at pp. 98-99)

See also *In the Matter of the Tenure Hearing of William Fleming, School District of the Borough of Hawthorne, Passaic County*, 1974 *S.L.D.* 246.

The Board, and any employing board of education, is entitled to truthfulness from employees in all matters, including the reasons they give for their absences. In certain instances wherein teaching staff members have been grossly untruthful to their employing boards, the Commissioner has determined that the appropriate penalty was dismissal. *Deer, supra; Pitch, supra*

The Commissioner determines, in the matter herein controverted, that respondent's absenting herself from her teaching post for a total of thirty-one school days and giving to her employer false and misleading reasons for those absences, constitutes such gross conduct that she has forfeited her tenure in the School District of the Borough of Midland Park. Accordingly, respondent is dismissed as of the date of her suspension, namely January 13, 1975.

COMMISSIONER OF EDUCATION

September 16, 1976

Pending State Board of Education

**In the Matter of the Annual School Election**

**Held in the School District of the Township of Warren, Somerset County.**

COMMISSIONER OF EDUCATION

**DECISION**

On March 9, 1976, the annual school election was conducted in the Township of Warren and the budget proposal by the Board of Education of the Township of Warren, hereinafter "Board," for the current expenses of the school district in the 1976-77 academic year was approved. Thereafter, on March 13, 1976, Glenn F. Kennedy, a citizen resident in Warren Township, hereinafter "petitioner," addressed a letter to the Commissioner of Education which alleged that literature favoring a vote "for the budget" had been distributed by school pupils contrary to law. *N.J.S.A.* 18A:42-4 He requested an investigation by the Commissioner.

Pursuant to such request an inquiry with respect to the election was conducted on March 31, 1976 at the office of the Somerset County Superintendent of Schools by a representative of the Commissioner. The report of the representative is as follows:

At the inquiry the Board stipulated that:

1. The Parent Teacher Association, hereinafter "PTA," had printed or caused to be printed, three handbills which requested that voters in the district vote in favor of the school budget.
2. The handbills were delivered by the PTA to the various schools of the district for distribution. (Tr. 15)

The Board also agreed to stipulate, although petitioner did not concur, that:

1. The manner of handbill distribution, via school pupils, was never brought to the attention of the Superintendent prior to the time of distribution took place.
2. The Board did not initiate, sanction or condone the method of distribution.
3. There is a Board policy permitting the distribution of PTA literature.
4. Neither the Superintendent nor the Board knew of the contents of the literature prior to distribution. (Tr. 15-16)

Testimony at the inquiry was principally concerned with the truth or falsity of these latter four stipulations offered by the Board and rejected by petitioner. This testimony and three handbills in evidence (P-1; P-2; P-3) are directly pertinent.

The handbills are similar in that each urges a "Vote for the budget" and certain various other assertions:

1. "DON'T SIT HOME AND LET THIS ZERO INCREASE BARE BONES BUDGET GO DOWN TO DEFEAT!" (P-2;P-3)
2. "Defeat of this budget will most assuredly require program cuts affecting every Warren student in Kindergarten through eighth grade." (P-1)
3. "ONLY YOU CAN PRESERVE QUALITY EDUCATION IN WARREN." (P-2;P-3)

The handbill P-1 is attributed to "The Warren Township PTA's" while P-2 and P-3 contain the notation "Sponsored by the PTA's of Warren." Thus, all three documents are not consistent with the statutory prescription. *N.J.S.A.* 18A:14-97 and 97.2 The statutes recited in their entirety provide:

*N.J.S.A.* 18A:14-97

"No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, *handbill*, card, pamphlet, statement, advertisement or other printed matter *shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied*

*or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.” (Emphasis supplied.)*

*N.J.S.A. 18A:14-97.2*

“In event that any such circular, handbill, card, pamphlet, statement, advertisement or other printed matter of the nature referred to in section 18A:14-97 is to be printed, copied, published, exhibited, or distributed or the cost thereof is to be defrayed by an association, *organization* or committee, the name and *address of the association*, organization or committee may be used in compliance with the provisions of this article if there is used therewith the *name of at least one person by whose authority*, acting for *such association, organization or committee, such action is taken.*” (Emphasis supplied.)

The handbills, measured in the context of this statutory criteria, do not contain:

1. A statement of the name and address of the person or persons causing them to be printed;
2. The name and address of the person or persons by whom the cost of printing was defrayed;
3. The name and address of the printer; or
4. The address of the association together with the name of one person of an association by whose authority, acting for such association, the action (to print and circulate the handbills) was taken.

Thus the handbills are clearly illegal and this fact *per se* is not contested by the Board. The statute of pertinence which provides the penalty for such illegality is *N.J.S.A. 18A:14-104* which is recited as follows:

“Any person violating any provisions of sections 18A:14-97, 18A:14-97.1 or 18A:14-97.2 shall be a disorderly person and shall be punished by a fine not exceeding \$500.00 or by imprisonment not exceeding one year, or both.

“Any person violating any provision of this chapter for which no penalty is provided shall be guilty of a misdemeanor.

“Any corporation violating any provisions of sections 18A:14-99 to 18A:14-102 inclusive, shall also forfeit its charter.”

The Board does aver that it or its agents were not responsible for the printing or distribution of the literature and that the distribution was attributable to an “honest misunderstanding.” (Tr. 47) The statute which prohibits use of school

pupils to take partisan literature to their homes or distribute it generally is *N.J.S.A.* 18A:42-4. The statute recited in full is as follows:

*N.J.S.A.* 18A:42-4

“No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.”

The President of the PTA did not testify at the hearing, although the two stipulations of reference, *ante*, served in lieu of such testimony that the PTA had caused the documents to be printed and circulated. (See Tr. 14 *et seq.*)

The Superintendent of Schools testified that he was “aware” of one of the handbills in the week prior to the election but that he was under the impression that it had already been distributed prior to the time it came to his attention. (Tr. 18-19, 22) He testified that for this reason he did nothing to stop its distribution. (Tr. 19) The Superintendent further testified that there is a Board policy which states that literature originating with PTA auspices may be distributed if it has received prior approval of the appropriate building principal. (Tr. 20) At a later time in the hearing he testified that one building principal had sanctioned the handbill distribution. (Tr. 43) The Superintendent testified he had not experienced problems with such handbill distribution in prior years and he said the principals of the district

“\*\*\*knew it was against the law for the Board to send out such information but they didn’t realize that it was against the law for the PTA to do so.\*\*\*” (Tr. 21)

The Superintendent testified he had not known about handbills P-2 and P-3 until after the election but at that time (March 23) in response to complaints he issued a memorandum to all school principals on the subject. (R-1) This memorandum did enjoin future distribution but did not contain information concerned with the illegality of the handbill in the context of *N.J.S.A.* 18A:14-97 and 97.2.

The President of the Board testified that she was not aware that the laws pertinent to distribution of partisan literature by pupils applied to PTA groups as well as to local boards of education (Tr. 28), although she testified she had known the PTA had plans to prepare and distribute a flyer prior to the election. (Tr. 28) She testified she “\*\*\*never thought to ask how they were

going to distribute it.\*\*\*” (Tr. 28) She testified she was never asked to permit handbill distribution and saw the handbill P-3 for the first time when it was sent to her by petitioner. (Tr. 29-30)

A teacher’s aide testified she had helped to count out and distribute the handbills one day and in the course of her work she had questioned whether or not the documents (P-2 or P-3) should be sent home with pupils. (Tr. 37, 40, 42) She testified that she voiced her doubts to the “teacher in charge” of her building and that this teacher “made a phone call” and received clearance that the handbills could be distributed. (Tr. 38) (The testimony of the Superintendent, *ante*, was that this call had been made to a principal.)

Such testimony and evidence should not, in the Board’s judgment, warrant a decision by the Commissioner to vitiate the election since the distribution was attributable to an “honest misunderstanding” over Board policy. (Tr. 45-47) The Board avers there is no evidence of official or unofficial action “\*\*\*by either the Superintendent of Schools or the Board of Education which had anything to do with compiling or distributing this literature.\*\*\*” (Tr. 47)

Petitioner avers that the school officials had knowledge of and permitted distribution of literature by school pupils contrary to law. He further avers that school facilities were used and personnel costs were incurred and that such use and costs, supported by all taxpayers, were employed for the benefits of a select group. Accordingly, he requests the Commissioner to vitiate the election.

The hearing examiner has examined all such arguments and evidence and finds that:

1. Handbills which advocated a position in favor of the school budget and which were illegal on their face were illegally distributed by school pupils prior to the election of March 9, 1976.
2. Such handbills were clearly sanctioned for distribution by at least one school official, a principal, and at least indirectly in part by the Superintendent of Schools who took no immediate and direct action of record to halt possible handbill distribution on March 8 or 9 although he was aware of one such handbill distribution on or about the date of March 5, 1976. (Tr. 19)
3. There is no evidence that either school officials or Board members conspired to formulate or distribute the handbills and the testimony that there was an “honest misunderstanding” is not without logic in the circumstances of the controversy.
4. It is not clear at this juncture that the costs of the handbills were borne by the PTA although it is stipulated that the organization “printed three pamphlets.” (Tr. 15)

Finally, the Commissioner's representative leaves to the Commissioner a decision concerned with petitioner's plea to vitiate the election. The representative recommends referral of the evidence concerned with handbill composition to the Somerset County prosecutor for consideration.

This concludes the report of the Commissioner's representative.

\* \* \* \*

The Commissioner has reviewed the report of his representative and the reply thereto submitted by the Board. Such reply reiterates certain evidence for clarification but takes no exception to the primary findings of the report. The fact that partisan literature was distributed by school pupils in the Township of Warren prior to the annual school election remains unchallenged. It is also not denied that a school official condoned or sanctioned such distribution and that prompt measures were not initiated on March 5, 1976, when details of the distribution of the handbill (P-1) were known, to halt future distributions.

Thus, it is clear that the statute, *N.J.S.A.* 18A:42-4, has been violated. It is equally clear from an examination of the handbills (P-1, 2 and 3) that other statutes of long standing were not complied with.

The Commissioner does not condone but condemns such violations of law and finds little mitigation for them in an argument that they were inadvertent. The statutory requirement for a fair and nonpartisan school election was not met and the election process was tinged with irregularity which must not be allowed to occur again.

Accordingly, the Commissioner directs the Board, which has the responsibility for the conduct of such elections, to take prompt and effective action to insure that such irregularities do not recur. As the Commissioner has previously said in *Theodore H. Halligan v. Board of Education of the Borough of Rutherford, Bergen County*, 1959-60 *S.L.D.* 198:

“\*\*\*While the Board may properly delegate authority to administer *N.J.S.A.* 18:14-78.1, the Board of Education, nevertheless, has the overall responsibility to see to it that the statute is observed.” (at p. 200)

The statute of reference in *Halligan* was the predecessor of *N.J.S.A.* 18A:42-4. Both statutes prohibit the distribution of partisan literature by school pupils.

The Commissioner further directs that a copy of the report of his representative and of this decision be forwarded to the Somerset County prosecutor. Such direction is founded on the fact that the statutes, *N.J.S.A.* 18A:14-97 *et seq.*, have been clearly violated, although the penalty for such violation is one that only a court of proper jurisdiction may impose after consideration of all of the factors.

Finally, the Commissioner finds no reason to vitiate the election on the basis of the irregularities which have been found to be present. Such irregularities, while condemned, are not sufficient cause to set an election aside. As the Commissioner said in *Mundy v. Board of Education of the Borough of Metuchen*, 1938 *S.L.D.* 194 (1926), affirmed State Board of Education 195 (1926):

“Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.”  
(at p. 194)

See also *Love v. Board of Chosen Freeholders of Hudson County*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), aff'd 13 *N.J.* 185 (1953). There has been no such showing with respect to the conduct of the election herein.

COMMISSIONER OF EDUCATION

September 21, 1976

**Board of Education of the Borough of Demarest,**

*Petitioner,*

*v.*

**Borough of Demarest, Bergen County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**ORDER**

This matter having been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the Borough of Demarest, Bergen County, hereinafter “Board,” (Bartlett and Turitz, Esqs., Stanley Turitz, Esq., appearing) which challenges the reductions imposed upon its 1975-76 school budget by the Mayor and Council of the Borough of Demarest, hereinafter “Council,” (Breslin and Schepisi, Esqs., John A. Schepisi, Esq., appearing); and

It appearing that the hearing examiner assigned to the matter issued his report on June 22, 1976, which set forth his findings of fact, conclusions of law, and recommendations with respect to those items in dispute; and

It appearing that the parties of interest have entered into a Stipulation of Settlement and Dismissal, with Amendment, which is made part hereof whereby Council shall pay to the Board the sum of \$108,500 no later than July 1, 1977; and

It appearing that the issues in dispute have been amicably settled between the parties, the Petition is hereby dismissed with prejudice on this 23rd day of September 1976.

COMMISSIONER OF EDUCATION

September 23, 1976

**Marilyn Arzberger,**

*Petitioner,*

v.

**Board of Education of the Township of Neptune, Monmouth County,**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Laird & Wilson (Andrew J. Wilson, Esq., of Counsel)

Petitioner complains that the Board of Education of the Township of Neptune, hereinafter "Board," improperly and illegally terminated her employment as a secretary. Petitioner seeks reinstatement and the recovery of all moneys which she claims are due her. The Board denies the allegations and asserts that its action with respect to the termination of petitioner's employment is in all respects proper and legal.

The parties have filed Motions for Summary Judgment with supporting Briefs. The matter is before the Commissioner of Education on the record, including the pleadings, Briefs of the parties, affidavits, and exhibits.

Petitioner was first employed as a bookkeeping clerk by Board resolution (R-6) adopted on February 23, 1972. The resolution provides as follows:

“RESOLVED: That [petitioner] be hired for a 30-day probationary period as a Bookkeeping Clerk in the Board Secretary’s Office retro-active to February 22, 1972 at a pro-rata salary\*\*\*.”

Subsequent to the expiration of petitioner’s thirty day probationary period, the Board resolved (C-1) on March 29, 1972:

“\*\*\*That having satisfactorily completed a 30-day probationary period, a contract be offered to [petitioner] as a Bookkeeping Clerk in the Board Secretary’s Office effective retro-active to March 22, 1972 to June 30, 1972 at a pro-rata salary\*\*\*.”

The employment contract (R-2) for the period March 22, 1972 to June 30, 1972, signed by petitioner and in the form prescribed by the Commissioner (N.J.S.A. 18A:27-7), contained a thirty day written notice of termination clause by either party.

Petitioner was reemployed as a bookkeeping clerk for the 1972-73, 1973-74 and 1974-75 school years and signed yearly employment contracts (R-3, R-4, R-5), each of which contained a thirty day written notice of termination clause by either party.

During the course of petitioner’s employment for the 1974-75 school year, the Board Secretary, by letter dated December 19, 1974, advised petitioner:

“The Board of Education, sitting in regular session on December 18, 1974, considered my recommendation concerning your continued employment and wishes to inform you that your employment as Bookkeeping Clerk in the Board Office [is] terminated immediately for the following reasons:

[Here follow five specific reasons supporting the Board’s action terminating petitioner’s employment.]

“Your salary, in accordance with your contract, will be continued for a 30-day period commencing January 2, 1975.

“It is my determination that you are entitled to two (2) weeks vacation, which will be a part of the 30 days, commencing January 2, 1975.\*\*\*”

(R-1)

The minutes of the meeting of the Board held December 18, 1974, show that it took action to terminate petitioner’s employment as hereinbefore stated. (C-2)

It is within this factual context that the Board moves for Summary Judgment. The Commissioner has reviewed the Brief in support of the Motion and observes that the Board's two major arguments contend that petitioner has not acquired a tenure status pursuant to *N.J.S.A.* 18A:17-2 and that while not required to, the Board has fully complied with the New Jersey Supreme Court's holding in *Mary Donaldson v. Board of Education of the City of North Wildwood*, 65 *N.J.* 236 (1974) and the Commissioner's earlier decision in *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 *S.L.D.* 332

The Commissioner observes that petitioner lays no claim to a tenure status. (Petitioner's Brief, at p. 5) Petitioner does argue, however, that upon the completion of her original thirty day probationary period as a bookkeeping clerk, she could only be terminated from her employment for cause subject to an adversary hearing. Petitioner asserts that she had an expectation of continued employment which is a property right that may not be tampered with, absent a notice and subsequent hearing. Petitioner, in support of this position, cites *Perry v. Sindermann*, 408 *U.S.* 593, 92 *Sup. Ct.* 2694, 33 *L.Ed. 2d* 570 (1972); *Board of Regents of State College v. Roth*, 408 *U.S.* 564, 92 *Sup. Ct.* 2701 (1972), 33 *L.Ed. 2d* 548; *Goss v. Lopez*, 419 *U.S.* 565 (1975); and *North Georgia Finishing, Inc. v. DiChem, Inc.*, *U.S.* , 95 *Sup. Ct.* 719 (1974).

Finally, petitioner attests in her affidavit (C-3) that the real reason her employment was terminated was a prior workmen's compensation claim she had filed against the Board and its insurance carrier because of an injury she sustained to her knee. Petitioner also attests that the Board Secretary had informed her subsequent to the expiration of her thirty day probationary period that she could only be terminated for just cause.

In a supplemental affidavit (C-4) petitioner argues that the Board Secretary had no authority to determine that her two week vacation was to be part of the thirty day notice. Petitioner contends that her vacation must be in addition to the thirty day notice which began on January 2, 1975. She asserts that her eighteen accrued days of sick leave together with her vacation would have taken her beyond February 22, 1975 for purposes of tenure acquisition. Petitioner vigorously opposes the Board's Motion for Summary Judgment on the grounds that the Board failed to contradict the sworn allegations set forth in her affidavit and cites *Marilyn Winston v. Board of Education of South Plainfield*, 125 *N.J.Super.* 131 (*App. Div.* 1973), 64 *N.J.* 582, 586 (1974).

The Commissioner observes that a board of education may make rules and regulations for the management of its schools and for the employment and discharge of its employees. *N.J.S.A.* 18A:11-1 In the instant matter, petitioner does not lay claim to a tenure status; rather, petitioner asserts she could not be terminated without cause, notice, and hearing. The Commissioner disagrees. Petitioner's employment began on February 22, 1972, and her service terminated on December 19, 1974. Consequently, her service to the district is less than that required for a tenure status to have accrued pursuant to the provisions

of *N.J.S.A.* 18A:17-2. There is no authority by which a board of education is required to serve notice of charges and to grant a subsequent hearing thereon to a nontenure clerical employee prior to discharge under the terms of the employment contract. Even if the Board Secretary, as alleged herein, stated that petitioner would only be removed from employment for cause, such a statement is not binding on the Board.

Petitioner's reliance on *Perry, supra*; *Board of Regents, supra*; *Goss, supra*; and *North Georgia, supra*, is misplaced. Petitioner's right to an expectation of employment is limited by the terms of the respective employment contracts she freely entered. (R-1, R-2, R-3, R-4) Each contract provided for a thirty day written notification of employment termination. The Board exercised its option available under the terms of the employment contract it had with petitioner, which option was also available to petitioner. For a full exposition of the legal principles articulated by the United States Supreme Court in *Perry, supra*, and *Board of Regents, supra*, as applied to nontenure teaching staff members in New Jersey, see *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County*, 1975 S.L.D. 669. In the Commissioner's judgment, petitioner, a secretarial employee, has no basis for claim against the Board emerging from the cited case.

On prior occasions the Commissioner has addressed the question of claimed vacation time by board of education employees. In *Ralph W. Herold v. Board of Education of the Borough of Mount Arlington, Morris County*, 1967 S.L.D. 255, Herold was employed by the Board for several years as its administrative principal and claimed compensation for purported vacation leave from the beginning of his last contract year to the date of his resignation prior to the conclusion of that year. Herold had taken vacations with pay at the beginning of each of the contract years of his employment, but as vacation earned for the previous year's employment, a condition set forth clearly in the employment contract. The Commissioner held that absent an employment contract provision for payment for accrued vacation leave in the event of early termination or provision for salary in lieu of vacation leave, Herold had no claim for such payment.

In *Ronald Giberson v. Board of Education of the Borough of South Plainfield, Middlesex County*, 1970 S.L.D. 433, Giberson was employed by the Board as a principal for several years and tendered his resignation on July 4, 1969, effective sixty days therefrom. Giberson continued to perform his duties during the sixty day period but failed to receive compensation for the last two week period. The Board held that because he had received vacation leave with pay during the 1969 summer and resigned, it owed him no compensation after August 15, 1969, two weeks prior to the expiration of the sixty day notice. The Board filed a counterclaim to recoup compensation it paid Giberson for vacation pay received during the 1969 summer. The Commissioner observed that neither party submitted an employment contract or Board policy regarding vacation leave and found that petitioner's claim for compensation for the last two weeks was for work performed and not for vacation pay. The Commissioner granted

Giberson's claim for compensation and directed the Board to adopt appropriate policies to govern vacation leaves to avoid similar disputes in the future.

In *Dr. Constant J. De Cotiis v. Board of Education of the Borough of Woodcliff Lake, Bergen County, et al.*, 1972 S.L.D. 456, De Cotiis was employed by the Board as its Superintendent of Schools. On July 8, 1966, De Cotiis sustained an accidental injury to his back which caused his absence from his duties for 183 days. Thereafter, De Cotiis was absent from his duties between June 2, 1969 and June 30, 1970 for personal illness diagnosed as heart disease. De Cotiis was absent again from his duties the entire 1970-71 school year for the same illness. On June 8, 1971, the Board had applied to the New Jersey Teachers Pension and Annuity Fund, Division of Pensions, Department of Treasury, hereinafter "TPAF," for the involuntary, ordinary disability retirement of De Cotiis. The TPAF approved the application on September 16, 1971, effective July 1, 1971. De Cotiis thereafter filed a Petition before the Commissioner claiming that the Board's action of securing his involuntary retirement as of July 1, 1971, deprived him of vacation leave with pay which had been due him and that the entitlement to such leave had been acknowledged by the Board by resolution dated April 24, 1968. The Commissioner held:

\*\*\*\*In the judgment of the Commissioner, under the particular circumstances of the instant matter, petitioner's claim for six months of vacation leave with pay rises to the status of a legally-enforceable right by virtue of the Board's clear action, as stated in its resolution of April 24, 1968\*\*\*\*. The fact that petitioner was involuntarily retired for ordinary benefits as of July 1, 1971, cannot deprive him of this rightful benefit derived from his years of service.\*\*\*\*" (at p. 462)

Finally, in *Richard Onorevole v. Board of Education of the City of Englewood, Bergen County*, 1974 S.L.D. 1261 Onorevole was employed by the Board on a twelve month basis. Onorevole was granted one month vacation leave with pay, accumulated from the prior year's service. Onorevole resigned his position on July 9, 1970, effective July 31, 1970. July 1970 was the month in which Onorevole was on his normal paid vacation leave. The Superintendent, upon receipt of the letter of resignation, required Onorevole to work twenty days in July in order to receive compensation. Onorevole did work the month of July 1970, reluctantly, and later filed his Petition seeking compensation for his one month's vacation.

The Commissioner held:

\*\*\*\*[T]he Board and petitioner had achieved a mutually agreeable arrangement whereby he [Onorevole] worked for an eleven-month period during the busiest time of one school year and was afforded a paid vacation during the month of July of the next school year. Such an arrangement is common in the public schools of New Jersey. Petitioner had every reason to believe that he was entitled to paid vacation leave for the month of July 1970.\*\*\*\*" (at p. 1269)

It may be concluded from a review of the referenced cases that boards of education must have clearly stated written policies with respect to vacation leaves with pay. Otherwise, resulting litigation, costly to all parties involved, such as in the instant matter may occur.

In the instant matter, as in *Giberson, supra*, there has been no employment contract provision nor Board policy submitted in regard to petitioner's claimed two week vacation with pay entitlement. Petitioner alleges entitlement to a two week paid vacation leave; the Board Secretary states (R-2) unequivocally that she is entitled to a two week paid vacation leave. The statement of the Board Secretary, as already noted, is not binding on the Board. The question remains whether, by virtue of a stated Board policy, rule or regulation, or unwritten rule of the Board established through past practice, petitioner is entitled to a two week paid vacation leave. Such an issue must be addressed in the context of the termination of employment prior to the expiration of the employment contract year. Should it be established that petitioner is entitled to the controverted vacation leave, such leave would be in addition to the thirty day notice of employment termination.

Petitioner's argument that she was terminated because of a workmen's compensation claim she had filed is without merit. Petitioner has failed to provide any credible evidence in support of this allegation. Additionally, with respect to petitioner's claim to unused sick leave, the Commissioner observes that accrued sick leave may only be used by employees when and if they became ill during the course of their employment. *N.J.S.A. 18A:30-1; De Cotiis, supra*

Accordingly, the Commissioner remands to the Board of Education the question of petitioner's claimed vacation leave with pay for further consideration. The Commissioner hereby retains jurisdiction in this limited area. In all other respects, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 24, 1976

Pending State Board of Education

**In the Matter of the Tenure Hearing of**

**Carolyn D. Baley,**

**School District of the Township of Mansfield, Warren County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board of Education, Wayne Dumont, Jr., Esq.

For the Respondent, Ruhlman and Butrym (Paul T. Koenig, Esq., of Counsel)

The Complainant Board of Education of the School District of the Township of Mansfield, hereinafter "Board," has certified two charges against respondent, a tenured school nurse in its employ, for consideration by the Commissioner of Education under the Tenure Employees Hearing Act, *N.J.S.A. 18A:6-10 et seq.* The Board certified that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary. These charges were certified to the Commissioner by resolution adopted at a special meeting of the Board held on December 23, 1975, and served on respondent by the President of the Board.

A hearing on these charges was conducted by a hearing examiner appointed by the Commissioner at the office of the Warren County Superintendent of schools, Belvidere, on April 20, 1976. The report of the hearing examiner follows:

Two separate charges were brought forth which will be discussed *seriatim*.

**CHARGE NO. 1**

"Carolyn D. Baley, a nurse employed by the Board of Education of the Township of Mansfield, in the County of Warren and State of New Jersey, did, at approximately 1:00 o'clock P.M., on December 8, 1975, at the Mansfield Township Elementary School in the school district wrongly and negligently administer medicine (Ritalin) to a student, [W.S.], even though the copied label attached to the bottle containing the medicine and an accompanying note directed and delivered to Mrs. Baley clearly prescribed that the pills in question were intended only for [R.S.], another student and a cousin of [W.S.]"

Respondent admits that, through an error, prescription medication was administered to a pupil other than the pupil for whom the medication was

prescribed but denies that the evidence and circumstances surrounding this incident warrants her dismissal or reduction in salary.

(Respondent's Answer, at p. 1)

#### CHARGE NO. 2

"Carolyn D. Baley, when she failed to make telephonic contact during the afternoon of December 8, 1975, with either the mother or father of [W.S.] at the [pupil's] home, did further wrongly and negligently fail to telephone the emergency number (being the place of employment of [the pupil's mother]) recorded in [W.S.]'s student emergency card file, and did not even attempt in the evening of December 8, 1975, to try again to contact the residence of [W.S.] and his parents to explain the events which had occurred."

Respondent denies the second charge and prays to the Commissioner for relief in the form of reinstatement to her former tenured position and reimbursement for all pay and allowances withheld during her period of suspension. (Respondent's Answer, at p. 2)

It is an uncontroverted fact that a Ritalin tablet prescribed for R.S. (C-4) was administered in error to his cousin, W.S. (Tr. 123) Respondent in detailed testimony explained that the medication had been delivered to her by the uncle of R.S. and the father of W.S., at the request of the mother of R.S., the child for whom the medicine was prescribed. (Tr. 116-122) Respondent further testified that on that date, December 8, 1975, she had been unusually busy with activities preparing for an immunization clinic. (Tr. 117)

Respondent in continuing testimony stated that immediately upon realizing her mistake she voluntarily reported the mistake to the administrative principal of the Mansfield Township School District. (Tr. 123) This was also established by the principal's testimony. (Tr. 15)

Respondent also testified that she saw W.S. three times between 2 and 3 p.m. of that day and noted no ill effects and also described her abortive efforts to call the pupil's home from 3 p.m. to 5:20 p.m. at which time she left the building. (Tr. 128)

Previous testimony by the mother of R.S. established her receipt of a telephone call from respondent which clearly evidenced respondent's confusion of R.S. with W.S., thinking of them, indeed as she did, as brothers. (Tr. 45) Subsequent testimony of respondent verified this confusion of identity. (Tr. 135)

The mother of W.S. expressed her concern for the health of her son because of the ingestion of the Ritalin tablet in light of her own history of allergies. (Tr. 57) She further stated, "\*\*\*\*My biggest complaint was the fact that no one contacted me\*\*\*." (Tr. 58)

Subsequent to the incident and within the following week, the mother of W.S. took her son to a physician who purportedly said “\*\*\*he thought \*\*\* [W.S.] was all right.\*\*\*” (Tr. 59)

The father of W.S. testified to being home on the day of the incident, December 8, 1975, until 2:50 p.m., that Mrs. Baley did not contact him prior to that time and that he subsequently left for work. (Tr. 66) The following day the father of W.S. took his son to school and stopped in the office where a conversation with Mrs. Baley in the presence of the assistant principal resulted in “a few hard words with her.” (Tr. 68, 70)

The closing statement on behalf of respondent established that a mistake had been made by respondent (Tr. 164), and the Board responded with an expression of deep concern that another mistake might be made. (Tr. 166)

By agreement of both counsel and the hearing examiner and subsequent to the hearing held on April 20, 1976, interrogatories were submitted by counsel for respondent to Dr. Faber, the medical inspector employed by the Board. They are herewith presented in entirety to the Commissioner for his consideration:

“1. What is the use of the substance Ritalin?

1. Psychic Energizer for mildly depressed people
2. Hyperactive children

It has been classified as a drug restricted for use by prescription only.

“2. How long would it take a dose, such as the dose administered by Mrs. Baley, to be assimilated into the system of a normal child of the age, height and weight of [W.S.] on December 8, 1975?

Child is age 8, Ht 52 inches, Wt 67 lbs. Depending upon digestive system status at that time it should average 20 to 90 minutes.

“3. What would be the effects of such a dose on such a child who had not had this medicine prescribed for him and had never taken it in the past?

None -- except after prolonged use such as 10-14 days 3 X a day.

“4. What would be the normal outward effects?

None

“5. What could be the potential undesirable side effects of a single unprescribed dose?

None.\*\*\*”

In summation the hearing examiner finds that sufficient credible evidence supports the validity of each of the two charges against respondent as filed with the Commissioner by the Board. Respondent erred by administering medication to a pupil other than the one for whom the medicine was prescribed. Subsequently, respondent failed to notify the parents of the pupil to whom the medication was mistakenly administered.

The hearing examiner leaves to the Commissioner to decide whether these charges are sufficient to warrant a dismissal or reduction in salary of respondent who has had no previous problem such as this. (Tr. 114)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has carefully reviewed the report of the hearing examiner and the record in the instant matter, and concurs in his findings.

There is no question that the two charges filed with the Commissioner have been substantiated. It remains to be determined if the charges as proven warrant the dismissal of this tenured employee as requested by the Board. The Commissioner determines that they do not. Such determination is one which does not minimize the seriousness of the charges but recognizes the fact that they are isolated events in a long career of service and not sufficiently flagrant to warrant dismissal.

The rationale in such instances was aptly set forth by the Court in *Redcay v. State Board of Education*, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed 131 N.J.L. 326 (E.&A. 1944). It was held that:

“\*\*\*Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.\*\*\*” (130 N.J.L. at 371)

There are no “numerous incidents” in the instant matter. There is, in effect, one incident and the circumstances of its occurrence were not devoid of elements of confusion. Respondent immediately recognized her error, however, and made a voluntary report of it to the school administrator.

Accordingly, in recognition of respondent’s good record over thirteen years of service, the Commissioner determines that the compensation lost by respondent during the initial 120 days of suspension is sufficient penalty.

The Commissioner therefore directs that respondent be reinstated to her tenured position for the school year 1976-77, and that she be granted all the emoluments of this position, except as noted above, including placement on her proper step of the Board's 1976-77 salary guide.

COMMISSIONER OF EDUCATION

October 1, 1976

Pending before State Board of Education

**Thelma Wisner,**

*Petitioner,*

v.

**Harold Y. Bills, Monmouth County Superintendent of Schools,  
Monmouth County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

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

For the Respondent, William F. Hyland, Attorney General of New Jersey (Jane Sommer, Attorney at Law)

Petitioner, a member of the Board of Education of the City of Asbury Park, hereinafter "Board," alleges that the Monmouth County Superintendent of Schools acted unreasonably and beyond the scope of his statutory authority when he appointed a president of the Board on March 3, 1976. Respondent contends that the controverted appointment was consistent with both the responsibility and authority conferred on him by *N.J.S.A. 18A:15-1*.

A Motion to Intervene on petitioner's behalf, brought by a resident taxpayer and the Asbury Park Education Association, was denied on August 9, 1976 by Order of the Commissioner of Education on grounds that the matter before him required an interpretation of law rather than interpretation of material facts.

The matter is before the Commissioner in the form of Motions by both litigants for Summary Judgment, supporting Briefs and accompanying affidavits. Since no relevant material facts are in dispute, the matter is ripe for a determination. The facts are these:

On March 1, 1976, the five member Board conducted its annual organization meeting pursuant to *N.J.S.A.* 18A:12-8. The sole nomination for president received no second, thus no president was elected. A vice president was duly elected at that meeting. On March 2 respondent was officially notified that the Board had failed to elect a president and on March 3 he appointed a newly elected member to that post. (Respondent's Affidavit) Thereupon, petitioner filed the matter as a controversy before the Commissioner.

Petitioner charges that respondent exceeded his authority as county superintendent by appointing a president on March 3. It is argued that *N.J.S.A.* 18A:15-1 alone is not controlling within such a factual context but must be considered *in pari materia* with *N.J.S.A.* 18A:15-2. *N.J.S.A.* 18A:15-1 reads as follows:

“At its first regular meeting each board shall organize by electing one of its members as president and another as vice president, who shall serve for one year and until their respective successors are elected and shall qualify, but if the board shall fail to hold said meeting or to elect said officers, as prescribed by this law, the county superintendent shall appoint from among the members of the board a president and vice president.”

*N.J.S.A.* 18A:15-2 provides that:

“A president or vice president of a board of education who shall refuse to perform a duty imposed upon him by this law may be removed by a majority vote of all of the members of the board, and in case the office of president or vice president shall become vacant the board shall, within 30 days thereafter fill the vacancy for the unexpired term. If the board shall fail to fill the vacancy within such time, the county superintendent shall fill the vacancy for the unexpired term.”

Petitioner contends that a swift appointment by respondent precluded the Board from electing its own president and thus contravened an express function of the Board. Petitioner further contends that respondent should have waited for a thirty day period as a reasonably appropriate time for the Board to fulfill its executive obligation to elect its president. In support of these contentions petitioner cites, *inter alia*, *Red Bank Board of Education v. Warrington*, 138 *N.J. Super.* 564 (*App. Div.* 1976) and *Lullo v. International Association of Firefighters, Local 1066*, 55 *N.J.* 409 (1970). (See Petitioner's Brief, at pp. 4-8.)

Petitioner advances the additional argument that *N.J.S.A.* 18A:15-1, being expressed with the conjunction “and,” requires a county superintendent to act only when a board fails to fill *both* the office of president and vice president. Thus, it is contended that, since the Board filled the office of vice president, respondent was without power to fill the office of president, and exceeded his statutory authority by doing so. (Petitioner's Brief, at pp. 9-12) *Lullo, supra*; *Cullum v. Board of Education of North Bergen*, 15 *N.J.* 285 (1954)

In summary, petitioner asserts that respondent had authority to appoint only if both offices were unfilled and that if, *arguendo*, he had such authority, it could have been exercised *only* after a thirty day period. Thus, petitioner prays for an order of the Commissioner declaring respondent's appointment *ultra vires* and directing the Board to elect its own president.

Respondent argues, conversely, that "\*\*\*\*a straight-forward reading of *N.J.S.A.* 18A:15-1 reveals a mechanism designed to assure that following its organization meeting each school board will have its necessary complement of officers to begin functioning smoothly immediately.\*\*\*" (Respondent's Brief, at p. 7)

Respondent avers that it is necessary that two officers be seated to preclude the Board being without leadership and thus unable to call meetings or function in the absence of a single officer. It is contended that *N.J.S.A.* 18A:15-1 assures that such an eventuality will not occur since there must be timely action by a county superintendent. (Respondent's Brief, at p. 7)

Additionally, respondent contends that weight should be given to the administrative interpretation of the statute by administrators over a period of years. *State v. LeVien*, 44 *N.J.* 323, 330 (1965) In this regard respondent relies on the affidavit of an experienced school superintendent, currently an administrator in the State Department of Education, who affirmed that he has been aware of several instances when boards have failed to appoint a president or a vice president, or both, and that:

\*\*\*\*In every such instance the various County Superintendents of Schools have exercised the authority conferred upon them by *N.J.S.A.* 18A:15-1 and appointed from among the members of the particular board either a president or a vice president or both.

"It is my understanding that the Department of Education's consistent interpretation of *N.J.S.A.* 18A:15-1 has been that the County Superintendent of Schools is required to appoint from among the members of a local board of education either a president or a vice president or both, whenever a local board either fails to hold a reorganization meeting, or holds such a meeting but fails to elect either a president or a vice president or both.\*\*\*"

(Affidavit of Lawrence C. Anderson)

Respondent contends that his exercise of authority was consistent with both a proper interpretation of the statutes and the long standing administrative interpretation thereof in this State. (Respondent's Brief, at pp. 6-8) *Wollen v. Fort Lee*, 27 *N.J.* 408, 418 (1958); *State v. Gill*, 441, 444 (1966) Thus respondent urges that Summary Judgment be granted in his favor and the Petition of Appeal be dismissed.

The Commissioner has carefully considered the arguments of law and determines that petitioner's contentions are inconsistent with both a proper interpretation of the statutes and an understanding of the legislative intent.

Petitioner argues that the two statutes of reference must be considered *in pari materia*. Pursuant to *N.J.S.A. 18A:15-2* a thirty day period is allowed a board to fill a vacancy in the office of president or vice president which occurs *when an officer refuses to perform his duties and is removed by majority vote of all members or when such office otherwise becomes vacant*, as through resignation. *N.J.S.A. 18A:15-1*, however, is silent concerning the time within which a county superintendent must appoint an officer upon the failure of a board to do so at its reorganization meeting.

It is a fundamental tenet of valid statutory interpretation that a statute may not be read to the exclusion of another of equal import but that statutes must be interpreted as a harmonious whole. *Abbotts Dairies v. Armstrong*, 14 *N.J.* 319 (1954); *Hoffman v. Hock*, 8 *N.J.* 397 (1952) It is also an essential principle that:

“\*\*\*Where the wording of a statute is clear and explicit *we are not permitted to indulge in any interpretation other than that called for by the express words set forth\*\*\*.*” (Emphasis supplied.)  
*Duke Power Company v. Patten*, 20 *N.J.* 49 (1959)

Similarly, it was stated by the Court in *Hoffman, supra*, that:

“\*\*\*We are enjoined to interpret and enforce the legislative will as written, and not according to some supposed unexpressed intention.\*\*\*”  
(at p. 409)

Change in the wording of a statute or additions thereto imply purposeful alteration to the substance of a law and as such go beyond the legitimate function of interpretation of statutes. *Essex County Retail Liquor Stores Association v. Municipal Board of Alcoholic Beverage Control of the City of Newark et al.*, 77 *N.J. Super.* 70 (*App. Div.* 1962)

In the instant matter, the Commissioner rejects petitioner's argument that a time limitation of thirty days, unstated in the statute, prevented respondent from acting quickly following the Board's failure to elect a president at its organization meeting. The Board, because of its failure to so act at its organization meeting, was precluded from electing a president thereafter. As was said by the Commissioner in *Alice Martello v. Board of Education of the Township of Willingboro, Burlington County*, 1975 *S.L.D.* 1025:

“\*\*\*Furthermore, had the Board failed to elect a vice-president at its organization meeting on March 17, 1975, *N.J.S.A. 18A:15-1* clearly establishes that *it would have lost its authority to elect at a later*

*meeting.* The statute of reference provides that if a board of education fails to elect either officer, or fails to hold an organization meeting, then the county superintendent of schools shall appoint respective board members to those positions.\*\*\*” (at p. 1028) (*Emphasis supplied.*)

Application of the foregoing enunciated principles of law and statutory interpretation to the matter herein controverted leads to the inexorable conclusion that respondent’s appointment was in compliance with the existent law. A review of respondent’s affidavit fails to raise the specter that the appointment was made without due consideration of the appointee’s qualification. In consideration thereof, the Commissioner concludes that respondent’s act was a legal exercise of his discretionary authority. The Commissioner so holds.

Accordingly, petitioner’s allegations are found to be without merit. Respondent’s request that the Petition of Appeal be dismissed is granted.

COMMISSIONER OF EDUCATION

October 1, 1976

**Thelma Wisner,**

*Petitioner,*

v.

**Harold Y. Bills, Monmouth County Superintendent of Schools,  
Monmouth County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**ORDER**

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

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

The determination of the Commissioner of Education in the above-entitled matter having been issued on October 1, 1976, dismissing the Petition of Appeal as without merit or providing grounds for the relief sought; and

Petitioner having filed a Motion for Reconsideration wherein it is alleged that Lawrence C. Anderson was in conflict of interest pursuant to R. 1:12-1(d), *Rules Governing the Courts of the State of New Jersey* 31 (rev. 1969), by

submitting an affidavit in the matter and also serving the Commissioner as a hearing officer in the case; and

It having been further alleged that the experience of Lawrence C. Anderson is a factual issue which should not have been determined on a Motion for Summary Judgment; and

It having been further alleged that the Commissioner's determination of October 1, 1976, is deficient in interpretation of law; and

The Commissioner having reviewed the matters raised by petitioner's Motion for Reconsideration and determined that Lawrence C. Anderson, whose long experience is well documented in the Commissioner's own files, served neither the Commissioner nor his subordinates in the Division of Controversies and Disputes in any more substantial way than to sign a perfunctory letter of transmittal of the aforementioned decision of October 1, 1976; and

The Commissioner, accordingly, finding no grounds for petitioner's charge that a conflict of interest flawed the determination of the matter; and

The matter of legal interpretation having been thoroughly considered and expounded in the October 1, 1976 decision; now therefore

**IT IS ORDERED** that petitioner's Motion for Reconsideration, having been found to be without adequate grounds to merit the relief sought, is hereby dismissed.

Entered this 29th day of October 1976.

**COMMISSIONER OF EDUCATION**

Pending before State Board of Education

**Joseph P. Ubelhart,**

*Petitioner,*

*v.*

**Board of Education of the Borough of  
Fair Lawn, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel  
(Reginald F. Hopkinson, Esq., of Counsel)

This matter having been opened before the Commissioner of Education on April 19, 1976 by the filing of a verified Petition of Appeal relative to the adoption of a resolution by the Board of Education of the Borough of Fair Lawn, hereinafter "Board," on February 26, 1976, which resolution abolished the position of Director of Elementary Education effective June 30, 1976 which was held by petitioner; and

An Answer to the verified Petition of Appeal having been filed on May 21, 1976, wherein it is stated that petitioner has no tenure in any position in the school system; and

The matter having been amicably adjusted by a further resolution of the Board on June 30, 1976, restoring petitioner to the position of Principal of the Elementary School which he had held previous to his incumbency as Director of Elementary Education; and

A Stipulation of Dismissal having been duly executed by the respective parties; and

The Commissioner having reviewed the pleadings, the resolutions hereinbefore detailed and the Stipulation of Dismissal, and having determined that the matter may be withdrawn from litigation before him; now therefore

**IT IS ORDERED** that this matter be and is dismissed.

Entered this 8th day of October 1976.

**COMMISSIONER OF EDUCATION**

**Marjorie S. Payne,**

*Petitioner,*

v.

**Board of Education of the Village of Ridgewood,  
in the County of Bergen,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Stephen G. Weiss, Esq.

This matter having been opened before the Commissioner of Education on July 8, 1976 by the filing of a verified Petition of Appeal relative to the adoption of a resolution on June 30, 1975 by the Board of Education of the Village of Ridgewood, hereinafter "Board", which resolution denied petitioner her increment for the ensuing school year; and

An Answer to the verified Petition of Appeal having been filed on September 2, 1976 wherein it is stated that the petitioner's salary adjustment for 1975-76 has been or will be restored, making the petition moot; and

The matter having been amicably adjusted by a further resolution of the Board on September 20, 1976, restoring petitioner's salary adjustment; and

A Stipulation of Dismissal having been duly executed by the respective parties; and

The Commissioner having reviewed the pleadings, the resolutions herebefore detailed and the Stipulation of Dismissal, and having determined that the matter may be withdrawn from litigation before him, now therefore

IT IS ORDERED that this matter be and is dismissed.

Entered this 8th day of October, 1976.

COMMISSIONER OF EDUCATION

**In the Matter of the Application of the Board of Education  
of the Borough of Milltown to Terminate its Sending-Receiving  
Relationship with the Board of Education of the City of New  
Brunswick, Middlesex County.**

**STATE BOARD OF EDUCATION**

**DECISION ON MOTION**

Decided by the Commissioner of Education, October 25, 1974

Affirmed by the State Board of Education, March 5, 1975

For the Petitioner Milltown Board of Education, Russell Fleming, Jr., Esq.

For the Petitioner Mayor and Borough Council of the Borough of  
Milltown, Charles V. Booream, Esq.; Rosen and Weiss (William C. Slattery, Esq.,  
of Counsel)

For the Respondent New Brunswick Board of Education, Terrill M.  
Brenner, Esq.

For the Respondent City of New Brunswick, Joseph E. Sadofski, Esq.

The Motion to reopen this matter for the purpose of supplementing the  
record is granted by the State Board of Education.

September 8, 1976

**In the Matter of the Application of the Board of  
Education of the Borough of Milltown to Terminate its  
Sending-Receiving Relationship with the Board of Education  
of the City of New Brunswick, Middlesex County. II**

**HEARING EXAMINER REPORT TO THE STATE BOARD OF  
EDUCATION AND THE COMMISSIONER**

For the Petitioner Milltown Board of Education, Russell Fleming, Jr., Esq.

For the Petitioner Mayor and Borough Council of the Borough of Milltown, Charles V. Booream, Esq.; Rosen and Weiss (William C. Slattery, Esq., of Counsel)

For the Respondent New Brunswick Board of Education, Terrill M. Brenner, Esq.

For the Respondent City of New Brunswick, Joseph E. Sadofski, Esq.

Petitioner, the Board of Education of the Borough of Milltown, hereinafter "Milltown Board," again requests a severance of its sending-receiving relationship with the City of New Brunswick, hereinafter "New Brunswick Board," for the education of high school pupils of Milltown in the New Brunswick High School. The New Brunswick Board abandons its prior opposition to such request and urges that it be granted. The New Brunswick Board avers, additionally, that a prior decision of the Commissioner of Education which provided for a voluntary transfer of New Brunswick High School pupils to the North Brunswick High School has been proven ineffective and should be set aside. The Board of Education of the Township of North Brunswick poses no opposition to this latter request and in fact accedes to it while it simultaneously supports the application of Milltown.

A hearing in this matter was conducted on September 13, 1976 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The instant Petition involves the same three Boards of Education as in *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown*, 1974 S.L.D. 938 (decided October 25, 1974), aff'd State Board of Education, March 5, 1975, and *In the Matter of the Application of the Board of Education of the Borough of Milltown to Terminate its Sending-Receiving Relationship with the Board of Education of the City of New Brunswick, Middlesex County*, 1975 S.L.D. 445, aff'd State Board of Education 454. Both of the prior decisions and affirmances have been appealed to Superior Court, Appellate Division, Docket Nos. A-2456-74 and A-139-75.

At this juncture, however, all parties have reached an agreement on matters which have heretofore been in dispute. They request the Commissioner

and the State Board to accede to the agreement and to a severance of all ties by which they have previously been bound.

A succinct recital of the relationships here in contest is necessary as a prelude to consideration of the instant requests. Such recital may be read *in pari materia* with the more complete recital found in the Decision of June 4, 1975 in the *Application of Milltown, supra*.

All three districts which join in the instant Petition were aligned in the years 1964-73 as one district in contractual sending-receiving relationships for the provision of high school education to pupils of Milltown, North Brunswick and New Brunswick. In 1971, however, the North Brunswick Board requested and ultimately received permission to construct its own high school and plans for construction went forward. At that juncture, the New Brunswick Board acted to enjoin the North Brunswick Board from proceeding with its plans and moved by separate Petition, cited *ante*, for a regionalization of all three districts in order that a racially integrated school system might be maintained. A protracted hearing ensued, and on October 25, 1974, the Commissioner rendered his Decision.

The Decision denied the merger which New Brunswick sought, and ordered that the sending-receiving relationship between North Brunswick and New Brunswick be terminated but that the relationship between Milltown and New Brunswick be temporarily continued. The Decision further directed, however, that the application of Milltown for a severance of its relationship with New Brunswick proceed to a plenary hearing and

“\*\*\*3. That the North Brunswick Board of Education provide space at the North Brunswick High School to accommodate up to 200 volunteering pupils from New Brunswick yearly\*\*\*.” (at p. 998)

Subsequently, the plenary hearing with respect to Milltown's application was held and a Decision was issued on June 4, 1975. The New Brunswick Board opposed the application at that time.

In his Decision of June 4, 1975 with respect to Milltown's application, *ante*, the Commissioner found certain primary facts of importance in reaching a determination. These facts were that:

“1. For the first time in years the New Brunswick High School is not overcrowded and its pupil population is well within its rated functional capacity. (1,288 pupils enrolled September 30, 1974; functional capacity 1,469)

“2. The true measure of the effect that this more comfortable, contained operation will have on pupil welfare has yet to be determined.

“3. The full effect of the decision in *New Brunswick, supra*, has also yet to be evaluated since the Commissioner's Order with respect to the voluntary transfer of 200 New Brunswick pupils to North Brunswick High School is not scheduled to be implemented until September 1975.

“4. A decision to grant petitioner’s request at this juncture would be untimely since budgets for the coming year are established and respondent has programmed its tuition revenue from petitioner for pupils from Milltown.

“5. The decision of the Commissioner in *New Brunswick, supra*, was affirmed by the State Board of Education but such affirmance has been appealed to the Appellate Division of Superior Court.”

Thereafter, in his Decision the Commissioner denied the application of Milltown and set forth the rationale for his determination. Of principal importance in this respect was the fact that an accession to the application might well prove to be both “transitory and precipitous” at a time when the main case in *New Brunswick, supra*, was in the Courts on Appeal and when there was still a possibility of a Court ordered merger or regionalization for the maintenance of a racially balanced school system.

Such possibility apparently no longer exists, however, since in April 1976 the New Brunswick Board instructed counsel to abandon the Appeal. (Tr. 23) It also agreed to the Milltown Board’s request to sever the sending-receiving relationship heretofore existing and has advanced its own request for a termination of the requirement that the New Brunswick Board be obligated to send, and the North Brunswick Board receive, “\*\*\*up to 200 volunteering pupils from New Brunswick yearly\*\*\*.” (at p. 998)

Thus, the circumstances in the relationship of the three communities have indeed been altered. Opposition to any severance by Milltown has been abandoned. There is agreement among the parties that the interests of each of them would be best served at the present juncture by a complete reversion to separate ways. It remains for the State Board and the Commissioner to determine whether, in the context of prior litigation and Decisions, there is reason to concur with the agreement the parties have reached. The Amended Petition of Appeal submitted by the Milltown Board at the hearing, *ante*, and the evidence adduced therein, are concerned with an avowal that altered circumstances and facts do constitute such reason.

The Amended Petition advances the following facts and arguments in support of the application of the Milltown Board:

“(a) Despite the fact that the overcrowding at New Brunswick High School is no longer in existence, the situation has not improved such that Milltown students deem the New Brunswick High School as a viable alternative. Indeed, the level of enrollment of Milltown students in New Brunswick is lower than ever. For the 9th grade entry in the Fall of 1976 the percentage is estimated to be 10%. This compares with prior years as follows:

1966	88%	1971	51%
1967	85%	1972	28%
1968	86%	1973	26%

1969	78%	1974	18%
1970	53%	1975	15%
		1976–10%	

“It is clearly indicated more than ever, that in practical terms, Milltown pupils are not being afforded an educational program which they deem suitable despite a more comfortable, contained operation.

“(b) The effect of the voluntary transfer of up to 200 New Brunswick students has been in effect for a full school year and has not, as the attendance figures show, improved the desirability of New Brunswick High School for Milltown students.

“(c) The concern over the establishment of the New Brunswick education budget and the anticipation of tuition revenues from Milltown is much less than may have been the situation previously because:

“(1) The prior statement to this effect on page 16 of the Commissioner’s Order of June 4, 1975 should have put New Brunswick on notice.

“(2) There are fewer students attending New Brunswick High School from Milltown than before.

“(3) The new state funding of aid to local education will apparently provide a supportive program that permits New Brunswick to be much less dependent on tuition from a sending district.

“(4) Milltown had in early 1976, prior to the adoption of the New Brunswick budget cautioned New Brunswick against anticipating any tuition by a letter sent to and acknowledged by New Brunswick.

“(d) The New Brunswick Board has signed consent orders authorizing the dropping and termination of any appeals taken by New Brunswick in any of the related litigation involving Milltown and North Brunswick. Thus there is no party, except Milltown, seeking to challenge the prior decision of the Commissioner involving the New Brunswick High School relationship with North Brunswick or Milltown. Obviously Milltown has no desire to pursue any appeals; it is permitted to withdraw as a result of this present application herein made, so the concern expressed previously by the Commissioner is effectively moot.”

The pupil population figures of reference received elaboration in testimony and documentation offered at the hearing.

The Milltown Superintendent of Schools testified that on September 10, 1976, there were 401 pupils eligible for enrollment in grades nine through twelve in the New Brunswick High School but only 79 were actually so enrolled. (Tr. 35) He delineated this enrollment in chart form as follows: (P-1)

**September 1976  
Milltown Pupils - Enrollment**

Grade	Total Number Eligible	At New Brunswick	Elsewhere
9	110	12	98
10	100	24	76
11	96	24	72
12	95	19	74
	<hr/>	<hr/>	<hr/>
	401	79	322*

\*An "approximation" (Tr. 32) (Note: At a later point in the hearing the New Brunswick Superintendent of Schools testified there were 81 Milltown pupils enrolled on September 10, 1976. (Tr. 50) The discrepancy may be directly attributable to the fluctuation in enrollment statistics usually evident during the opening week.)

Such figures may be contrasted with those reported in the prior Decision in *Milltown, supra*, as follows in September 1974:

**September 1974  
Milltown Pupils - Enrollment**

Grade	Total Number Eligible	At New Brunswick	Elsewhere
9	126	23 (18%)	103
10	115	30 (26%)	85
11	128	47 (36%)	81
12	118	51 (43%)	67
	<hr/>	<hr/>	<hr/>
	487	151 (31%)	336

Thus, the percentage of eligible pupils enrolled from Milltown in New Brunswick High School has decreased from 31% in 1974 to approximately 19.7%.

The Superintendent of North Brunswick Township Schools testified that 1332 pupils were enrolled in North Brunswick High School on September 10, 1976, and that 59 pupils of such enrollment were from New Brunswick (Tr. 55), although 77 had previously given an indication of an "interest" in enrollment. He submitted the following enrollment data in chart form: (P-2)

"3. Enrollment by grade level-New Brunswick students

Grade Level	Year 1975-76	Date 9-10-76
9	12	33
10	11	14
11	11	10
12		2
[Total]	34	59

The North Brunswick Superintendent also testified that general population growth within North Brunswick Township was responsible for a yearly increase in pupil population at all levels of the school system and that as a result an absence of pupils from New Brunswick, which might occur if the Commissioner's prior direction were abandoned, would pose no problem to North Brunswick. (Tr. 57 *et seq.*)

The President of the New Brunswick Board testified that there were two principal reasons for the request of his Board to be permitted to retain all of the pupils of New Brunswick in New Brunswick High School. (Tr. 45, 46) He listed these as "financial considerations" and a reduced curriculum attributable to greatly reduced pupil enrollment. (Tr. 45, 46) He testified that a financial "burden" would be imposed on New Brunswick if Milltown pupils were withdrawn while New Brunswick pupils were continued in enrollment at North Brunswick High School. (Tr. 45) Subsequent to the hearing, but at the request of the hearing examiner, the New Brunswick Superintendent of Schools furnished the following data with respect to enrollment in New Brunswick High School. (P-3) (Tr. 60)

**June 1976**  
**Enrollment by Race - New Brunswick High School**

	Black	White	Spanish	Other		Total
High School	512	369	134	4	—	1019
Gibbons (an Annex)	47	11	3	0	—	61
Totals	559	380	137	4	—	1080

The Superintendent advised the hearing examiner, however, that such racial data was not yet available for the 1976 Fall enrollment, but the total enrollment had decreased to 1069 pupils on September 13, 1976.

The Mayor of Milltown testified in support of the Petition of the Milltown Board. He testified that a total of \$5,276,777 was available and "\*\*\*could be used\*\*\*" within present statutory debt limitations, and with voter approval, toward capital programs proposed by the Milltown Board for elementary or other schools or "\*\*\*with some other town or towns on a regionalized basis." (Tr. 40) He requested immediate severance of the present sending-receiving relationship with New Brunswick to effect another relationship which is available and "\*\*\*to pursue on the long term the concept of regionalization on the high school level, grades 9 through 12, with some town or towns." (Tr. 43)

Finally, the following stipulations were set forth, by agreement of counsel, at the hearing. (P-4) (Tr. 3, *et seq.*)

“1. The withdrawal of North Brunswick pupils from New Brunswick High School, pursuant to the Commissioner’s October 25, 1974 decision, has alleviated the overcrowded conditions.

“2. The New Brunswick Board, pursuant to the directive in the Commissioner’s June 4, 1975 decision, has reviewed its relationship and policies with respect to the Milltown sending-receiving relationship and the withdrawal of all of the Milltown pupils from New Brunswick High School to complete their high school education at New Brunswick High School if they choose. The New Brunswick Board has also determined to abandon its efforts to regionalize the three districts of New Brunswick, North Brunswick and Milltown on the high school level, and will dismiss its pending appeal from the Commissioner’s denial of its regionalization petition.

“3. The withdrawal of all Milltown pupils from New Brunswick High School will not cause a disproportionate change in the racial composition of New Brunswick High School. This is particularly so because of the steady downward trend in Milltown enrollment since 1968. As of the first day of the 1976-77 school year there were only 79 Milltown pupils out of a total enrollment of 988 in New Brunswick, i.e., less than 8%. If the Milltown 9th grade enrollment is projected forward, and total enrollment kept constant, Milltown pupils constitute less than 4.9% of total enrollment.

“4. At the time of the Commissioner’s June 4, 1975 decision, 151 pupils from Milltown attended New Brunswick High School. At the beginning of the 1976-77 school year Milltown enrollment was down to 79, a decline of almost 50% since the Commissioner’s decision. Milltown’s 9th grade enrollment at New Brunswick in September, 1976 was 12, as compared with 110 8th grade pupils in the Milltown public schools in June, 1976, i.e., an 89% drop in public school enrollment between 8th and 9th grade.

“5. Milltown has traditionally sent 80 to 90% of its eligible pupils to public high school. If Milltown can designate a receiving district for its high school pupils which will provide school facilities and an educational program suitable to their needs, it is anticipated that, in future years, a substantial proportion of the Milltown high school population will return to public school.

“6. There are suitable alternative receiving districts for Milltown high school pupils within Middlesex County. For example, Spotswood has a functional capacity of 1120 and a 7-12 enrollment of 672. Spotswood, in addition to Highland Park and Dunellen, is willing and able to take all or some Milltown pupils on an interim or permanent basis. Spotswood and Dunellen, in fact, each have an empty school.

“7. The parties also agree and stipulate that the termination of all sending-receiving relationships are based on good and sufficient reasons and are equitable under the circumstances.”

The hearing examiner has examined all such facts and arguments in the context of this long and involved litigation and concludes that a decision herein may not be reached in isolation. It must be consistent with past determinations which have proven to be valid. Determinations which have proved to be unworkable must be cast aside.

A review of all such unique determinations in the two prior Decisions produces one clear and precise view; namely, that the Decisions of the Commissioner and the State Board cited, *ante*, resulted from a balance of equities. The constitutional prescription that all pupils shall be granted a “thorough and efficient” education has been pitted in a direct confrontation with an equally compelling mandate that such education shall be afforded in an integrated environment or at least in one in which segregation is not deliberately fostered. The landmark Decisions in *Jenkins et al. v. Township of Morris School District*, 58 N.J. 483 (1971) and *Booker v. Board of Education of the City of Plainfield*, 45 N.J. 161 (1965) have been cited and recited as foundations for or against given propositions in this respect and in relationship to these two matters.

Such cases could not, however, completely and solely serve herein for purposes of decision since the compelling facts are different. There is not, in the New Brunswick area, the one community concept of *Jenkins*. The general population of the City of New Brunswick is predominantly white. Accordingly, the previous determinations that were reached by the Commissioner and the State Board were also different and grounded in such special facts and in other circumstance.

The principal educational fact of importance as set forth in *New Brunswick, supra*, is that in 1971 the New Brunswick High School was overcrowded. The hearing examiner’s report characterized the condition as “serious overcrowding” and found that it was “\*\*\*definitely detrimental to the education process.” (1974 *S.L.D.*, at p. 977) It was this condition which was of primary importance in North Brunswick’s resolution to build its own High School. The constitutional confrontation of equally strong imperatives was born.

The proposed solution that emerged from such confrontation was in effect a compromise derived from a weighting of the two imperatives. North Brunswick was allowed to proceed to build its own High School and did so. The educational mandate for the provision of a thorough and efficient educational program was thus insured for thousands of pupils, in North Brunswick High School and in New Brunswick, too, because the New Brunswick High School was then enabled to abandon the double session schedules of 1970-71 and move toward the normalcy of regular scheduling. Enrollment was at satisfactory levels in both schools. The Decisions of the Commissioner and the State Board were thus educationally sound and in conformity with the constitutional mandate at least in part.

There remained the question of whether such educational programs could go forward in an integrated environment. Regionalization and other alternatives were explored. There was a determination in *New Brunswick, supra*, however, that there was no clear authority for the Commissioner or the State Board to regionalize the schools of the three communities and in its absence there was a decision against an attempt to impose such a solution. There was a Decision, instead, by the Commissioner, with the ultimate concurrence of the State Board, to foster a racially integrated educational program by:

1. permitting up to 200 New Brunswick pupils a year to voluntarily enroll in North Brunswick High School; and
2. maintaining Milltown, at least temporarily, as a sending district to New Brunswick.

The facts presently before us, however, indicate that these latter decisions have been dramatically unsuccessful and that continuance of them will be deleterious to all three school districts. A diminishing number, approximating only 20%, of eligible pupils from Milltown now attend New Brunswick High School. Even if a majority of such pupils attended, however, the school population would still be composed of predominantly non-white pupils. New Brunswick, with school facilities of its own now available, is forced to pay many thousands of dollars to another school district for tuition although a rather small percentage of eligible pupils from New Brunswick have enrolled in North Brunswick High School. Both Milltown and New Brunswick seek relief from such conditions.

Thus, the attempt of the Commissioner and the State Board, through methods available to them, to insure integrated educational opportunity for pupils in the New Brunswick area has not been effective. The pupils of New Brunswick High School are predominantly non-white. The educational program provided them depends according to the New Brunswick Board's President, at least in part, on a higher enrollment or at least on one that is not artificially reduced. (Tr. 46)

In such circumstances the hearing examiner recommends adoption of the view that the united expression of the three communities may not be lightly set aside. There are indeed compelling reasons why the expression should be given effect.

Of prime importance in this latter regard is the fact that the New Brunswick High School, with an enrollment of approximately 1050 pupils comfortably housed in a facility that can accommodate more than 1400 (Tr. 51), may with the assistance of new funds from the "Public School Education Act" (Chapter 212, Laws of 1975) once again attract a majority of white pupils from the predominantly white City of New Brunswick. The key to integration of the New Brunswick High School would appear at this juncture to be lodged in this possibility and not in the measures which have in the past been proven ineffective. A compulsion at the State level which has failed may well be replaced by efforts of the people of New Brunswick, assisted by the State through increased financial assistance, which will succeed. The racial integration of New

Brunswick schools does not depend solely, as in many districts, on the maintenance of sending-receiving relationships but depends instead on the ability of the school district to attract and hold its own resident pupils. This in indeed a unique circumstance.

Accordingly, the hearing examiner recommends that:

1. the sending-receiving relationship between the Milltown Board and the New Brunswick Board be terminated on June 30, 1977 or on some earlier date when an interim relationship suitable to the Commissioner has been arranged, but that all Milltown pupils presently enrolled in New Brunswick High School be permitted to remain there for the current academic year if they so choose;
2. the Milltown Board immediately initiate steps to submit a permanent regionalization plan to the Commissioner as a permanent provision for the education of high school pupils;
3. the Commissioner retain jurisdiction pending his approval of such submissions;
4. the New Brunswick Board be permitted to withdraw as a mandated sending district to North Brunswick effective immediately except that New Brunswick pupils presently enrolled in North Brunswick High School shall be allowed to continue in such enrollment if they choose for the balance of this 1976-77 academic year.

This concludes the report of the hearing examiner.

September 17, 1976

## STATE BOARD OF EDUCATION

### DECISION

State Board of Education Decision on Motion to Supplement the Record,  
September 8, 1976

For the Petitioner Milltown Board of Education, Russell Fleming, Jr., Esq.

For the Petitioner Mayor and Borough Council of the Borough of Milltown, Charles V. Booream, Esq.; Rosen and Weiss (William C. Slattery, Esq., of Counsel)

For the Respondent New Brunswick Board of Education, Terrill M. Brenner, Esq.

For the Respondent City of New Brunswick, Joseph E. Sadofski, Esq.

The State Board of Education has reviewed the report of the Hearing Examiner and the exceptions filed thereto by the New Brunswick Board of Education. Such exceptions are set forth as six separate points by Respondent. As its first point, Respondent states that the recommendations of the “\*\*\*Hearing Examiner are satisfactory if the sending-receiving relationship between the Milltown Board and the New Brunswick Board is continued until June 30, 1977.\*\*\*” The State Board of Education concurs with this view, believing that an end to the sending-receiving relationship at this point in time would be counterproductive and result in a severe financial burden to the New Brunswick Board of Education.

The State Board of Education hereby adopts the report of the Hearing Examiner as its own, with the exception and specification that the sending-receiving relationship between the Board of Education of the Borough of Milltown and the Board of Education of the City of New Brunswick be continued until June 30, 1977; and the limited relationship between New Brunswick and North Brunswick also be continued until such date.

This determination shall be contingent upon the dismissal of the pending appeals of the three parties by the New Jersey Superior Court, Appellate Division, which presently maintains jurisdiction in these matters.

October 6, 1976

Dismissed New Jersey Superior Court December 6, 1976

Jane G. Bowers and Carmel D. Colofranson,

*Petitioners,*

v.

Board of Education of the City of Burlington, Burlington County,

*Respondent.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioners, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, John E. Queenan, Jr., Esq.

Petitioners, guidance counselors who have acquired a tenure status in the school district operated by the Board of Education of the City of Burlington, hereinafter "Board," contend that the Board has improperly deducted moneys from their salaries to which they are entitled. The Board asserts that petitioners were overpaid for their services, and therefore the deductions were necessary so that petitioners would be properly compensated.

A hearing in this matter was conducted on September 23, 1975 in the office of the Burlington County Superintendent of Schools, Mt. Holly, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

The record shows that guidance counselors in the district have, in years past, been required to work beyond the normal academic year for teachers, and that they have been paid extra compensation for their extra services.

Contracts signed by petitioners for the 1973-74 academic year are reproduced here to illustrate the understandings and contentions of the parties in the instant matter. The contracts are identical except for the dollar amounts and read in pertinent part as follows:

"You [petitioners] indicated to my office, in September 1972, that your degree status would be (*M.A. +15/M.A. +30*) before September 1, 1973. You have (*21/23*) years experience credited to you. Therefore, your salary for the 1973-74 school year will be (*\$14,650/\$14,950*). This salary includes \$750. compensation for three additional work weeks in the summer."

\*\*\*

"I expect to remain in the employ of the Burlington City Public Schools for the 1973-74 school year (September 1, 1973 to June 30, 1974) and accept the salary of (*\$14,650/\$14,950*).\*\*\*" (R-1, R-4)

Identical contracts except for dollar amounts were again accepted by petitioners for the 1974-75 academic year. An added note on each of these new contract offers reads as follows:

“NOTE: Your contract period begins August 26, 1974 and will extend for ten (10) working days after the closing of school in June 1975. The amount of (\$1,102/\$1,125) which represents three weeks pay, has been included in your salary.” (R-3, R-5)

A note of acceptance attached to these contracts states that:

“I further understand that my contract period begins August 26, 1974 and will extend for ten (10) working days after the closing of school in June 1975. The amount of (\$1,102/\$1,125) which represents three weeks pay, is included in my salary.” (R-3, R-5)

In addition to these contractual periods for which petitioners were properly compensated (R-1, R-3, R-4, R-5), petitioners also worked in July 1974 at the request of the high school principal. (Tr. 64-65)

The sole issue in contention herein is petitioners' proper rate of compensation for the duties performed by them during the summer of 1974. Such duties were performed after June 30, 1974 and prior to August 26, 1974. Succinctly stated, petitioners were paid according to the 1974-75 agreement between the Board and the Burlington City Teachers Association. (P-1) The Board later deducted from their salaries dollar amounts which caused their resultant earnings to reflect what it considered proper compensation for petitioners' services in July 1974 which was pursuant to the previous agreement (R-2), effective for the two school years beginning July 1, 1972 and ending on June 30, 1974. (Petition of Appeal; Answer; R-6, R-7, R-8)

The evidence and the testimony are clear and uncontradicted in that the litigants agree that after the close of school for pupils which occurred about the middle of June of each school year, petitioners were required to work ten extra days prior to June 30. A third week's work was also required during the last week in August just prior to the opening of school in September. (Tr. 4-5; R-3, R-5) Specifically, the record shows that one petitioner worked for three days and the other petitioner worked for five days in July 1974. (Tr. 9, 45) They were paid pursuant to an extension of the 1973-74 contract. A letter from the Superintendent of Schools dated September 3, 1974, addressed to one petitioner in that regard, reads as follows:

“This is to inform you that an error was made in the amount of summer payment for your extra five days. You should have been paid \$250.00 based on the extension of the 1973-1974 contract.

“Your contract did not go into effect until August 26th. You were paid \$375.00 so there will be an adjustment made as soon as possible for the overpayment for the \$125.00.” (R-6)

A similar letter was sent to the other petitioner in which she was advised that her payment for work in July was in error and that her salary would be reduced by seventy dollars. (Tr. 13-14)

Petitioners contend that their proper compensation should be pursuant to the terms of the negotiated agreement made with the Board effective 1974-75 (P-1) and not pursuant to the agreement (R-2), which petitioners contend expired on June 30, 1974.

In this regard, the hearing examiner finds that no expressed written agreement between petitioners and the Board existed for extra work in the summer of July 1974, and that the only agreement between the litigants were those committed to writing in the agreement (P-1) which was effective between July 1, 1974 and June 30, 1975. That agreement reads in pertinent part as follows:

#### ARTICLE VIII

“C. Any teacher who is required to work beyond the regular teacher ‘in-school work year’ shall be compensated at a rate consistent with their normal school year compensation.” (P-1, at p. 6)

This agreement further provides that:

#### ARTICLE XVII

“C. Any individual contract between the Board and an individual teacher, heretofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement, during its duration, shall be controlling.” (P-1, at p. 11)

In the instant matter, petitioners and the Board did not have a written understanding as to salaries to be paid to petitioners for the summer of 1974. The principal’s uncontradicted testimony is that he received authorization from the Superintendent to offer the extra work to petitioners in July 1974 for necessary scheduling of pupils for the coming academic year. (Tr. 64-65) He testified that he thought their compensation was to be at the previous year’s rate (Tr. 70), but there is no evidence in the record that this understanding was ever discussed with either petitioner.

The hearing examiner, therefore, makes the following findings of fact:

1. The agreement (R-2) expired on June 30, 1974. (See Article XIX, at p. 16.)
2. There were no written agreements between the litigants setting forth their salaries for the summer of 1974.

3. Petitioners did in fact perform duties in July 1974 at the direction of the high school principal who received authorization from the Superintendent to so advise them.

4. The rate at which petitioners should have been compensated is that rate committed to writing in the policy agreement effective July 1, 1974 through June 30, 1975. (P-1)

The hearing examiner finds further that the Board improperly deducted moneys from petitioners' salaries for duties they performed in July 1974, and he recommends that the Commissioner direct the Board to reimburse petitioners the amounts which were improperly deducted from their salaries.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto by the litigants. Among the several findings of the hearing examiner is the fact that the Board has improperly deducted moneys from petitioners' salaries for duties they performed in July 1974. The Commissioner concurs with this finding of fact and adopts this conclusion and the entire report of the hearing examiner as his own.

There is no need for further exposition of the matter herein controverted. Therefore, the Commissioner directs the Board of Education of the City of Burlington to reimburse petitioners by the amounts which were improperly deducted from their salaries for work performed by them during the summer of 1974.

COMMISSIONER OF EDUCATION

October 15, 1976

**In the Matter of the Tenure Hearing of Ison Stephenson,  
School District of the City of Bridgeton, Cumberland County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board, Casarow, Casarow & Kienzle (A. Paul Kienzle, Jr., Esq., of Counsel)

For the Respondent, Tomar, Parks, Seliger, Simonoff & Adourian (Robert F. O'Brien, Esq., of Counsel)

The Board of Education of the City of Bridgeton, Cumberland County, hereinafter "Board," certified to the Commissioner of Education on May 13, 1975, charges of insubordination and unbecoming conduct against Ison Stephenson, hereinafter "respondent," a janitor with a tenure status in its employ. Respondent was suspended from his employment without pay by action of the Superintendent of Schools on March 19, 1975. The Board affirmed that action of the Superintendent in its resolution to certify the charges on May 13, 1975.

A hearing was conducted in the matter on September 12, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Board certified the following charge against respondent:

"That Ison Stephenson prior to March 17, 1975 did bring into the Bridgeton High School a sawed-off shotgun and retained said shotgun in the Bridgeton High School until the said March 17, 1975 at which time said shotgun was discovered, said actions constituting gross disregard for school rules, regulations and school Board policy and said improper actions constituting conduct unbecoming a school employee and said actions presenting a clear danger to the safety of the staff and student body of the Bridgeton School System."

It is this charge, the Board asserts, which classifies respondent's behavior as insubordinate and unbecoming. In support of its allegation, the Board elicited testimony from a janitorial co-worker of respondent who testified that on March 17, 1975, he discovered a sawed-off shotgun in respondent's footlocker which was located in the boiler room of the high school. (Tr. 12-13, 17) The co-worker explained that he normally is assigned janitorial duties outside the high school building. (Tr. 16) However, on March 17, 1975, he was assigned duties inside the high school because respondent was ill. (Tr. 20) Respondent testified that he had the gout that day and was home ill. (Tr. 48)

The co-worker testified further that he went to the boiler room for rags, and it appears from the testimony of respondent that the footlocker in question which contained the rags was an elongated metal box located on the floor of the room. While respondent testified that the footlocker was used almost exclusively by him, it was always unlocked and other janitors also used it as a source of rags. (Tr. 65)

The co-worker testified that when he reached into the footlocker, he discovered the weapon underneath some rags. (Tr. 13) He also testified that the weapon was in two pieces and that it looked old. (Tr. 19) The co-worker testified that he placed the weapon back in the footlocker, underneath the rags, and called the Board's building and grounds supervisor to request his presence at the high school. (Tr. 13) When the supervisor failed to appear the co-worker reported what he had found to the high school principal. He then showed the principal where he had found the weapon and, in fact, the weapon itself. (Tr. 13, 23) Finally, the co-worker testified that respondent telephoned him the next morning and asked him, the co-worker, whether he had found "something" in his footlocker. The co-worker testified that when he said he did, respondent asked to have it "saved" because it belonged to him. (Tr. 23) The co-worker testified that respondent said he had found the weapon in the school yard. (Tr. 14, 23)

The principal testified that the co-worker informed him of his discovery at approximately 2 p.m. on March 17, 1975. (Tr. 24) The principal testified that he then took the weapon, which was in two pieces (the stock and barrel), to his office whereupon he telephoned the Bridgeton Police Department. (Tr. 25) It is noted here that the principal testified that there were some rust spots on the two pieces of weapon. (Tr. 25) The Bridgeton Police Department dispatched two detectives to the principal's office where they questioned the principal and the co-worker who had made the discovery. Then the detectives took the weapon to police headquarters. (Tr. 26)

The principal testified that at approximately 8 a.m. the following day respondent telephoned him at his office and said:

“\*\*\*to the effect that he [respondent] understood that I had something that was found down in his footlocker, and I said, 'yes.' And he said, 'It belongs to me, and would you hold it for me and I will come and pick it up.' I said that I cannot hold it for you, that I had given it to the police.\*\*\*” (Tr. 27)

The principal testified that respondent then explained that he had brought the weapon to school "a while back" to clean and polish it. (Tr. 27)

Subsequent to this telephone conversation, the principal testified that the two Bridgeton detectives returned to his office in the company of a federal agent from the Bureau of Alcohol, Tobacco and Firearms. (Tr. 28) The hearing examiner observes it appears that because the weapon was a sawed-off shotgun, or the barrel of the weapon had been shortened, federal laws may be involved.

The principal escorted the three law enforcement officers to the boiler room and pointed out the metal footlocker in which the weapon had been discovered. At that point, the officers wanted to search respondent's regular locker which was locked. A telephone call was placed to respondent's residence but no one answered. In the meantime respondent appeared at the school building. The officers asked him if they might search his regular locker. While respondent did not have his key with him, he agreed to break his locker open. (Tr. 28) The search of the locker by the officers produced nothing of importance. (Tr. 34) The officers then questioned respondent and he agreed to take a polygraph test, although one was not thereafter administered to him. (Tr. 59) The principal also testified that respondent stated during the questioning that he had found the gun outside about two years previously. (Tr. 33)

At this juncture, the hearing examiner observes that the involvement of the Bridgeton Police Department in the discovery of the weapon at the high school ended because the police chief advised the Superintendent, by letter dated April 7, 1975, *inter alia*:

“\*\*\*[T]he weapon was not found on Mr. Stephenson's person or his car. As it stands now, it is a federal violation and that agency [the Bureau of Alcohol, Tobacco, and Firearms] is not interested in making a case, so the weapon will be confiscated\*\*\*.” (C-3)

The principal testified that Board policy, particularly since the Bridgeton schools have experienced racial tensions (Tr. 42), requires anyone who desires to “\*\*\*bring it [a weapon] in to work on it in the shop, to clean it up, or\*\*\*to bring it in as a demonstration piece in the classroom of any kind, like a Revolutionary War weapon, or a Civil War weapon\*\*\*must get permission from the administration.” (Tr. 31) The hearing examiner observes that a written copy of this policy was not produced at the time of the hearing.

Finally, the principal testified that respondent, who has been employed by the Board for twenty-two or twenty-three years (Tr. 32, 41), had been a reliable employee, always the first one on duty (Tr. 41) and that his prior conduct had been satisfactory. (Tr. 32)

Respondent, who has been a national field evangelist for twenty years (Tr. 47), testified that he found the weapon, in two pieces, one winter morning during 1972 when he went outside to check the sewerage system. (Tr. 51) Respondent explained that when he reported to work that day the emergency light for sewerage system was on. (Tr. 51) He testified that when he went to check the system, located directly outside the boiler room, he found the two pieces of the weapon on the septic tank lid. (Tr. 51)

Respondent testified that he took the two pieces, placed them in the footlocker underneath some rags and went about his duties. (Tr. 51) Respondent admitted failing to report his discovery to anyone because, he asserted, he simply forgot to in the press of his many responsibilities. (Tr. 51)

Respondent testified that he was unaware that a Board policy existed with respect to weapons, nor, he testified, did anyone ever so inform him of its existence. (Tr. 51-52) He testified that he placed the weapon in the footlocker in the boiler room because the boiler room is always locked and is an unauthorized area for pupils. (Tr. 51) Respondent testified that once he placed the weapon inside the footlocker on the day he found it, he never took it from there nor did he touch it again. (Tr. 56) However, on cross-examination he testified that he had to go into the footlocker many times to get rags. (Tr. 66) Respondent denies telling the principal that he brought the weapon in to clean, stating that the weapon was his, or requesting the principal to hold the weapon for him. (Tr. 57)

The hearing examiner observes that respondent is alleged to have brought a sawed-off shotgun into the high school at a time prior to March 17, 1975, and retained that weapon until it was discovered on that day. In the hearing examiner's view that is the essence of the charge. The hearing examiner finds that the evidence in support of that charge is overwhelming. How or why the weapon was brought to school is irrelevant. The fact is that by respondent's own testimony and viewed in the light most favorable to him, he did bring the weapon into school at a time prior to March 17, 1975, and did retain it in his footlocker until it was discovered on that date.

This affirmative finding is referred to the Commissioner for decision as to what penalty, if any, should be imposed on respondent in the context of his unblemished record of twenty-two years of service to the Board.

The hearing examiner observes that respondent was suspended from his employment without pay on March 19, 1975, and was informed of such suspension by letter (C-1) of the same date from the Superintendent. The record does not establish whether the Superintendent unilaterally suspended him or whether the Board acted to suspend on that date. It is clear, however, that the Board did not act to certify charges against respondent to the Commissioner until May 13, 1975, almost two months after the suspension. *N.J.S.A.* 18A:25-6 grants authority to superintendents of schools, with the approval of the board president, to suspend an assistant superintendent, principal, or teacher. The statute of reference also requires the superintendent, should he exercise this authority, to report the suspension forthwith to the board, which "\*\*\*\*shall take such action for the restoration or removal of such person as it shall deem proper\*\*\*\*" pursuant to law. The authority to suspend other tenured employees is vested solely in the board of education at *N.J.S.A.* 18A:6-14 which provides, *inter alia*:

"Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay\*\*\*."

In the instant matter, the Board itself could not have suspended respondent without pay until it certified charges to the Commissioner. Accordingly, the hearing examiner finds that respondent's suspension without pay between March 20, 1975, and May 13, 1975, was improper and recommends that the

Commissioner, notwithstanding any discipline he deems appropriate on the charge herein, direct the Board to compensate respondent for that period of time.

Finally, the hearing examiner reports that respondent, a member of Teamsters Local 676 which is the negotiating unit for him with the Board, originally asserted that the charges, *sub judice*, more properly required arbitration rather than review by the Commissioner. By letter dated June 2, 1975, the hearing examiner advised respondent that Commissioner has sole jurisdiction with respect to the adjudication of tenure charges pursuant to *N.J.S.A. 18A:6-11* brought by a board of education against any of its employees and cited *In re Fulcomer*, 93 *N.J. Super.* 404 (*App. Div.* 1967).

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions and objections filed thereto by the parties pursuant to *N.J.A.C. 6:24-1.17(b)*.

The Commissioner agrees with and adopts as his own the finding of the hearing examiner that respondent did bring the sawed-off shotgun into the school building at a time prior to March 17, 1975 at which time the weapon was discovered in his footlocker. The Commissioner views this act of commission as an extremely serious one since respondent, as an employee of the Board, is expected to exercise greater prudence than that which he exhibited herein. The Commissioner cannot accept respondent's testimony that once he placed the weapon in his footlocker he forgot it was there. Each opening of the locker should have served as a reminder it was there. Moreover, when and if respondent found the weapon on school property, his first duty was to report his find to school authorities.

The Commissioner does not view the seriousness of the act committed as being lessened by the failure of federal or local law enforcement authorities to press criminal charges against respondent nor by the fact that the weapon was discovered in two pieces. Neither pupils, employees of a board, nor citizens visiting a school at any given time should be subjected to the threat of violence which might be inflicted by an illegal firearm. The Commissioner so holds.

The Commissioner, having found the weight of the evidence supports the charge herein, will consider whether such conduct warrants dismissal. Such a determination of fitness is usually required to be in accord with the principles enunciated by the New Jersey Supreme Court in *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N.J.L.* 326 (*E. & A.* 1944), wherein the Court determined that unfitness to hold a post might be shown by one incident, if sufficiently flagrant. In the instant matter, the

Commissioner finds that the conduct of respondent is sufficiently flagrant so as to warrant his forfeiture of his tenure employment with the Board. The Commissioner so holds.

A last matter remains since respondent was not properly suspended by the Board without pay until May 13, 1975. A prior suspension by the Superintendent which began on March 19, 1975, was improperly grounded and illegal. The Commissioner so holds.

Finally, the Commissioner directs that respondent be dismissed from his tenured position as of May 13, 1975, but that any emoluments withheld from him during the period March 19, 1975 to May 13, 1975, be restored forthwith.

COMMISSIONER OF EDUCATION

October 28, 1976

**Board of Education of the Central Regional High School District,**

*Petitioner,*

v.

**Governing Bodies of the Municipalities of Berkeley Township,  
Island Heights, Lacey Township, Seaside Heights,  
Seaside Park and Ocean Gate, Ocean County,**

*Respondents.*

COMMISSIONER OF EDUCATION

### ORDER

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the Central Regional High School District, hereinafter "Board," (Richard A. Grossman, Esq., Special Counsel for the Board) which challenges the reductions imposed upon its 1976-77 school budget by the six governing bodies of the municipalities which constitute the regional school district, the Boroughs of Island Heights, Seaside Heights, Seaside Park, Ocean Gate and the Townships of Berkeley and Lacey, hereinafter "governing bodies." (Silverman and Walsh, Richard A. Walsh, Esq., of Counsel) The following facts were set forth in the Petition of Appeal.

At the annual school election held on March 2, 1976, the Board submitted to the electorate the following proposals for amounts to be raised by local taxation for the 1976-77 school year:

Current Expense	\$3,815,879
Capital Outlay	86,400

Both proposals were defeated. Thereafter, the Board and governing bodies consulted and the governing bodies adopted separate resolutions determining that lesser amounts were necessary to be raised by local taxation as follows:

	<b>Board's Proposal</b>	<b>Governing Bodies' Resolutions</b>	<b>Reduction</b>
Current Expense	\$3,815,879	\$3,666,879	\$149,000
Capital Outlay	86,400	15,800	70,600
Total Reduction			<u>\$219,600</u>

Subsequently, the parties of interest entered into a Stipulation of Settlement and Dismissal which provided *inter alia* that the sums of \$122,466 for current expense and \$65,600 for capital outlay costs would be added to the amounts previously certified to be raised for expenses of the Central Regional High School District for the 1976-77 academic year so that the total levy shall be \$3,789,345 for current expenses and \$81,400 for capital outlay. The grand total levy shall be \$3,870,745.

The Commissioner concurs with the Stipulation. The Petition is hereby dismissed this 29th day of October 1976.

COMMISSIONER OF EDUCATION

**James J. White and Bertha V. White,**

*Petitioners,*

v.

**Board of Education of the Township of Boonton, Morris County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Shanley & Fisher (L. Bruce Puffer, Jr., Esq., of Counsel)

For the Respondent, Porzio, Bromberg & Newman (Ralph Porzio, Esq., of Counsel)

Petitioners, residents of Mountain Lakes, enrolled their son, "D.W.," for the 1973-74 school year in the adjacent school district operated by the Board of Education of the Township of Boonton, hereinafter "Boonton Board." Petitioners aver that the Boonton Board's billing of tuition for one year on June 7, 1974, was, within the factual context surrounding the enrollment and attendance of D.W. in the Boonton school system, a manifestly unreasonable and arbitrary abuse of the Boonton Board's discretionary authority which should be set aside by the Commissioner of Education.

The Boonton Board, conversely, maintains that its tuition charge was legal, reasonable, and consistent with not only its statutory discretionary authority but also its policy controlling admission of nonresident pupils and the assessment of tuition charges for nonresident pupils.

A hearing to establish the relevant facts was conducted on September 19, December 16, and December 30, 1975 at the offices of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. Those facts which are undisputed are herewith set forth as a background to the contentions of the parties and the findings of fact of the hearing examiner which follow:

Petitioners on June 1, 1973, contracted to purchase a home at 101 Holly Lane in Boonton. (R-9) Thereafter, they offered for sale the home in which they resided at 20 Hanover Road in the adjoining community of Mountain Lakes and, on the day prior to the opening of school in September, they enrolled D. W. in the sixth grade at the Boonton Board's Rockaway Valley School. For the entire 1973-74 school year D.W. attended the Rockaway Valley School to which he was transported daily by a school bus operated by the Boonton Board. (R-2-4) Petitioners were unsuccessful in selling their Mountain Lakes home in which they continued to live and in February 1974, they contracted to sell the house at 101 Holly Lane, Boonton, which sale was consummated on May 22,

1974. At no time pertinent to the instant controversy did they reside in Boonton Township.

The Superintendent informed the Boonton Board on June 6, 1974, that D.W. was not domiciled in Boonton Township, whereupon the Boonton Board advised its attorney who billed petitioners for tuition for the entire 1973-74 school year. (Tr. II-114; R-7-8) The audited cost per pupil for that year was \$1,014.74. (R-6) Petitioners appeared at a meeting of the Boonton Board and agreed to pay a prorated tuition charge for the month of June but protested the fact that they had been billed a full year's tuition for D.W. Nevertheless, the Boonton Board on September 13, 1974, reaffirmed its prior determination that tuition was payable in the amount of \$1,014.74. Thereafter, the Petition of Appeal of the instant controversy was filed before the Commissioner on December 10, 1974.

Petitioners contend that at the time D.W. was enrolled on September 4, 1973, full disclosure was made to two of the Boonton Board's secretaries that they were then nonresidents living in Mountain Lakes. (Tr. I-19) They further allege that the Superintendent's secretary directed that the address of their Boonton Township property be listed on D.W.'s enrollment form. (Tr. I-22; Tr. III-108) Petitioners maintain that they were not advised of any forthcoming tuition charge at that time, or that they were so advised at any time until June 7, 1974, at the end of the academic year. They aver that failure of the Boonton Board or its agents to advise them of possible tuition charges deprived them of an awareness that a tuition charge was contemplated by the Board, and thus effectively barred them from exercising the option of rejecting the tuition charge and re-enrolling D.W. in the Mountain Lakes school system. They further state that they believed that, as Boonton Township taxpayers, they were entitled to enroll him there and that, had they known of a tuition charge, they would not have done so. (Tr. I-30, 35; Tr. III-113)

Petitioners argue that, even if the Boonton Board itself was unaware of D.W.'s enrollment as a nonresident pupil, it is bound by the action of its agents who did enroll him. (Tr. III-147-152) In this regard petitioners cite *Colgrove v. Behrle*, 63 N.J. Super. 356 (App. Div. 1960) wherein it was said that:

“\*\*\*It is settled that knowledge of an agent is chargeable to his principal wherever the principal, if acting for himself, would have received notice of the matters known to the agent. \*\*\*A principal's liability is affected by the knowledge of his agent if the agent had a duty to supply information to the principal relevant to the matters entrusted to him.\*\*\*”

(at pp. 366-367)

And *Heake v. Atlantic Casualty Insurance Company*, 15 N.J. 475 (1954) wherein the Supreme Court stated:

“\*\*\*Since [the principal] has placed the agent in a position to do such acts [the principal] must be answerable for the manner in which the agent has conducted himself in doing business on behalf of the principal.\*\*\*”

(at p. 482)

And *Price v. Old Label Liquor Company, Inc.*, 23 N.J. Super. 165 (App. Div. 1952) in which the Court stated:

“\*\*\*It is well settled in cases depending upon the apparent authority of the agent that the question is whether the principal by his voluntary act has placed the agent in such a position that a person of ordinary prudence conversant with business usages and the nature of the particular business would be justified in presuming that the agent had the authority to perform the act in question\*\*\*.” (at p. 169)

Petitioners urge that, in consideration of these pronouncements of the Courts, the Commissioner determine that the secretaries' failure to advise them of the fact that tuition would be required forestalled the possibility of a meeting of the minds on an offer and acceptance necessary to effectuate a contractual agreement between parties. They argue that, absent such a contractual agreement, the Boonton Board is estopped from collecting tuition at a later date. (Tr. III-153-155)

Finally, petitioners argue that the testimony of witnesses called on their behalf is credible and establishes the fact that petitioners used no subterfuge to screen from the Boonton Board or its agents the fact that they were enrolling D.W. as a nonresident pupil. They maintain that their actions were directed by the Superintendent's secretary and were in no way designed as a subterfuge to deceive or defraud. (Tr. III-156-161) For these reasons they urge that the Commissioner rescind and revoke the tuition imposed upon them by the Boonton Board during the time they were, in fact, homeowners in the Township of Boonton.

The Boonton Board, conversely, asserts that the credible evidence is found in the denial by the Superintendent's secretary and the office secretary wherein they stated that they at no time advised petitioners to list their Boonton Township property as their address on D.W.'s enrollment form. (Tr. I-117-118, 166, 168)

The Boonton Board maintains that petitioners were well aware that tuition could be charged for a nonresident pupil as evidenced by petitioners' own testimony that, had they been successful in selling the Mountain Lakes home as they anticipated, tuition payments could have been assessed by the Mountain Lakes Board for their twelfth grade daughter who remained in school in Mountain Lakes. (Tr. I-41) The Boonton Board further states that petitioners' own testimony reveals that they expected tuition payments could likewise be assessed by the Boonton Board in the event they sold their Boonton Township property. (Tr. III-94) Thus, the Boonton Board contends, petitioners were not so unsophisticated as to be oblivious to their legal obligations. (Tr. III-132-137)

The Boonton Board maintains that it was petitioners' responsibility as nonresidents to apply directly to the Boonton Board as the statutorily constituted authority, rather than to its subordinates, for admission of D.W. and that they had a continuing obligation to advise the Boonton Board of their subsequent change of status. (Tr. III-135)

The Boonton Board argues that, in any event, the actions of its subordinates are not binding since the Boonton Board alone is empowered to act under *N.J.S.A.* 18A:38-3 which states:

“Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district *with the consent of the board of education upon such terms, and with or without payment of tuition, as the Board may prescribe.*” (Emphasis added.)

The Boonton Board maintains that, until June 1974, it was unaware of the fact that D.W. was enrolled as a nonresident pupil and that, when it was apprised of the fact, it acted expeditiously to bill petitioners for his tuition, consistent with its policy and practice.

In support of its contention that the Boonton Board is not bound by any action of its subordinates, the Board cites, *inter alia*, *Boyd v. Department of Institutions and Agencies*, 126 *N.J. Super.* 273 (*App. Div.* 1974); *Keenan v. Board of Chosen Freeholders of Essex County*, 106 *N.J. Super.* 312 (*App. Div.* 1969); *Debold v. Monroe Township*, 110 *N.J. Super.* 287 (*Chan. Div.* 1970); *Carlson v. Hannah*, 6 *N.J.* 202 (1951); *Price, supra*; *Midtown Properties, Inc. v. Madison Township*; 68 *N.J. Super.* 197 (*Law Div.* 1961), *aff'd* 78 *N.J. Super.* 471 (*App. Div.* 1963). In this regard the Board quotes *Carlson* wherein it was stated by the Court that:

“\*\*\*The power of an agent to bind his principal is limited to such acts as are within \*\*\* his authority. \*\*\*Such actual authority may be expressed or implied.\*\*\*” (at p. 212)

and *Midtown* wherein the Law Court stated:

“\*\*\*It is too well established to cite authority for the proposition that while a public body may make contracts as an individual, it can only do so within its express or implied powers; and that those who deal with the municipality are charged with notice of the limitations imposed by law upon the exercise of that power.\*\*\*” (68 *N.J. Super.* at 208)

(See Tr. III, at pp. 118-128.)

For these reasons the Boonton Board maintains that its exercise of discretion is entitled to a presumption of correctness and that petitioners are liable for the payment of tuition for which they have been properly billed.

The hearing examiner has carefully reviewed and considered the three days of testimony of the hearing and makes the following findings of fact relevant to the controverted matter:

1. The testimony of petitioners is irreconcilable with that of the Superintendent's secretary and the office secretary. The weight of credible evidence leads the hearing examiner to conclude that petitioners' testimony is to be

relied upon wherein it was testified that petitioners revealed that they were nonresidents (Tr. I-19), and that the Superintendent's secretary advised that their Boonton Township property address be placed on D. W.'s enrollment form. (Tr. I-22; Tr. III-108) This finding is grounded in part on the contradiction within the testimony of the Superintendent's secretary wherein she testified (Tr. I-122) that she did not know the location of petitioners' residence in Mountain Lakes until June 1974, and later testified (Tr. I-154) that she had known of their residence for a period of ten years. It is further grounded on the contradiction wherein the Superintendent's secretary testified that she had, to her knowledge, never been on Hanover Road nor knew of its location. The hearing examiner finds credible the forthright testimony of petitioners, their sons and daughter, as well as that of a neighbor and the neighbor's mother-in-law, all of whom testified that the Superintendent's secretary had delivered pumpkin cakes to their residences at the Thanksgiving season over a period of at least four years. (Tr. I-109; Tr. II-170; Tr. III-79, 84, 86, 101)

The testimony of the office secretary is also inconsistent wherein she stated that on the day D. W. was registered the Superintendent was in his office. (Tr. I-192) The Superintendent stated that he was on that day busy conducting a teachers' meeting. (Tr. II-99) Testimony of the Boonton Board's agents is further inconsistent wherein the office secretary stated that it is the responsibility of the Board Secretary to assign bus transportation, whereas the Superintendent testified that this is an assigned responsibility of the Superintendent's secretary. (Tr. I-181; Tr. II-104)

2. The Superintendent and the Boonton Board were unaware that D. W. was enrolled as a nonresident until this fact was revealed on June 6, 1974 by a substitute bus driver who observed D. W. crossing a busy boulevard to the neighboring community of Mountain Lakes. (Tr. II-121-122)

3. The Boonton Board's only written policy applicable to D. W.'s situation during 1973-74 was as follows:

\*\*\*The Boonton Township Board of Education will not accept any other out-of-town tuition pupils, part-time or otherwise, for the regular school year.\*\*\* (R-1)

It was the practice of the Boonton Board, however, to allow a non-resident pupil to enroll if a move to a house in the Township was expected in a short time. In such instances, if the move was not completed by the last day of the month, prorated tuition was billed for that month. (Tr. II-4; Tr. III-51) This practice was reduced to a written policy on October 10, 1974. (R-21) Thereafter, a copy of that policy has been provided to those registering for admission to the school. (R-16)

4. Petitioners' actions after enrolling D. W. cannot be construed as an attempt to conceal their residence. They listed their Mountain Lakes property with a realtor who successfully ran for a seat on the Boonton Township Board, joined the Boonton Township PTA, attended its meetings and spoke openly

of the problems they encountered in personally advertising and attempting to sell their Mountain Lakes property in which they were living. (P-2; Tr. I-23, 62, 69-72) Testimony at the hearing convinces the hearing examiner that at least one agent of the Boonton Board, namely the Superintendent's secretary, was aware and continued to be aware throughout the 1973-74 school year that D. W. was a nonresident pupil enrolled in the Boonton Board's school (Tr. I-65, 100, 105, 109; Tr. III-92-99)

5. D. W. was not officially assigned to a bus at the time of his enrollment or thereafter, in spite of a practice of the Boonton Board of providing transportation to all pupils who live a substantial distance from the school. (Tr. II-19) Nevertheless, he rode a school bus which picked him up at a point about one block from his home. Neither a bus pass nor his name on the bus list was required for him to ride the school bus. (Tr. II-153-160; Tr. III-56-58)

6. Petitioners at no time, even after the closing of the sale of their Boonton Township property on May 22, 1974, advised the Boonton Board directly of the fact that they were nonresident parents of a pupil enrolled in the Boonton Board's schools, or that they were no longer Boonton Township property owners after May 22, 1974. It is apparent from their testimony that petitioners expected to be liable for tuition charges when they ceased paying taxes on May 30, 1974 to Boonton Township. (Tr. III-94) The hearing examiner is unable to conclude that petitioners had properly discharged their obligation as citizens to make such information known to the Boonton Board, even if their testimony is true that they advised the Superintendent's secretary at a social function on May 28, 1974, that their Boonton Township property had been sold. (Tr. III-93) Petitioners did not appear to be persons of such naivety as to believe that a secretary to the Superintendent is indeed in charge of the school system.

7. The Boonton Board placed great emphasis on preventing the enrollment of nonresident pupils without its sanction and advised its agents to adhere strictly to policy. (Tr. II-162-166) However, a lax procedure in bus transportation assignment and lack of adherence to bus lists allowed D. W., in this instance, to ride unnoticed for nine months of the school year.

This concludes the findings of relevant facts as set forth by the hearing examiner. He leaves to the Commissioner the issue of whether petitioners, within the factual context herein set forth, are liable for any portion or the full amount of the Board's tuition charge of \$1,014.74.

\* \* \* \*

The Commissioner has carefully reviewed the entire record including the transcripts of three days of hearing, the report of the hearing examiner and the

exceptions thereto filed by counsel pursuant to *N.J.A.C.* 6:24-1.17(b). It is noted that much of that submitted by both parties subsequent to the issuance of the hearing examiner report is not in the form of exceptions to findings of fact, but in the form of Briefs and arguments of law which are normally filed previous to the issuance of a hearing examiner report. Nevertheless, the Commissioner has considered those arguments of law set forth therein and proceeds to a determination of the controverted matter.

Petitioners argue that when, as homeowners in the Township of Boonton, they went to the school to enroll D.W., they did what any ordinary citizen would do and that, absent advice from the Board's agents who enrolled D.W., they had no reason to believe that they would be liable for tuition payments. Petitioners assert that the Board, or its agents acting on its behalf, were under obligation to advise them in advance of any tuition charges to be made in accord with Board policy. (Petitioners' Reply at pp. 6-13) It is further argued that failure to do so until June 1974 deprived petitioners of the fundamental right to accept or reject such financial obligation. (*Id.*, at p. 16) Petitioners aver that the failure of the Board or its agents to advise them in timely fashion of tuition charges may not be corrected by the retroactive imposition of such charges at year's end. (*Id.*, at p. 17) In regard to the Board's discretionary right to impose or not impose a tuition charge pursuant to *N.J.S.A.* 18A:38-3, petitioners argue as follows:

“\*\*\*Certainly such parents have the right to rely on the assumption that if any conditions are to be imposed on the enrollment of their children those delegated with the responsibility of overseeing such enrollment would inform them of such conditions.\*\*\*” (*Id.*, at p. 20)

Petitioners assert that, in the interests of equity and essential justice, the Board is estopped from imposing a tuition charge for D.W. in view of the omission of essential information which should have been provided them, but was not, by the Superintendent's secretary. To this end petitioners cite *Summer Cottagers' Ass'n. of Cape May v. City of Cape May*, 19 *N.J.* 493 (1955) wherein the Court stated:

“\*\*\*The essential principle of the policy of estoppel here invoked is that one may by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct.\*\*\* An estoppel by matter *in pais* may arise by silence or omission where one is under a duty to speak or act.\*\*\*” (at pp. 503-504)

Conversely, the Board argues that even if it were conceded that the Superintendent's secretary was aware of the fact that D.W. was not domiciled in Boonton Township, she was not and could not be delegated the power to enter into an agreement concerning tuition payments. The Board avers that such power is delegated by the Legislature only to boards of education and may not be delegated to nor exercised by their agents. *N.J.S.A.* 18A:38-3 It is further argued that a secretary could not legally assume financial and educational

burdens on behalf of the school district. *N.J.S.A.* 18A:38-3 (Board's Exceptions, Objections and Replies, at pp. 1-4)

The Board argues that, as a governmental agency dealing with public funds, its power to set tuition is conferred by specific statutory authority which may not be delegated and cannot be altered by acts either of omission or commission of its subordinates. The Board further challenges the applicability of the cited cases in the hearing examiner report, in that *Colgrove, supra*; *Heake, supra*; and *Price, supra*, arose from the private sector rather than from governmental or educational bases. (*Id.*, at pp. 9-11) *Summer Cottagers', supra*

The Board contends that it never approved the attendance of D.W. at its school, never discussed the matter, and never was advised of nor considered the matter of his tuition prior to advisement by the Superintendent on June 7, 1974. The Board avers that to impute authority to its Superintendent's secretary to create an estoppel from collecting tuition for D.W. would be an erosion of authority within the present school district structure in New Jersey. (*Id.*, at pp. 1-5)

The Board states that if, *arguendo*, the Superintendent's secretary could consent to the attendance of D.W., such consent would not constitute waiver of a substantial sum of money in payment of tuition. It is contended that there is general reluctance to apply estoppel to governmental agencies and that to do so in the instant matter would be contrary to the public interest and would destroy effective management of the school district. (*Id.*, at pp. 9-12) *Boyd, supra*; *Adler v. Department of Parks, Irvington, 20 N.J. Super. 240 (App. Div. 1952)*; *Samuel v. Wildwood, 47 N.J. Super. 162,169 (Chan. Div. 1957)*; *Summer Cottagers', supra*

In this regard the Board cites *Carlson v. Hannah, 6 N.J. 202 (1951)*, wherein it was said that:

“\*\*\*[I]t is well settled that, unless otherwise agreed, the authority of an agent to manage a business extends no further than the direction of the ordinary operations of the business, including authority to make contracts which are incidental to such business, are usually made in it, or are reasonably necessary in conducting it.\*\*\*” (at p. 212)

The Board maintains that it was not bound by its subordinate since the Board alone could validly make such tuition arrangements as in its discretion were deemed proper. *Price, supra* (Board's Brief, at pp. 13-17) Thus, the Board concludes that:

“\*\*\*[N]o express or implied authority existed and \*\*\* it is contrary to reasonable belief and against public policy to cloak a secretary or clerk with apparent authority to bind the Board of Education.\*\*\*” (*Id.*, at p. 18)

The Commissioner agrees with the Board's contention that only it may legally exercise discretion pursuant to *N.J.S.A.* 18A:38-3 to determine whether

tuition shall be charged to a nonresident who seeks to enroll in its public schools. In this instance no then-existing Board policy fully covered the matter, since the stated policy categorically barred enrollment of nonresidents, whereas, in fact, the Board had sanctioned, on occasion, the enrollment of pupils who were expected to be domiciled in the district within a short time. Although the Superintendent's secretary could neither legally assign nor waive tuition payment for a pupil domiciled outside the district, she was not without responsibility to make known to the administrators or to the Board that D.W. was in fact enrolled. That she was aware of the fact that petitioners continued to be domiciled in another district is conclusively shown by the record. It is equally obvious that this was not reported to her superiors. The Commissioner holds that petitioners had reason to believe that she was clothed with responsibility and authority to enroll pupils in the ordinary operations of the district. *Carlson, supra*

If, in the controverted matter, there was a finding that petitioners had acted deceptively or with duplicity to screen from the Board or its agents the fact that D.W. was domiciled without the district, the Commissioner would without question find for the Board. The record, however, reveals that, when petitioners enrolled D.W., they were candid and open in revealing their domicile. They were equally open thereafter in their participation in school events and discussions of problems and delays in effecting their planned move into Boonton Township. Since this is so, the Commissioner determines that, as a matter of fairness and equity, they were entitled to be told in timely fashion by the Board's agents or by the Board of both the prevailing practice of charging tuition for pupils domiciled outside the district and the amount of such charges. Had this been done, they would have had opportunity to either accept and enroll D.W. or reject such financial obligation and enroll him without charge in the district where he was domiciled. Such advisement would have met the essential contractual elements of an offer and acceptance. Absent such elements, the Commissioner determines that no contractual obligation existed.

Chief Justice Weintraub, in a concurring opinion, elaborated upon the concept of domicile in *Worden et al. v. Mercer County Board of Elections*, 61 N.J. 325 (1972) as follows:

“\*\*\*The concept of domicil is not constant. *It is designed to assure fairness to the individual or the State or both in a given setting.* Its ingredients therefore will vary, depending upon what is just and useful in a given context.\*\*\*”  
(*Emphasis supplied.*) (at p. 349)

Even so, herein, the Commissioner, while not called upon to interpret the matter of domicile, must consider the total contextual basis of the controverted matter and render a determination of equity and fairness to both petitioners and the Board.

It is determined that the Board is estopped from collecting tuition for D.W. since its agents who regularly enrolled and supervised enrollment of pupils failed either to make known to petitioners that the Board would charge tuition

or to make known to the Board the non-domiciliary status of petitioners. *Colgrove, supra; Heake, supra; Price, supra; Summer Cottagers', supra*

The doctrine of estoppel must be applied with caution to the actions of governmental agencies. *Summer Cottagers', supra* Nevertheless, its application is not limited solely to non-governmental agencies. In this regard see *Agnes D. Galop v. Board of Education of the Township of Hanover, Morris County, 1975 S.L.D. 358, aff'd State Board of Education 366; Robert Savoia v. Board of Education of the City of Hoboken, Hudson County, 1975 S.L.D. 98; Robert Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County, 1972 S.L.D. 638; Kieffer Shriner v. Board of Education of the Town of Boonton, 1975 S.L.D. 939.*

The Board's citation of *Carlson, supra*, is inapplicable herein, since it was not an assumption of greater authority than that conferred by the Board which flawed the acts of the Board's agents who enrolled D.W. Rather, it was a failure on their part to make known to the Board that which was essential for the Board to know in order to legally determine and give due notice to petitioners that tuition would be charged. Absent such timely notice, the Board is barred from collecting tuition for the major portion of the 1973-74 school year. Nor does the Commissioner find merit in the Board's alternative argument that tuition should be charged from January 1974 when the agreement to sell their Boonton Township property was effected. Such action has no bearing on the matter since ownership of property in the Township of Boonton, where they did not reside, created no right for petitioners to enroll pupils without tuition in the Boonton Township schools. Concomitantly, the sale or the agreement to sell that property could in no way affect their rights.

Nevertheless, petitioners made a forthright offer to pay the Board pro-rated tuition charges for the month of June 1974. In consideration of this offer, the Board is directed to bill petitioners for tuition for June 1974 at the applicable rate established for that year or as shown to be the actual cost per pupil by the annual audit of accounts. Petitioners are not liable for tuition for the period September 1973 through May 1974. The Commissioner so holds. To this extent the relief sought by petitioners is granted.

COMMISSIONER OF EDUCATION

November 1, 1976

**Irene Feigen, Andrea Tuber, Edward Lowenfish and  
Livingston Concerned Parents Association,**

*Petitioners,*

v.

**Board of Education of the Township of Livingston, Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Shavick, Stern, Schotz, Steiger & Croland (Howard Stern, Esq., of Counsel)

For the Respondent, Riker, Danzig, Scherer & Debevoise (Thomas C.C. Humick, Esq., of Counsel)

Petitioners, citizens of the Township of Livingston and an Association of parents of school pupils, allege that a decision of the Board of Education of the Township of Livingston, hereinafter "Board," to merge two elementary schools into a single zone for school attendance purposes was secretly formulated and agreed upon prior to public disclosure. They further allege that such decision denied them procedural due process and was bereft of fundamental and historic elements of fair play. The board denies that its actions were procedurally or otherwise incorrect or illegal and maintains instead that it simply exercised its lawful discretion to manage the schools of the district.

A hearing in this matter on the merits of the Petition of Appeal was conducted on March 8 and April 29, 1976 by a hearing examiner appointed by the Commissioner of Education at the offices of the Essex County Superintendent of Schools, East Orange. Prior thereto, on July 30, 1975, an oral argument with respect to petitioner's Motion for Relief, *pendente lite*, was conducted at the State Department of Education, Trenton. The Commissioner denied such Motion on August 18, 1975, and a similar Motion was denied on August 22, 1975 by the New Jersey Superior Court, Appellate Division, Docket No. AM-781-74. Petitioners have filed a Memorandum of Law; the Board has filed a Brief. The report of the hearing examiner is as follows:

The schools of Livingston have traditionally been organized on a kindergarten or grade one through grade six basis, but in June 1975 the Board altered this pattern in two schools of the district. Specifically, on the date of June 9, 1975, the Board formally approved a merger into one attendance zone of the areas previously assigned separately for school attendance to the Squiertown and Rider Hill Schools. While the two schools had each contained grades kindergarten through six prior to the merger, the arrangement thereafter was to be altered to include grades one, two and three in the Squiertown School and grades kindergarten, four, five and six in Riker Hill. Pupils were to be transported by bus when the new organization plan required such busing.

Subsequent to the decision of June 9, 1975, the Board implemented its plan in September 1975 and at this juncture the plan has been effective for a period of one year.

Petitioners challenge the plan, and aver that it was hastily conceived, adopted finally in a private session of the Board in contravention of law and serves no educational purpose. The testimony at the hearing was primarily concerned with such avowals.

Petitioners' principal witness at the hearing was the President of the Board who gave a chronology of events which led to the Board's controverted action of June 9, 1975. She testified that the Board had first begun discussions of a merger of the two attendance zones in December 1974 and that such discussion was initially occasioned by the necessity of preparing a budget for the 1976-77 academic year and by declining pupil enrollment. (Tr. I-27) She testified that the Board was concerned at the time with the imponderables of expected State assistance and a resultant "tax call" to local taxpayers, and that the merger of the two school attendance zones was one of the cost saving options for consideration. (Tr. I-28) The President further testified that such consideration continued into January 1976 and that sometime early in that month the Superintendent of Schools recommended an adoption of the plan for a merger of the two school zones in the context of the required budget preparation. (Tr. I-34) She said that the "\*\*\*Board came to a consensus that that is the plan they would go along with in terms of putting the type of funding that would be needed into the budget.\*\*\*" (Tr. I-34) At a later time in her testimony she equated the word "consensus" with "decision" as the latter word was used by the Board Secretary in minutes of the Board meetings in April and May. (Tr. I-64-66; Tr. II-3, 13)

Subsequent to the January "consensus" of the Board at the private meeting with respect to the school attendance zones there was no public discussion of the matter until April 14, 1975, and no public announcement concerned with it. Despite this fact, a total of twenty-four citizens of the Township, having somehow learned of the proposed change, appeared for the public meeting of the Board on that date and spoke to the Board about it. (P-2; Tr. I-58) The minutes of the meeting reflect that fact and also contain this statement:

"The Board members each gave their reasons for making the *decision to merge* the two schools and it was explained that the Board would have a meeting on May 5, 1975, and invited all interested parents to attend."  
(*Emphasis supplied.*) (P-2)

Additionally, the first page of the minutes contains the record of an approved Board resolution to reduce the teaching staff of the school system by sixteen teachers. (P-1) This total, the President testified, included four teachers to be reduced because of the merger. (Tr. I-16)

Subsequent to the Board's meeting of April 14, 1975, an announcement of a meeting to be held on May 5, 1975, was sent to parents of pupils in the two schools. (P-5) Such announcement made reference to the Board's "\*\*\*announced plan to merge\*\*\*" the schools and invited parents to attend so that the

Board could “\*\*\*make available to you [the parents] the information about the two schools in the year ahead.” (P-5) A later witness testified that plans for the May 5 meeting had first been announced by the President of the Board on April 8, 1975 at a PTA meeting and that on that occasion those present were “\*\*\*told a decision had been reached.\*\*\*” (Tr. I-89, 112)

Thereafter the Board met again on May 12, 1975, and received a “Superintendent’s Statement On The Bases (sic) For The Merger Of Riker Hill And Squiertown School Districts.” (R-2) The minutes of the meeting (P-3) state that “\*\*\*the Board felt the original decision [with respect to merger of the two schools] was the correct one\*\*\*” but that formal action would be delayed until June. (P-3) According to the Board President, the Superintendent’s statement (R-2) was a written summary of his views originally presented to the Board in December 1974 and January 1975. (Tr. I-64)

The Board President’s testimony with respect to the June meeting was as follows:

“We formalized the agreement that we had come to in January concerning the merger of the Riker Hill-Squiertown schools.” (Tr. I-67)

She testified further that in June the Board had also appointed a committee “\*\*\*to study the possibility of redistricting in the elementary districts\*\*\*” other than the Riker Hill and Squiertown Schools. (Tr. I-76-77) She testified that the study was to have omitted the two schools because of “\*\*\*the Board’s commitment to leave the merger in effect for three to five years.” (Tr. I-77)

The study of reference (P-4) was completed in 1974 by “The Townwide Redistricting Committee” but, contrary to the Board’s instructions, the Committee considered the Riker Hill and Squiertown Schools in its lengthy and detailed proposals. Specifically the study recommended the closing of the Squiertown School and a merger of the pupils from that school with those of Riker Hill. One other school, Monmouth Court, was also recommended to be closed. (P-4, at p. 7) The Board President testified that the Board had not discussed its merger decision after receipt of the study and that the study had had no impact. (Tr. I-159)

The present Superintendent of Schools, Assistant Superintendent in December 1974 and 1975 when merger of the two schools was discussed, testified that in his opinion the June 1975 Board resolution to merge the schools was a necessary prerequisite to the merger in September. (Tr. II-25) He did admit, however, that, without a merger, budgetary changes would have been required. (Tr. II-26) He testified that Monmouth Court School would be closed in September 1976 and that the decision in this regard was in accord with the study report which the Board had commissioned. (P-4)

This concludes a recital to testimony at the hearing. The hearing was marked by a series of objections by both counsel to the proffers of evidence

and/or the rulings pertinent thereto by the hearing examiner. An offer of testimony from an insurance actuary with respect to the risk factor in the altered transportation arrangements made necessary by the merger met with objection from the Board. (Tr. 1-7) The objection was sustained. (Tr. I-9-13, 17-18) Similarly, testimony with respect to the implementation of the busing arrangement required by merger met with objection and such objection was also sustained. (Tr. I-90-94)

Petitioners aver that the Board has been, by its actions with respect to merger of the two schools, in violation of the "Right to Know Law" (*N.J.S.A. 10:4-1 et seq.*) and that its ratification in June 1975 of an action on which it had reached a "consensus" or "decision" in January was merely *pro forma*. They cite *Kramer v. Board of Adjustment, Sea Girt*, 80 *N.J. Super.* 454, 463 (*Law Div.* 1963) in support of their view that the decision should therefore be set aside. Additionally, they aver that on review the Commissioner "\*\*\*\*must either make an independent finding of fact as to the merits of the plan of merger or must remand it to the Board for full, complete and public hearing\*\*\*\*." (Petitioners' Brief, at p. 4)

Petitioners also aver that the neighborhood school concept is an important one for consideration, specifically acknowledged by the courts, and that the concept should be given practical effect absent an overriding social goal such as desegregation. In particular, they cite *Booker v. Board of Education of the City of Plainfield*, 45 *N.J.* 161 (1965) wherein the Court while weighing school busing and redistricting to achieve desegregation said:

\*\*\*\*"This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time economy and the *other acknowledged virtues of the neighborhood policy* must be borne in mind." 45 *N.J.* at 180 [1965] (*Emphasis added.*)\*\*\*\*"  
(Petitioners' Brief, at p. 7)

The Board contends that it did nothing herein that it was not empowered by law to do as a proper exercise of discretion and avers the Petition should be dismissed. It cites *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (*App. Div.* 1960) in support of this contention and cites *Thomas v. Board of Education of Morris Township*, 89 *N.J. Super.* 327 (*App. Div.* 1965), *aff'd* 46 *N.J.* 581 (1966) to support an avowal that the Board's action has a presumption of correctness.

The Board further asserts that all of its closed conference meetings of December 1974 and January 1975 were held prior to enactment of the Open Public Meetings Act, *N.J.S.A. 10:4-6 et seq.* and that no official action was in fact taken with respect to school merger until June 1975. It cites *Schults v. Board of Education of Teaneck*, 86 *N.J. Super.* 29, 47 (*App. Div.* 1964) to support its assertion that closed conference meetings were not illegal at the time that it met. The Board challenges petitioners' assertions with respect to the maintenance of neighborhood schools and asserts that "\*\*\*\*there is no vested right in the maintenance of existing neighborhood school districts in New Jersey." (Board's Brief, at p. 9)

The hearing examiner has examined all such testimony and argument and finds that the decision of the Board to merge the Riker Hill and Squiertown Schools was made at a private meeting of the Board in January 1975 and that the formal action of June was, as petitioners contend, a *pro forma* action which was, in the circumstances, illegal. The decision or consensus of January was incorporated as an integral facet of the Board's budget submitted to the voters in March 1975. (Tr. I-34) It was constantly, and without exception, in testimony or documents thereafter referenced as the "decision" or "consensus." (Tr. I-34, 50, 57, 63, 67, 89; Tr. II-3, 13; P-1, 2, 3, 5) The decision, from the first date of public knowledge, had been presented as a finality and in fact it was never altered (Tr. II-13; P-5), although there were evidently some "second thoughts" after public opposition had surfaced. (Tr. II-13)

Such private and final action by a local board of education has been consistently declared *ultra vires* by the Commissioner and the courts in the context of the Legislature's mandate that all official meetings of a local board of education shall be "public." *N.J.S.A. 18A:10-6 Cullum v. Board of Education of North Bergen, Hudson County*, 15 *N.J.* 285 (1954) (See also *Harry S. Cummings v. Stanley Leher et al.*, 1967 *S.L.D.* 105.) As the Court said in *Cullum*:

\*\*\*The Legislature has unmistakably and wisely provided that meetings of boards of education shall be public (*R.S.* 18:5-47); if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded. This in no wise precludes advance meeting during which there is free and full discussion, wholly tentative in nature; it does, however, justly preclude private final action such as that taken by the majority in the instant matter.\*\*\*

(15 *N.J.* at 294)

The finding herein is that the Board's action of January 1975 to merge two of its schools was not "wholly tentative in nature" but a final act from which the Board never deviated thereafter.

Further, the hearing examiner finds the Board's expressed "commitment" to the controverted school merger (Tr. I-77) for "three to five years" to be ill-advised and also illegal. A local board of education is a noncontinuous body and, except as specifically set forth in law, there is no authority for one board to reach forward beyond its own official life and into the term of a successor board to make a decision not due until then. *Cummings, supra*; *Brownes v. Meehan*, 45 *N.J.L.* 189 (*Sup. Ct.* 1883); *Fitch v. Smith*, 57 *N.J.L.* 526 (*Sup. Ct.* 1895); *Dickinson v. Jersey City*, 68 *N.J.L.* 99 (*Sup. Ct.* 1902)

Finally, the hearing examiner finds no proof that the Board's decision to merge the two schools was faulty on its merits. It is uncontroverted that there was need to reduce school costs. As the Court said in *Schults v. Teaneck, supra*, "The so-called 'neighborhood school' concept \*\*\* is not so immutable as to admit of no exceptions whatsoever.\*\*\*" (at p. 37) The study of the Redistricting Committee does not dispute the Board's projections of a diminishing pupil enrollment but in fact confirms them and proposes another course of action. In effect the Committee questions the wisdom of the plan the Board chose.

The Commissioner has not interfered with or interposed his judgment for that of the local board on the merits of similar matters in the past. He has held instead that local boards of education are responsible for the wisdom of their actions to those who elect them to office and not to the Commissioner. *William Wassmer et al. v. Board of Education of the Borough of Wharton, Morris County*, 1967 S.L.D. 125; *Boult and Harris v. Board of Education of Passaic*, 1939-49 S.L.D. 7, aff'd *State Board of Education* 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948)

In conclusion, the hearing examiner finds the Board's plan to merge two of its schools during the 1975-76 academic year was one which was illegally approved at a private meeting and that the expressed commitment to it for a period of three to five years was also illegal. He recommends that the Board be directed to reevaluate the plan in terms of continuance during the year next succeeding issuance of the Commissioner's final decision in the matter.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings expressed therein; namely that the Board did in fact approve a plan to merge two of the elementary schools of the school district at a private meeting of the Board and that the expressed commitment to such merger for a lengthy period of time was illegal. Such approval and commitment do, therefore, require a reevaluation at this juncture by the Board. The Commissioner so holds.

Accordingly, the Commissioner directs the Board to reconsider the merger of the two elementary schools which is at contest herein in a lawful public meeting of the Board held not later than February 1, 1977, and to decide at that meeting the attendance pattern which shall be in effect for such schools for the 1977-78 academic year.

COMMISSIONER OF EDUCATION

November 3, 1976

Constance Vieland,

*Petitioner,*

v.

Board of Education of the Princeton Regional School District,  
Mercer County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Smith, Cook, Lambert, Knipe & Miller (Thomas P. Cook, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Princeton Regional School District, hereinafter "Board," avers that she holds tenure in the position of Director of Staff Services and/or as a supervisor and that her removal from such position in June 1975 was *ultra vires*. She requests a restoration to her position. The Board denies that petitioner has ever attained tenure in a position other than teacher and avers that its controverted action to remove her from the position of Director of Staff Services was legally correct and within its discretion.

A hearing was conducted in this matter by a hearing examiner appointed by the Commissioner of Education on September 25, 1975 at the State Department of Education, Trenton. Subsequently, Briefs and Reply Briefs were filed. Brief submission was completed on January 30, 1976. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board as a psychologist in 1966 and acquired tenure in such position in the spring of 1970. (Tr. 10) In the interim, however, she had been assigned to duties other than those usually performed by a psychologist and from September 1967 forward to October 6, 1970, she testified she was on "special assignment" to a position designated as "coordinator of teacher education programs." (Tr. 60) The principal facts concerned with the period October 6, 1970 to June 20, 1975, are stipulated by counsel as follows:

"1. After acquiring tenure as a psychologist in Respondent's School System, Petitioner was appointed on October 6th, 1970 to a position variously entitled Coordinator of Staff Development and Coordinator of Staff Development Programs, effective July 1, 1970 to June 30, 1971. The job description for that position, as approved by the Board of Education, is set forth in Exhibit P-1.

"2. The Board did not require a certificate other than that of school psychologist for the position.

“3. At the time of the aforesaid appointment, Petitioner did not possess any certificate other than that of school psychologist.

“4. On June 15, 1971 the Board reappointed Petitioner to the same position for the year July 1, 1971 to June 30, 1972.

“5. On August 29, 1972 the Board reappointed Petitioner to the same position, effective July 1, 1972 to June 30, 1973.

“6. On October 2, 1973 the Board appointed Petitioner to the position of Director of Staff Services, effective July 1, 1973 to June 30, 1974.

“7. On April 30, 1974 the Board reappointed Petitioner to the same position for the year July 1, 1974 to June 30, 1975.

“8. The job description approved by the Board for the Director’s position is set forth in Exhibit P-2.

“9. On or about March 26, 1973 the State Board of Examiners issued to Petitioner a conditional supervisor’s certificate, with advice from that Board that it covered her position as Coordinator of Staff Development Programs for the school year 1972-73 and that the certificate would expire July 1, 1974. In September 1974 Petitioner was issued a permanent supervisor’s certificate, application therefor having been made sometime prior thereto.

“10. On February 25, 1975 the Board adopted a resolution terminating Petitioner’s employment as Director of Staff Services effective June 20, 1975, pursuant to the 60-day notice provision contained in Petitioner’s contract with the Board.”  
(Stipulation of Facts)

At the hearing it was further stipulated that petitioner had performed supervisory duties during the period July 1, 1973 to June 20, 1975 in the position of Director of Staff Services, and that for the total period she had held the required supervisor’s certificate. (See Tr. 123.) Despite this stipulation, the Petition, *sub judice*, is premised on an assumption that such service, rendered pursuant to a job description approved by the Board (P-2), did not entitle petitioner to tenure in a “new” position according to the mandate of the statute *N.J.S.A. 18A:28-6*. Accordingly, the hearing was concerned primarily with an examination of petitioner’s duties in the 1972-73 academic year in an effort to determine whether the service of that year might be added to the service of 1973-75 in order to arrive at a determination that petitioner had earned tenure in a “new” position.

The statute which governs the entitlement to tenure in a new position is *N.J.S.A. 18A:28-6* which is recited in pertinent part as follows:

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

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

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

“(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years\*\*\*.”

An academic year is defined by *N.J.S.A.* 18A:1-1 to mean:

“\*\*\*‘Academic year’ means the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation\*\*\*.”

Petitioner’s stipulated service as a supervisor from July 1, 1973 to June 20, 1975, would appear to conform to the spirit, if not the letter, of *N.J.S.A.* 18A:28-6(b). Petitioner did serve in the new position for a period in excess of “two academic years.” She did not, however, serve in the new position “at the beginning of the next succeeding academic year [1975-76].”

Thus, some examination of petitioner’s service in the 1972-73 academic year is required. The hearing examiner has reviewed the total record in this regard and finds little difference in a categorization of petitioner’s responsibilities in that year and the two years that followed. In the broadest sense of the term, the responsibilities were those of a supervisor and the duties performed were pursuant to a job description petitioner wrote in 1970 (P-1) which was known to the Board. (Tr. 105-106)

Petitioner testified that in 1972, as in prior years, she had (1) worked with teachers in curriculum review (Tr. 36); (2) conducted meetings for teachers (Tr. 37, 39-40); (3) helped develop and submit curriculum proposals (Tr. 40); and (4) helped develop the mini-grant program. (Tr. 47) She further testified that her work in curriculum development embraced all grade levels, K-12, and that she was directly responsible for the work of the director of a teacher’s aide program, as well as an administrative assistant, and to some extent, a coordinator of the Wednesday program. (Tr. 70-71) (Note: Subsequent to July 1, 1973, the number of persons who reported directly to petitioner increased to approximately sixteen. (Tr. 90, 108)

The Curriculum Coordinator appointed in November 1972 testified she was assisted and guided by petitioner in the 1972-73 academic year, and that petitioner’s responsibility had continued in 1973-74. (Tr. 79-80, 82)

The Director of Student Services testified he and petitioner “\*\*\*shared responsibility for the implementation of the [State] testing program\*\*\*” in 1972 and that petitioner had “organized” the interpretive process. (Tr. 86)

An elementary school principal testified she saw “\*\*\*no appreciable difference in [petitioner’s] assignment and performance of work\*\*\*” between July 1971 and June 1975. (Tr. 92)

The President of the Board testified that it was his understanding that petitioner’s service as staff coordinator, which began in 1970, consisted of service as a consultant to the Superintendent, to the Board and to “\*\*\*various people within the system\*\*\*” but that such duties “\*\*\*did not involve a substantial amount of direct supervision or evaluation.\*\*\*” (Tr. 106)

The Superintendent testified that there was a general administrative realignment in 1973 (Tr. 167, 173), but that prior to that year he had not deemed it necessary to inquire whether or not a supervisor’s certificate was required for the duties that petitioner performed. (Tr. 175) In this regard, the hearing examiner observes that on March 14, 1973, the Associate Superintendent addressed a note to the Secretary of the State Board of Examiners. He attached thereto a job description and inquired about an appropriate certificate for petitioner. The job description delineated nine items of work performed by petitioner in the categories of General Administration, Supervision and Evaluation, and Curriculum Consultation. (P-10)

The Secretary of the State Board of Examiners replied on April 6, 1973, as follows:

“We believe that a supervisor’s certificate would cover the duties in the job description submitted by you.” (P-9)

Thereafter, the Associate Superintendent addressed a letter to the Secretary of the State Board of Examiners on June 27, 1974, which contained a request for a standard, rather than a conditional, supervisor’s certificate for petitioner and said:

“\*\*\*This letter is to attest that Dr. Vieland has completed two years of satisfactory experience as Coordinator of Staff Development and Director of Staff Services under my direct supervision.” (P-8)

It is also noted here by the hearing examiner that on September 5, 1973, in response to petitioner’s inquiry, the County Superintendent informed petitioner that her conditional supervisor’s certificate (P-5) had “covered” her work for the school year 1972-73.

Thus, the facts with respect to the nature of petitioner’s employment during the period 1970-75 may be summarized as follows:

1. During all of the period 1970-73 petitioner served the Board in the performance of duties which were known to the Board (Tr. 105) and which required a supervisor’s certificate.

2. An application for the appropriate certificate was delayed until 1973 but when issued the certificate was retroactive to the beginning of the 1972-73 academic year.

3. Petitioner performed supervisory duties under an appropriate supervisor's certificate from the beginning of the 1972-73 academic year through June 20, 1975.

4. Such service has earned for petitioner the entitlement to the privileges of tenure pursuant to the precise requirements of *N.J.S.A.* 18A:28-6(a), (b) or (c). The hearing examiner so finds.

Such finding takes cognizance of the fact that a job description prepared by petitioner in 1970 (P-1) specifically states that "\*\*\*\*[t]he nature of the role of the Coordinator requires explicit omission (sic) of the supervisory or evaluative role." Petitioner's explanation of this phrase (Tr. 68) mitigates the otherwise direct exclusion, and the judgment of the Secretary of the State Board of Examiners and of the hearing examiner is that the recital of duties performed was at all times forward from 1970 that of a supervisor and not of a psychologist.

Indeed, in terms of duties performed there appears to be little doubt that, almost by inadvertence, petitioner began the performance of duties categorized as those of a supervisor in 1967 and that in that year, as the Superintendent testified, there was a "\*\*\*\*crossing of the Rubicon.\*\*\*\*" (Tr. 171) Petitioner moved in that year from one category to another with respect to the performance of duties. There was an inordinate delay, however, in the effort to obtain an appropriate certificate coverage. (See Tr. 132.)

The finding of this report is that when such coverage was obtained and while the duties which mandated it continued, the time began to toll toward the precise period required for a new tenure accrual. *N.J.S.A.* 18A:28-6

The hearing examiner recommends, therefore, that petitioner be restored forthwith to her tenured position as supervisor (Director of Staff Services) or be afforded seniority rights to other positions within the general category of Supervisor pursuant to law. *N.J.A.C.* 6

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by the Board and petitioner in the context of the total record. The exceptions of the Board cite *Michael Keane v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County*, 1970 *S.L.D.* 162 and *Buehler v. Board of Education of Ocean Township*, 1970 *S.L.D.* 436, aff'd State Board of Education 1971 *S.L.D.* 660, aff'd Docket No. A-2297-70, New Jersey Superior Court, Appellate Division, November 2, 1972 (1972 *S.L.D.* 664) in support of an argument that

petitioner has not acquired tenure as a supervisor in the Princeton Regional School District. In particular the Board avers that the determination in *Keane* was that “\*\*\*tenure in a particular category or position (as distinct from tenure in the district) accrues only by employment in a particular job for the statutory period\*\*\*” and may not be accrued in a “general category” of supervisor. (Board’s Exceptions, at p. 2) The decision in *Buehler* is cited as the basis for a reiteration of the view that tenure as a supervisor may accrue only when a teaching staff member performs duties in an established position which are recognized and approved by the Board and that there was no such recognition or approval herein. The Board also avers the hearing examiner’s report fails to define the meaning of the recommendation that petitioner be afforded seniority rights in other positions within the general category of supervisor. Petitioner makes no objection to the report of the hearing examiner *per se* except to note that it makes no mention of salary adjustment which she claims is due.

The Commissioner concurs with the report of the hearing examiner. The record clearly shows that petitioner performed the duties of a supervisor of instruction, a recognized position, with the knowledge and approval of the Board for at least the two year, eleven month period, July 1, 1972 through June 20, 1975, and that during that period she held the required supervisor’s certificate. (See Tr. 105; P-2, 9, 10.) Such service stands as the precise fulfillment of the prescription for a tenure accrual in a new position. *N.J.S.A.* 18A:28-6 The Commissioner so holds.

This holding is not inconsistent with *Keane, supra*, since therein petitioner performed duties as assistant to the principal or as assistant principal at the elementary level and since such positions were not recognized at the time in the rules of the State Board of Education. As a result the Commissioner determined that *Keane’s* service must be categorized only as that of a teaching staff member with general tenure in the district. Petitioner herein performed service directly within the parameters of a recognized position, that of supervisor, and her service was performed with the requisite certificate.

Moreover, this holding is consistent with the caution expressed by the Commissioner in *Buehler, supra*, against assignment of teaching staff members to clearly supervisory duties requiring a supervisor’s certificate. Such service may not be relegated to some kind of amorphous limbo. The Commissioner has cautioned boards of education in the past with respect to just such categorization in *Buehler* and in *Elizabeth Boeshore v. Board of Education of the Township of North Bergen, Hudson County*, 1974 *S.L.D.* 805.

In *Buehler, supra*, the Commissioner first cited *Grasso v. Board of Education of Hackensack*, 1960-61 *S.L.D.* 137 for a definition of supervision:

“\*\*\*Supervision deals with the development and maintenance of high standards of curriculum, instruction and guidance and the continuous improvement thereof. It includes, among other things, the observing, advising and directing of teachers in their instructional and guidance activities inside and *outside the classroom*. Through advice, either upon request or otherwise, through programs of *in-service training* and through

*curriculum improvement activities*, the supervisory staff acquaints the classroom teacher with the *aims, materials and methods of education* and encourages and assists them to achieve the objectives of the schools.’\*\*\*”  
(*Emphasis supplied.*) (at p. 442)

He then held in *Buehler, supra*, that “\*\*\*teachers should not be given such duties, basically supervisory in nature, unless the assignment is made by the employing board of education and defined succinctly within the framework of a job description or table of organization.\*\*\*” (at p. 442) He finally determined, however, in *Buehler* that there was no affirmative act by the Board “\*\*\*involving assignment of the title of supervisor or a delegation by the Board of the duties of the office\*\*\*” and that tenure had not accrued. (at p. 443) (*Emphasis supplied.*)

The decision in *Boeshore, supra*, was based on facts more similar to those in the matter, *sub judice*. Petitioner therein had performed duties of the office as Assistant Superintendent of Schools although she was not given that title. Such performance was rendered with the knowledge and at the direction of the Board of Education. She possessed the certificate required to serve as Assistant Superintendent. The Commissioner held she had earned a tenured accrual in that position.

The facts herein may be compared. Petitioner clearly performed supervisory duties in the period July 1, 1972 to June 20, 1975 at the direction and with the knowledge of the Board. Such duties, in a full-time position, were those within the parameters of a supervisor’s authority as defined in Grasso and recited, *ante*, and they were performed with the full knowledge of the Board which approved them as part of a job description. (P-1; Tr. 105) This job description (P-1) listed a series of duties to be performed by petitioner. Such duties are recited in part as follows:

#### *I Specific Functions*

- “1. Consultation to the Superintendent of Schools and to Administration on matters concerning the over-all direction of school development and particular decisions concerning implementation of district, building, and program goals.
- “2. Development and implementation of programs designed to develop and maximize present staff resources. (Examples: the Wednesday Program; para-professional training programs; present planning for role differentiation in Middle School organization.)
- “3. Development and implementation of particular staff education programs. This also involves identification of staff training needs and identification of qualified staff members to conduct courses and study groups. (Examples: playroom groups; training in group leadership skills; child study classes.)

- “4. Consultation to school psychologists and other staff members concerning within-school research projects. This also often involves assistance in facilitating particular research projects and provision for feedback to participating staff and students.
- “5. Screening, facilitation of implementation, and follow-up of research projects initiated by institutions, organizations, or individuals outside of the school district and provision for feedback to participating staff and students.
- “6. Maintenance of a district resource center for staff in the areas of current developments and program in education, both locally and nationally; educational opportunities available for individual staff members; funding sources available to staff members for individual or group personal and professional development. In addition to acquisition and maintenance of resources, this includes dissemination of information and assistance to staff members in facilitating use of these resources. (Examples: Mini-Grants; announcements of State scholarships and fellowships; provision of information and facilitation of appropriate school use of Federal funds; acquisition and maintenance of a district professional library.)
- “7. Maintenance of contact with various educational training institutions concerning field work placements, and supervision of field work in connection with the Rutgers School Psychology graduate program.
- “8. Consultation to administration and staff in the area of educational evaluation. (Examples: consultant to group of Middle School teachers involved in report card revision; consultant to individual staff members and to groups in the area of program evaluation.)
- “9. Provision, either directly or indirectly through referral, of counseling services for staff members, concerning professional problems or personal problems which affect professional functioning. This also includes development of programs to maximize present staff resources for provision of these services.”

It is immaterial, therefore, that thereafter the job description (P-1) said that the position of Coordinator required “explicit omission of the supervisory or evaluative role” since the principal part of the duties recited prior thereto were supervisory in nature and the exclusion was clearly a narrow one applicable to a single part of a supervisor’s usual duties. The word “or” in the phrase “supervisory or evaluative role” clearly delineates and limits the exclusion. The Commissioner so holds.

Finally, the Commissioner observes that this Board has, like the Board in *Boeshore, supra*, again ignored the advice contained in the State Board rule *N.J.A.C. 6:11-10.5* which states:

“(a) School districts are urged to assign to administrative or supervisory personnel titles that are recognized in these regulations. If the use of unrecognized titles is necessary, a job description should be formulated and submitted to the county superintendent of schools in advance of the appointment, on the basis of which a determination will be made of the appropriate certificate for the position.”

Thus a submission to the County Superintendent is mandatory in advance of appointment. (See *Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County*, 1975 S.L.D. 644, aff'd State Board of Education January 7, 1976.) There was no submission “to the county superintendent in advance of the appointment” of petitioner. There was instead a tardy submission which occurred long after petitioner had begun to perform supervisory duties. It can hardly be held at this juncture, however, in the context of the admonitions of *Buehler, supra*, and *Boeshore, supra*, that the negligence can be condoned or used as the basis for the denial of a tenure entitlement which petitioner has clearly earned as a supervisor.

Accordingly, the Commissioner directs the Board to provide petitioner all emoluments due her as a supervisor retroactive to the date of her removal from the position by the Board and to afford her recognition of seniority rights in that category pursuant to rules pertinent thereto of the State Board of Education. *N.J.A.C.* 6

COMMISSIONER OF EDUCATION

November 12, 1976  
Pending before State Board of Education

**James C. Nicholas,**

*Petitioner,*

vs.

**Board of Education, Borough of Chatham, Morris County,  
a public body corporate of the state of New Jersey,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER AND STIPULATION OF SETTLEMENT**

This matter having been opened to the Division of Controversies and Disputes, Honorable August E. Thomas, Director presiding, in Morris Plains, New Jersey on January 9, 1976 for plenary hearing of Petitioner's appeal from the Respondent's appointment of him as a study hall supervisor for the year 1973-74 at the same salary (\$16,100.00) he had received for the 1972-73 school year, thereby denying him a \$1,200.00 salary adjustment increment or increase, and his appointment by Respondent for the school year 1974-75 to a schedule consisting of only one Social Studies class with all other class assignments being study hall supervision, at the same salary he had received for the 1972-73 and 1973-74 school years, and counsel for the respective parties, to wit, George J. Benson, Esq., Attorney for Petitioner and Carl A. Frahn, Esq., Attorney for Respondent, having advised the Director that the issues in dispute between said parties had been amicably adjusted, and the Director having heard the provisions of such stipulated settlement and the representations of approval on the record by the Petitioner James C. Nicholas and by the Respondent Board of Education of the Borough of Chatham by James S. Collins, Superintendent of Schools, and finding good cause appearing,

It is on this 12th day of November 1976 ORDERED that pursuant to the settlement stipulated on the record by the respective parties and hereby approved by the Director that (1) Petitioner's appeal as to his work assignment and denial of salary adjustment for the school year 1973-74 is hereby withdrawn and dismissed with prejudice; (2) Respondent grant Petitioner the \$1,200.00 salary adjustment withheld from him for the 1974-75 school year, retroactive to the effective date thereof, September 1, 1974, for Petitioner and others similarly situated at Step 16, Schedule E on Respondent's 1974-75 teacher salary guide, and that Petitioner be paid by Respondent according to said Step and Schedule of the salary guide from the aforesaid retroactive date henceforth; and (3) Petitioner not appeal from Respondent's denial to him of the salary adjustment granted by Respondent for the school year 1975-76 and to other persons situated at Step 16 of Schedule E on Respondent's salary guide.

**COMMISSIONER OF EDUCATION**

**In the Matter of the Tenure Hearing of**

**Steve Masone,**

**School District of the Borough of Rutherford, Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, H. Ronald Levine, Esq.

The Board of Education of the Borough of Rutherford, Bergen County, hereinafter "Board," certified nine written charges of inefficiency, incompetency, and unbecoming conduct on June 25, 1974 to the Commissioner of Education against respondent, a teacher with a tenure status in its employ. Respondent denies each of the allegations and originally filed a Motion to Dismiss eight of the nine charges against him. On February 28, 1975, the Commissioner dismissed four of the charges for failure of the Board to comply with the provisions of *N.J.S.A.* 18A:6-13. (See *In the Matter of the Tenure Hearing of Steve Masone, School District of the Borough of Rutherford, Bergen County*, 1975 *S.L.D.* 163, affirmed State Board of Education 167, Motion for Leave to Appeal denied, Docket No. AM-388-74, New Jersey Superior Court, Appellate Division, August 19, 1975.)

Thereafter and subsequent to the completion of certain discovery proceedings, respondent brought forward another Motion to Dismiss the remaining charges pending against him or, in the alternative, for the Commissioner to direct additional definitive depositions.

Oral argument on the Motion was heard on December 16, 1975 at the State Department of Education, Trenton, by a representative appointed by the Commissioner. The entire record of the matter, including the moving papers, the transcripts of oral arguments heard, the transcripts of depositions taken by way of discovery, and exhibits are now before the Commissioner for adjudication.

Prior to a discussion of the parties' legal arguments in support of their respective positions on the Motions controverted herein, the Commissioner is constrained to observe that the time lapse of approximately twenty-one months between June 25, 1974, when the Board certified charges against respondent, and the present is due in large measure to the time required for the resolution

of procedural problems with discovery proceedings. The taking of depositions and the serving of and answering of interrogatories, the time consumed by the appeals from the Commissioner's prior decision on Motion, and the difficulty encountered in arriving at mutually convenient dates between the parties in the scheduling of proceedings all contributed to the delay.

Specifically, the Commissioner observes that the chronology of proceedings in this matter is as follows:

On June 25, 1974, the Board certified nine charges, all of which were generally categorized by it as inefficiency, incompetency and unbecoming conduct, against Steve Masone, a tenured teacher in its employ. The Commissioner's office received the charges on June 27, 1974, and the matter was assigned to a hearing examiner.

By letter dated June 28, 1974, the hearing examiner notified respondent of the charges and advised him to submit his defense thereto within ten days. Respondent's written defense denying the charges was filed July 9, 1974. In it respondent argues, as an affirmative defense, a lack of specificity in the charges.

Respondent's filed Answer was acknowledged by the hearing examiner on July 10, 1974, and the parties were advised, by letter dated July 16, 1974, that a conference of counsel was scheduled for July 31, 1974.

The conference of counsel was conducted on July 31, 1974, and the agreements reached provided that the Board would submit a bill of particulars with respect to the first seven charges within two weeks and that thereafter sixty days would be allowed for discovery based on the bill of particulars.

On August 8, 1974, the Board submitted a five page, single spaced typewritten bill of particulars detailing the specifics of the nine charges. Thereafter, on September 13, 1974, respondent filed a Notice of Motion to compel discovery in regard to the production of certain plan books, depositions, and other documents in the possession of the Board. By letter dated September 18, 1974, the Board advised the hearing examiner that it would allow respondent to review its relevant records in the matter, that it would agree to timely depositions, but that it would oppose the review of plan books other than those of respondent.

The hearing examiner ruled on September 20, 1974, that an oral argument on respondent's entire Motion would be set down and so notified the parties. Between the dates of September 20 and October 2, 1974, the hearing examiner's efforts to secure a mutually convenient time for the oral argument on the Motion were futile. On October 2, 1974, he advised the parties that the date of October 22, 1974, was established as the day to entertain the argument.

In the meantime respondent submitted a list of fifty-one interrogatories to the Board with a cover letter dated October 1, 1974. Also, on October 1, 1974, by way of an Amended Answer to the Answer previously filed on July 9,

1974, respondent moved to dismiss the nine charges against him on the grounds that he, respondent, viewed all nine charges as charges of inefficiency and that the Board failed to give him ninety days to overcome the alleged inefficiencies as required by *N.J.S.A.* 18A:6-12, and on the grounds that the Commissioner lacked jurisdiction.

On October 22, 1974, an oral argument was held on respondent's Motion to compel discovery and his Motion to Dismiss the nine charges against him. Furthermore, the Board raised objection to the relevance of certain of the fifty-one interrogatories earlier served upon it by respondent. The hearing examiner, on the record and made part of the transcript (Tr. 50-77), procedurally ruled on the discovery relevance of each interrogatory in dispute.

The Commissioner, by written decision dated February 28, 1975, dismissed four of the nine charges against respondent and asserted his jurisdiction in the matter. Thereafter, by letter dated March 13, 1975, the hearing examiner advised the parties that a hearing date on the remaining five charges had been set for May 20, 1975.

On March 11, 1975, however, respondent determined to appeal the Commissioner's decision on the jurisdictional issue. The Board, on March 14, 1975, filed a Notice of Appeal to the Commissioner's decision in which he dismissed four of the nine charges. Respondent, on March 21, 1975, filed a Cross-Appeal to the Board's Appeal before the State Board of Education.

Notwithstanding the Appeals on the Commissioner's decision to the State Board, respondent, by letter dated April 4, 1975, requested the Board to respond to the interrogatories upon which the hearing examiner had procedurally ruled on October 22, 1974. Thereafter, on April 22, 1975, the hearing examiner confirmed in writing the agreement of the parties to adjourn the scheduled hearing date of May 20, 1975, in view of the Appeals before the State Board.

As of May 2, 1975, respondent still had not received answers to his interrogatories. Consequently, he filed another Motion to Dismiss for failure of the Board to supply the answers as directed by the hearing examiner. Respondent filed an affidavit in support of his Motion.

On May 7, 1975, the hearing examiner granted the Board fifteen days to file its affidavit in opposition to respondent's Motion. The Board filed its opposing affidavit on May 8, 1975 in which the Board asserted that because of the then pending Appeals, the requested answers might be unnecessary. Essentially, the Board took the position that it would not supply the answers to the interrogatories until the pending Appeals were decided *and* until it determined thereafter whether to appeal the matter further if the State Board's decision were adverse. By letter dated May 13, 1975, respondent pressed for answers to his interrogatories.

On June 4, 1975, the State Board affirmed the Commissioner's decision of February 28, 1975, and on July 1, 1975, the hearing examiner confirmed August 18, 1975, as the hearing date in the matter as agreed to by the parties. On July 2 respondent pressed again for answers to his interrogatories and demanded the opportunity to secure an order from the Commissioner by which the Board would be compelled to submit its answers to him.

Thereafter, on July 11, 1975, respondent acknowledged receipt of the Board's answers to certain interrogatories and advised the Board that he was still waiting for answers to seventeen other interrogatories.

There followed a series of personal contacts and telephone conversations by the hearing examiner on divers dates with individual counsel to the parties in an effort to complete the requested discovery proceedings. On July 16, 1975, the hearing examiner advised the parties that because of the discovery problems, leave would be granted respondent to present his argument in support of his position. Consequently, the date of August 18, 1975, originally set as the hearing date, was used for oral argument. The hearing examiner procedurally ruled, in writing dated August 21, 1975, with respect to respondent's requested discovery.

In the meantime, respondent had a Motion for Leave to Appeal the Commissioner's earlier decision of February 28, 1975, as affirmed by the State Board on June 4, 1975, pending before the Appellate Division, Superior Court.

The Attorney General's office, by memo dated September 15, 1975, advised the hearing examiner that respondent's Motion for Leave to Appeal before the Appellate Division was dismissed on the Board's Motion. On September 15, 1975, the record of the matter was returned to the hearing examiner.

By October 14, 1975, respondent filed another Motion to have the Board comply with respect to the hearing examiner's letter of August 21, 1975 in regard to discovery. A telephone message dated October 28, 1975, shows that discovery proceedings were in effect.

On November 19, 1975, respondent moved to dismiss the remaining charges, with supporting affidavit, on the grounds that the Board failed to certify the charges within forty-five days of their receipt as required by *N.J.S.A. 18A:6-13*.

On December 2, 1975, the date of December 16, 1975, was established because there appeared to be *prima facie* evidence from the supporting affidavit that the Board might not have complied with the statute of reference. Oral argument was held on December 16, 1975, and the transcript was delivered the week of January 4, 1976. The decision is now in process.

This concludes the factual presentation with respect to the proceedings thus far in the case.

The Commissioner observes that the five charges pending against respondent and upon which the instant Motion to Dismiss is being considered are as follows:

*CHARGE ONE*

“That the said Steve Masone having been directed to alter and improve his teaching of Science by resorting to planned laboratory experiences and demonstrations instead of relying predominantly on lectures with questions and answers did nevertheless continue to resort predominantly to lectures and questions and answers thus showing an inability and/or unwillingness to improve his teaching capabilities and techniques.

*CHARGE FIVE*

“That the said Steve Masone, having been instructed to take directions from and cooperate with the Department Chairman failed to comply with said directions and instructions by failing to administer the second marking period unit test; failing to attend the meeting to develop the third unit test; \*\*\*[this portion dismissed]; failing to meet with the Science teachers.

*CHARGE SEVEN*

“That the said Steve Masone, having been instructed and directed to refrain from and avoid digressions from the subject matter which he was assigned to teach did nevertheless continue to engage in needless digressions and diversions.

*CHARGE EIGHT*

“That the said Steve Masone did, on or about February 5, 1974, having previously received permission to rent a van to take approximately ten students to the Submarine Ling, did, when unable to obtain a van, instead of cancelling said trip, pile the ten students into a Jeep Scout which had only two seats thereby endangering the safety and lives of said pupils. In addition, the said Steve Masone took said pupils on a Ferry which was not on the approved itinerary.

*CHARGE NINE*

“That the said Steve Masone did on or about the 14th day of December, 1973, direct to Mr. Donald M. Everitt, his principal, a communication which was abusive and disrespectful in which communication the said Steve Masone made improper threats against the Principal and his Department Chairman.

“The undersigned, DONALD M. EVERITT, hereby prefers the foregoing charges against STEVE MASONE, a teacher in the Borough of Rutherford School System, pursuant to the provisions of the revised Statutes of New Jersey 18A:6-10, et seq., and requests that the Board shall determine

whether or not the said charges and the evidence in support thereof is sufficient to justify further proceedings in accordance with the statutes in such cases made and provided.”

Respondent grounds his Motion to Dismiss the charges on what he alleges to be the Board’s failure to comply with the provisions of *N.J.S.A.* 18A:6-13 which failure he further alleges is clearly established by the deposed testimony (P-1A) of the Superintendent of Schools.

The Commissioner observes that *N.J.S.A.* 18A:6-13 requires boards of education to determine, within forty-five days of its receipt of a written charge or charges against a tenured employee, whether or not to certify such charge or charges to the Commissioner for determination.

Respondent asserts that the Superintendent’s testimony establishes that the Board was in receipt of the charges herein at some time during March or April 1974. (Tr. 8-10) Consequently, respondent contends, the Board’s action of waiting until June 25, 1974 to certify the charges against him was not timely and therefore the charges must be dismissed.

The Commissioner observes that in his prior decision on Motion, he stated, *inter alia*:

“The Commissioner observes that the nine charges were signed on June 24, 1974, *ante*, and were properly certified by the Board at the special meeting held June 25, 1974. The Commissioner finds no procedural defect in regard to the charges which are not dismissed [the same charges being considered *sub judice*].” (at p. 166)

The Commissioner notices that that holding was predicated upon the legal arguments set forth by respondent in that Motion to Dismiss. There, respondent argued that seven of the nine charges were charges of inefficiency and, as such, should be dismissed for failure of the Board to comply within forty-five days of the expiration of the ninety day period afforded him to correct the alleged inefficiencies. Respondent argued that another charge should be dismissed for reasons not relevant here. Respondent did not move to dismiss the remaining charge which is hereinbefore set forth as Charge Eight. The Commissioner, in his total review of the nine charges originally certified by the Board, determined that four charges, and a portion of another charge, were of inefficiency. The Commissioner also determined that the Board failed to comply with the provisions of *N.J.S.A.* 18A:6-13 by failing to certify the charges determined to be inefficiency within forty-five days of the expiration of ninety days afforded respondent to correct the alleged inefficiencies.

Subsequent to the disposition of the Appeals and Cross-Appeals of the Commissioner’s decision on Motion, respondent deposed his department chairperson on October 27, 1975, and on November 17, 1975, he deposed the Superintendent. Two days thereafter, on November 19, 1975, respondent filed his

instant Motion to Dismiss which is grounded primarily upon the Superintendent's testimony.

The Commissioner finds that to place the arguments of the parties in their proper perspective, the original letter (C-1) of the principal dated December 7, 1973 by which respondent was notified of alleged inefficiencies and the Board's statement of charges it certified on June 25, 1974, must be reproduced here for purposes of comparison:

"I am hereby notifying you of inefficiencies I find in your teaching. You have ninety (90) days in which to correct them or I will file formal charges of inefficiency with Dr. Luke Sarsfield, Superintendent of Schools.

"Following is a list of areas in which I expect improvement to the degree it satisfies me.

- "A. An improvement must be shown in your methods of teaching science. Your reliance on lecture in a field which presents extensive opportunity for laboratory and hands-on experience is not acceptable.
- "B. An improvement must be shown in your methods of evaluating pupils. You have too few grades for your students plus a lack of a variety of evaluative methods.
- "C. Definite assignments must be given; homework collected and graded or checked. Record book must show methods of evaluation.
- "D. Plan book must be kept for two days in advance, in addition it must be meaningful. Pages to be covered, activities, questions, lab. work, homework assignments *must* be contained in the plans. You must have long and short range plans and objectives for the work to be covered and you must stick to it. The course of study must be covered by year's end.
- "E. Cooperation with the Science department chairman must improve. You are to take directions from her and cooperate with decisions made by the department. Materials or reports called for by the department chairman or principal must be submitted on time and be complete.
- "F. An improvement must be shown in your room housekeeping. Your room is a mess. I have seen an old rusty battery in your sink for over a month. The environment is not conducive to learning or teaching children order, neatness or organization.
- "G. An improvement must be shown in your tendency to digress from your subject matter to subjects which are in no way relevant to

science. Over the years I have had innumerable complaints from parents and students on your relating personal and Navy experiences in your classes.

“Again I expect satisfactory improvement in these areas by the end of ninety (90) days. Towards this end I will be spending time in your classes observing how well you are working on these inefficiencies.” (*Emphasis in text.*) (C-1)

The Board’s certification of charges reads as follows:

“Pursuant to the provisions of *N.J.S.A. 18A:6-10 et seq.*, the following charges of inefficiency and incompetency and of unbecoming conduct are hereby preferred against Mr. Steve Masone, a teacher under tenure in the Borough of Rutherford School System, to wit:

*CHARGE ONE*

“That the said Steve Masone having been directed to alter and improve his teaching of Science by resorting to planned laboratory experiences and demonstrations instead of relying predominantly on lectures with questions and answers did nevertheless continue to resort predominantly to lectures and questions and answers thus showing an inability and/or unwillingness to improve his teaching capabilities and techniques.

*CHARGE TWO*

“That the said Steve Masone, having been directed to improve the evaluation of his pupils did nevertheless fail to improve his evaluation methods.

*CHARGE THREE*

“That the said Steve Masone having been directed to improve his assignments to pupils failed to make such improvements.

*CHARGE FOUR*

“That the said Steve Masone having been directed and instructed to improve the upkeep of his plan book and to follow Board Policy in regard thereto did fail to comply with said directives and instructions thereby making the covering of course requirements difficult or impossible.

*CHARGE FIVE*

“That the said Steve Masone, having been instructed to take directions from and cooperate with the Department Chairman failed to comply with said directions and instructions by failing to administer the second marking period unit test; failing to attend the meeting to develop the third unit test; failing to keep proper lesson plans as directed by the Department Chairman on evaluative criteria; failing to meet with the Science teachers.

*CHARGE SIX*

“That the said Steve Masone, having been directed and instructed to improve his room housekeeping failed to comply with said instructions and directions.

*CHARGE SEVEN*

“That the said Steve Masone, having been instructed and directed to refrain from and avoid digressions from the subject matter which he was assigned to teach did nevertheless continue to engage in needless digressions and diversions.

*CHARGE EIGHT*

“That the said Steve Masone did, on or about February 5, 1974, having previously received permission to rent a van to take approximately ten students to the Submarine Ling, did, when unable to obtain a van, instead of cancelling said trip, pile the ten students into a Jeep Scout which had only two seats thereby endangering the safety and lives of said pupils. In addition, the said Steve Masone took said pupils on a Ferry which was not on the approved itinerary.

*CHARGE NINE*

“That the said Steve Masone did on or about the 14th day of December, 1973, direct to Mr. Donald M. Everitt, his principal, a communication which was abusive and disrespectful in which communication the said Steve Masone made improper threats against the Principal and his Department Chairman.

“The undersigned, DONALD M. EVERITT, hereby prefers the foregoing charges against STEVE MASONE, a teacher in the Borough of Rutherford School System, pursuant to the provisions of the revised Statutes of New Jersey 18A:6-10, et seq., and requests that the Board shall determine whether or not the said charges and the evidence in support thereof is sufficient to justify further proceedings in accordance with the statutes in such cases made and provided.”

The Superintendent testified that he became aware that the principal was considering tenure charges against respondent sometime during November 1973. (P-1A, at pp. 30-31) The Superintendent also testified that he became aware of the principal's letter (C-1) to respondent approximately on December 7, 1973, when a copy was given to him. (P-1A, at pp. 32-33) Subsequent to the ninety day period afforded respondent to correct the alleged inefficiencies, the Superintendent testified, he sent a copy of the principal's letter (C-1) to the Board sometime in March or April 1974. (P-1A, at pp. 35, 76) It is noted here that the Superintendent testified that he could not recall whether a copy of the principal's original letter (C-1) was submitted to the Board (P-1A, at p. 35) or whether a different letter which contained the allegations of charges of inefficiencies “\*\*\*and or some other charges was forwarded to and received by the

Board\*\*\*\* (P-1A, at p. 36) was submitted to it. It is clear to the Commissioner at this juncture that at the very least the charges of inefficiency, as set forth in the principal's letter (C-1), were submitted to the Board sometime in March or April 1974.

The Superintendent, who by statute is an *ex officio* member of the Board (*N.J.S.A.* 18A:17-20) and does in fact sit with the Board at its meetings (P-1A, at p. 35), testified that the Board, subsequent to its receipt of the letter (C-1), had at least six, perhaps eight, meetings in which the subject matter of the contents of the charges it eventually certified was discussed. (P-1A, at pp. 37, 39) The Superintendent also fixed the months of March and/or April 1974, as the time when these meetings occurred. (P-1A, at pp. 37, 44, 46-47) It is noted here that the Superintendent then testified that the meetings could have gone into the month of May 1974. (P-1A, at pp. 48, 54A-54B, 72) The Superintendent is clear in his testimony that the six to eight meetings occurred prior to June 1, 1974, because he was physically injured on June 1, 1974. (P-1A, at pp. 39-40) The Commissioner notices that the testimony (P-2) of the department chairperson establishes that she was called to a meeting by the Board on April 16, 1974 to discuss the allegations of inefficiencies made by the principal. (P-1A, at p. 5; P-2, at pp. 108-109)

The Commissioner finds that the Board, subsequent to its receipt of the principal's letter (C-1) or an expanded version which includes Charges Eight and Nine, did have six to eight meetings in regard to the contents of all the charges it finally certified on June 25, 1974. Specifically, the Superintendent testified that the principal presented the Board with a narrative surrounding the alleged improper use of a motor vehicle by respondent as set forth in Charge Eight, *ante* (P-1A, at p. 40); the principal discussed the contents of Charge Nine, *ante*, with respect to the alleged threats made by respondent (P-1A, at p. 41); and that charges of insubordination were discussed by the principal with the Board. (P-1A, at p. 44) In fact, the Superintendent testified that the Board was having its six to eight meetings in regard to "charges" made by the principal against respondent (P-1A, at p. 45), and that the meetings were held to discuss the charges of inefficiency, the charges of insubordination, the charges of incapacity, and the charges of conduct unbecoming a teacher. (P-1A, at p. 44)

The Commissioner determines that the testimony of the Superintendent establishes that in March or April 1974, the Board was in receipt of the seven alleged inefficiencies (C-1) from the principal, four of which were determined to be properly categorized as charges of inefficiency (*In re Masone, supra*), and that it considered itself to be in receipt of the charges with respect to the allegations of misuse of a motor vehicle and the threats to the principal as brought forward by the principal.

These facts form the basis for respondent's Motion to Dismiss the charges pending against him. The Board certified the charges against him on June 25, 1974. Forty-five days prior to that date was May 12, 1974. Because May 12, 1974 was a Sunday, the earliest date the Board could have been in receipt of

the charges was Monday, May 13, 1974. Consequently, respondent argues that by virtue of the Board being in possession of the charges as early as March or even April 1974, its date of certification of those charges to the Commissioner, June 25, 1974, is not timely and therefore that action stands in violation of *N.J.S.A.* 18A:6-13.

The Board argues, however, that the only written charge it had before it during March, April or May was the letter (C-1) of the principal which contained allegations of inefficiencies. Furthermore, the Board notices that the allegations of inefficiency have been dismissed by the Commissioner. (Tr. 42)

The Board asserts that the written charges it certified to the Commissioner were not filed with its Board Secretary until June 24, 1974, and that it took its formal action the following day, June 25, 1974. Consequently, the Board contends that any consideration of the substantive matters set forth in its certification of charges of June 25, 1974, which may have occurred at a time prior to June 24, 1974, is wholly immaterial and relies on *Campbell v. Hackensack*, 115 *N.J.L.* 209 (*E. & A.* 1935); *Catalano v. Pemberton Township Board of Adjustment*, 60 *N.J. Super.* 83 (*App. Div.* 1960); *Prezlak v. Padrone*, 67 *N.J. Super.* 95 (*Law Div.* 1961); *Marini v. Holster*, 48 *N.J.* 289 (1966). The Board states that it did not receive formal written charges against respondent until June 24, 1974, and that it took formal action the next day. Accordingly, the Board avers that these facts cannot be altered by the testimony of the Superintendent.

The Commissioner is constrained to observe that the letter (C-1) from the principal dated December 7, 1973, was received by the Board sometime in March or April. The Board's argument that the letter was not received by its Board Secretary is without merit. It was the receipt of that letter which precipitated the Board, through its six or eight meetings, to "\*\*\*\*determine\*\*\* 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\*\*\*." *N.J.S.A.* 18A:6-11 Furthermore, a comparison of the principal's letter (C-1) with the Board's formal certification of charges, *ante*, clearly demonstrates that the principal's letter is in fact the statement of charges with the exception of Charges Eight and Nine. It is also clear that the statutory requirements of *N.J.S.A.* 18A:6-13 imposed upon the Board with respect to Charges One through Seven have not been adhered to as required. Accordingly, the Commissioner grants respondent's Motion to Dismiss Charges One, Five and Seven as hereinbefore set forth.

There is no evidence in the record to establish that the Board had in its possession Charges Eight and Nine in written form before June 24, 1974. Consequently, the Board in this regard complied with the requirements of *N.J.S.A.* 18A:6-13. Respondent's Motion to Dismiss Charges Eight and Nine is denied. The Commissioner directs his representative to set down a hearing date on these two charges with utmost promptitude.

COMMISSIONER OF EDUCATION

March 10, 1976

**In the Matter of the Tenure Hearing of**

**Steve Masone,**

**School District of the Borough of Rutherford, Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, H. Ronald Levine, Esq.

The Board of Education of the Borough of Rutherford, Bergen County, hereinafter "Board," certified to the Commissioner of Education on June 25, 1974 nine written charges of inefficiency, incompetency, and unbecoming conduct against respondent, a teacher with a tenure status in its employ. Subsequent to the certification of the charges, respondent brought forward two separate Motions to Dismiss, both of which were partially granted to the extent that seven of the nine charges have been dismissed. (See *In the Matter of the Tenure Hearing of Steve Masone, School District of the Borough of Rutherford, Bergen County*, 1975 S.L.D. 163, affirmed State Board of Education 167, Motion to Dismiss Appeal granted, Motion No. M-2392-74, New Jersey Superior Court, Appellate Division, August 19, 1975, hereinafter "*In re Masone No. 1*"; *In the Matter of the Tenure Hearing of Steve Masone, School District of the Borough of Rutherford, Bergen County*, 1976 S.L.D. (decided March 10, 1976), hereinafter "*In re Masone No. 2*.")

A hearing was conducted into the two remaining charges on May 11, 1976 at the office of the Bergen County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The two charges which remain against respondent were specified on the original nine charges as Charges Nos. Eight and Nine and shall now be discussed separately.

**CHARGE EIGHT**

"That the said Steve Masone did, on or about February 5, 1974, having previously received permission to rent a van to take approximately ten students to the Submarine Ling, did, when unable to obtain a van, instead of cancelling said trip, pile the ten students into a Jeep Scout which had only two seats thereby endangering the safety and lives of said pupils. In

addition, the said Steve Masone took said pupils on a Ferry which was not on the approved itinerary.”

The principal of the Board’s Rutherford Junior High School testified that respondent had completed an application form to take ten of his pupils on a field trip on February 5, 1974. (Tr. 5) The principal testified that while he cannot locate that form, he recalls that respondent stated he desired to take his pupils to the United States Navy’s submarine Ling which was berthed at Hackensack and then to the South Street Seaport Museum, located in lower Manhattan, New York City. The principal also testified that he recalls that those two places comprised the total scheduled itinerary (Tr. 7) and that he and respondent had agreed that a rented van was to be the method of transportation.

Respondent advised the principal by written memorandum (P-1) dated February 6, 1974, the day after the trip, that he and his ten pupils had visited the submarine and the South Street Seaport Museum. Respondent also advised the principal that he and his pupils had visited a “Whopperburger establishment,” toured the Wall Street financial district, and went for a round-trip ride on the Staten Island Ferry. Respondent also informed the principal that:

“\*\*\*The cost of the rental of the Van and admissions would have compressed the finances of some of the youngsters to were (sic) they would have had to choose between eating lunch or depriving themselves admission to some of the sights. In order to relieve this, I elected to drive them in my vehicle\*\*\*.” (P-1)

The principal then sent the following memorandum to respondent:

“On February 5, 1974 you went on a field trip with your practical science class. The original plans which had the approval of myself and Dr. Sarsfield, called for the renting of a van which would accommodate eleven (11) persons. You ran into difficulty with acquiring this van and without a call to me you changed plans and piled ten (10) boys plus yourself into your Scout, which I know without a doubt was overloaded passenger-wise and a potentially dangerous and catastrophic situation. I am not faulting your desire to give the boys an enriching experience, but I seriously question the wisdom and judgment of a veteran teacher as yourself.

“Thank God nothing happened but your actions were potentially dangerous to the children and could have jeopardized your career and future along with several other administrators. Your desire to do things for your students must be tempered by discretion and sound judgment in the future.” (P-2)

The hearing examiner observes that that portion of Charge Eight which alleges that respondent took his pupils “\*\*on a Ferry which was not on the approved itinerary\*\*\*” is, in fact, true. Respondent testified that he did take the pupils for a round-trip ride on the Staten Island Ferry. (Tr. 108) Respondent testified that he elected to do so because of the proximity of the Staten Island

Ferry to the financial district of New York City and because he learned that only one of the ten pupils had been on the Ferry. (Tr. 107) Consequently, respondent testified that he seized the opportunity to expose the pupils to that experience which he labeled educational. (Tr. 108)

The hearing examiner observes that the testimony of the principal establishes that the approved itinerary for the trip was limited to the submarine and to the South Street Seaport Museum. It is clear that respondent and his pupils exceeded the approved itinerary by going on a round-trip ferryboat ride. It is also clear by respondent's report (P-1) to the principal that the approved itinerary was also exceeded by the visit to the "Whopperburger establishment" and by the visit to the financial district. Notwithstanding these extra visits by respondent and his pupils, there is nothing in the record to establish that respondent violated any policy of the Board or of the administration. If there is no complaint lodged against respondent for visiting the financial district of New York City and the eating establishment, it must be assumed that respondent had the authority to alter the approved itinerary. Accordingly, the hearing examiner finds that while respondent did take his pupils on the Staten Island Ferry such an alteration of the itinerary, in the context of this charge, does not rise to the level of a tenure charge pursuant to *N.J.S.A. 18A:6-11*.

The hearing examiner further finds that the portion of Charge Eight alleging that respondent had used a Jeep Scout instead of a rented van is, in substance, true. Respondent used his own personal vehicle which is a four-wheel drive, International Scout and not a Willys Jeep. The principal testified that by respondent's use of his own vehicle he had "\*\*\*\*endangered the safety and lives of said pupils\*\*\*" because in the principal's judgment such a vehicle cannot hold ten pupils and a driver safely. (Tr. 12) The principal testified that the basis for this opinion is common sense and good judgment. (Tr. 37-80)

Respondent testified that his vehicle's original equipment includes a driver's seat and an accompanying passenger seat. The rear of the vehicle contains eight smaller seats, four on each side of the body. (Tr. 100) Respondent testified that he had used the vehicle on other field trips with the approval of the administration and, under the circumstances of the day, could discern no reason why he should not have used it again. The circumstances are as follows:

Respondent testified that the original plan called for a rented van. (Tr. 102) It was agreed between him and the principal that he would meet the pupils at the school on the morning of the trip. Respondent testified that it was further agreed that he was to transport the pupils to the submarine in his vehicle and proceed to Paramus to collect the rented van. (Tr. 103) In anticipation of this procedure respondent had visited a Paramus rental agency prior to the date of the trip and selected a van suitable to his needs.

Respondent testified that he did meet the pupils at school on the day of the trip and prepared to drive them in his vehicle to the submarine. Respondent explained that he drove the vehicle, one pupil sat in the passenger seat, eight pupils sat on the rear seats, and the tenth pupil sat on a cross-member of the

vehicle's body between the rear seats. (Tr. 106) Respondent testified that he informed the principal they were leaving the school grounds when preparations were complete. (Tr. 104) Subsequent to their visit to the submarine, he drove to Paramus with the pupils to get the van. Respondent explained that upon his arrival at the rental agency the van he had selected was not available. Instead, he was offered a substitute van which, in his judgment, was not acceptable. (Tr. 105) Consequently, he elected to continue the trip in his own vehicle.

The hearing examiner observes that the principal's testimony with respect to the method of transportation is limited to the extent that respondent was to have rented a van capable of holding eleven people. (Tr. 8) While it is true that respondent did not telephone the principal when he discovered the van he had planned to use was not available, such a failure does not constitute sufficient proof to sustain the charge herein. It is established that respondent had been allowed on prior occasions to use his own vehicle for field trips. Respondent asserts this had happened on several occasions (Tr. 101), the principal asserts it happened once. (Tr. 9-10) The hearing examiner is convinced that respondent on February 5, 1974, used his vehicle to transport the pupils to at least the submarine Ling with the knowledge of the principal. He so finds.

The hearing examiner can find no proofs that respondent, by using his own vehicle, endangered the lives or safety of his pupils. If the principal agreed that the method of transportation was to be a van capable of holding eleven people and left the selection of a van to the judgment of respondent, surely respondent's judgment in refusing to take a van other than the one he selected must be affirmed. The principal failed to prove that respondent's own vehicle was not safe.

Finally, the hearing examiner observes that respondent testified that the difference between his explanation of why he used his own vehicle as set forth in his memorandum (P-1) on February 6, 1974 to the principal and his actual testimony is that both reasons joined together in his mind to arrive at the decision not to accept the substitute van. (Tr. 117-119)

#### *CHARGE NINE*

"That the said Steve Masone did on or about the 14th day of December, 1973, direct to Mr. Donald Mr. Everitt, his principal, a communication which was abusive and disrespectful in which communication the said Steve Masone made improper threats against the Principal and his Department Chairman."

The genesis of this charge is found in a four page, single-spaced typewritten memorandum dated December 14, 1973 from respondent to the principal. (P-3) The hearing examiner observes that this memorandum addressed what respondent perceived as an inordinate number of evaluations of his teaching performance by the principal and a supervisor. A review of its contents establishes that the relationship between the principal and respondent was not harmonious. The principal testified that he considered he was threatened because respondent stated he would take their differences to the Board and/or the public for resolution.

The hearing examiner finds no basis to conclude that the contents of the memorandum, delivered to the principal privately, which takes serious issue with the operation of the school are sufficient grounds for a conclusion that respondent is guilty of conduct unbecoming a teacher.

A last matter remains. At the conclusion of the Board's proofs in support of the charges herein, respondent moved to dismiss the charges for failure of the Board to adhere to *N.J.S.A.* 18A:6-13. Such Motion was based on the testimony of the principal. While the charges are recommended to be dismissed on their merits, consideration of the procedure utilized by the Board with respect to the whole of this matter must be addressed.

The Commissioner held *In re Masone No. 2, supra*, that:

“\*\*\*There is no evidence in the record to establish that the Board had in its possession Charges Eight and Nine [the two charges which remain] in written form before June 24, 1974 [the date the Board certified the nine charges against respondent]. Consequently, the Board in this regard complied with the requirements of *N.J.S.A.* 18A:6-13. Respondent's Motion to Dismiss Charges Eight and Nine is denied\*\*\*.” (at p. )

The principal, from whom all nine charges had emanated, testified with respect to the Board's possession of Charges Nos. Eight and Nine in writing.

On the basis of this testimony respondent seeks dismissal of the remaining charges and grounds such request on the alleged failure of the Board to adhere to the provisions of *N.J.S.A.* 18A:6-13. Prior to a recitation of that testimony it is necessary to review the circumstances attendant to the entire matter.

The principal had advised respondent on December 7, 1973 of certain inefficiencies he had determined existed in respondent's teaching performance. The principal also advised respondent he had ninety days to correct the alleged inefficiencies, *In re Masone No. 1, supra*. Thereafter, on June 25, 1974, the Board determined to certify nine charges of inefficiency, incompetency and unbecoming conduct against respondent. Respondent brought forward a Motion to Dismiss all nine charges for various reasons. The Commissioner held that four charges and a portion of another of the nine charges certified were of inefficiency. *In re Masone No. 1* The Commissioner further held that the Board had violated the statutory prescription of *N.J.S.A.* 18A:6-13 with respect to the certification of inefficiency charges. Thus, those charges considered to be charges of inefficiency were dismissed.

Subsequent to the Commissioner's decision (*In re Masone No. 1, supra*) and upon the completion of certain discovery proceedings, respondent brought forward another Motion to Dismiss grounded upon *N.J.S.A.* 18A:6-13. The statute of reference requires a board of education to determine, within forty-five days of its receipt of a written charge or charges against a tenured employee, whether to certify such charge or charges to the Commissioner for determination.

Respondent argued in his second Motion to Dismiss that the deposed testimony of the Superintendent established that the Board had been in receipt of the ten remaining written charges for a period of time longer than forty-five days. The Commissioner held that the Board was in possession of the remaining written charges, excepting Charges Nos. Eight and Nine, for a period of time longer than forty-five days and dismissed those charges. Charges Nos. Eight and Nine, *sub judice*, remain.

The principal testified with respect to Charges Nos. Eight and Nine that at the conclusion of the original ninety day period afforded respondent to correct the alleged inefficiencies, he submitted to the Superintendent a list of charges (R-1) dated March 7, 1974. (Tr. 43) The hearing examiner observes that this list of charges was not part of the record until the hearing into the charges considered herein. The hearing examiner also observes that the principal further testified that his list of charges included the subject matter of Charges Nos. Eight and Nine. (Tr. 50, 54) The principal further testified that he attended a Board meeting on April 17, 1974 at which time the Board was in possession of his list of charges and that each of the charges was thoroughly discussed in conversations between him and the Board. (Tr. 48-50) The Superintendent testified that the Board had the list of charges in its possession at least two to three days prior to its meeting with the principal. (Tr. 87)

A comparison between the formal charges as summarized, *ante*, and the principal's list of charges (R-1) in the possession of the Board on April 17, 1974, discloses no substantial difference. Consequently, the hearing examiner finds that the Board was in possession of written Charges Nos. Eight and Nine on April 17, 1974, at least sixty-eight days prior to its certification of the charges to the Commissioner on June 25. There is no evidence in the record, however, to establish that the list of charges (R-1) had been processed to the Board through its Board Secretary on or before April 17, 1974, as required by *N.J.S.A.* 18A:6-11. The hearing examiner therefore refers respondent's Motion to Dismiss the charges to the Commissioner for determination.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the entire record in the instant matter, including the report of the hearing examiner and the exceptions and objections filed thereto by the Board.

The Board takes exception to the hearing examiner's findings with respect to Charge Eight that respondent's alteration of the field trip itinerary, within the context of the whole of the Charge, does not rise to the level of a tenure charge pursuant to *N.J.S.A.* 18A:6-11; that the principal had knowledge respondent planned to use his own vehicle to transport the pupils to at least the submarine Ling; and that the Board failed to establish respondent's vehicle was unsafe.

The Commissioner agrees with and adopts as his own the findings of the hearing examiner with respect to Charge Eight. In the first instance, the record

herein fails to establish that either the Board or its administrators have articulated a policy by which its teaching staff members would know the limits of their authority during the conduct of field trips they chaperone. Respondent did, in fact, alter his itinerary herein for what he considered educational purposes. In the absence of a policy by which respondent would be precluded from making on-site alterations to a field trip itinerary, it must be assumed that respondent had such authority. Consequently, the issue may be reduced to whether respondent acted reasonably with respect to the controverted alteration of the itinerary. Respondent's testimony is clear and unequivocal that the ferry boat ride was taken to provide his pupils with an educational experience, to which only one of his ten pupils had formerly been exposed. The Commissioner finds no basis herein to conclude that respondent acted in a manner which may be characterized as anything but reasonable.

Next, the Commissioner notices that it is established that respondent had used his own vehicle on prior occasions to transport pupils on field trips. The principal offered no persuasive testimony to establish how respondent was to transport his pupils from the school site to the Paramus rental agency. The Commissioner agrees that respondent's testimony establishes that the principal did have knowledge that respondent's vehicle was to be used for pupil transportation to at least the submarine Ling.

Finally, the Commissioner observes the principal testified that the sole criteria he used to conclude respondent's vehicle was unsafe to transport ten pupils was common sense and sound judgment. Such a conclusion, however, is contradicted by respondent's testimony that his vehicle is capable of transporting ten pupils, plus himself, safely. The Commissioner determines that the Board failed in its proofs that respondent's vehicle was unsafe within the context of Charge Eight.

The Board objects to the finding of the hearing examiner with respect to Charge Nine that the contents of the letter (P-3) respondent delivered to the principal on December 14, 1973, does not constitute conduct unbecoming a teacher. The Commissioner agrees with and adopts as his own the finding of the hearing examiner that the contents of that letter do not constitute conduct unbecoming a teaching staff member. It is obvious that respondent's relationship with the principal was not harmonious. In the Commissioner's view, the principal's receipt of the letter could have been the starting point between the principal and respondent to reconcile their disagreements instead of being used as the basis for a tenure charge. Nothing is set forth in that letter which would constitute unbecoming conduct. The Commissioner so holds.

A last matter remains. While the Charges herein have not been supported by the Board and are hereby dismissed, the Commissioner notices that the principal testified that he submitted a list of charges (R-1) to the Superintendent on or about March 7, 1974. This list of charges includes not only the two charges herein, but seven charges heretofore dismissed by the Commissioner for failure of the Board to adhere to the statutory prescription with respect to the certification of tenure charges. (See "*In re Masone No. 1*" and "*In re Masone No. 2.*")

Four charges of inefficiency were dismissed *In re Masone No. 1* for failure of the Board to adhere to the provisions of *N.J.S.A. 18A:6-13*. The statute of reference requires charges of inefficiency to be certified within forty-five days following the expiration of the ninety-day period of time given the teacher to correct the alleged inefficiencies. Three of the five remaining charges were dismissed *In re Masone No. 2* because respondent established that the Board failed to certify the three charges within forty-five days of their receipt as required by *N.J.S.A. 18A:6-13*. The Commissioner also observed *In re Masone No. 2*:

“\*\*\*There is no evidence in the record to establish that the Board had in its possession Charges Eight and Nine [the Charges herein] in written form before June 24, 1974. Consequently, the Board in this regard [with respect to Charges Eight and Nine] complied with the requirements of *N.J.S.A. 18A:6-13*\*\*\*.” (at p. )

The Commissioner is constrained to point out that the principal's testimony establishes the Board did, in fact, have Charges Eight and Nine in its possession by at least April 17, 1974, sixty-eight days prior to its June 25 meeting when it finally certified the nine charges. Consequently, the Board did not follow the requirement of *N.J.S.A. 18A:6-13* to certify Charges Eight and Nine within forty-five days of receipt of charges. The Board's argument that the charges herein were not filed with its Board Secretary pursuant to *N.J.S.A. 18A:6-11* is wholly without merit and attempts to place form over substance. The principal testified that on April 17, 1974, he attended a Board meeting at which the list of the nine charges (R-1) was in the possession of the Board and was thoroughly discussed. Thus, within the factual context of the entire matter herein the Commissioner finds the procedural guidance of *N.J.S.A. 18A:6-11*, that charges be filed with the Board Secretary, was met when the Board took possession of the Charges as early as April 17, 1974.

Accordingly, even if Charges Eight and Nine had not been dismissed for failure of the Board to carry the burden of proof, they would have been dismissed for the failure of the Board to certify in a timely fashion, contrary to *N.J.S.A. 18A:6-13*.

The Commissioner of Education hereby directs the Board of Education of the Borough of Rutherford, Bergen County, to immediately reinstate Steve Masone to its employ and to assign him to a position within the scope of his certificate. It is further directed that Steve Masone is to receive all salary, less mitigation, at the next regularly scheduled pay period and he is to be credited with other emoluments which may have been withheld from him from the date of his suspension.

COMMISSIONER OF EDUCATION

November 15, 1976

**Board of Education of the Township of Brick,**

*Petitioner,*

v.

**Ronald Heinzman; John Hickman; Brick Township Education Association;  
the American Arbitration Association; and Julius Malkin, Arbitrator,  
Ocean County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondents, Joseph N. Dempsey, Esq.

John Hickman and Ronald Heinzman, nontenured teachers employed by the Board of Education of the Township of Brick, hereinafter "Board," were notified in May 1971 that they would not be reemployed for the ensuing year. They were unsuccessful in attempts to procure a court order to reinstate them. (Exhibit A) Thereupon the matter was grieved and moved to arbitration with court approval. (Exhibit B) A binding arbitration award was issued declaring that there had been a violation of the negotiated agreement and directing the Board to reinstate them to teaching positions together with lost salary and attendant emoluments. (Exhibit C) The Board, however, was successful in procuring an Order from the Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. C-741-72, dated June 6, 1973, enjoining and restraining any action by Heinzman, Hickman or the Brick Township Education Association, hereinafter "Association," seeking enforcement of the award of Respondents Julius Malkin and the American Arbitration Association. In its Final Judgment the Court stated, *inter alia*, that:

“\*\*\*[T]he subject matter of tenure and employment of the Defendant teachers is not a proper subject matter for arbitration under the agreement\*\*\*; and,

“\*\*\*[T]enure of a teacher should have uniformity of interpretation which requires the expertise of the Commissioner of Education to interpret and thereby establish the educational policy with uniformity throughout the state; and,

“\*\*\*[A]ll other issues \*\*\* shall await the determination of the Commissioner\*\*\*.”  
(Exhibit D)

See also J-1, at pp. 23-24.

Thus, the matter comes before the Commissioner in the form of a Petition of Appeal filed by the Board, the Answer filed by respondents, the Board's Notice of Motion for Summary Judgment, a stipulation of facts, transcript of proceedings in the New Jersey Superior Court, Chancery Division (J-1), exhibits, petitioner's Briefs, hereinafter "BP-I" and "BP-II," filed February 15, 1974 and May 8, 1975, and a Brief on behalf of the respondent Association, hereinafter "BR," filed April 8, 1975. In an interlocutory decision dated October 8, 1976, rendered after Oral Argument held before the Commissioner's representative on October 1, 1976 at the State Department of Education, Trenton, the Commissioner denied as unnecessary respondents' Motion seeking a second conference of counsel in the matter.

A summary of the relevant stipulated facts is herewith set forth to reveal the contextual setting of the controversy.

Respondents Heinzman and Hickman were completing service to the Board for their second and third academic years, respectively, when in May 1971 they were notified by the Superintendent, at the Board's direction, that they would not be reemployed for the ensuing 1971-72 academic year. Hickman, on March 19, and Heinzman, on April 20, had been recommended by their principal and supervisors for reemployment. (BP-I, at p. 1) The negotiated agreement in effect between the Board and the Association specified in Article XI(E) that:

"Non-tenure teachers shall be notified of their status for contract renewal by their Principals and immediate supervisors, in accordance with one of the following schedules:

- "(1) Notification, in writing, by April 1, that contract award will be recommended for the ensuing year, or
- "(2) Notification, in writing, by April 1, that contract award will not be recommended for the ensuing year, or
- "(3) Notification, in writing, by April 1, that decision regarding ensuing contract is still under consideration, but to be determined not later than May 1." (BP-I, at pp. 1-2)

The Board, arguing that the Commissioner, with his special expertise in the educational field, holds jurisdictional authority over such matters, cites, *inter alia*, *Durgin v. Brown*, 37 N.J. 189 (1962). (BP-I, at pp. 4-8) The Board contends that it is endowed by legislative fiat with sole and absolute discretion over the reemployment of a nontenured teacher. *Donaldson v. Board of Education of North Wildwood*, 115 N.J. Super. 228 (1971), 65 N.J. 236 (1974); N.J.S.A. 18A:11-1; N.J.S.A. 18A:16-1; N.J.S.A. 18A:27-4 (BP-I, at pp. 9-10)

Additionally, the Board, arguing that its managerial prerogatives to determine who shall teach in its schools may not be usurped by an arbitrator, cites *Lullo v. International Association of Fire Fighters*, 55 N.J. 409 (1970) wherein the Court stated:

“\*\*\*It is crystal clear that in using the term ‘collective negotiations’ the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee. The reservation in section 7 of the Civil Service rights of the individual employee is a specific indication of that fact. The lawmakers were sensitive that Civil Service statutes in many areas provide for competitive employment examinations, eligible lists, fixed salary lists, for promotion, transfer, reinstatement and removal, and require all employees to be dealt with on the same basis. And undoubtedly they were conscious also that public agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion. Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects.\*\*\*”

(at p. 440)

Similarly, the Board cites *Porcelli v. Titus*, 108 N.J. Super. 301 (App. Div. 1969) as follows:

“\*\*\*We endorse the principle, as did the court in *Kemp v. Beasley*, 389 F.2d 178, 189 (8 Cir. 1968), that ‘faculty selection must remain for the broad and sensitive expertise of the School Board and its officials,’ and this we do notwithstanding an existing employment agreement where subsequent conditions make impossible a literal performance of all of its terms.\*\*\*”

(at p. 312)

The Board also cites in this regard *Patricia Meyer v. Board of Education of Sayreville, Middlesex County*, 1970 S.L.D. 188, wherein the Commissioner commented upon Meyer’s contention that failure to give notice of nonretention as called for by an existing salary guide entitled her to reemployment, as follows:

“\*\*\*Such a result is clearly inconsistent with N.J.S.A. 18A:27-1\*\*\*. While a board of education may make rules governing, *inter alia*, employment, promotion and dismissal of teaching staff members, such rules must be consistent with N.J.S.A. 18A:27-4. Thus, any rule of the Board, whether by negotiated contract with the teachers’ organization or otherwise, which would affect employment or reemployment of a teacher staff member in a way other than the manner specifically provided by N.J.S.A. 18A:27-1, is, on its face, *ultra vires*. This does not mean that a board may not agree with its teachers on an orderly procedure to endeavor to correct unsatisfactory performance or to give a teacher fair opportunity to seek other employment if he is not to be reemployed, but the failure of a board to conform to such an agreement cannot constitute a waiver of a statutory obligation.\*\*\*”

(at pp. 190-191)

See State Board remand 1970 S.L.D. 192; Commissioner’s Decision on Remand 1971 S.L.D. 140; reversed State Board 1972 S.L.D. 673, affirmed Docket No. A-2466-71, New Jersey Superior Court, Appellate Division, March 29, 1973 (1973 S.L.D. 774).

The Board argues that Hickman and Heinzman had merely been recommended by their immediate superiors rather than having been notified of re-employment by the Board. In this regard the Board cites *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County*, 1973 S.L.D. 261 wherein White, who had been placed on the board's approved list for renewal, was later removed from that list, and her nonreemployment supported by the Commissioner although she had not been noticed according to requirements of the negotiated agreement.

The Board also relies on *Gladys S. Rawicz v. Board of Education of Piscataway, Middlesex County*, 1973 S.L.D. 305, remanded State Board of Education 1974 S.L.D. 1244, decision on remand 1246, aff'd State Board April 2, 1975, aff'd Docket No. A-2756-74, N.J. Superior Court, Appellate Division, June 8, 1976, wherein the Commissioner held that a board was not required to reemploy a nontenured teacher who had not been given notice of nonrenewal by April 30, as specified in the negotiated agreement. (It should be noted at this juncture that the statutory obligation pursuant to *N.J.S.A. 18A:27-10 et seq.* requiring notification of nonrenewal to nontenured teachers did not become effective until September 1, 1972.)

The Board contends, *arguendo*, that, even if Heinzman and Hickman should be found to have entitlement to relief because of the arbitrator's award or the failure of the Board to give timely notification, their relief extends only to monetary compensation and *not to reinstatement or tenure status*. (BP-II, at pp. 1-10) *N.J.S.A. 18A:28-5; Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (*E. & A.* 1941); *Canfield v. Board of Education of Pine Hill*, 97 *N.J. Super.* 483 (*App. Div.* 1967), rev'd 51 *N.J.* 400 (1968); *Robert T. Currie v. Board of Education of the School District of Keansburg, Monmouth County*, 1966 S.L.D. 193

Respondents argue, conversely, that notice by the Board's agents prior to April 1 that Heinzman and Hickman would be recommended for reemployment caused them to believe that they would in fact be reemployed and unfairly delayed an awareness of the necessity of their making early application for employment elsewhere. (BR, at pp. 1-3) In this regard respondents emphasize that notice of nonreemployment was not received from the Board until after May 1. Thus respondents argue that the provision of Article XI(E)3, *ante*, was violated which requires:

“Notification, in writing, by April 1, that decision regarding ensuing contract is still under consideration, but to be determined not later than May 1.” (BP-1, at p. 2)

Respondents characterize as illogical, devious and misleading the Board's contention that its responsibility to comply with Article XI(E) (3) was satisfied by favorable notice of recommendation by the principals and supervisors. Respondents contend that a consistent harmonious interpretation and application of the terms of the negotiated agreement required that teachers know by April 1 that either they would be reemployed for the ensuing year or that there

was doubt concerning this reemployment in which event final notice would be given by May 1. (BR, at pp.3-6)

Respondents argue that the Board, by the terms of the agreement, was obligated to give notice of an unfavorable decision regarding reemployment by May 1. They further contend that, absent such notice, the Board was obligated to reemploy Hickman and Heinzman who, in this instance, logically presumed that the Board had, by inaction, agreed to their reemployment. (BR, at pp. 6-8)

The Commissioner has reviewed the statutory and case law extant in 1971 and finds therein no requirement that compelled the Board to notify its nontenured teachers by a certain date whether they would be reemployed for the ensuing year. Nevertheless, the Board and the Association entered into an agreement fixing May 1 as an arbitrary date by which teachers were to be notified in writing of the determination of their employment status. The wording of that agreement, which makes no mention of the Board's responsibility in this regard, is incomplete, imprecise and fraught with ambiguity. The responsibility for lack of clear and concise phraseology and adequate compliance with legal responsibility must be borne *jointly* by the negotiating parties. It is, however, the language which must now be interpreted in arriving at a determination of the issue which has been the basis of tortuous, convoluted and costly litigation. As was said in *Joseph Gabriel et al. v. Board of Education of the Manchester Regional High School District, Passaic County*, 1974 S.L.D. 922:

“\*\*\*A salary policy, once adopted, has a binding effect\*\*\*.” (at p. 927)

It 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 that:

“\*\*\*In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman*, 23 N.J. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al.*, 20 N.J. 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Ins. Co.*, 132 N.J.L. 206, 211 (E. & A. 1944); *Bass v. Allen Home Development Co.*, 8 N.J. 219, 226 (1951); *Sperry & Hutchinson Co. v. Margetts*, 15 N.J. 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (3rd ed. 1943), section 4502\*\*\*” (at p. 106)

An accepted and often enunciated principle of law is that a negotiated agreement may not supersede, modify or render a nullity any statutory requirement, right or duty of a board. One such prime requirement and right conferred upon boards of education is to determine annually those nontenured teachers who shall teach in the public schools. As was said by the Commissioner in *Collingswood, supra*:

“\*\*\*[A] board may not adopt a rule or policy which would in effect either amend a statute or deny the board’s authority conferred by statute.\*\*\*” (1973 *S.L.D.* at p. 263)

It was also stated in *White, supra*, that:

“\*\*\*Although the Commissioner finds that the parties had no authority to write into an agreement what is essentially an automatic renewal provision triggered by failure to give notice, the Commissioner further finds that even if they intended to do so, the remedy petitioner seeks (reinstatement) is contrary to statutory law, specifically *N.J.S.A.* 18A:27-1, and the statutes contained in the Tenure Teachers Hearing Act, *N.J.S.A.* 18A:28-5 *et seq.* However, petitioner can seek other remedies.\*\*\*” (at pp. 263-264)

And,

“\*\*\*It is clear in the instant matter that the Board, for whatever reasons, did not hold to its policy which required written notice by March 1st to those teachers who were not to be reemployed for the following year. The Commissioner determines that, absent the statutory authority pursuant to *N.J.S.A.* 18A:27-10 through 13, which was not effective at the time of the Board’s actions, *ante*, the Board is not compelled to grant petitioner reemployment for the 1972-73 school year. The failure of the Board to conform to its policy in this instance does not affect the Board’s obligation to employ nontenure teaching staff members in accordance with *N.J.S.A.* 18A:27-1.\*\*\*” (at p. 265)

Similarly, it was stated by the Commissioner in *Nancy Weller v. Board of Education of the Borough of Verona, Essex County*, 1973 *S.L.D.* 513 that:

“\*\*\*[B] oards of education must, of course, negotiate with their employees all of those salary and other benefits of direct or indirect compensation in return for their services or employment. However, such negotiations, which are required, cannot be held to abrogate those rights and duties given to local boards by the Education statutes. (Title 18A) The rights of employer and employee are mutually exclusive, and to view them accordingly is to view the body of statutory law contained in the Education statutes and in the New Jersey Employer-Employee Relations Act as a ‘unitary and harmonious whole.’\*\*\*” (at p. 524)

In a similar matter relative to the tenure of teachers, the Commissioner stated in *Henry R. Boney v. Board of Education of the City of Pleasantville and Robert F. Wendland, Superintendent of Schools, Atlantic County*, 1971 *S.L.D.* 579 that:

“\*\*\*The applicable statute, *N.J.S.A.* 18A:6-10, requires reasons or charges and a hearing only for teachers who have acquired a tenure status.\*\*\* *It is clear that teachers in a nontenure status do not possess such rights statutorily, and the Commissioner holds that they may not acquire them*

*by indirection through grievance procedures or negotiated agreements.\*\*\*” (Emphasis supplied.)* (at pp. 585-586)

Respondents herein argue that Hickman and Heinzman who were not notified of their employment status by May 1 must be deemed to have acquired an employment contract for the following year. A careful scrutiny of Article XI(E) of the negotiated agreement reveals no such stated provision. Nor may such provision, unstated, be implied or rendered effective by indirection. *Weller, supra; Boney, supra* The prevailing law in 1971 required the affirmative act of a Board to establish a continuing contract with a teacher in a succeeding school year. By its failure to act by May 1 the Board in no way effectuated or could effectuate continuing contracts. Nor was the Board, absent an exercise of bad faith or violation of their constitutional rights, precluded from determining in early May that Hickman and Heinzman would not be reemployed. As was stated in *Mildred Wexler v. Board of Education of the Borough of Hawthorne, Passaic County*, 1976 S.L.D. 309, aff'd State Board of Education 314:

“\*\*\*The Board’s statutory authority under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:28-9 may not be invalidated by any items in a negotiated agreement. Any violations of such agreement must be resolved under the terms of the agreement itself.\*\*\*” (at p. 313)

*N.J.S.A.* 27-1 provides that:

“No teaching staff member shall be appointed, *except by a recorded roll call majority vote to the full membership of the board of education appointing him.*” (Emphasis supplied.)

To find for respondents would render this statute a nullity. Such finding would be contrary to the principle that the education statutes and policies of boards of education must complement each other in a harmonious whole. Respondents argue further that *N.J.S.A.* 18A:27-10 *et seq.* provides that when a board does not notify a teacher by April 30 of his employment status, the teacher by stating that he accepts employment for the ensuing year is deemed to have acquired such employment status. The Commissioner finds no retrospective application of *N.J.S.A.* 18A:27-10 *et seq.* which first became effective September 1, 1972. *White, supra* Nor was such provision written into Article XI(E). Even had it been so written, its application would have been *ultra vires*. Hickman and Heinzman, by the Board’s inaction, acquired neither a contractual nor tenured status. The Commissioner so holds.

The Board, which alone could determine the employment status of Hickman and Heinzman by May 1, did not do so. The Board was a party to the negotiated agreement, however loose its construction. It was, in good faith, required by the agreement to notify them, in writing, by May 1 of their employment status. Having failed to do so, the Board is culpable. It is not, however, obligated to reinstate them nor to pay their salaries for the entire 1971-72 school year. Nevertheless, having failed to give timely notice, which only it could

give, the Board is ordered to pay John Hickman and Ronald Heinzman sixty days' salary and attendant emoluments beginning September 1 and ending October 30, 1971, which penalty is in accord with that deemed appropriate by the State Board in *Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County*, 1975 *S.L.D.* 112, rev'd State Board of Education 117, aff'd Docket No. A-3756-74, New Jersey Superior Court, Appellate Division, June 21, 1976. Such penalty is in keeping with that similarly enunciated by the Commissioner when untimely notice was given by a board in *Patricia Bitzer v. Board of Education of the Town of Boonton, Morris County*, 1976 *S.L.D.* (decided April 29, 1976), aff'd State Board of Education August 4, 1976.

To this limited extent the relief requested in the Petition of Appeal is granted. Prayers for reinstatement and additional restoration of salary are denied.

COMMISSIONER OF EDUCATION

November 15, 1976

Pending before State Board of Education

Linda Wachstein,

*Petitioner,*

*v.*

Board of Education of the Township of Medford, Burlington County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Dietz, Allen, Radcliffe, & Sweeney (Robert E. Dietz, Esq., of Counsel)

Petitioner is a teacher who was employed for the academic years 1973-74 and 1974-75 by the Board of Education of the Township of Medford, hereinafter "Board," and was given sixty days' notice of termination of her contract in May 1974. Petitioner alleges that the termination of her employment contract is arbitrary, capricious, unreasonable, and illegal in that it amounts to a personal reprisal against her for the exercise of rights guaranteed to her by the negotiated agreement, hereinafter "Agreement," between the Board and the Medford

Township Teachers Association, hereinafter "Association." Hearings in this matter were conducted on April 9, May 21, and September 5, 1975 in the County Extension Building, Mount Holly, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

The personnel committee of the Board held a meeting on March 26, 1974 at which time it discussed and considered the reemployment of nontenure teachers for the academic year 1974-75. Present at that meeting were seven members of the nine member Board, the Superintendent of Schools, the principal and the assistant principal of the Memorial School in which petitioner taught, and the curriculum coordinator for the school district. Although the personnel committee consisted of three Board members, seven were present because meetings of that committee were open to all Board members. (Tr. II-48-51, 90, 92; Tr III-5-10)

The President of the Board testified that she was the chairman of the personnel committee at that meeting in which petitioner's and other nontenure teachers' reemployment was discussed and that three of the district's four administrators recommended not to reemploy petitioner. The fourth administrator stated that if petitioner was reemployed she would require very close supervision. (Tr. II-49-51) At a meeting of the Board held April 1, 1974 to consider agenda items for the next regular public meeting, the Board discussed the reemployment of nontenure teachers. The personnel committee recommended that petitioner and certain other nontenure teachers not be reemployed. (Tr. II-53) Later, at the regular monthly meeting of the Board held April 10, 1974, a motion not to reemploy petitioner for the 1974-75 academic year was tabled for further Board discussion. (Tr. II-55; J-2) (The hearing examiner notices that the motion (J-2) contains an incorrect date, 1973-74, when it should have read 1974-75.)

At a special meeting of the Board held April 25, 1974, the Board discussed its Fair Dismissal Procedure Policy which had been negotiated with the Association. That policy reads as follows:

- "1. *One week prior to the issuance of contracts to nontenure teachers* continuously employed since the preceding September, the Board shall give either:
  - "a. A written offer of contract for employment for the next succeeding year providing for at least the same terms and conditions of employment, normally with such increases in salary and benefits as may be required by law or Agreement between the Board and the Association except that increments may be withheld for cause pursuant to 18A:29-14.
  - "b. *A written notice that such employment shall not be offered.*
- "2. All communications, procedures, and determinations shall be kept private and should not be open to public discussion."  
(*Emphasis added.*) (P-1; Tr. II-55; J-2)

The Board President testified that, as a result of the Board's review of the Fair Dismissal Procedure Policy on April 25, 1974, the Board concluded that it was legally bound to offer petitioner a reemployment contract because it was no longer possible to give her one week's notice prior to April 30 that a contract would not be offered. (Tr. II-55) The Board President testified further that, at the same meeting, the Board directed its solicitor to notify petitioner that the Board, in offering her reemployment, had not changed its mind; rather, it would grant reemployment in order to conform to its Fair Dismissal Procedure Policy and that it would in fact move to terminate her contract by giving her sixty days' notice at its regular meeting to be held on May 8, 1974. (Tr. II-56; J-4) The Board then executed the contract on April 30, 1974 (Exhibit A), and notified petitioner in writing on May 9, 1974 of its determination to terminate her 1974-75 contract by giving her sixty days' notice according to a term the contract contained. (J-3, J-4)

Applicable statutes *N.J.S.A.* 18A:27-10, 11, and 12 read as follows:

*N.J.S.A.* 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. *A written notice that such employment will not be offered.*"  
(*Emphasis supplied.*)

*N.J.S.A.* 18A:27-11

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

*N.J.S.A.* 18A:27-12

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

The primary purpose of these statutes is to give teachers timely notice when they are not to be reemployed in order that they may seek other employment.

Petitioner contends that the Board's action terminating her employment contract, when viewed in the light of the facts and evidence adduced at the hearing, was based on the fact that she exercised certain protected rights, rather than upon the statement of reasons given her by the Board. She alleges specifically, therefore, that the reasons offered her (Exhibit C) serve only as a pretext for her termination and that the real reasons for her termination are that she exercised her statutory rights (1) not to perform duties on a public holiday when school was in session pursuant to *N.J.S.A.* 18A:25-3 and (2) that she filed a grievance pursuant to *N.J.S.A.* 34:13A-1 *et seq.*

Petitioner contends that the Board has failed to support its reasons for her non-reemployment as embodied in the statement of reasons given her on or about July 17, 1974.

The hearing examiner knows of no requirement whereby a board of education must sustain the burden of proving its reasons not to reemploy a nontenure teacher. Such a requirement that a board of education must prove its reasons, in effect, would change the status of a nontenure teacher in such a manner as to grant the same status as a tenure teacher. In the latter instance a board of education must file charges and thereafter prove that the charges are true and warrant either dismissal of the tenure teacher or a reduction in salary. *N.J.S.A.* 18A:6-10 *et seq.*

The President of the Board and another Board member testified that they discussed petitioner's reemployment at a meeting of the personnel committee on March 26, 1974 at which time seven Board members were present. At that meeting the committee did not review records; rather, it relied on the recommendations of the school administrators. (Tr. II-49-51, 78-79, 90-94) The assistant principal and the principal testified that they were dissatisfied with petitioner's extra-classroom performance and her professional attitude in this regard and that she continually ignored a repeated directive to be in her classroom at 7:45 a.m. (Tr. II-126-128; Tr. III-5-8)

The record shows that the teachers in the Memorial School in which petitioner taught traditionally had coffee in the teachers' lounge each morning prior to meeting their pupils in homerooms. (Tr. III-21-25) Petitioner testified that she discussed pupils' progress in the faculty lounge. (Tr. I-131; Tr. II-6-8) The teachers, petitioner in particular, were told many times by the principal to be in their rooms and not in the faculty lounge at 7:45 a.m. Embodied in the Board's reasons is a statement that the principal personally informed petitioner ten to fifteen times to be at her teaching station at 7:45 a.m. (Exhibit C) He explained in a faculty meeting that the working day was between the hours of 7:45 a.m. and 3:00 p.m. The president of the Association testified that the principal had informed the teachers more than once that their working day comprised these aforementioned hours. (Tr. I-56, 58, 83-84) The principal

testified also that teachers often asked to be excused early, that is, prior to 3:00 p.m. when their afternoon teaching was completed and they had no further duties in the school. In this regard, he testified that petitioner had asked to be excused too frequently and although her requests to leave early had never been denied, they were so frequent that they became unreasonable. (Tr. III-14-16) He testified also that he admonished all teachers for failure to go to their teaching stations at 7:45 a.m. and that some teachers cooperated and some did not. (Tr. III-25-26, 46-47)

Further testimony given by the principal revealed that during a faculty meeting on November 19, 1973, an argument developed between the president of the Association and himself regarding the working day. It was the principal's intention to show two films at this meeting; however, when it was observed that the second film might run ten or fifteen minutes past 3:00 p.m., the president of the Association asked him not show the film since at least some teachers had planned to leave at 3:00 p.m. He testified that his argument in front of the faculty that day confirmed the fact that hours of duty for teachers were between 7:45 a.m. and 3:00 p.m., although he had expected a "give-and-take arrangement" with his staff. (Tr. III-22-25)

The principal also testified that petitioner, as a remedial reading teacher, had special responsibilities and that it was important that she make herself available to those pupils who were having difficulties. (Tr. III-27) Despite these occurrences, when he made his time directives known to the staff and specifically to petitioner, he testified that on one occasion she indicated that she would not follow his directive to be at her station at 7:45 a.m. (Tr. III-49) Petitioner denies that she ever told the principal that she would not comply with his directive.

Her recollection of the principal's testimony is that she did not respond to his query about being in her room on time and that she said "thank you, and walked out." (Tr. III-51) Nevertheless, petitioner's own testimony corroborates the contentions of her administrators, and petitioner admits that she was told by the principal, at least five times until about the middle of December 1973, that she should be in her classroom at 7:45 a.m. to consult with other teachers and to be ready to assist any pupils who might need to see her. (Tr. I-130-132) She testified also that she did stop going to the teachers' lounge "for a while." (Tr. I-131) She testified further that she followed the principal's directive on "occasions." (Tr. III-54-55)

Other reasons given to petitioner are (1) that she has failed to perform certain duties and responsibilities as assigned by her immediate supervisor and by the principal and (2) that she has failed to carry out her teaching duties to the satisfaction of her supervisor and the principal of Memorial School. These reasons are spelled out in rather specific detail in four type-written pages and petitioner has offered no proof that they are arbitrary or capricious. Regarding her allegation that one of the reasons she was not reemployed is because she absented herself on a public holiday, petitioner offers as proof the fact that her

pay was docked for that day. (Tr. I-86-92) She notified the Board that she had taken only two personal days, that two were allowable under the Board's policy, and that she was entitled to be absent on the public holiday. She later received her pay for that holiday with her last pay check for the year. (Tr. I-86-92) Petitioner's other allegation that the Board's refusal to reemploy her was an arbitrary and capricious act is based on her contention that she complained to the Superintendent (P-4) and filed a grievance protesting the fact that her room assignment was being changed so that her former room could be used by the Child Study Team. Petitioner has offered no convincing proofs in this regard and the record shows that she prevailed in her grievance to the Board and that she was thereafter reassigned to her former room for the balance of the school year. (J-12; P-3)

Petitioner asserts that the words expressed by one Board member that she was not a "team player" gives credence to her contention that the reasons given her by the Board (Exhibit C) are not the real reasons for her non-reemployment.

In this regard, the hearing examiner finds that this remark allegedly made by a Board member, even if true and prejudicial to petitioner, does not constitute evidence which links that remark to the action of the Board as a body in its decision not to reemploy her. The one Board member who objected to the action of the Board at the public meeting on May 8, 1974, not to reemploy petitioner, made no mention of an arbitrary or devious action being taken by the Board. Rather, he objected to the Board's voting not to reemploy petitioner when one member had not been present during petitioner's appearance before the Board to dissuade the Board from terminating her employment. (See attachment to J-3.)

In *Donaldson v. Board of Education of the City of North Wildwood, Cape May County*, 65 N.J. 236 (1974), the Court held as follows:

\*\*\*The Legislature has established a tenure system which contemplates that the local board shall have board discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or 'other just cause.' N.J.S.A. 18A:28-5 *The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board \*\*\* may conclude that tenure should not be granted.\*\*\** (Emphasis added.) (65 N.J. at 240-241)

Further, the Court stated that:

\*\*\*a timely request for informal appearance before the board should ordinarily be granted even though no formal hearing is undertaken.\*\*\* (Emphasis added.) (65 N.J. at 246)

In *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 S.L.D. 332, the Commissioner commented as follows:

“\*\*\*The purpose of granting a private, ‘informal appearance’ before a board to a nontenured teaching staff member is expressly to provide an opportunity for the teaching staff member to dissuade the board from its determination not to offer reemployment. It is essential that the written statement of reasons, if requested, be furnished prior to the requested appearance before the board. This is so because the affected teaching staff member will undoubtedly desire to offer a refutation of those reasons.\*\*\*” (at p. 334)

The hearing examiner finds that the Commissioner has at various times reviewed actions of local boards of education and in certain instances, finding that the protected rights of teaching personnel were violated, has set aside the actions of boards wherein they violated those protected rights of nontenured employees or otherwise abused their discretionary powers. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County*, 1974 *S.L.D.* 260 and 1975 *S.L.D.* 191, affirmed State Board of Education 199, aff’d Docket Nos. A-3916-74 and A-4011-74, New Jersey Superior Court, Appellate Division, July 1, 1976; *North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO, and Beth Ann Prudente v. Board of Education of the Township of North Bergen, Hudson County*, 1975 *S.L.D.* 461

At other times the Commissioner has upheld the actions of boards of education when no abuse of discretion was found. *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood, Cape May County*, 1973 *S.L.D.* 351; affirmed State Board, 1973 *S.L.D.* 360; affirmed Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975.

The criteria for such decisions is found in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional School District, Atlantic County*, 1968 *S.L.D.* 7, dismissed State Board of Education 11, affirmed New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202. The Commissioner commented that:

“\*\*\*The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny.\*\*\*” (1968 *S.L.D.*, at p. 10)

There is not, however, in the instant matter a showing of violation of such protected statutory or constitutional rights. While petitioner, as in *Ruch*, disagreed with the validity of the Board’s decision not to reemploy her there is no evidence that the reasons it afforded her were not the true reasons or that the

Board's action was frivolous, unreasonable or statutorily or constitutionally proscribed. The hearing examiner so finds.

Accordingly, the hearing examiner recommends that the Petition be dismissed on its merits.

There remains for consideration the fact that petitioner was not afforded timely notice of her nonrenewal as required by law. *N.J.S.A.* 18A:27-10 The Board's subsequent action of May 8, 1974 to terminate the contract was within the Board's discretion and commensurate with the decision of the State Board of Education in *Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County*, 1975 *S.L.D.* 112, rev'd State Board of Education 117, aff'd Docket No. A-3756-74, New Jersey Superior Court, Appellate Division, June 21, 1976.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto pursuant to *N.J.A.C.* 6:24-1.17(b).

It has been admitted by the Board that petitioner was not afforded timely notice of the nonrenewal of her contract pursuant to statutory prescription. *N.J.S.A.* 18A:27-10, 11, 12 When a board of education fails to give a teaching staff member timely notice that he/she will not be reemployed and later terminates that teaching staff member by utilizing the termination clause embodied in the individual's contract, that teaching staff member is entitled to remuneration according to the provisions in the termination clause. *Armstrong, supra* (Exhibit A; J-3, J-4) Accordingly, the Commissioner hereby directs the Board to pay petitioner sixty days' salary pursuant to the terms of her 1974-75 contract, if it has not already done so.

The Commissioner is satisfied from his review of the record that petitioner has not demonstrated that the Board has violated any of her statutorily or constitutionally protected rights. Nor has it been shown that the Board's determination not to reemploy her was arbitrary, capricious, or unreasonable. Rather, the evidence shows that the Board discussed petitioner's reemployment and that it had sound reasons why a reemployment contract should not be offered.

The Commissioner does not concede that the Board had to prove its reasons; however, proof was offered in evidence at the hearing, and the evidence shows clearly that its actions regarding petitioner were not tainted or proscribed.

Petitioner is entitled to sixty days' salary as set forth above. Absent any finding of impropriety or that the Board has violated any of petitioner's rights, the Petition of Appeal is otherwise dismissed.

COMMISSIONER OF EDUCATION

November 17, 1976

**In the Matter of the Tenure Hearing of Beatrice Konowitch,  
School District of Middle Township, Cape May County.**

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Complainant Board, Cafiero and Balliette (William M. Balliette, Esq., of Counsel)

For the Respondent, Hartman, Schlesinger, Schlosser and Faxon (Joel S. Selikoff, Esq., of Counsel)

The Board of Education of the School District of Middle Township, hereinafter "Board," certified tenure charges against respondent, a teaching staff member in its employ, and seeks her dismissal. Respondent denies each and every allegation against her and demands immediate restoration to her teaching position.

Subsequent to the filing of the pleading herein, respondent moved before the Commissioner of Education to: 1) order her immediate reinstatement to her teaching position with retroactive salary payment as of the beginning of the 1975-76 academic school year, for failure of the Board to follow the statutory prescription of *N.J.S.A. 18A:6-14* with respect to the certification of charges and the suspension of the employee against whom charges are certified, and 2) to seek dismissal of the charges filed by the Board as inefficiency for the Board's failure to adhere to the precise conditions in filing inefficiency charges set forth in *N.J.S.A. 18A:6-12*.

The Motions are now before the Commissioner for adjudication on the record and respective Briefs.

The Commissioner observes that the Board certified and filed the following charges on May 15, 1975:

"WHEREAS, ON February 3, 1975 Mrs. Beatrice Konowitch was advised by the Superintendent that formal charges would be brought against her for inefficiency, unkempt room conditions, maintaining poor discipline, physically handling pupils and screaming and yelling, and

"WHEREAS, ninety days have passed since said notification,

"NOW, THEREFORE, BE IT RESOLVED that formal charges be brought against Mrs. Beatrice Konowitch for inefficiency for the following reasons:

1. Lack of classroom control
2. Poor teaching techniques
3. Not following building procedure manual
4. Not implementing supervisors' recommendations

5. Not 'listening' to pupils
6. Pupils not 'listening' to teacher
7. Lack of good housekeeping techniques
8. Inaudible voice level
9. Poor attention involvement
10. Talking directly to one pupil and ignoring rest
11. Allow pupils to not follow directions
12. Not checking to see that directions are followed
13. Inability or refusal to use good questioning techniques
14. General inconsistencies
15. Lack of thorough planning and the implementation thereof
16. Using reading 'aloud' without a purpose
17. Allowing 'unstructured' reading lesson
18. Omitting reading groups
19. Negligent in correcting pupil errors
20. General lack of leadership
21. Lack of proper interpretation of supervisors' recommendations
22. Ignoring safety rules
23. Wasting 15 minutes in organizing activity
24. Not following school building 'schedule'
25. Not providing tests to all pupils
26. Ineffective physical arrangement of 'self' and furniture
27. Unware of 'disturbing' and 'unrelated' activities in the classroom
28. Unkempt room conditions and poor discipline

**"BE IT FURTHER RESOLVED** that formal charges be brought against Mrs. Konowitch for unkempt room conditions for the following reasons:

1. Papers and other 'litter' on floor
2. Boxes, books and paper strewn on desks and floors of listening centers
3. Teacher's desk not visible because of piles of litter

**"BE IT FURTHER RESOLVED** that formal charges be brought against Mrs. Konowitch for poor discipline for the following reasons:

1. Allowing unrelated inter-communications between pupils while lesson is presented
2. Allowing extraneous activities, non-related to lesson or goals
3. General inattention of pupils to teacher
4. Allowing pupils to walk aimlessly around the classroom
5. Allows pupils to 'run' out of room at dismissal
6. Allowing pupils to be so 'noisy' and 'uncontrolled' in the hallway as to disturb other classes
7. Not following building procedures in 'moving' or 'lining up' pupils"

The Commissioner observes that although the Superintendent's letter of February 3, 1975 to respondent (P-1) states in part that "\*\*\*formal charges will

be brought against you for \*\*\* physically handling pupils and 'screaming and yelling'\*\*\*" such charges were not in fact certified by the Board. Accordingly, the aforementioned charges contained in the Superintendent's letter which were not certified by the Board are not viable in the instant matter.

With respect to respondent's Motion for immediate reinstatement to her teaching position with retroactive salary as of the beginning of the 1975-76 academic year, the Commissioner observes that the Board could have suspended respondent with or without pay on May 15, 1975, when it certified tenure charges to the Commissioner. The Board failed to take such action at that time, but did take such action by way of its letter to respondent dated August 6, 1975. (C-1) By virtue of this written communication the Board notified respondent that

“\*\*\*this is your formal notice that you are considered suspended effective immediately upon the termination of your 1974-75 contract, without pay.

“Any changes in your status will have to await the hearing by the Commissioner of Education.” (C-1)

In regard to the Board's action in suspending respondent without pay as stated above, the Commissioner observes that *N.J.S.A.* 18A:6-14 provides in pertinent part 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, pending final determination of the same\*\*\*.*”

*(Emphasis supplied.)*

It is clear that the Board failed to suspend respondent either with or without pay on May 15, 1975, when it certified tenure charges but, rather, waited until August 6, 1975 to do so. (C-1)

Local boards of education are agencies of the State and as such have only those powers as are specifically granted, necessarily implied or incidental to the authority expressly conferred by the Legislature. *Edwards v. Mayor and Council of Moonachie*, 3 *N.J.* 17 (1949); *N.J. Good Humor Inc. v. Bradley Beach*, 124 *N.J.L.* 162 (*E. & A.* 1939) Such powers can neither be increased nor diminished except by the Legislature. *Burke v. Kenny*, 6 *N.J. Super.* 524 (*Law Div.* 1949) The Legislature has empowered local boards of education by *N.J.S.A.* 18A:6-14 with the authority to suspend with or without pay, upon certification of tenure charges. In the judgment of the Commissioner, neither this Board nor any other local board of education may modify the precise statutory requirements. Accordingly, the Board cannot seek to remedy its failure to suspend respondent with or without pay on May 15, 1975, when it formally certified tenure charges to the Commissioner, by its action taken later on August 6, 1975. (C-1) The Commissioner therefore grants respondent's Motion for immediate reinstatement to her former teaching position with retroactive salary as of the beginning of the 1975-76 academic year pending final determination of the instant matter.

In regard to respondent's Motion to Dismiss the charges herein, the Commissioner observes that the record reflects that by letter dated February 3, 1975, the Superintendent of Schools advised respondent of the following:

"This is to advise you that I am formally notifying you that formal charges will be brought against you for inefficiency, unkempt room conditions, maintaining poor discipline, physically handling pupils and 'screaming and yelling'.

"New Jersey School Law, Title 18A:6-12 specifically states that the board shall not forward any charge of inefficiency to the commissioner unless at least 90 days prior thereto and within the current or preceding school year, the board or superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of alleged inefficiency.'

"Please consider this the ninety (90) day notice; prior to forwarding charges to the Commissioner."

Respondent argues that this notice of alleged inefficiencies by the Superintendent with respect to her teaching falls far short of the requirement for being notified of alleged inefficiencies set forth at *N.J.S.A.* 18A:6-12, which provides *in toto*:

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

Furthermore, respondent argues that the Superintendent's letter (P-1) fails to specify the alleged inefficiencies "\*\*\*\*with such particulars as to furnish the employee an opportunity to correct and overcome same," and cites *In the Matter of the Hearing of Alfred E. Jakucs, School District of the City of Linden, Union County, 1968 S.L.D. 189* and *In the Matter of the Tenure Hearing of Consuelo Garcia, School District of Midland Park, Bergen County, 1970 S.L.D. 335*.

Respondent contends that the "particulars" of the inefficiency charges herein were not made known until May 15, 1975, when the Board determined to certify the specific charges hereinbefore set forth. Consequently, respondent argues that she was not afforded an opportunity to correct her alleged inefficiencies during a ninety day period as required by *N.J.S.A.* 18A:6-12. Therefore, respondent concludes, each and every charge certified by the Board against her should be dismissed.

The Board argues, however, that the specificity of the charges alleged to be lacking in the Superintendent's letter (P-1) of February 3, 1975, was already

known by respondent by way of numerous observation reports submitted by her superiors prior to that date. The Board further alleges that those reports afforded respondent numerous specifics with respect to her alleged inefficiencies so that she should have been aware as to what was necessary on her part to correct the inefficiencies as set forth by the Superintendent.

The Board contends that to hold the intent of *N.J.S.A. 18A:6-12* with respect to the notice of inefficiency to be all inclusive, notwithstanding prior observation reports, amounts to placing form over substance. Consequently the Board opposes respondent's Motion to Dismiss.

The specific charges certified by the Board against respondent may be classified into three categories. The first category deals with inefficiency and consists of twenty-eight specific sub-charges. The second category deals with unkempt room conditions and contains three specific sub-charges. The third category deals with poor discipline and includes seven sub-charges. The Commissioner finds that with certain exceptions all sub-charges in the first category are of inefficiency. The exceptions are sub-charges nos. 1, 3, 4 and 24. Sub-charge no. 1 properly belongs in category three with respect to poor discipline. Sub-charges nos. 3, 4 and 24 are charges of insubordination and are, accordingly, grouped as such by the Commissioner. The second category, dealing with unkempt room conditions, contains charges of inefficiency. The third category, concerning poor discipline and including sub-charge no. 1 from the first category, contains charges of incapacity.

Consequently, the Commissioner concludes that the Board certified a major charge of inefficiency including twenty-seven sub-charges, three charges of insubordination, and seven charges of incapacity.

The Commissioner determines that the Board failed to provide the written notice required by *N.J.S.A. 18A:6-12* to respondent with regard to the twenty-seven sub-charges of inefficiency certified in category one against respondent. Accordingly, these charges are dismissed. The Board is not precluded, however, from filing charges of inefficiency against respondent provided that such charges conform with the statutory prescription set forth in *N.J.S.A. 18A:6-12 et seq.* See *In the Matter of the Tenure Hearing of Anna Simmons, School District of the Borough of Eatontown, Monmouth County, 1973 S.L.D.* at page 740, *aff'd* State of Board of Education 1975 *S.L.D.* 1160.

The Commissioner points out that the charges of insubordination and incapacity against respondent do not require the ninety day notice set forth in *N.J.S.A. 18A:6-12*, and therefore are still viable. He orders a hearing to be conducted on these charges forthwith.

In summary, respondent's Motion for reinstatement with retroactive salary as of the beginning of the 1975-76 academic year is granted. Respondent's Motion to Dismiss the charges of inefficiency is also granted. In all other respects said Motion is denied.

COMMISSIONER OF EDUCATION

December 23, 1975

**STATE BOARD OF EDUCATION**

**DECISION**

Decision on Motion by the Commissioner of Education, December 23, 1975

For the Petitioner-Appellee, Cafiero & Balliette (W.M. Balliette, Jr., Esq., of Counsel)

For the Respondent-Appellant, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

The Application for Stay which was filed with this Board by Petitioner-Appellee is hereby denied. The Decision on Motion of the Commissioner of Education is affirmed for the reasons expressed therein.

March 3, 1976

**In the Matter of the Tenure Hearing of Beatrice Konowitch,  
School District of Middle Township, Cape May County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

This matter having been brought before the Commissioner of Education by William M. Balliette, Jr., Esq., attorney for the Middle Township Board of Education, hereinafter "Board," through the filing of the certification of tenure charges against one of its teaching staff members, Beatrice Konowitch, on June 5, 1975, and the filing of a formal Answer on June 19, 1975 by respondent, Joel S. Selikoff, Esq., counsel; and

Respondent, subsequent to a conference of counsel held on July 16, 1975, at the State Department of Education, having filed a Motion to Dismiss said tenure charges against her by the Board with accompanying Memorandum of Law on October 15, 1975; and

The Board's Memorandum of Law in opposition to said Motion to Dismiss having been filed with the Commissioner on October 21, 1975; and

A decision on respondent's Motion to Dismiss having been rendered by the Commissioner on December 23, 1975, whereupon certain of the tenure charges of inefficiency certified by the Board were dismissed, while the remaining charges of incapacity and insubordination were remanded for further hearing; and

It appearing that the Board filed a Motion for a Stay of the Commissioner's decision with the State Board of Education on January 19, 1976, and that the Board subsequently filed a Brief in Support of its Points of Appeal with the State Board on January 30, 1976; and

The Reply Brief of respondent having been filed with the State Board on February 18, 1976; and

The State Board having rendered a decision affirming the Commissioner's Decision on Motion on March 3, 1976; and

The first day of hearing having been held in the instant matter on June 3, 1976, subsequent to which the parties filed a Joint Stipulation of Dismissal with prejudice of the tenure charges against respondent on September 15, 1976; and

It appearing that all matters in dispute having been amicably resolved between the parties, and respondent herein, Beatrice Konowitch, having resigned her position as a teaching staff member with the Board effective September 8, 1976; now therefore,

IT IS ORDERED that the certification of the Board's tenure charges against respondent be dismissed with prejudice.

Entered this 17th day of November 1976.

COMMISSIONER OF EDUCATION

**Board of Education of the Borough of Bloomingdale, Passaic County,**  
*Petitioner,*

*v.*

**Board of Education of the Borough of Butler, Morris County,**  
*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel  
(Gordon D. Meyer, Esq., of Counsel)

For the Respondent, Edwin J. Nyklewicz, Esq.

Petitioner, the Board of Education of the Borough of Bloomingdale, hereinafter "Bloomingdale Board," avers that its present sending-receiving relationship with the Board of Education of the Borough of Butler, hereinafter "Butler Board," is intolerable, inconsistent with constitutional guarantees and unproductive of a thorough and efficient education. It requests the Commissioner of Education to effect a regionalization of the two communities to insure a representative voice on behalf of all of the pupils of Bloomingdale. The Butler Board maintains that it is providing a thorough and efficient system of education for its pupils and the pupils of Bloomingdale and that there is no authority for the relief which is sought by the Bloomingdale Board. The Butler Board avers, therefore, that the Petition of Appeal should be dismissed.

A hearing was conducted October 2, 1975 by a hearing examiner appointed by the Commissioner at the office of the Morris County Superintendent of Schools, Morris Plains. Subsequently, Briefs were filed by the parties and submission was completed on January 5, 1976. The report of the hearing examiner is as follows:

This matter was substantially submitted in written form in a total of twenty-one exhibits marked in evidence at the time of hearing. Principal views of the parties, as well as factual data, are clearly set forth therein but received further elaboration and delineation in the hearing process. Much of the factual data upon which the arguments rest is not in dispute.

The communities of Butler and Bloomingdale comprised one township in the 19th century and have been united for educational purposes in various grade-level configurations for a century or more. (Tr. 32) In recent years, however, Bloomingdale pupils have attended schools from kindergarten through grade eight in Bloomingdale and in the Butler High School through a sending-receiving relationship in grades nine through twelve. Most recently, there was a contractual ten year relationship between the two Boards in the period 1964-74 and at the end of that time the sending-receiving relationship continued pursuant to law. *N.J.S.A. 18A:38-13*

The termination of the contractual relationship was initially responsible for a decision to make a total assessment of the educational program in Butler and Bloomingdale and a Planning and Development Committee, composed of representatives of both communities, was formed in 1972 for this purpose. The report of the Committee was submitted to both Boards in September 1973 (PR-4(b)), and on October 16, 1973, the Bloomingdale Superintendent of Schools submitted a copy of the report with covering letter to the State Department of Education. This letter said, *inter alia*, that

“\*\*\*The study committee unanimously recommended that the concept of a grade 9-12 regional organization be submitted to the Butler and Bloomingdale Boards of Education for approval.\*\*\*” (PR-4(a))

The letter was received and reviewed in the State Department of Education and a Deputy Assistant Commissioner testified he replied by letter on January 22, 1974, and said, *inter alia*:

“\*\*\*Although we did not find a clearly stated recommendation by the Butler-Bloomingdale Committee, a 9-12 regionalization was inferred. The State Department supports its County Superintendent’s recommendations for K-12 regionalization as educationally superior, but supports regionalization of grades 9-12 as an alternative.\*\*\*” (PR-5)

Thereafter, the Deputy Assistant Commissioner testified he was informed that the Butler Board was not amenable to further study of regionalization proposals and he was requested to convene a meeting of the two Boards. He testified further that he complied with such request by letter of September 6, 1974 (PR-6), which invited the parties for a “discussion of the matter” but that the Butler Board replied that it would be unable to participate. (Tr. 22, PR-7) This reply also stated:

“\*\*\*In regard to the subject of regionalization, please understand that the Butler Board’s position at this time is that we see no educational or financial benefits accruing to the students or taxpayers of our District by virtue of regionalization.

“If the majority of the Board of Education or the people of Butler through their elected representatives indicate to the Board that a change in this position is desirable, we shall be willing to consider it.” (PR-7)

The position of the Butler Board has not been altered in the interim. The Bloomingdale Board now requests the Commissioner to consider the factual data contained in the Planning and Development Committee Report and other data as reason for the imposition of a mandated regionalization.

Of principal importance in this regard are certain pupil population data and pupil population projections which must be viewed in the context of the rated functional capacity of Butler High School. This rated functional capacity as determined by the formula of the Building Services Division, State

Department of Education on July 28, 1975, was 866 pupils but excluded six instructional areas in an annex which has not been approved for pupil use by the State Department. (PR-1) Such functional capacity, defined generally as the optimum number of pupils who may be housed in a school building at one time, is extended for the period of a whole school day by scheduling devices, staggered attendance sessions, work study programs. (PR-2)

The present and future projected enrollment of Butler High School may be reviewed in the context of this functional capacity of 866 pupils and may be set forth succinctly as follows:

**Pupil Enrollment**  
**Butler High School**

<b>Present</b>	<b>From Butler</b>	<b>From Bloomingdale</b>	<b>Total</b>
Sept. 30, 1975 (R-7)	562	582	1144
<b>Projected*</b>			
1976-77	569	594	1163
1977-78	546	604	1150
1978-79	578	626	1204
1979-80	600	634	1234
1980-81	619	617	1236
1981-82	607	603	1210
1982-83	553	568	1121
1983-84	537	546	1083
1984-85	490	540	1030

\*See P-6 and R-3. This projection combines the projection of Bloomingdale Board for its pupils and the school totals estimated by Butler Board. The projection is comparable to R-4 made in 1974 but considerably more conservative than estimates made in 1973 by the Planning and Development Committee. (PR-4(b))

Thus, it may be seen that at the present time the Butler High School is overcrowded in terms of rated functional capacity and that such overcrowding will continue in the future, although it is mitigated by scheduling devices of reference, *ante*.

It is this fact which stands as one of the principal causations for the instant Petition since the two Boards differ over the remediation for overcrowded conditions which is now in effect, and differ with respect to a judgment of their severity at the present time and in future years. On the one hand, the Butler Board argues that present program and scheduling are within reasonable limits and tolerable. The Bloomingdale Board avers that new measures need to be taken, but, most importantly, that the citizens of Bloomingdale are entitled, and in fact required, to participate in the educational planning process. Thus, the

request for intervention herein is not the usual one for a severance of the relationship but a strengthening of it.

The President of the Bloomingdale Board and its Superintendent of Schools testified at the hearing and prior thereto submitted affidavits which set forth their views. Affidavits were also received from other Board members and from the Mayor of Bloomingdale.

The Bloomingdale Superintendent avers that the citizens of Bloomingdale have no direct voice or control over any of the important policy matters which affect the operation of the Butler High School. He lists some of these as concerned with the:

- (1) appointment of teaching staff members;
- (2) transfer of teaching staff members;
- (3) adoption of courses of study;
- (4) textbook selection;
- (5) withholding of salary increments;
- (6) determination of charges against tenured employees;
- (7) discipline of pupils; and
- (8) school calendar formulation.

He further avers that this lack of representation is contrary to the mandate of the Public School Education Act of 1975 which requires local control of the public schools in order that a thorough and efficient education may be assured. (See Tr. 72, 81.) The Superintendent further testified that while he finds no fault with the curriculum or staff of Butler High School he does object to staggered sessions, extra costs involved with busing and early dismissal. (Tr. 76) He testified that Bloomingdale presently contains more than forty-one percent vacant land in its approximately nine square mile area and that such land could serve as the site for as many as 2,000 more homes. (Tr. 71) He also said that a separate high school in Bloomingdale would not be feasible at the present time, because of small enrollment, and that there was no alternative satisfactory placement available for Bloomingdale pupils. (Tr. 80)

The President of the Bloomingdale Board testified that the Bloomingdale and Butler communities are separated by a river but share a long common boundary and share many services as would one community, *i.e.* electric and water systems, churches, shopping centers, first aid squads, a main street which is continuous in its passage from Butler through Bloomingdale. (Tr. 33-37) He testified that a lack of similar sharing with respect to the education of high school pupils from Bloomingdale constitutes a denial of the “\*\*\*right to establish policy\*\*\*” and that such denial may be clearly seen from certain uncontroverted facts:

1. Bloomingdale citizens have no right to vote at the budget referendum in Butler although Bloomingdale pupils comprise more than fifty percent of the Butler High School student body.

2. There is no representation by Bloomingdale citizens in matters such as the formulation of a calendar, the selection of team sports, and the decision to use substandard rooms.

3. The Bloomingdale Board is required to pay, in perpetuity, an amount of five percent toward the capital costs of construction of Butler High School “\*\*\*and yet 40 years ago when we started this we didn’t own any of the high school and still do not.\*\*\*” (Tr. 53)

The Mayor of Bloomingdale testified that the Borough must pay a total of almost \$1,000,000 to Butler for tuition each year but that the budget for Butler schools “\*\*\*cannot be effectively discussed, reviewed or cut by our Governing Body, irrespective of the fact that we represent almost half the parents and taxpayers supporting the Butler High School.\*\*\*” He concluded with the avowal that “\*\*\*under the present relationship, our high school children cannot receive the thorough and efficient education which is their constitutional right, and that regionalization is the best means of meeting our obligation to them.”

(Affidavit of Daniel R. Morse, at pp. 2-3)

The Vice-President and President of the Butler Board testified that although no citizen of Bloomingdale has “voting power” with respect to the operation of Butler High School there has always been a good relationship between the two districts; the Superintendents have regularly conferred, representatives from the Bloomingdale Board have been invited to attend meetings of the Butler Board, and have been consulted on many matters of mutual interest. (See R-1.) They also testified that they realize “\*\*\*both Butler and Bloomingdale need each other to continue to meet the needs of the youth of both communities\*\*\*” and that they have in effect “\*\*\*always treated the Bloomingdale student as if he were their own.\*\*\*” (R-1) They jointly aver, however, that they and the Butler Board oppose regionalization and that the Borough of Butler “\*\*\*is very emotional in its stand against [it].” (R-1) The Vice-President testified:

“\*\*\*I think the way the school system has been operated \*\*\* is the most efficient and economical way we can do it under the present method of State financing.\*\*\*” (Tr. 99)

And,

“\*\*\*The people in Butler wouldn’t want the home rule taken away from them.\*\*\*” (Tr. 100)

And further:

Q. “Do you feel that the Butler Board of Education can represent the people of Bloomingdale with regard to policy decisions?”

A. “\*\*\*[T] hat school was built in Butler, it was built by referendums and enforced by the people of Butler. And, if we are willing to let a

sending district participate in the discussions and decisions, that's fine. But, I look at it strictly as a landlord tenant relationship. That is our school and it will remain our school.\*\*\*" (Tr. 109)

The Vice-President further testified that the two communities of Butler and Bloomingdale are not one in fact as alleged by the Bloomingdale Board. (Tr. 93) He testified that they have separate fire and police departments and that the shopping or business areas of the two boroughs are separate and distinct. (Tr. 94)

The Superintendent of Butler Schools testified that his own views on the desirability of regionalization had been altered because of changes in population projections (Tr. 129) and by the belief that "\*\*\*\*we can with very limited building effectually take care of the combined student population of Butler and Bloomingdale for the next 12 years.\*\*\*" (Tr. 131) The Superintendent also stressed Butler's "pride of ownership" and averred that the Butler Board wanted "control of their school." (Tr. 133) He testified further that in his opinion and despite the functional capacity study of the State Department (PR-1, *ante*), Butler High School is not overcrowded. (R-2) In support of this avowal, he cites class sizes of 16 to 24.5 in nine principal subject areas. The Superintendent further testified that he had attempted over the years to alert the Bloomingdale Superintendent to alterations in policies applicable to Butler High School. (Tr. 139)

Thus, the testimony of both parties herein is centered around two or three principal issues. On the one hand, the Bloomingdale Board avers that Butler High School is overcrowded but that the present sending-receiving relationship provides no voice for Bloomingdale citizens in the alleviation of the problem. The Butler Board maintains that there is an informal representation by Bloomingdale in Butler school affairs, that the high school is not seriously overcrowded and that, in any event, there is no advantage to the citizens of Butler in the regionalized approach which the Bloomingdale Board demands.

The Briefs of the two Boards are primarily centered around such issues.

The Bloomingdale Board's Brief advances two principal points; namely (1) that regionalization is a necessary and inescapable solution to problems associated with Butler High School and (2) that the Commissioner has the authority to effect such regionalization. Point one is supported by an avowal that no other sending-receiving relationship in New Jersey exists wherein the sending district has more pupils enrolled in a high school than the receiving district. Further, the Bloomingdale Board avers that the many common ties of the two communities, such as utilities, border, first aid squad, and commercial, club and religious services, warrant an additional one; namely, one involving the school system. This avowal is founded in a lengthy recital of the joint report of the Planning and Development Committee (PR-4(b)) and in two important court decisions; namely *Jenkins et al. v. Township of Morris School District and Board of Education*, 58 N.J. 483 (1971) and *Robinson et al. v. Cahill et al. (Robinson I)*, 62 N.J. 473 (1973). The Bloomingdale Board finds substantial

similarities in the one-community fact situation of *Jenkins* to the instant matter. It cites *Robinson* in support of an avowal that the Supreme Court has espoused the principle of “home rule” in educational affairs and that such fact mandates a voice be afforded in school matters to all segments of an educational community. In particular the Bloomingdale Board observes that the latest decision in *Robinson* upholds the constitutionality of the Public School Education Act of 1975 (Chapter 212, Laws of 1975) which provides in Article II(5) that a “thorough and efficient” system of public schools shall include the

“b. Encouragement of public involvement in the establishment of educational goals.”

Various other excerpts of the Court’s decision in *Robinson* are also cited and the Bloomingdale Board concludes that

“\*\*\*Once it is recognized that Bloomingdale residents have a vested interest in high school education and have been denied “residency” (regionalization) by a minority, the residency test fails as merely a circular argument which cannot be permitted to deny the clear intent of the equal protection clause.\*\*\*” (Bloomingdale Board’s Brief, at p. 20)

Point II of the Brief of the Bloomingdale Board asserts that the facts of the instant matter are as compelling as those in *Jenkins*, *supra*, and although the relationship of the two communities is not exactly the same, community ties are significant. In any event, the Bloomingdale Board avers the authority of the Commissioner to effect regionalization cannot be limited to the one factual situation of *Jenkins* and that he should

“\*\*\*require a merger thereby regionalizing the high school so as to meet the standards of a thorough and efficient education as set forth in recent statutory and case law, as well as the equal protection clauses of the New Jersey and Federal Constitutions.” (Bloomingdale Board’s Brief, at p. 26)

The Butler Board finds the Bloomingdale Board’s request for a mandated regionalization to be an “\*\*\*attempt to circumvent the requirements of *N.J.S.A.* 18A:13-34\*\*\*” with a factual situation different from the one in *Jenkins*. (Butler Board’s Brief, at Point I) It further disputes the contention of the Bloomingdale Board that “one man-one vote” principles should be made applicable to the instant matter. (Point II)

The statute of reference, *N.J.S.A.* 18A:13-34, sets forth the statutory scheme for the creation of a regional school district. It provides for an initial special school election by the voters of two or more districts on resolutions to approve the proposed regional district and voter approval is required. The Butler Board argues that this statute governs the situation herein and that *Jenkins*, *supra*, was not a mandate for the Commissioner to set aside the statutory scheme except in unique circumstances; *i.e.*, where racial segregation was the heart of the problem and where the communities were in effect a single community. The

Butler Board particularly cites that phrase of the Court's decision in *Jenkins* which appears to limit its scope:

“\*\*\*[T]he situation here is indeed a specially compelling one and in traditional judicial fashion our holding may be confined to it. As has already been pointed out, here we are realistically confronted not with multiple communities but with a single community having no visible or factually significant internal boundary separations, and with a record which overwhelmingly points educationally towards a single regional district rather than separate local districts.\*\*\*” (at p. 505)

The Butler Board avers that there is no racial issue herein and that the one-community fact of *Jenkins* is not duplicated in Bloomingdale and Butler. Absent such a fact, it is the Butler Board's argument that there is no authority for the Commissioner to fundamentally alter the legislative scheme. In support of this view the Butler Board cites decisions of the Commissioner subsequent to *Jenkins*, in particular *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown, Middlesex County*, 1974 S.L.D. 938, aff'd State Board of Education March 5, 1975 and *Board of Education of the City of Plainfield v. Boards of Education of the Borough of Dunnellen et al.*, 1974 S.L.D. 25, remanded State Board of Education 1430.

The Butler Board's argument with respect to the one man-one vote principle is that it poses constitutional questions which should not be posed initially before the Commissioner but before the courts and that, in any event, “\*\*\*cases should be disposed of on other than constitutional grounds if at all possible\*\*\*.” (Butler Board's Brief, at p. 8)

The hearing examiner has considered all such evidence and arguments and sets forth the following facts as centrally important to the legal arguments recited, *ante*:

1. Bloomingdale is the only sending district to Butler High School and pupils of Bloomingdale comprise more than fifty percent of the student body.
2. The parents of this majority of pupils, and citizens of Bloomingdale, are barred by the statutory scheme for the government and management of the schools of the State from the exercise of any authority over the school policies of Butler High School although certain cooperative efforts have served to mitigate this lack of representation.
3. Butler High School is, by functional capacity standards of the State Department of Education, overcrowded and will continue to be so in the future unless a building program is launched. Such overcrowding has, however, been managed well and has not seriously affected the school's educational program. (See Tr. 158.)

4. The communities of Bloomingdale and Butler are not the one community, in fact, that the Court found as unique in *Jenkins, supra*, although there are many factors which create a bond between them which would appear to be a strong one: a contiguous boundary, interlinking of main streets, common utilities, etc.

5. The facts of the instant matter are not unlike those which are pertinent to scores of other sending-receiving relationships in the State. There is no official authority or right of representation for any citizen of a sending district in the school affairs of a receiving district. School affairs of a receiving district are managed solely by the board of education of that district. *N.J.S.A. 18A:11-1, 38-8 et seq.*

The question for determination is whether or not such lack of representation is a direct or indirect dichotomy and inconsistent with the recent mandate of the Legislature that there shall be “\*\*\*public involvement in the establishment of educational goals\*\*\*” in order that a thorough and efficient educational program may be assured in each community. *N.J.S.A. 18A:7A-1 to 28* If it is held that there is such inconsistency, and it is difficult to see how a public can be involved in the “establishment” of “educational goals” when there is no official voice, a question remains; namely, where is the remedy? A decision by the Commissioner, grounded in a liberal interpretation of *Jenkins, supra*, that the request for regionalization must be granted in order that the Public School Education Act of 1975 may be made effective would appear to negate prior law with respect to the governance of sending-receiving relationships and would contain implications of magnitude for all such relationships in the State. A decision to the contrary and a rejection of the request will continue in effect the traditional statutory scheme until such time as the problem has been addressed by the New Jersey Legislature.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and considered all the facts and arguments contained therein. The issues which are posed are indeed unique ones and arise in part from the mandate of the Public School Education Act of 1975 that there shall be “\*\*\*public involvement in the establishment of educational goals\*\*\*” to insure that each of the State’s school districts provides a thorough and efficient educational program. *N.J.S.A. 18A:7A-1 to 28*

The mandate is, however, in seeming contradiction to the statutes which establish sending-receiving relationships. *N.J.S.A. 18A:38-11 et seq.* Such statutes, and particularly *N.J.S.A. 18A:38-13*, comprise the “high school designation law” and have remained virtually unchanged since the adoption of Chapter 281, P.L. 1929, as amended by Chapter 301, P.L. 1933. This statute as amended (*R.S. 18:14-7*) provided in pertinent part:

“Any school district heretofore or hereafter created, which has not heretofore designated a high school or schools outside of such district for the children thereof to attend, and which district lacks or shall lack high school facilities within the district for the children thereof, may designate any high school or schools of this state as the school or schools which the children of such district are to attend. No such designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the Commissioner.\*\*\*”

This statutory prescription was later sectionalized by the Laws of 1967, Chapter 271, into *N.J.S.A.* 18A:38-11 and 38-13. It maintains the mandate, however, that no “designation” of a high school shall be “changed” unless an “application” is made to the Commissioner and approved by him as the result of an affirmative showing of “good and sufficient” reason.

Of primary importance, however, for the instant matter is that the present statute *N.J.S.A.* 18A:38-13 provides for the continuity of sending-receiving relationships but provides no representation by the sending district in the affairs of a receiving district. Indeed, a review of case law indicates that a “sending” relationship was initially regarded as a privilege afforded by districts with high schools to those without them and that protection was thought to be required for receiving districts. Thus, the Commissioner said *In the Matter of the Board of Education of Midland Park, Bergen County, to Transfer Certain of Its High School Pupils Attending Ridgewood High School*, 1938 *S.L.D.* 667 (1933):

“\*\*\*Prior to 1929, when the above statute became effective, boards of education frequently changed the designation of the high schools for the pupils of their respective districts without apparent good cause for such action after the district to which they had been sending their pupils had erected buildings for their accommodation and had otherwise provided for their education. It is clearly the *purpose* of this statute *to protect the districts which have provided high school facilities for other districts from the withdrawal* of pupils without good cause being shown for such action\*\*\*.”  
(*Emphasis added.*) (at p. 668)

This purpose received an elaboration in *Board of Education of the Township of Sparta v. Board of Education of the Town of Newton, Sussex County*, 1939-49 *S.L.D.* 30 (1946), *aff'd* State Board of Education 32, wherein the Commissioner said:

“\*\*\*In considering an application for a change of designation, the Commissioner must keep in mind the purpose of the high school designation law. In this State there are one hundred and sixty-six (166) school districts which maintain high schools for pupils of all the high school grades. These high schools also receive tuition pupils from neighboring school districts which do not maintain high schools. This arrangement is mutually advantageous. The sending districts obtain high school facilities much

cheaper than they can provide similar facilities for themselves and the additional pupils make possible an expansion of their educational offerings and a reduction in overhead.

“Prior to 1929 when the first high school designation law was enacted, boards of education sometimes transferred their pupils to secure a lower tuition rate after the receiving district had erected buildings and otherwise provided for their education. Receiving districts hesitated, under such circumstances, to bond themselves to erect buildings and to expand their facilities to provide education for tuition pupils. The high school designation law was enacted to protect districts which had provided facilities for pupils of other districts from the withdrawal of these pupils without good cause. This statute benefits the sending district as well as the receiving district. If this law had not been enacted, sending districts, either individually or by uniting with other districts, would have been compelled to burden themselves with the erection and maintenance of high schools.

“In order to provide for cases where good and sufficient reason exists for the transfer of pupils to another high school, the Legislature charged the Commissioner with the responsibility of determining when such good and sufficient reason for a change of designation does exist. The Commissioner feels constrained to exercise his discretion under this statute with great caution. Otherwise the law will not accomplish the salutary purpose intended by the Legislature.\*\*\*” (at p. 31)

Thus, the sending-receiving relationship laws have also been historically viewed as mutually advantageous although the governance of high school districts has been left completely to the jurisdiction of the receiving district. It is apparent, however, that new elements have been added to the complexity of school district relationships. Such districts no longer have available the options to frequently change the high school to which pupils are sent since population pressures have locked in the relationships. The Public School Education Act mandates public involvement in the establishment of educational goals but has not altered the fact that there is no official representation in school affairs for thousands of citizens whose children attend high school in neighboring communities which act as receiving districts for purposes of high school education.

The question for determination herein is concerned with the impact which such new elements or alterations in traditional relationships may or must have. There is also a primary concern with respect to the jurisdiction which may be exercised to effect change in the order of magnitude demanded by petitioner. This demand is no less than the imposition of a regionalization of the Bloomington and Butler school districts by the Commissioner.

Such concern rests primarily on the fact that the statutory plan for the regionalization of school districts mandates that there shall be a voter referendum and that:

“\*\*\*In any case in which a proposal for the creation of a regional district or for the enlargement of a regional district is submitted, such proposal shall be adopted only if a majority of the votes cast thereon

“a. In each of the local districts, other than a consolidated district proposing to form the regional district,

\*\*\*

shall be case in favor of the adoption of such proposal.” (*N.J.S.A.* 18A:13-5)

Pursuant to this statutory plan all regional districts, except one, which are now in existence in New Jersey were initially approved by majority vote of the electorate in local districts. The one exception was directly attributable to the decision of the Supreme Court of New Jersey in *Jenkins, supra*, wherein the Court found the Commissioner was adequately empowered to direct “\*\*\*suitable steps toward regionalization \*\*\*” or even “\*\*\*to direct a merger on his own\*\*\*” if he found it to be necessary for fulfillment of the State’s constitutional mandates. (*Emphasis supplied.*) (58 *N.J.* at 508) The Court’s finding was, of course, grounded in circumstances which the Court characterized as unique and compelling but, in effect, it added new dimension to the parameters of the Commissioner’s responsibility for supervision of the State’s schools. It is directly at point herein with respect to such responsibility although the factual situation is different.

The principal issue in *Jenkins, supra*, was whether the Commissioner had authority within his powers to effectuate a merger of two school districts in advancement of the State’s educational policies. There, as herein, there was no specific statutory authority for the Commissioner to impose a school district merger and he reluctantly decided that he could not direct one even though Morristown and Morris Township were found to be one community in fact and even though a severance of the long relationship would have fostered proscribed racial segregation.

Ultimately, in *Jenkins, supra*, the Supreme Court disagreed with such conclusion and based its disagreement on both constitutional and statutory mandates and on its prior interpretation pertinent thereto. Thus, the Court said in *Jenkins*:

“\*\*\*The Commissioner’s flat disavowal of power despite the compelling circumstances may be sharply contrasted with the sweep of our pertinent constitutional and statutory provisions and the tenor of our earlier judicial holdings. See *N.J. Const.*, art. 1, para. 5; art. 8, sec. 4, para. 1 (1947); *N.J.S.A.* 18A:4-23, 24; *N.J.S.A.* 18A:6-9; *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501 (1970); *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 *N.J.* 94 (1966); *Booker v. Board of Education, Plainfield*, 45 *N.J.* 161 (1965); *Morean v. Bd. of Ed. of Montclair*, 42

*N.J.* 237 (1964); see also *In re Masiello*, 25 *N.J.* 590 (1958); *Laba v. Newark Board of Education*, 23 *N.J.* 364 (1957); *Schults v. Bd. of Ed. of Teaneck*, 86 *N.J. Super.* 29 (*App. Div.* 1964), *Aff'd*, 45 *N.J.* 2 (1965).

“Our Constitution contains an explicit mandate for legislative ‘maintenance and support of a thorough and efficient system of free public schools.’ Art. 8, sec. 4, para. 1. In fulfillment of the mandate the Legislature has adopted comprehensive enactments which, *inter alia*, delegate the ‘general supervision and control of public education’ in the State to the State Board of Education in the Department of Education. *N.J.S.A.* 18A:4-10. As the chief executive and administrative officer of the Department, the State Commissioner of Education is vested with broad powers including the ‘supervision of all schools of the state receiving support or aid from state appropriations’ and the enforcement of ‘all rules prescribed by the state board.’ *N.J.S.A.* 18A:4-23. The Commissioner is authorized to ‘inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state’ (*N.J.S.A.* 18A:4-24), is directed to instruct county superintendents and superintendents of schools as to ‘the performance of their duties, the conduct of the schools and the construction and furnishing of schoolhouses’ (*N.J.S.A.* 18A:4-29), and is empowered to hear and determine ‘all controversies and disputes’ arising under the school laws or under the rules of the State Board or the Commissioner. *N.J.S.A.* 18A:6-9.\*\*\*” (58 *N.J.* at 493-494)

The Court then detailed a number of cases wherein the Commissioner’s authority had been broadly construed and reached the following conclusion with respect to the bridging of traditional governmental subdivision:

“\*\*\*As the Supreme Court pointed out in *Reynolds v. Sims*, 377 *U.S.* 533, 84 *S. Ct.* 1362, 12 *L. Ed. 2d* 506, 535 (1964), political subdivisions of the states whether they be ‘counties, cities or whatever’ are not ‘sovereign entities’ and may readily be bridged when necessary to vindicate federal constitutional rights and policies. See *Gomillion v. Lightfoot*, 364 *U.S.* 339, 347, 81 *S. Ct.* 125, 5 *L. Ed. 2d* 110, 116 (1960); *United States v. State of Texas*, 321 *F. Supp.* 1043, 1050-58 (E.D. Texas 1970); cf. *Jackman, et al. v. Bodine, et al.*, 55 *N.J.* 371 (1970). It seems clear to us that, similarly, governmental subdivisions of the state *may readily be bridged when necessary to vindicate state constitutional rights and policies*. This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere; but it does entail suitable measures of power in our State authorities for fulfillment of the *educational* and racial policies embodied in our State Constitution and in its implementing legislation. Surely if those *policies* and the views firmly expressed by this Court in *Booker* (45 *N.J.* 161) and now reaffirmed are to be at all meaningful, the State Commissioner must have power to cross district lines to avoid ‘segregation in fact’ (*Booker*, 45 *N.J.* at 168), at least where, as here, there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually

significant internal boundary separations.\*\*\*”  
(*Emphasis supplied.*) (58 *N.J.* at 500-501)

Finally, the Court said:

“\*\*\*[I]t may be noted that the Commissioner acted with unusual hesitancy when he merely recommended the study of regionalization in which the Township Board declined to participate; he could readily have directed its participation with the ample strength of an arsenal of powers including, *inter alia*, the power to withhold State aid (*N.J.S.A.* 18A:55-2) and the power to withhold approval of school construction. *N.J.S.A.* 18A:45-1; *N.J.S.A.* 18A:18-2.\*\*\*” (Id., at 507)

As noted, *ante*, the Court’s final conclusion was that the Commissioner has adequate power to direct “\*\*\*suitable steps toward regionalization\*\*\*” or even “\*\*\*to direct a merger on his own\*\*\*.” (Id., at 508)

Subsequent to the Court’s decision in *Jenkins, supra*, the Commissioner did order that the two district of Morristown and Morris Township be merged. Later he found no such compelling or unique circumstances in *New Brunswick, supra*, and declined to set aside “historic home rule principles” completely although they were set aside in part.

The facts of the instant matter may be viewed in such a perspective. Are they indeed as compelling as they were in the Court’s opinion in *Jenkins*? Are the facts distinguished by uniqueness from those extant in *New Brunswick*? The Commissioner determines the answers to both questions are affirmative ones.

Of utmost importance in this regard is the fact that in a State which rightfully prides itself on a condition with respect to education which the Court in *Jenkins* characterized as “home rule” there is no “rule” at all for the citizens of Bloomingdale with pupils in Butler High School. They are totally dependent, without an effective voice, on policies developed with respect to such pupils by the Butler Board. Regardless of the beneficence of such Board, there are evident disagreements in many aspects of school affairs and a fundamental right to effective representation is denied the citizens of Bloomingdale.

This situation is especially compelling because of the nature of the statistical data. Bloomingdale pupils comprise more than 50 per cent of the enrollment of Butler High School. The taxpayers of Bloomingdale spend more than a million dollars a year for their education. Where is the authority, then, for a denial of representation in the formulation of educational policy? Such authority rests in the silence of a statutory plan first developed in 1929, as noted *ante*, primarily for the protection of receiving districts. This plan stands in apparent contradiction to other statutes clearly designed to effectuate a balanced presentation of local views in school affairs and to afford a proportional but effective vote by elected representatives. It may be contrasted with the statutory plan which governs regional school districts. *N.J.S.A.* 18A:13-8 *et seq.*

These statutes with respect to regional schools precisely detail the composition of regional boards of education as a reflection of the comparative population percentages of constituent districts. *N.J.S.A.* 18A:38-13 provides that members of a regional board shall be apportioned “\*\*\*as nearly as may be according to the number of their inhabitants.\*\*\*” The statute that follows, *N.J.S.A.* 18A:38-14, is designed to provide an update as official population percentages change in the Federal decennial census since it states that in order that “inequitable representation” may be quickly corrected, a “special election” shall be held “\*\*\*no later than 60 days\*\*\*” after census data has been officially promulgated.

The statute *N.J.S.A.* 18A:38-13 which governs sending-receiving relationships may also be contrasted, in terms of representation, with all other statutes which delegate responsibility to locally elected or appointed boards of education for the government of the schools of the respective school districts; elementary, vocational, special, and comprehensive kindergartens through grade twelve. The representation is precisely set forth with respect to such districts. *N.J.S.A.* 18A:12-10 *et seq.*; *N.J.S.A.* 18A:46-35; *N.J.S.A.* 18A:54-16

It seems apparent from such comparison that citizens of sending districts with pupils in school are in a class apart; voteless, without even an advisory function to perform, totally dependent on the decisions of citizens of other communities for the education their children receive. The demand for representation is thus one which is understandable and not dissimilar to the one King George III became cognizant of in an earlier time. The remedy is surely to be found, however, in other than a resort to arms.

There remains the question with respect to the Commissioner’s authority to effect change.

The Commissioner has examined this question and finds such authority, at least in the context of the facts herein, in the decision of the Court in *Jenkins, supra*, as expressed in the citations, *ante*. He finds it also in the clear expression of the Legislature in interpreting the constitutional mandate of a “thorough and efficient education” to mean in part that there must be participation by local citizens in school affairs. Specifically, the Public School Education Act, *N.J.S.A.* 18A:7A-1 *et seq.*, provides in pertinent part:

“In order to encourage citizen involvement in educational matters, New Jersey should provide for free public schools in a manner which *guarantees* and *encourages* local participation consistent with the goal of a thorough and efficient system serving all of the children of the State:

“A thorough and efficient system of education includes local school districts in which decisions pertaining to the hiring and dismissal of personnel, the curriculum of the schools, the establishment of district budgets, and other essentially local questions are made *democratically* with a *maximum of citizen involvement* and self-determination and are consistent with statewide goals, guidelines and standards.\*\*\*”

(*Emphasis supplied.*)

It is noted that there is no guarantee of official, effective representation in educational matters at the high school level in the community of Bloomingdale, and neither is there encouragement of it in the *status quo*. Such representation is required to be provided. The Commissioner so holds.

Accordingly, the Commissioner directs the Bloomingdale and Butler Boards to study the various possibilities of regionalization forthwith and to submit to the State Department of Education not later than June 30, 1977, the proposal deemed most feasible by the Boards for a referendum by their combined electorate pursuant to law. *N.J.S.A.* 18A:13-5 Such proposal must contain as a minimum a regionalization of grades nine through twelve but may include other grade levels.

Until such proposal has been received and approved by both the Commissioner and the electorate, the Commissioner retains jurisdiction.

COMMISSIONER OF EDUCATION

November 17, 1976

**Sarah Louise Miller, Doris Straughn, and Ruth Jeck,**

*Petitioners,*

*v.*

**Board of Education of the Township of Lakewood, Ocean County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Starkey, Turnbach, White & Kelley (Edward J. Turnbach, Esq., of Counsel)

For the Respondent, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

Petitioners, tenured school nurses in the employ of the Board of Education of the Township of Lakewood, hereinafter "Board," allege that the Board improperly established their individual salaries for the 1975-76 school year by a salary guide captioned "Non-Degree (Nurses Only) Salary Guide 1975-1976." Petitioners allege that the Board employs other non-degree personnel in teaching positions and pays such personnel in accord with the degree salary guide for teachers. Petitioners have requested the Board to pay them in accordance with the teachers' salary guide as required by *N.J.S.A. 18A:29-4.2*, but the Board has denied the request. Petitioners pray to the Commissioner of Education to enter an order directing the Board to pay them in accordance with the degree salary schedule for teachers as required by the aforesaid statute and previous decisions of the Commissioner.

The Board denies the allegations set forth herein.

Petitioners and the Board, through their respective counsel, hereby stipulate and submit the following facts to the Commissioner in order to obviate the necessity of a hearing. It is the intention of the parties that the Commissioner shall render his decision based upon the factual situation. (Stipulation of Facts, at p. 1)

Each petitioner is a registered nurse holding a standard school nurse certificate, without a degree, and each is employed as a school nurse by the Board and has acquired a tenure status. Each petitioner is at the highest step of the non-degree salary guide which for 1974-75 was \$11,000 and for 1975-76 was \$11,860.

Petitioners Miller, Straughn and Jeck have been employed by the Board for twenty-nine years, sixteen years and nineteen years respectively.

The Board has employed two non-degree industrial arts teachers for the school years 1974-75 and 1975-76. Each was hired in 1974-75 at \$8,900,

equivalent to step 0 of the Board's 1974-75 bachelor's degree salary guide, and at \$9,600, equivalent to step 1 of the Board's 1975-76 bachelor's degree salary guide.

The Board contends that it would not have placed these non-degree teachers on the bachelor's degree scale if they had not each agreed to obtain a bachelor's degree as a condition precedent to their being employed. (Stipulation of Facts, at p. 5)

It is the further contention of the Board that there is a shortage of industrial arts teachers and that it had no choice other than to pay them more than required by step 0 or step 1 of the non-degree salary guide. (Stipulation of Facts, at p. 5)

The Commissioner notices that the statute *N.J.S.A. 18A:29-4.2* is precise in the mandate it imposes for the payment of salary to nurses who hold standard school nurse certificates. It provides that:

"Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

Thus, nurses may not be treated differently from other teaching staff members with similar preparation in placement on salary schedules. (See *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County*, 1972 *S.L.D.* 577.)

The Commissioner is fully cognizant of the problems faced by boards of education in competing with business and industry for the services of competent, skilled technicians to be employed as teachers of vocational courses. He addressed this directly in *Betty Ascough et al. v. Board of Education of the Toms River Regional School District, Ocean County*, 1975 *S.L.D.* 389 when he said:

\*\*\*\*The Commissioner recognizes the difficulty local boards of education encounter in their attempts to secure highly-trained persons to teach specialized and technical subjects in vocational education departments. In many instances such persons possess the knowledge and ability to impart to pupils the specialized skills of auto mechanics, carpentry, sheet metal work, plumbing, and the like, but do not possess baccalaureate degrees. The quandary, therefore, facing local boards is in obtaining the services of highly-skilled persons for vocational education within the salary constraints of the relatively lower levels of compensation generally set forth in the 'non-degree' salary scales of boards' salary policies. The Commissioner recognizes that such a problem is not easy to resolve. Consequently, many local boards offer persons, trained to teach vocational education, salaries as set forth in bachelor's degree scales, or higher scales, to attract them into their employ.

“Obviously, the board’s dilemma is justifying the compensation of a teaching staff member, not possessing a degree, according to its degree scale, as in the case of a highly-experienced teacher with a two-year normal school certificate or a highly-trained vocational education teacher, *while at the same time compensating another teaching staff member likewise without a degree, such as a school nurse, according to its ‘non-degree’ guide.* In the Commissioner’s judgment, the dilemma is irreconcilable and requires, therefore, immediate correction.

\*\*\*

“Boards of education which choose to compensate teaching staff members without degrees according to the bachelor’s scale, or higher scale, of its salary policy *must* compensate all teaching staff members in the same manner.\*\*\*” (Emphasis supplied.) (at pp. 394-395)

The Commissioner believes it is important to point out that a school nurse, by statute, is considered a teaching staff member. *N.J.S.A.* 18A:1.1 provides, *inter alia*, that:

“\*\*\*‘Teaching staff member’ means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school \*\*\* and includes *a school nurse.*” (Emphasis supplied.)

The Board declares that one non-degree teacher has already attained a bachelor’s degree and the second non-degree teacher should receive a bachelor’s degree within the next few weeks. (Stipulation of Facts, at p. 5) If this does occur and no other non-degree teacher is on the degree salary guide for teachers, then salary discrimination between bachelor’s degree and non-degree teaching staff members will have ceased.

The Commissioner finds that discrimination in salary placement for petitioners did occur for the school years 1974-75 and 1975-76. Petitioners’ salaries were improperly established according to the lower rates in the Board’s non-degree salary guide. At least two other teaching staff members without a bachelor’s degree were compensated according to the Board’s bachelor’s degree salary guide for the school years 1974-75 and 1975-76.

Accordingly, the Board is directed to place petitioners at the highest step of the bachelor’s degree scale of the salary guide, which is their proper level and step on the guide. For the school year 1974-75 this was \$15,585 and for 1975-76 it was \$16,500. Similar levels for the nurses’ salary guide were \$11,000 in 1974-75 and \$11,860 in 1975-76.

The Board is further directed to forward each petitioner the amount of \$9,225, the sum of the differences between the last step of the nurses’ guide and the last step of the bachelor’s degree scale of the teacher guide, for the two school years in question.

In the instant matter, petitioners do not possess baccalaureate degrees and, accordingly, are not, by virtue of their training, entitled to further advancement on the baccalaureate scale if the maximum of this scale is increased. The Board may, of course, renegotiate a salary guide for nurses at any time, but given the circumstances described above, petitioners' salaries may not be diminished except pursuant to the tenure law. *N.J.S.A. 18A:28-5 et seq.*

COMMISSIONER OF EDUCATION

November 22, 1976

**Elisabeth K. Morer,**

*Petitioner,*

v.

**Board of Education of the Township of Teaneck, Bergen County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

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

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

Petitioner, a teaching staff member with a tenure status in the employ of the Board of Education of the Township of Teaneck, Bergen County, hereinafter "Board," challenges the action of the Board by which her teaching position was abolished and her employment terminated. Petitioner asserts that her seniority of employment demands that she be reinstated and that she be afforded all compensation and benefits improperly withheld from her. The Board denies the allegations and asserts that its actions with respect to the abolishment of petitioner's teaching position and its subsequent termination of her employment are in all respects proper and legally correct. The Board has moved for Summary Judgment in its favor. The Motion is opposed by petitioner.

The matter is referred directly to the Commissioner of Education for adjudication on the total record, which includes the pleadings, Briefs, affidavit and exhibits.

Petitioner was first employed by the Board for the 1967-68 academic school year and assigned to teach general business at the secondary level. At the time of her initial employment she was in possession of a teaching certificate

issued by the New Jersey State Board of Examiners entitled "Secondary School Teacher of General Business." (C-1) It is agreed by the parties that between the school year 1967-68 and the completion of the school year 1974-75, petitioner's teaching assignments were that of a teacher of general business education at the secondary level. (Amended Petition of Appeal, at p. 1; Board's Brief, at p. 1; Petitioner's Brief, at p. 1) The Commissioner observes that petitioner was one of ten teaching staff members employed by the Board and assigned as business education teachers.

On April 9, 1975, the Board determined to abolish two of the ten teaching positions in the field of general business education. It is clear that one of the two positions abolished was held by a first year teacher and the other by petitioner. The Board argues that because petitioner had less seniority than eight of the other general business education teachers, she and the first year teacher were selected to be terminated as a result of the reduction in force.

Subsequent to the Board's action on April 9, 1975, petitioner was notified by letter dated April 10, 1975 from the Superintendent of Schools that the Board:

\*\*\*wishes to inform you that you will not be offered a contract for the school year 1975-76 because of the elimination of your position."(C-4)

The Commissioner observes from his own official records that petitioner, by letter dated April 18, 1975 (C-5), inquired of the Department of Education's Bureau of Teacher Education and Academic Credentials whether she could receive a copy of her English certificate which was purportedly issued during 1966. Petitioner was informed by letter from the State Board of Examiners dated April 24, 1975 (C-6), that the only certificate issued to her was the one which entitled her to teach general business studies. Petitioner was further advised that no record existed of the Department granting her a certificate to teach English.

The Commissioner is aware of the difficulty petitioner may have experienced in 1966 in her attempt to secure an English certificate. She explained the difficulty in a letter dated May 25, 1975 (C-7) to the Bergen County Superintendent of Schools. The fact remains that during her time of employment by the Board the only certificate she possessed was one to teach general business education.

Petitioner apparently applied thereafter for certification to teach English and on June 16, 1975, she was advised by the State Board of Examiners that she would be eligible for a one year temporary certificate pending receipt of official documents from her former college and employer. The notation at the bottom of the letter states in pertinent part:

\*\*\*If you wish to *apply for this certificate* [temporary] *at this time*, please do so through the office of your county superintendent of schools."  
(*Emphasis supplied.*) (C-8)

The Commissioner notices that a temporary certificate is defined in *N.J.A.C. 6:11-4.2*, as a one-year certificate issued to those persons who come from other states with which New Jersey has no reciprocal agreement with respect to teacher certification requirements. Furthermore, the Commissioner notices that for renewal of a temporary certificate the holder must complete a prescribed number of college credits during the school year for which the certificate was issued.

In the instant matter, petitioner was advised by the State Board of Examiners by letter dated August 6, 1975 (C-9), that in order for the temporary English certificate issued to her in July 1975 (C-1) to be made a regular certificate, she would be required to take eleven additional semester hour credits in English. Finally, the Commissioner notices that petitioner was issued a regular certificate to teach English in July 1976. (C-2)

Petitioner complains that at the time her position was abolished by the Board on April 9, 1975, and her employment terminated at the end of the 1974-75 school year, she was eligible for temporary certification as a teacher of English. Petitioner maintains therefore that on the basis of seniority she should have been offered one of the six positions held by English teachers new to the system or by nontenure teachers reemployed at the commencement of the 1975-76 school year. She cites *N.J.S.A. 18A:28-10* and *N.J.A.C. 6:3-1.10 et seq.* in support of this contention.

The Board moves for Summary Judgment in its favor by virtue of the fact that at no time during petitioner's employment did she ever possess certification other than that of a general business education teacher. Thus, the Board reasons that petitioner cannot now claim any teaching position in English because of seniority. Furthermore, the Board asserts that the certification petitioner possessed at the commencement of the 1975-76 school year was temporary and at that time she did not qualify for a regular certificate as did the other teachers employed to teach English at the beginning of the 1975-76 school year.

The Board demands that, under the circumstances herein, Summary Judgment be granted in its favor. The Board asserts that the Commissioner must not substitute his judgment for that of the Board with respect to those whom it employs as teachers, particularly when there has been no proof that its actions were arbitrary, capricious or unreasonable. The Board cites prior decisions of the Commissioner in support of this position: *Louis and Helene Chiriaco et al. v. Board of Education of Borough of Hawthorne et al., Passaic County*, 1974 *S.L.D.* 551; *Barbara Gertner v. Board of Education of Borough of Elmwood Park, Bergen County*, 1974 *S.L.D.* 611; *Donald P. Sweeney v. Henry Komorowski*, 1974 *S.L.D.* 740; *Leslie M. Shenkler v. Board of Education of Borough of Ho-Ho-Kus, Bergen County*, 1974 *S.L.D.* 772, *aff'd* State Board of Education, 1975 *S.L.D.* 1157; *"W.G." v. Board of Education of Township of Ocean, Monmouth County*, 1974 *S.L.D.* 780; *Mrs. John Engle et al. v. Board of Education of Township of Cranford, Union County*, 1974 *S.L.D.* 785, *aff'd* State Board of Education, 1975 *S.L.D.* 1085; *James P. Beggans, Jr. et al. v. Board of Education of Town of West Orange, Essex County*, 1974 *S.L.D.* 829, *aff'd* State Board of Education, 1975 *S.L.D.* 1071, *aff'd* Docket No. A-1928-74

New Jersey Superior Court, Appellate Division, November 6, 1975; *Leroy Lynch et al. v. Board of Education of Essex County Vocational School District, Essex County*, 1974 S.L.D. 1308, aff'd State Board of Education, 1975 S.L.D. 1098; *John J. Kane v. Board of Education of City of Hoboken, Hudson County*, 1975 S.L.D. 12; *Sally Klig v. Board of Education of Palisades Park, Bergen County*, 1975 S.L.D. 547; *Robert Longo v. Board of Education of City of Absecon, Atlantic County*, 1975 S.L.D. 336; *Alfred Zitani v. Board of Education of Township of Willingboro, Burlington County*, 1975 S.L.D. 439; *Phebe Baker v. Board of Education of Lenape Regional High School District et al., Burlington County*, 1975 S.L.D. 471.

Petitioner argues that the statutory provisions of *N.J.S.A. 18A:28-1 et seq.* clearly set forth that the tenure rights of teachers should be preserved and demand liberal support and interpretation, particularly in instances where a reduction in force is effected by boards of education. In this regard petitioner cites the following decisions rendered by the courts in support of her contention: *Viemeister v. Board of Education of Prospect Park*, 5 *N.J. Super.* 215, 218 (*App. Div.* 1949); *Downs v. Board of Education of Hoboken*, 13 *N.J. Misc.* 853 (*Sup. Ct.* 1935); *Seidel v. Board of Education of Ventnor City*, 110 *N.J.L.* 31 (*Sup. Ct.* 1932); *Horan et al. v. Board of Education of the Town of Kearny*, 1938 S.L.D. 532 (1933), aff'd State Board of Education 535, aff'd as *Board of Education of Kearny v. Horan*, 11 *N.J. Misc.* 751 (*Sup. Ct.* 1933).

Petitioner avers that she has acquired a tenure status as a teaching staff member in the employ of the Board and that when the Board abolished her position as general business education teacher effective at the end of the 1974-75 school year, she held equal entitlement to a position as English teacher by virtue of her temporary English certification and seniority over all other non-tenure teaching staff members employed or retained by the Board for the 1975-76 school year.

In support of this avowal petitioner relies on *Seidel, supra*, where the language of the Court is quoted in pertinent part as follows:

“\*\*\*the protection afforded by the statute [*N.J.S.A. 18A:28-5 et seq.*] would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom, and retaining the non-exempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by statute.\*\*\*” (110 *N.J.L.* at 33)

Petitioner maintains in her Brief, at p. 9, that the only applicable category in which her seniority may be determined under State Board regulations, adopted pursuant to *N.J.S.A. 18A:28-10*, is set forth at *N.J.A.C. 6:3-1.10(k)* (27) which reads as follows:

“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 been or shall be required by the State Board of Education. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate\*\*\*.”

It is this definition, petitioner asserts, that lends credibility to her claim that her tenure and seniority are not in the first instance limited to the specific endorsements on her teaching certificates nor to the position she held at the time the Board effected a reduction in force.

Finally, petitioner maintains that the fact that she was not in actual possession of a certificate to teach English prior to August 6, 1975 in no way abrogates her rights to employment. She further maintains she had been eligible for a teaching certificate since the date of her initial employment and cites *Harold Reinish v. Board of Education of the Borough of Cliffside Park, Bergen County*, 1965 *S.L.D.* 50, aff'd State Board of Education 1966 *S.L.D.* 252, aff'd New Jersey Superior Court, Appellate Division, 253.

The Commissioner observes at this juncture that it was stated in *Reinish, supra*:

“\*\*\*Nor is there any merit in the argument that even though petitioner [Reinish] may have been eligible for the issuance of a certificate to teach Social Studies, none was issued to him. \*\*\* The fact that he was qualified for such certificate is enough.\*\*\*” (at p. 54)

The Commissioner notices that Reinish was employed by the Cliffside Park Board of Education as a guidance counselor for six years. The Board determined to abolish that position and terminated his employment. Reinish made claim to tenure as a teaching staff member by virtue of his eligibility for a certificate as a social studies teacher. The Commissioner agreed with Reinish and found that he had acquired tenure as a teaching staff member and was eligible for assignment within the scope of the certificate he possessed, or was eligible to possess, at the time he was initially employed by the Cliffside Park Board of Education.

The Board, in the matter herein, rejects petitioner's claim to a tenure status and seniority protection in any subject field other than that which she held as a teacher of general business education when she was first employed in its school system. In this regard the Board avers that it correctly adhered to the provisions of *N.J.S.A.* 18A:28-10 and *N.J.A.C.* 6:3-1.10 when it determined that it was necessary to terminate petitioner's employment due to a reduction in force.

The Commissioner observes that his ruling with respect to the tenure status and employment rights of petitioners in *Horan, supra*, was grounded in pertinent part on his interpretation of the New Jersey Supreme Court's determination in *Seidel, supra*. In *Horan* the Commissioner said:

“\*\*\*[T]he Supreme Court in the case of *Seidel vs. Ventnor City Board of Education*, decided January, 1933, ruled that *a tenure teacher is protected in her employment in a school district even if her position is abolished if at the time there is a vacancy, or a position filled by a non-tenure teacher in the type of work for which she was originally employed or to which she was subsequently transferred.*\*\*\*”

(*Emphasis supplied.*) (1938 *S.L.D.*, at pp. 534-35)

In affirming the decision of the Commissioner and that of the State Board of Education in *Horan, supra*, the New Jersey Supreme Court commented as follows:

“\*\*\*The opinion rendered by this court in *Seidel v. Board of Education of Ventnor City*, 110 *N.J.L.* 31; 164 *Atl. Rep.* 901, seems dispositive of the question. It was there held, as summarized in the syllabus, that a teacher in a public school, employed by general contract as such, who, by service for three years or more, has come under the protection of the [tenure] statute providing for an indefinite period thereafter may not be dismissed for reasons of economy while other teachers not so protected, *whose assignments such teacher is competent to fill, are retained under employment.*\*\*\*”

(*Emphasis supplied.*) (11 *N.J. Misc.* at 753)

The Commissioner has reviewed the facts and the arguments of the parties in the instant matter. It is clear that petitioner is a teaching staff member pursuant to the provisions of *N.J.S.A.* 18A:1-1 who has acquired a tenure status with the Board pursuant to *N.J.S.A.* 18A:28-5. Petitioner's seniority rights are preserved within the category of “secondary” as it appears in *N.J.A.C.* 6:3-1.10 (k)(27). What remains to be settled with respect to petitioner's seniority status is whether or not her seniority extends to other subject fields within the “secondary” category. In this regard, the Commissioner finds that petitioner's claim to seniority protection within the above category must be determined in accordance with the subject field endorsed on her certificate at the time of her initial employment with the Board. This endorsement specifically indicates that petitioner possessed a certificate to teach general business education (C-1) when she was first employed. Consequently, petitioner can only claim a tenure status and seniority protection within the scope of the subject field endorsed on her teaching certificate at that time.

The Commissioner finds that the arguments advanced by petitioner are insufficient to support her position that her case is analogous to *Seidel, supra*, *Horan, supra*, or *Reinish, supra*, by virtue of the following facts:

1. In *Seidel* and *Horan*, petitioners could claim at the time their positions were abolished that they were certified to fill a position of “\*\*\*a nontenure

teacher in the type of work for which [they were] originally employed or to which [they were] subsequently transferred.\*\*\*" (1938 *S.L.D.*, at pp. 534-35) Petitioner, in the instant matter, was certified only as a "Secondary Teacher of Business Education" (C-1) at the time she was first employed by the Board.

2. In *Reinish*, it was determined that petitioner's tenure and seniority rights were protected as a teacher by virtue of the fact that he was fully qualified and eligible for a "\*\*\*Limited Secondary Teacher's Certificate to teach Social Studies in grades 7 to 12\*\*\*" at the time of his original employment by the Board. (1965 *S.L.D.*, at p. 51)

In the instant matter the Commissioner finds and determines that petitioner did not possess a certificate to teach English at the time she was employed by the Board. In this regard, the Commissioner relies on the letter of April 24, 1975, sent to petitioner by the State Board of Examiners which states in part:

\*\*\*I regret to inform you that we have no record of [your] certification in English.\*\*\*" (C-6)

Additionally, the letter of June 16, 1975 from the State Board of Examiners to petitioner states in the notation at the bottom:

\*\*\*The receipt of the original letters completes your eligibility for the one-year *temporary certificate to teach English*. If you wish to apply for this certificate at this time, please do so through the office of your county superintendent of schools." (Emphasis supplied.) (C-8)

The Commissioner also notices that petitioner was informed in this above-referenced letter that:

\*\*\*For the *regular certificate to teach English* you would need to have a total of twenty-four semester-hour credits in English \*\*\* for *standard certification to teach English*.\*\*\*" (Emphasis supplied.) (C-8)

The Commissioner finds and determines that the issuance of petitioner's temporary certificate to teach English by the State Board of Examiners in July 1975 (C-1) does not extend her seniority rights within the category of "secondary" as set forth in *N.J.A.C. 6:3-1.10(k)(27)* over those certified nontenure teachers who were employed or retained to teach English at the commencement of the 1975-76 academic school year.

In conclusion, the Commissioner finds and determines that petitioner's employment by the Board as a teacher of general business education was properly abolished on April 9, 1975, and that she has no claim to protection over other nontenure teachers who were certified to teach in other subject fields within the same seniority category. Petitioner's name is to remain on the preferred eligible list which protects her seniority as a teacher of business

education, in the event that the Board reestablishes an additional teaching position or positions in its business education department or such a position becomes vacant in the future.

Accordingly, the Board's Motion for Summary Judgment is granted and the Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

November 23, 1976

**Gladys B. Vanderbeck,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Hamburg, Sussex County,**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Busche, Clark & Leonard (R. Webb Leonard, Esq., of Counsel)

Petitioner, the Secretary of the Board of Education of the Borough of Hamburg, hereinafter "Board," avers she had a tenured status as a full-time employee of the Board and that such status was illegally and improperly altered in May 1975 when the Board resolved to reconstitute her position as one requiring only half-time employment. She requests the Commissioner of Education to declare the Board's actions null and void and to restore her to her former full-time position. The Board avers that its action controverted herein was legally correct and motivated by economic necessity. It further avers that the duties of Board Secretary do not justify the continuance of a full-time employee.

A hearing was conducted in this matter on January 8, 1976 at the office of the Sussex County Superintendent of Schools, Newton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner was first employed as Secretary of the Board in September 1971, and attained a tenured status in such position pursuant to law (*N.J.S.A. 18A:17-2*) in the fall of 1974. Her employment during all of that time was

classified as that of a full-time employee and it remained so classified during all of the 1974-75 academic year. On May 13, 1975, however, the Board approved two motions which caused the instant controversy. Such motions were:

“\*\*\*to abolish the full-time position of school board secretary for financial reasons\*\*\*”

and,

“\*\*\*to have the board secretary created as a half-time job for the Hamburg Board of Education for the school year 1975-76.\*\*\*” (PR-1)

(Note: At a later meeting of the Board a Board member moved a resolution to amend the minutes of May 13, 1975 to read “\*\*\*to have the position of the board secretary created as a half-time job\*\*\*” (PR-7) but the resolution, although seconded, was not submitted to a vote.)

Subsequently petitioner voiced her displeasure with the Board's action in a letter to the Board dated June 10, 1975, which said, *inter alia*, that she would:

“\*\*\*appreciate a conference with the proper board representatives on the evening of June 19, 1975 at which time my representative expects to be available.\*\*\*” (PR-4)

An exchange of correspondence followed and in a letter of July 25, 1975, the District's Administrative Principal told petitioner she was invited to select a date in late August to meet with a Board Committee, although a representative of her choosing could not “\*\*\*be associated with the New Jersey Education Association.” (PR-6) This position was a reiteration of a previously expressed view of counsel to the Board that petitioner was “\*\*\*not a group nor a member of a group eligible for collective bargaining under Title 34 of New Jersey Statutes.\*\*\*” (PR-8)

Thereafter, the Board issued a contract to petitioner on August 27, 1975 which contained specific details of the “half-time job.” The contract specifications are recited in pertinent part as follows:

- “1. \*\*\*Annual salary includes regular hours described in section number two (2) plus one (1) public Board meeting per month.
- “2. The time for the performance of the above-described duties shall be for a duration of 4 hours per day, 5 days per week and 52 weeks per year at the directions (sic) of the Administrative Principal. Overtime shall be performed at the direction of the Administrative Principal.
- “3. Compensation for the above-described duties shall be at the rate of \$4,200.00 per hour (year). Compensation for overtime performed beyond 40 hours per week shall be at one and one-half times the basic rate of compensation. (\$3.88 per hour).\*\*\*” (PR-3)

The contract (PR-3) for the specified half-day position included benefits for vacation and sick leave and contained the reference "See attached Job Description." (at para. no. 1 (1.1)) This referenced job description is, according to petitioner, identical to the one which set forth her duties as full-time Board Secretary and is, in essence, a compendium of duties required by the statutes to be performed by holders of the office. *N.J.S.A. 18A:17-5 et seq.* (Tr. 5)

The issues are framed in such facts and are recited below as they were formulated at the conference of counsel held on December 1, 1975:

1. Did the Board in this instance reduce petitioner's employment for just cause or was such reduction an arbitrary exercise of discretion which was not in good faith?

2. May a board employ a half-time board secretary in the context of the statutes or does such statute contemplate the employment of a full-time secretary without exception?

3. Does a person who has acquired tenure as a full-time board secretary in the context of the statute *N.J.S.A. 18A:17-2* lose such tenure if the position is reduced in its requirements to something other than a full-time position?

4. Was petitioner entitled to be a member of the bargaining unit and was there a violation of the agreement between the Board and the Teachers Association with respect to a change in the terms and conditions of petitioner's employment?

5. Was the Board's action to establish petitioner's employment as that of a half-time employee procedurally correct?

6. Was petitioner's salary illegally reduced in this instance?

It is noted here that all issues except the first are primarily legal issues which require an examination of applicable law. The first issue requires a factual finding grounded in testimony and/or other evidence. Such testimony and/or other evidence with respect to this first issue were developed at the hearing.

Petitioner testified that she was not able to accomplish all the work required of her in the half-time employment (Tr. 31), but that she had been authorized by the supervisory principal to work "additional time" with extra compensation. (Tr. 34) She testified that, additionally, some of the duties previously performed by her had been performed in the 1975-76 academic year by clerical personnel of the school. (Tr. 36) She recited these duties as:

\*\*\*List of bills for a Board meeting, typing from my rough notes, agenda for the Board meeting, typing from my drafts, the minutes for the official minute book, typing a report on the cash flow for the month, typing the report revenue sheets for the month.\*\*\* (Tr. 36)

Petitioner testified that other of her usual duties which it was not possible to accomplish had been performed by school auditors at an additional cost of \$895. (P-1; Tr. 33) She testified that it was a “conclusion on [her] part” from an examination of the total situation that the Board “wanted me out.” (Tr. 51) She indicated that this conclusion was principally grounded in the fact that the Board had reduced her compensation “so severely.” (Tr. 51) Petitioner also testified that two other positions, those of a librarian and physical education teacher, had been reduced from full to half-time employment in the 1975-76 academic year but that a part-time art teacher position had been created. (Tr. 53) She testified that the school district enrolls approximately 325 pupils in one school and employs approximately thirty-eight persons in all categories. (Tr. 53-54)

The Board President testified that the Board had been forced to reduce expenditures in the 1975-76 budget and that it reduced specific line item appropriations for the two teachers as referenced, *ante*, for class field trips, for telephone service and for the Board’s own expenses. (Tr. 58) She testified that all reductions were for economic reasons and that a reduction in petitioner’s position “may have been more difficult for ourselves” but was effected anyway because “\*\*\*it wouldn’t directly involve the children.” (Tr. 58)

The chairman of the Board’s personnel committee also testified that the change in petitioner’s status was for “economic reasons” and that there were no other reasons. (Tr. 44) He further testified that he had suggested a cooperative effort be made to adapt petitioner’s hours of employment so that they would be amenable to her. (Tr. 78) He testified that it was not his understanding that petitioner was a member of the unit which negotiated with the Board on terms and conditions of employment. (PR-11; Tr. 84)

The Administrative Principal testified that he “\*\*\*had no reason to think [the position of Board Secretary] must be a full time job.\*\*\*” (Tr. 88) He further testified he believed there was flexibility in the assignments of clerical personnel to allow for an assumption of petitioner’s duties. (Tr. 89-90)

Petitioner asserts that such testimony and the total record is evidence that the Board’s controverted action was one which was not in good faith and was, in fact, an action which was taken to force her to resign. The Board denies such assertion and stipulates, instead, that it recognizes petitioner’s tenure – even in the present half-time employment. (Tr. 24) The Board further avers that its actions were taken in good faith.

The hearing examiner concurs with this latter avowal. The reduction of budget line items was not applied to petitioner’s position alone but to a number of other expenditures. Petitioner was apprised well in advance of the May 13, 1975 meeting that there was a contemplated change in the nature of her employment (Tr. 45), and in fact the advertised budget of the Board for the 1975-76 school year reflected such change. Witnesses for the Board testified in a convincing manner that the motivation for their action was economic necessity and, in fact, economies were achieved.

Accordingly, the hearing examiner finds that the Board's action to reduce petitioner's employment was for causes which the Board believed to be reasonable and that the action was taken in good faith. There remains the question of its legality.

Petitioner's principal arguments herein may be succinctly summarized as follows:

1. The Board's action was procedurally defective in that it lacked a vote on the motion of June 11, 1975 to correct the minutes of the May 13, 1975 meeting.

2. A local board of education may appoint a part-time or full-time secretary but if it chooses the latter option and the secretary acquires tenure pursuant to law (*N.J.S.A. 18A:17-2*), the position in which the tenure has been accrued may not be abolished. (See Tr. 16, 72.)

3. The salary of tenured employees may not be reduced except in the manner outlined in the statutes. (Tr. 20)

The Board maintains there is no procedural defect in an attempt to correct a grammatical error (PR-7) and that its notice to petitioner was ample in the circumstances known to her. The Board further argues that the Legislature did not intend by its acts to bar the possibility of position change for board secretaries who had acquired tenure in full-time positions and that an argument to the contrary could mean that a full-time board secretary would have to be employed "\*\*\*even though there is no school.\*\*\*" (Tr. 25)

The statutes of relevance to Board action herein are both specific and general in nature and they are reproduced in their entirety as follows:

*N.J.S.A. 18A:11-1:*

"The board shall -

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes\*\*\*, and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

*N.J.S.A. 18A:17-5:*

“Each secretary shall be appointed by the board, by a recorded roll call majority vote of its full membership, for a term to expire not later than June 30 of the calendar year next succeeding that in which the board shall have been organized, but he shall continue to serve after the expiration of his term until his successor is appointed and qualified. The secretary may be appointed from among the members of the board and, subject to the provisions of this Title and any other law, the board shall fix his compensation; provided, however, that the Secretary shall not receive compensation from the board for any period during which he is an elected or appointed member of the board.

“In case of a vacancy in the office of secretary, the vacancy shall be filled by the board within 60 days after the vacancy occurs and if the board does not make such appointment within such time the county superintendent shall appoint a secretary who shall receive the same compensation as his predecessor in office received and shall serve until a secretary is appointed by the board.

*N.J.S.A. 18A:17-2*

“a. Any secretary, assistant secretary, school business administrator or business manager of a board of education of any school district who has or shall have devoted his full time to the duties of his office and has or shall have served therein for three consecutive calendar years, and

“b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after

“1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or

“2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and

“c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary,

shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title [18A:6-9 *et seq.*]"

Thus, it is clear that a local board of education is required to have a board secretary and that each person appointed to such position may, if employed "full-time," acquire tenure in the position. It is also clear that once tenure has been acquired the employee who holds it may not be reduced in compensation. Thus, on its face, it would appear that the Board's controverted action herein to alter the nature of petitioner's employment and to reduce her salary was illegal.

Such view must be tempered, however, by the broad general powers granted to local boards of education to govern and manage their schools (*N.J.S.A.* 18A:11-1) and by the general principle, particularly applicable to "teaching staff members," that "reasons of economy" are sufficient reasons for the abolishment of positions. *N.J.S.A.* 18A:28-9 It can hardly be held that such reasons are valid for the reduction of certificated personnel directly involved with pupils in the educational program but are not valid for those other personnel, in whatever capacity, who support teaching staff members in their work.

The hearing examiner concludes to the contrary. Such positions may also be abolished under the general powers authorization of the statute *N.J.S.A.* 18A:11-1. If in fact such abolishment is in good faith, and the finding, *ante*, is that it was in this instance, an appointment which recognizes tenure entitlement but also reduces compensation is not an anomaly. As the Commissioner said in *Michael J. Keane v. Flemington - Raritan Regional Board of Education*, 1970 *S.L.D.* 176:

\*\*\*an employee's compensation is at the rate of his present assignment and no claim can be made to be continued at the higher rate of a position formerly held when lawfully reassigned to a lesser paid job. *N.J.S.A.* 18A:28-6; *Deily v. Jersey City Board of Education*, 1950-51 *S.L.D.* 44\*\*\*" (at pp. 178-179)

Accordingly, the hearing examiner finds no impropriety or illegality in the substantive changes the Board made in petitioner's position of employment and a finding that a procedural defect or grammatical error should abort the Board's clear intent (PR-1) would be an elevation of form over substance. He recommends, therefore, that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the four objections thereto filed by petitioner. Petitioner objects to the finding that the full-time position of Board Secretary was properly abolished by the

resolutions PR-1 and PR-7. She also asserts again that a full-time position of Board Secretary may not be abolished and further avers that no mention was made in the report of her argument with respect to untimely and inadequate notice of such abolishment. Finally petitioner maintains the report makes no mention of her contention that any reduction in workload or compensation is subject to negotiation as a term and condition of employment and that such reduction may not be imposed unilaterally.

The Commissioner does not agree with such exceptions and concurs in all respects with the report of the hearing examiner. The facts of the matter are clear and basically uncomplicated. Petitioner held a tenured entitlement to the statutorily mandated position of Board Secretary and performed the duties of the position as a full-time employee of the Board during all of the 1974-75 academic year. On May 13, 1975, the Board purportedly abolished the full-time position, and "created" a "half-time job" in its place. (PR-1)

Petitioner clearly knew long before that date, however, of the Board's plans to effect economy (Tr. 45) and the Board's resolution of May 13, 1975 (PR-1), was simply the formalization of a decision which was made at the time the Board's budget was completed in January 1975. Such resolution was not precise but may not be substantively faulted by that fact. As the Commissioner said when faced with a similar resolution for review in *Edward A. Nelson v. Board of Education of the City of Bayonne*, 1938 S.L.D. 91 (1932), aff'd State Board of Education 93:

\*\*\*The intention of the Board of Education in its resolution appears to be very clear. It was to abolish the office, position or employment held by the assistant secretary. To hold that public bodies cannot effect a purpose because of a fine legal distinction in the use of a word, would be contrary to the general ruling of our civil courts.\*\*\* (at p. 92)

The holding herein is the same.

We are not concerned here with the true abolishment of a position but with an alteration of it in the context of a very small school district's changing need. Petitioner's entitlement to tenured protection is no less a protection now than before. Petitioner is still "regularly employed," and while the statute N.J.S.A. 18A:17-2 limits the acquisition of tenure by a board secretary to those who are employed "full time," it can hardly be held that an alteration of the time requirement of the position removes the entitlement when it is once acquired. (See *Josephine DeSimone v. Board of Education of the Borough of Fairview, Bergen County*, 1966 S.L.D. 43.) Indeed, the rationale for a contrary holding was set forth by the Court in a case concerned with a teacher's entitlement to tenure protection. *Seidel v. Board of Education of Ventnor City*, 110 N.J.L. 31 (Sup. Ct. 1932)

The Court held therein that:

“\*\*\*Granting that apart from the statute, a school board may in the interest of economy reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom, and retaining the non-exempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statute.\*\*\*” (at p. 33)

While petitioner is not a teaching staff member according to the definition of *N.J.S.A.* 18A:1-1, her competence to fill the position to which she holds tenure was adjudged adequate by the Board at the time when the precise conditions for a tenure accrual had been met. The parallel to *Seidel, supra*, is clear.

Finally, the Commissioner finds no merit in a contention that petitioner is entitled to the early notice of job expectancy afforded nontenure teachers by *N.J.S.A.* 18A:27-10 since as noted, *ante*, she is not a tenured teaching staff member and the law cannot be construed to apply to the facts herein. Neither can the Commissioner find merit in an argument that the Board was powerless to act unilaterally in this matter. Its controverted decision was one it made within the parameters of its general authority for the government and management of the schools of the district and for the conduct of its own affairs. *N.J.S.A.* 18A:11-1

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 2, 1976

**In the Matter of the Tenure Hearing of Edward Jeffers,  
School District of the Borough of Keansburg, Monmouth County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board, Healy & Falk (Patrick D. Healy, Esq., of Counsel)

The Keansburg Board of Education, hereinafter "Board," at a meeting held on March 4, 1976, unanimously voted charges against a tenured employee, Edward Jeffers. These charges of intoxication and improper use of sick leave, amongst others, were subsequently certified to the Commissioner of Education on March 30, 1976.

By certified letter of May 6, 1976, a hearing examiner on behalf of the Commissioner informed Edward Jeffers of the charges and set down a period of ten days in which to file an Answer. None was filed.

Edward Jeffers was contacted by a hearing examiner on August 10, 1976, and advised to file an Answer himself or procure the services of an attorney to act on his behalf.

This telephone call was followed by another certified letter to Edward Jeffers on September 8, 1976, repeating the information given him during the August 10, 1976 telephone conversation and establishing another period in which to file an Answer, this period ending on September 20, 1976.

Receiving no response respondent was again contacted by telephone on September 22, 1976, and again on October 25, 1976, and in each case he was urged to file an Answer. To this date no response has been made by Edward Jeffers.

The Commissioner is fully aware of the tenets of fair play and due process and opines that every justifiable effort has been exercised to acquaint Edward Jeffers with his rights and accord him an opportunity to respond to the charges certified against him. He has been repeatedly contacted, subsequent to his suspension, by certified mail and personally by telephone. He has failed to respond to the charges certified against him even after such repetitive admonitions.

The Commissioner finds and determines that these unrefuted charges are sufficient to warrant his dismissal from his employment with the Keansburg Board of Education as of the date of his suspension. The Commissioner so orders and additionally instructs the Board to assist Edward Jeffers in the determination of retirement benefits, if any, for which he may be eligible.

**COMMISSIONER OF EDUCATION**

December 8, 1976

Jean Warren,

*Petitioner,*

*v.*

Board of Education of the Borough of Brooklawn, Camden County,

*Respondent.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioner, Feingold & Jehl (John P. Jehl, Esq., of Counsel)

For the Respondent, William D. Dilks, Esq.

Petitioner is a teacher with a tenure status who appeals the action of the Board of Education of the Borough of Brooklawn, hereinafter "Board," in which her salary was withheld for five and one-half days and her salary increment was withheld for the 1975-76 academic year.

A hearing in this matter was conducted on March 10, 1976 in the office of the Camden County Superintendent of Schools, Pennsauken, before a hearing examiner appointed by the Commissioner of Education. Introduced in evidence is a transcript of the testimony of Charles Lewis Starr Brennan, Sr., M.D., petitioner's father, and a single medical report. Briefs were filed after the hearing. The report of the hearing examiner follows:

The litigants stipulate that petitioner is a tenured teacher with eight years of service and that she had accumulated twenty three and one-half days' sick leave as of June 30, 1975. It is further stipulated that the Board did not subtract sick leave days from this accumulated leave for petitioner's absences on June 6, 9, 10, 11, 12, and 13, 1975, the last days school was in session. (Conference Agreements)

On or about Tuesday or Wednesday, June 3 or 4, 1975, petitioner asked permission of the administrative principal of the school in which she taught to take three days' personal leave on Wednesday, Thursday and Friday, June 11, 12, and 13, 1975, the last three days of school for teachers and pupils for that school year. The purpose of the request was a desire to accompany her husband on a business trip to Colorado. (Tr. 12, 38) The principal testified that he replied, "I don't see why the Board should not approve the three days." (Tr. 39) Petitioner assured the principal that she would take care of her year-end classroom duties, have the room well-ordered, and have everything ready for a substitute to take her place if necessary. She also asked if it would be possible to receive her final pay check before her trip. The principal made the inquiry about the check and on Thursday evening of the same week, June 5, the principal discussed petitioner's request with the Board. (Tr. 39-40) After some deliberation, the principal testified that the Board became concerned that it might be establishing an unwise precedent by permitting petitioner to leave her position

for the last three days of school and then advised him that he should not grant the requested three days' personal leave. (Tr. 40-41)

On Friday morning, June 6, as petitioner was reporting to school to sign in for her teaching assignment, the principal confronted her in the office and said, "I have bad news for you. The Board has turned down your request for a leave." (Tr. 41) He testified that petitioner walked over to the telephone in the office, placed a call (to her husband) and he heard her say, "I guess I will just have to use sick leave," or words to that effect. (Tr. 14, 42-43, 51) Petitioner said she felt ill and asked her husband to bring some medicine to the school. Petitioner took the medication, which she testified was sufficient to get her through the morning session. She further testified however, that when she went home for lunch, the events of the morning in conjunction with her previous medical problems and illness were so extremely upsetting that she was unable to return to school for the afternoon session. (Tr. 7-17) Petitioner was visited by a doctor, who is also her father and had been the physician for the Board for approximately forty years. He advised her to stay off her feet and not return to the classroom. She testified that he said, "It's just too upsetting and it's causing you more physical problems and it's compounding the whole situation." (Tr. 16-17, P-1, at p. 2) Petitioner testified that she went to bed immediately, as directed, and stayed there until Sunday morning. She continued to rest as directed and stayed at home, for the most part for two more days, until Tuesday evening, June 10, when she and her husband and their two children left with their station wagon and camper for the previously planned trip to Colorado. (Tr. 18-19, 22-24) Petitioner testified that she did not drive during the trip and that she could rest, and even lie down if necessary in the back of the station wagon or the camper. (Tr. 19-24) She testified also that she would not have been able to work on Wednesday, Thursday, and Friday, the last three days of school. (Tr. 24)

The Board determined that petitioner deliberately defied its decision to deny the requested personal leave and that she had taken the unauthorized leave, as she had previously planned, irrespective of its decision. The Board avers that her actions constitute insubordination and a misuse of sick leave. (Board's Brief, at pp. 1-2) Therefore, the Board withheld petitioner's salary for the last five and one-half days of school, and withheld her salary increment (\$300) for the 1975-76 academic year.

The issues in this matter were framed at a conference between counsel and the hearing examiner as follows:

- A. Was petitioner in fact sick on any of the days in question?
- B. If not, does the Board have the authority to withhold her pay for those days it determines that she was not, in fact, sick?
- C. Did the Board have a reasonable basis for its conclusion in withholding the increment?

The hearing examiner finds in the testimony and the evidence that petitioner has had a continued illness of a personal nature for at least the past several years prior to this controversy, and that she was under the semiannual care of a gynecologist and also under the care of a physician, her father. (P-1; P-2; Tr. 7-10) She testified that she was ill on the morning of June 6 when she reported to work and that the events of that morning intensified her illness. She testified as follows with respect to the call to her husband about the denial of her requested personal leave:

“\*\*‘I came in here this morning not feeling well,’ and I said that I came because I knew I was expected to get my classroom in order before I left for those last three days and I came in on that basis knowing I didn’t feel well and I said, ‘I don’t feel well at all,’ and I said, ‘What is going to happen is it’s going to cause me to become more ill,’ and I said, ‘I will end up being out the rest of the year on sick leave.’\*\*” (Tr. 14-15)

Petitioner’s testimony that she became ill and was unable to return to work on the afternoon of Friday, June 6, and that she remained in bed during the weekend was supported by her physician’s testimony (her father) that he examined her and directed her to stay off her feet. (P-1) There is no evidence that she was not sick as she testified, from noon Friday, June 6, through Tuesday, June 10; however, petitioner’s health was evidently sufficiently improved by Tuesday evening so that she could begin the trip she and her husband had previously planned. (Tr. 18) The round trip to Colorado is approximately four thousand miles, and petitioner’s decision to attempt that trip had to be grounded on her determination that it would be less physically demanding on her than would her teaching assignment for the last three days of school. She predicted that she was going to be sick for the rest of the school year, and in fact testified that, “I suppose I’m going to be sick for the rest of the year and it will probably end up as sick days.” (Tr. 21)

The Board policy with respect to personal leave reads as follows:

“1. *PERSONAL Business Days*

“Each teacher may have up to two (2) days for *personal business*. *The business should be as such that cannot be transacted at a time other than during school hours*. A personal business day must be approved by the Administrative Principal in advance. Personal business days are not accumulative.

“a. Teachers will be granted three additional days at a deduction in salary equal to the cost of a substitute. Any time taken beyond three days will be a reduction of 1/200 of yearly salary for each day taken.”

*(Emphasis supplied.)* (C-1)

The Board states that petitioner had used her two days for personal business pursuant to this policy and sought to have the additional three days approved under provision (a) of the policy. The Board argues that the policy provides for personal business and that petitioner was trying only to obtain a longer summer vacation under the guise of a business trip.

The hearing examiner finds that the circumstances surrounding this entire dispute, which culminated in petitioner's illness and subsequent cross-country trip, coincide too precisely with petitioner's previously planned trip to make her story credible. At most, her testimony is acceptable in that she was ill on Friday afternoon, Monday and Tuesday, June 6, 9, and 10. However, it strains credibility to find that she was too ill to work on Wednesday, Thursday, and Friday, June 11, 12, and 13, at which time she was on the trip. Even if petitioner had felt better on any one of those days, she would not have been able to report to work because of her trip. Accordingly, the hearing examiner cannot accept her testimony which, in effect, predicted that she would be ill for the rest of the year. Illness is not usually predictable. The hearing examiner finds, therefore, that petitioner was in willful defiance of the Board's denial of her request for personal leave from June 11 through June 13. He further finds that she became ill on Friday, June 6 and that this illness as certified by her physician continued through Tuesday, June 10.

There remains the question of the penalty exacted by the Board for her unauthorized absence. In accordance with these findings, the hearing examiner recommends that the Commissioner direct the Board to compensate petitioner for her salary which was withheld for Friday afternoon, Monday and Tuesday, June 6, 9, and 10; but that the deductions from salary for her absence on Wednesday, Thursday and Friday, June 11, 12 and 13 be determined as appropriate.

The authority for withholding a teacher's increment is found in *N.J.S.A.* 18A:29-14 which reads as follows:

"Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

Accordingly, pursuant to statutory prescription, the findings, *ante*, and the Court decision in *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288 (*App. Div.* 1960), the hearing examiner determines that the Board had a reasonable basis in reaching its conclusion that it would withhold petitioner's salary increment in the amount of \$300.

Finally, the hearing examiner recommends that the Commissioner find that the Board has acted properly pursuant to its statutory authority and, with the exceptions as noted, he further recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto pursuant to *N.J.A.C. 6:24-1-17(b)*.

The Commissioner adopts the findings of fact, conclusions and recommendations of the hearing examiner as his own. The Commissioner determines that the Board acted properly and pursuant to statutory prescription in withholding petitioner's salary increment for the 1975-76 academic year. The Commissioner determines further that petitioner is entitled to salary for Friday afternoon, Monday and Tuesday, June 6, 9 and 10, on which dates the record shows that she was ill and at home. Petitioner is not entitled to salary for her absences on Wednesday, Thursday and Friday, June 11, 12 and 13, while enroute to Colorado.

With the exception of salary for petitioner for the two and one-half days as set forth above, the Petition of Appeal is otherwise dismissed.

COMMISSIONER OF EDUCATION

December 8, 1976

**Severin Palydowycz, Edward Buzinky, Doris Davidson,  
John Nick and Frank Polizzi,**

*Petitioners,*

v.

**Board of Education of the City of Clifton and  
Aaron Halpern, Principal, Passaic County,**

*Respondents.*

COMMISSIONER OF EDUCATION

**ORDER**

For the Petitioners, Saul R. Alexander, Esq.

For the Respondents, Sam Monchak, Esq.

Petitioners having opened this matter before the Commissioner of Education on October 21, 1976 by the filing of a Petition of Appeal and Demand for Restraint wherein it is alleged that Respondent Halpern, hereinafter "principal," exceeded and abused his authority wherein he required that petitioners respond to a questionnaire regarding their involvement in the

handling of pupil activity funds of the class of 1977; and it being further alleged that the questionnaires were accusatory in nature; and it being further alleged that inquiries conducted by the principal into the matter were semi-judicial or prosecutory in nature in disregard of petitioners' constitutional and due process guarantees that they are not compelled to offer evidence which could tend to incriminate themselves; and

Petitioners having sought relief from the Commissioner in the form of an order both delineating which questions in the aforementioned questionnaire require answers and restraining the principal from proceeding further with the aforementioned investigation until such determination is made; and

Respondents having filed a timely Answer and Counterclaim wherein it is alleged that the questions propounded in the aforementioned questionnaires are proper and consistent with an investigative process, which the Board is under duty to conduct pursuant to *N.J.S.A.* 18A:19-14 and that the procedure is in no way violative of petitioners' constitutional rights; and wherein it is further alleged that petitioners are under duty to cooperate fully with the investigation into possible misuse of pupil funds and that failure to do so is grounds for disciplinary action against petitioners; and wherein respondents seek in a counterclaim an order from the Commissioner directing petitioners to answer in writing the aforementioned questionnaires and cooperate in the investigation or in the alternative be subject to disciplinary proceeding and withholding of salary for insubordination and willful failure to carry out their prescribed duties; and

Respondents having submitted in support of their Notice of Motion a Memorandum of Law wherein is cited in support of the contention that petitioners must cooperate in the investigation *Laba v. Newark Board of Education*, 23 *N.J.* 364 (1975) and *Lowenstein v. Newark Board of Education*, 33 *N.J.* 277 (1960); and

Petitioners having also filed a Memorandum of Law in support of their contention that they are not required to answer those questions propounded by the principal in which Memorandum is cited *In the Matter of the Tenure Hearing of John Orr, School District of the Township of Wyckoff, Bergen County*, 1973 *S.L.D.* 40 and *In the Matter of the Tenure Hearing of Paul W. Jones, School District of the Borough of North Arlington, Bergen County*, 1971 *S.L.D.* 520; and

The Commissioner having carefully considered the pleadings, arguments of law and cases cited, and having similarly considered those further arguments advanced by counsel at an oral argument conducted by the Commissioner's representative on November 16, 1976 at the State Department of Education, Trenton; and

The Commissioner having carefully examined the questionnaires which are the focus of attention in the instant controversy; and

The Commissioner having determined that the Board and its agents are under obligation to investigate the possible mismanagement, handling and accounting of the pupil activity funds of the class of 1977 pursuant to *N.J.S.A.* 18A:19-14 and *N.J.A.C.* 6:20-2.3; and

The Commissioner having determined that petitioners, pursuant to *N.J.S.A.* 18A:19-14, are under similar obligation to cooperate with respondents in every reasonable way by providing such information as they have gained in performance of their assigned duties as class sponsors and administrative agents of the Board; and

The Commissioner having determined that the controverted questionnaires and their covering letters dated October 12 and 14, 1976, are neither permeated by accusatory, prosecutory, or harassing language as alleged by petitioners nor designed to incriminate those responding in honest fashion to the inquiries therein; and

The Commissioner having determined that it is essential that those questionnaires by answered by petitioners (*Laba, supra; Lowenstein, supra*); and

The Commissioner having determined that certain minor modifications, *post*, will aid both in restoring harmony to the required investigation and in clarification of such information as is sought in the investigation; and

The Commissioner having determined that the facts of the instant matter substantially differentiate it from *Jones, supra*, and *Orr, supra*; now therefore

IT IS ORDERED that the questionnaire of October 12 be modified by the Board by the deletion of the substantially non-productive questions nos. 19 and 20 and that the questionnaire dated October 14 be modified by deleting no. 3(e) and by rephrasing for clarification no. 4(d); and

IT IS FURTHER ORDERED that each petitioner within three days of receiving the questionnaires as modified by the Board, *ante*, shall answer to the best of his/her knowledge and recall each question thereon; and

IT IS FURTHER ORDERED that the remaining facets of respondents' Motion to Dismiss and Counterclaim, and petitioners' prayer for restraint be and are denied.

Entered this 8th day of December 1976.

COMMISSIONER OF EDUCATION

**Saul Hornik, Alan Eisenberg, Nathaniel Weil, Tomi Berney  
and George Berger,**

*Petitioners,*

*v.*

**Board of Education of the Township of Marlboro and Frank Defino,  
Acting Superintendent of Schools, Monmouth County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Petitioners, Saul Hornik, *Pro Se*

For the Respondents, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

This matter having been opened before the Commissioner of Education through the filing of a formal Petition of Appeal (Saul Hornik, *pro se*, Alan Eisenberg, *pro se*, Nathaniel Weil, *pro se*, Tomi Berney, *pro se*, and George Berger, *pro se*) which challenges the propriety of a pupil reassignment plan adopted for the 1976-77 school year by the Board of Education of the Township of Marlboro, Monmouth County, hereinafter "Board," (DeMaio and Yacker, Vincent C. DeMaio, Esq., appearing); and

It appearing that petitioners seek a restraint against the Board from implementing the controverted pupil redistricting plan pending an adjudication on the merits of the matter; and

Oral argument of the parties having been heard on August 17, 1976 at the State Department of Education, Trenton, by a representative of the Commissioner, the matter is referred directly to the Commissioner for determination.

The Commissioner notices that petitioners base their request for a restraint upon the allegation that the Board failed to publicly present demographic data it considered prior to its adoption of the controverted pupil redistricting plan. (C-2) Petitioners argue that this alleged failure stands in direct opposition to the statutory prescription set forth in *N.J.S.A. 18A:58-16*.

The Commissioner observes the referenced statute provides that in order for a school district to receive State aid it must comply with the rules and standards for the equalization of opportunity prescribed by law. Petitioners argue herein that because the Board failed to present unspecified demographic data to the public prior to its adoption of the controverted redistricting plan (C-2), a violation of *N.J.S.A. 18A:58-16* follows.

The Commissioner does not agree. The matter being considered herein is for the issuance of a restraint. The Commissioner is aware of the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint. In *United States v. Pavenick*, 197 F. Supp. 257, 259-60 (D.N.J. 1961) the Court cited *Communist Party of the United States of America v. McGrath*, 96 F. Supp. 47 (D.D.C. 1951) as follows at p. 48:

“\*\*\*Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.\*\*\*”

The Commissioner is constrained to state that the action taken by the Board is entitled to the presumption of correctness, and the Commissioner will not overturn its decision unless there is an affirmative showing that the decision was improper, unreasonable or arbitrary. *Thomas v. Board of Education of Morris Township*, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966)

In the instant matter, petitioner has failed to provide any convincing reason why the Board should be restrained pending a decision on the merits of the pleadings.

The Commissioner finds and determines that no sufficient grounds have been presented to support the application for a restraining order against the Board. Accordingly, petitioners' application for restraint is denied.

Finally, the Commissioner observes that petitioners, who moved the Motion herein *pro se*, have since retained legal counsel. Thereafter, petitioners moved to withdraw the instant Petition of Appeal, without prejudice, by letter dated November 2, 1976. The Board, by letter dated November 4, 1976, registers no objection to petitioners' request to withdraw. Accordingly, the matter is withdrawn, without prejudice, upon the request of petitioners.

COMMISSIONER OF EDUCATION

December 8, 1976

**George Cafarelli and the Long Beach Island Teachers Association,**  
*Petitioners,*

*v.*

**Long Beach Island Board of Education, Ocean County,**  
*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Starkey, Turnbach, White & Kelly (Edward J. Turnbach, Esq., of Counsel)

For the Respondent, James L. Wilson, Esq.

The Long Beach Island Teachers Association, hereinafter "Association," joins George Cafarelli, hereinafter "petitioner," in alleging that the Board of Education of Long Beach Island, hereinafter "Board," failed to compensate petitioner for graduate credits in law studies in accord with the terms of an arbitration award and the policy negotiated between the Board and the Association. The Board maintains that petitioner was fully compensated for all graduate credits to which he is entitled.

This matter is jointly submitted to the Commissioner of Education for Summary Judgment on a Stipulation of Facts and Briefs by the respective litigants. The facts are as follows:

Petitioner, a tenured elementary school teacher, requested that the Board compensate him in 1971-72 for ten graduate credits in law studies in the amount of \$250 under the terms of the salary guide which, in addition to scheduled salaries based on years of approved service, contained the following provisions:

“\*\*\*\$25.00 for each additional graduate credit up to 32 beyond Bachelor and beyond Masters.”  
(Exhibit A)

Petitioner's request was denied, whereupon he grieved the action and, upon denial of his grievance, sought to move the matter to advisory arbitration. Although the Board obtained a New Jersey Superior Court, Chancery Division, injunction restraining petitioner from seeking arbitration, the New Jersey Superior Court, Appellate Division, following the opinion in *Board of Education of Englewood v. Englewood Teachers Association*, 64 N.J. 1 (1973), reversed the lower Court's ruling and directed that the matter proceed to advisory arbitration in accordance with the terms of the negotiated agreement. (Exhibit C, D) When, upon further appeal, the Supreme Court of New Jersey denied certification, the matter was arbitrated and an advisory award recommended which, in pertinent part, advised the Board to:

“\*\*\*Restitute George Cafarelli in the amount of \$1000 that being the total sum owing him for the school years 1971-72, 1972-73, 1973-74, and 1974-75 inasmuch as the amount of \$25 a credit for 10 credits equals \$250 per year starting with 1971-72 and becoming part of Cafarelli's salary entitlement for each year thereafter.\*\*\*” (Exhibit E, at p. 6)

Following the arbitrator's decision, the Board paid petitioner \$250 for 1971-72 but refused to pay him for the years 1972-75 on the rationale that the language governing payment for graduate credits as found in the 1971-72 policy was altered in the 1972-75 policies to read as follows:

“Twenty-five dollars (\$25) for each graduate credit in the field of education, directly related and beneficial to the teacher's classroom situation and approved in advance by the Superintendent of Schools, beyond highest degree level\*\*\*.” (Exhibit F)

Petitioner filed the instant Petition of Appeal before the Commissioner on July 22, 1975 and, thereafter, resigned effective January 4, 1976. (Exhibit I)

Petitioner argues that the Board's refusal to continue to pay \$250 per year for the years 1972-75 is contrary to *N.J.S.A. 18A:6-10* which provides that, absent the certification of charges of inefficiency, unbecoming conduct, incapacity or other just cause, before the Commissioner, a tenured employee shall not be dismissed or reduced in compensation. In this regard petitioner states that:

“\*\*\*In effect, the Board reduced the compensation \*\*\* for the years 1972-75 by not paying him for the graduate credits just as effectively as it would have done so by subtracting increments or steps from his credit\*\*\*.” (Petitioner's Brief, at p. 6)

It is further contended that, whereas the Board continued after 1971-72 to pay other teachers for graduate credits and did not do so for petitioner, it effectively reduced his salary in violation of *N.J.S.A. 18A:6-10*.

Petitioner contends that the Board's action was arbitrary, capricious, unreasonable and discriminatory in that other teachers continued to be paid for credits previously recognized in the 1971-72 school year, whereas he was denied such compensation. Petitioner argues that, since no teacher with recognized credits could turn back the clock to gain prior approval of those credits by the Superintendent, the intent of that facet of the policy could have been prospective only. He asserts that it would, accordingly, be impossible to validate in such manner credits previously accepted by the Board. Thus, he argues that the Board's prior validation should remain undisturbed. Petitioner argues further that only in his case did the Board apply the revised policy prospectively. This he avers was arbitrary, capricious, unreasonable and discriminatory.

Petitioner, seeking an order of the Commissioner directing the Board to reimburse him in the total amount of \$750 for his graduate credits for the

three academic years 1972-75, buttresses his arguments of law by citing *William J. Convery v. Perth Amboy Board of Education et al., Middlesex County, 1974 S.L.D. 372*; *Robert Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County, 1972 S.L.D. 638*; and *James Docherty v. Board of Education of West Paterson, Passaic County, 1967 S.L.D. 297*.

The Board argues, conversely, that it not only had the right and duty to negotiate salary policies for the years 1972-75, but that it was obligated to compensate its employees in accordance with the terms of those policies which stated, *inter alia*, that:

“\*\*\*Any individual contract between the Board and an individual teacher, hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement.\*\*\*” (Exhibit B)

The Board avers that petitioner has received the compensation to which he is entitled from 1972-75, since it was the policies then in effect, rather than the 1971-72 policy which controlled the payment of salary for eligible graduate credits for those years. *Elizabeth Stiles et al. v. Ringwood Borough Board of Education, Passaic County, 1974 S.L.D. 1170* The Board asserts that it was duly empowered to negotiate with the majority representative of its teaching staff the basis on which future salaries were to be computed and that, having done so, it was no longer bound by the terms of its prior negotiated policy. (Respondent's Brief, at pp. 3-5)

The Board argues that it was not the intention of the negotiating parties at any time to validate for payment graduate credits in law studies which are unrelated to the work of an elementary teacher. In this vein, the Board points out that the Association was a party to negotiating the revised language contained in the 1972-75 policies. The Board maintains that the credits taken in law studies by petitioner were not among the customary and accepted concerns of education and that petitioner took them, not to improve his teaching performance, but as preparation for a legal career. The Board avers that within such a context it had neither the duty nor the discretionary powers to expend public moneys to compensate him for such credits. (Respondent's Brief, at pp. 10-11, 13)

Finally, the Board raises the question of whether the Commissioner has jurisdiction over the matter herein controverted. (*Id.*, at p. 12)

The Commissioner, having carefully considered the respective arguments of law as they relate to the factual context stipulated herein, addresses first the matter of jurisdiction.

In his quasi-judicial role of determining controversies that arise under educational law pursuant to *N.J.S.A. 18A:6-9*, the Commissioner has determined numerous cases wherein education boards have been charged with capricious, arbitrary or unreasonable application of their own policies to the salaries, increments, or stipends they provided to teaching staff members. *Agnes D.*

*v. Board of Education of the Township of Hanover, Morris County, 1975 S.L.D. 358, aff'd State Board of Education 366; Kieffer Shriner v. Board of Education of the Town of Boonton, Morris County, 1975 S.L.D. 939; Joseph Gabriel et al. v. Board of Education of the Manchester Regional High School District, Passaic County, 1974 S.L.D. 922; Alfred Zitani v. Board of Education of the Township of Willingboro, Burlington County, 1975 S.L.D. 439; Stiles, supra; Convery, supra; Anson, supra; Board of Education of the Township of Madison, Middlesex County v. Madison Township of Education Association et al., 1974 S.L.D. 488*

The propriety of a board's acts pursuant to *N.J.S.A. 18A:16-1* regarding the evaluation of and compensation for graduate credits of teachers is a proper matter for administrative review of the Commissioner, who, in this instance also, holds jurisdiction.

The Commissioner finds no merit in the Board's argument that it had no authority of law to compensate petitioner for credits in law studies. *Convery, supra*, is dispositive of this contention. Therein it was stated:

“\*\*\*[T]he Board's own salary policies state that “\*\*\*a law degree \*\*\* shall be equivalent to a Master's degree.\*\*\*” \*\*\* Petitioner is entitled to be paid on the basis of the ratio established for principals who hold a Master's Degree\*\*\*.” (at p. 377)

Therein, that board was, in fact, *ordered* to compensate Convery on the master's degree level for a degree in law in accord with its own salary policies.

In the instant matter, the Board has compensated petitioner for 1971-72 the amount of \$250 for ten law credits which he had previously earned. The narrow issue remaining for determination of the Commissioner is whether the Board's salary policy required that it further compensate petitioner \$750 or whether the negotiated change in language obviated such further obligation. The Commissioner finds the facts in those cases cited by petitioner importantly distinguishable from the stipulated facts herein. Accordingly, the Commissioner proceeds to examine relevant case law in arriving at a determination.

In *Zitani, supra*, a tenured school psychologist who had not previously been included in a teacher's negotiating unit was in 1971-72 included in the negotiating unit. In accord with the board's salary scale provisions he received no regular salary increment for three years thereafter. The psychologist contended that he should have been awarded annual increments on the basis of his prior years of industrial experience and service to the Board. In denying his appeal, the Commissioner stated:

“\*\*\*[T]he Commissioner knows of no requirement of law that compels the Board to recognize for salary purposes petitioner's years of service as a psychologist in industry\*\*\*. Thus, the Board's determination \*\*\* not to recognize this previous service for salary purposes may not be termed as capricious or unreasonable.\*\*\* In such matters the Commissioner will

examine the reasonableness of the Board's actions, but will not, absent a finding of arbitrary, unreasonable, capricious, or illegal action, interpose his judgment by invalidating that which the Board is statutorily empowered to do.\*\*\*" (1975 S.L.D., at p. 444)

Similarly herein, the Board was empowered but without obligation to recognize for salary purposes graduate credits in law studies. The Board and the Association negotiated a proviso that required \$25 for "\*\*\*each additional graduate credit up to 32 beyond Bachelor and beyond Masters." (Exhibit A) From that point forward and until it negotiated a change in the language of that proviso the Board was obligated to compensate its teachers in accord with the ordinary meaning of its existing language. Petitioner had graduate credits in law and was entitled to payment therefor. In such instances, it is not what was intended or what may have been considered desirable by one or both parties but the common meaning of the language agreed upon which 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:

“\*\*\*In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman*, 23 N.J. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al.*, 20 N.J. 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Ins. Co.*, 132 N.J.L. 206, 211 (E. & A. 1944); *Bass v. Allen Home Development Co.*, 8 N.J. 219, 226 (1951); *Sperry & Hutchinson Co. v. Margetts*, 15 N.J. 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (3rd ed. 1943), section 4502\*\*\*” (at p. 106)

The Commissioner is constrained to counsel the Board *and* the Association that greater precision in use of language is required to prevent confusion and costly litigation in the interpretation of constructions and to delineate clearly intended retrospective and prospective policy applications. In any event, such lack of technical precision is mutually attributable to both litigants herein.

The Board was obligated by the policy to pay petitioner for graduate credits in law in 1971-72 and it has done so. Nevertheless, neither the Board nor the Association were obligated to retain indefinitely the language of the aforementioned proviso. Effective during 1972-75 was a more restrictive provision that awarded \$25 per graduate credit "\*\*\*in the field of education, directly related and beneficial to the teacher's classroom situation and approved in advance by the Superintendent\*\*\*." (Exhibit F) The parties were not thereafter bound by the former language of the proviso. As was said by the State Board of Education in *Lena V. Morgenweck et als. v. Board of Education of Gloucester City, Camden County*, 1938 S.L.D. 412 (1930), rev'd State Board of Education 419:

“\*\*\*When a scale or schedule of salaries is adopted by a board, as one of its rules, *it becomes binding upon the board until modified or repealed.*\*\*\*” (Emphasis supplied.) (at p. 421)

Herein, the parties placed a limitation upon the awarding of salary for credits by requiring that they be in the field of education, thus excluding petitioner’s credits in the field of law. They further stated, using the conjunctive *and*, that such educational credits must be approved in advance by the Superintendent. In interpreting such a policy, as in the interpretation of a statute, the interpretation may not lead to an anomalous or meaningless conclusion. So, herein, the Commissioner concludes that, since advance approval may not be applied retrospectively, the intent of the parties was only that any credits taken *thereafter* in the field of education would be approved in advance. The language is clear, however, that either retrospectively or prospectively only credits in the field of education and *relevant to a teacher’s classroom duties would merit compensation.*

Petitioner argues that once he was paid the negotiated benefit of \$25 per credit he, as a tenured teacher, must thereafter continue to be so compensated. The Commissioner finds no merit or authority in law for such a holding. The very principle of negotiations as it exists in the laws of this State provides a vehicle to accommodate changing needs of school systems and their employees. Were petitioner’s holding to prevail it would stifle that flexibility which must be inherent in an evolving complex society.

In *Shriner, supra*, the Commissioner determined that the board, which had paid an additional \$1,000 of base salary to Shriner for being athletic director, could not, when he was unilaterally relieved of that duty, reduce his contract salary to a figure below that which he was previously paid. The Commissioner, however, stated that:

“\*\*\*[Shriner] has no continuing entitlement beyond 1972-73 to a salary \$1,000 greater than that called for in the negotiated salary policy for a teaching staff member of his years of experience, training, and assigned duties. \*\*\*Consequently, the Board may establish petitioner’s salary at \$16,500 subsequent to school year 1972-73 until his years of experience entitle him to receive the next increment on his assigned salary scale. *Stiles et al. v. Ringwood, supra*\*\*\*.” (at p. 942)

Similarly, in the matter herein controverted the Board could not legally reduce the salary which it had paid to petitioner as a tenured teacher. Nor did it do so. Nevertheless, as a result of a change in a negotiated policy, it was no longer obligated to continue to provide benefits which were formerly required by its salary policy. It was under no obligation to continue to provide petitioner additional salary for credits in law studies which were not recognized by the 1972-75 policies. The Commissioner so holds.

Accordingly, it is determined that petitioner has been compensated in full accord with the Board's existing salary policies and is not entitled by law or equity to the relief which he seeks. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 8, 1976

Marie Sheridan,

*Petitioner,*

v.

Board of Education of the Township of Ridgefield Park, Bergen County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg, Simon & Selikoff (Gerald Goldberg, Esq., and Paul N. Gilbert, Esq., of Counsel)

For the Respondent, Irving C. Evers, Esq.

Petitioner, a secretary employed by the Board of Education of the Township of Ridgefield Park, hereinafter "Board," alleges that her dismissal on June 30, 1974, and loss of wages from that date until September 1, 1974, when she was reemployed, were *ultra vires* acts in violation of her tenure rights and the provisions of *N.J.S.A. 18A:6-9 et seq.* The Board holds that her dismissal was the result of a legal reduction in force and that she has no entitlement to the retroactive compensation she seeks for the months of July and August 1974.

The matter comes directly before the Commissioner of Education in the form of a stipulation of facts (J-1), a Motion to Dismiss entered by the Board and Briefs. The relevant facts are as follows:

Petitioner, employed from September 1970 through June 1974 as a ten-month secretary in the Ridgefield Park High School, worked annually from September through June. Upon completion of an uninterrupted period in excess of three consecutive academic years, she acquired a tenure status in September 1973, pursuant to the provisions of *N.J.S.A. 18A:17-2b(2)*. The Board advised petitioner in the spring of 1974 that it was eliminating one ten-month secretarial position in its high school and that she would not be reemployed for the 1974-75 school year. At that time there was in the Board's employ one non-tenured secretary who worked on a twelve-month basis, assigned to the Board office.

On August 9, 1974, a twelve-month secretary in the high school retired and petitioner was offered reemployment on a twelve month basis. Petitioner accepted this position but expressed the preference that she begin work on September 1, 1974, which condition was accepted. (J-1)

The Board argues in support of its Motion to Dismiss that, although the Legislature and the State Board of Education have seen fit to provide for seniority rights of teaching staff members (*N.J.S.A.* 18A:28-10) and janitors (*N.J.S.A.* 18A:17-4), they have made no such provision for secretaries employed by school districts. The Board avers that, absent legislative authorization, the Commissioner is without power to establish such a system of seniority rights for school secretaries. (Board's Reply Brief, at pp. 4-5, 7) *Sabato v. Sabato*, 135 *N.J. Super.* 158 (*Law Div.* 1975); *Twillia Coombs v. Board of Education of the Township of Plumsted, Ocean County*, 1976 *S.L.D.* 630, *Gladys S. Rawicz v. Board of Education of the Township of Piscataway, Middlesex County*, 1973 *S.L.D.* 305. The Board argues further that its negotiated agreement with its employees has established no system of seniority and that the Commissioner is powerless to amend that agreement. (Board's Reply Brief, at p. 9) It is further contended that no "natural" or constitutional right to seniority exists upon which petitioner can rely. *Trailmobile Co. v. Whirls*, 301 *U.S.* 40, 53 (1957) Accordingly, the Board asserts that, since there has been no legal promulgation of a system of seniority for school secretaries, petitioner is not now entitled to assert them or to claim seniority rights over others. (Board's Brief, at pp. 3-5; Board's Reply Brief, at p. 6)

The Board argues that, since specific statutes were enacted separate and apart from tenure statutes, it must be concluded that tenure and seniority are not synonymous. It is contended that, since no statute provides for promulgation of seniority rules for secretaries, it was the legislative intent to confine such seniority benefits to teaching staff members and janitors. (Board's Reply Brief, at pp. 1-4)

The Board maintains that its action in eliminating one of its two ten-month secretarial positions was proper and that its decision to terminate petitioner, who had fewer years of service than its other ten-month secretary, was in conformity with the legislative intent of *N.J.S.A.* 18A:6-10. (*Id.*, at p. 3)

Additionally, the Board maintains that the matter is moot since petitioner was reemployed on September 1, 1974, the same date that she would have begun to work and earn wages had the Board not abolished her position. (Board's Brief, at p. 5) The Board also contends that petitioner, who chose not to work in August 1974 when the opportunity to do so was offered, could not legally be paid for days not worked. (Board's Brief, at p. 7; Board's Reply Brief, at p. 10)

Petitioner avers that the grant of tenure to secretaries pursuant to the provisions of *N.J.S.A.* 18A:17-2 includes, by necessity, a grant of seniority which gives her the right to seniority over the twelve-month nontenured secretary in the Board's employ. In this vein it is argued that tenure without

seniority would not only be meaningless, but would allow boards to utilize evasive tactics which would subvert the legislative intent. Petitioner asserts that the purpose of tenure is to provide stability and fairness in employment practices and that the Board in the instant matter, having retained in its employ a secretary without tenure, has acted unfairly. (Petitioner's Brief, at pp. 1-4)

Petitioner holds that:

“\*\*\*[I]n the case of a layoff of tenure secretaries, a board of education must first dismiss all nontenure secretaries, and must dismiss tenure secretaries in the inverse order of their seniority (i.e., 'last hired-first fired').\*\*\*” (Id., at p. 4)

Petitioner contends that the fact that she was a ten-month secretary as opposed to the twelve-month status of the nontenured secretary is of no moment since education law does not recognize such a distinction. In this regard petitioner avers that secretarial skills or qualifications vary little from one position to another within a school district. (Id., at p. 5) Petitioner maintains that it was incumbent upon the Board, when effecting a reduction in force on July 1, 1974, to terminate its nontenured secretary and transfer petitioner to her twelve-month position. Petitioner affirms that she was ready and willing to work during July and August 1974 and grounds her claim to retroactive compensation for the months of July and August 1974 on this rationale.

Finally, petitioner asserts that the matter is not moot by reason of her claim to retroactive salary for July and August 1974. To this end, petitioner requests the Commissioner to order summary judgment in her favor. (Id., at pp. 5-8)

The Commissioner has carefully considered and weighed the arguments of law of the contending parties to this dispute. He has, additionally, researched the statutes and applicable case law. The Commissioner rejects the argument that the matter is moot. He agrees with the Board's contention that no statute nor rule of the State Board of Education has ever 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 employing boards. Nor have categories of employment been promulgated for secretaries, such as have been established for teaching staff members. *N.J.A.C. 6:3-1.10* Absent such categories and established seniority standards, the Commissioner rejects petitioner's argument that seniority procedures would be triggered within the ranks of tenured secretaries by a reduction in force effected by a board of education.

The Commissioner similarly rejects petitioner's claim to retroactive salary for the period from August 10, 1974 through August 31, 1974, since it is stipulated that when petitioner was offered reemployment upon the retirement of a twelve-month secretary, she “\*\*\*expressed her preference to commence her reemployment in September of 1974.\*\*\*” (J-1, at p. 3) The issue of payment for this period is *res judicata*. It was stated by the Commissioner in *Joseph*

*McKay v. Board of Education of the Borough of Red Bank, Monmouth County*, 1972 S.L.D. 606, as follows:

“\*\*\*Petitioner is not entitled to reimbursement of salary for the\*\*\* [period of time when he] voluntarily refrained from rendering any service during the course of this litigation (*N.J.S.A.* 18A:6-30). Any such payment would constitute a gift of public funds for services not rendered, which is clearly prohibited by the law of this State. *New Jersey Constitution, Art. VIII, Sec. III, Pars. 2, 3.*” (at p. 611)

Petitioner is not entitled to compensation for the period she chose not to work from August 10 through August 31, 1974. The Commissioner so holds.

Nevertheless, the Commissioner determines that petitioner has presented a viable claim for redress for wages not received during the period from July 1, 1974 through August 9, 1974. The New Jersey Supreme Court’s *per curiam* opinion in the case of *Board of Education of the Town of Kearny v. Vincent P. Horan et al.*, 11 *N.J. Misc.* 751 (1933) is controlling. (See *Horan et al. v. Kearny*, 1938 S.L.D. 532, 537.) The Court held that a number of tenured teachers were illegally dismissed by the Kearny Board of Education. This illegality arose from the fact that, in effecting a reduction in force, the Kearny Board had terminated tenure teachers but retained in its employ numerous nontenured teachers.

The pertinence of this case arises from the parallel between the provisions of tenure for teachers in 1933 and the provisions of tenure for secretaries in 1974. Teachers in 1933 were clothed with tenure but no categories of teachers and no seniority statutes nor rules had as yet been promulgated. Thus, when the Court reviewed and affirmed the Commissioner’s and the State Board’s decisions in *Horan, supra*, the only pertinent law was earlier case law. Relying on that law, the Supreme Court stated, *inter alia*, that:

“\*\*\*The opinion rendered by this court in *Seidel v. Board of Education of Ventnor City*, 110 *N.J.L.* 31; 164 *Atl. Rep.* 901, seems dispositive of the question. It was there held, \*\*\*that a teacher in a public school,\*\*\* who, by service for three years or more, has come under the protection of the statute providing for an indefinite period thereafter may not be dismissed for reasons of economy while other teachers not so protected, whose assignments such teacher is competent to fill, are retained under employment.\*\*\* [T]he *Seidel* case is authority for the proposition that that *movement for economy is not to be accomplished by dismissing teachers who are under the protection of the statute providing for indefinite tenure while other teachers not so protected are retained.*\*\*\*

“As was said in the *Seidel* case:

“\*\*\*[T]he protection afforded by the statute would be little more than a gesture if such local board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom and retaining the non-exempt. If such reduction is to be made

at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statutes.'\*\*\*"

(*Emphasis supplied.*) (11 *N.J. Misc.* at 752-753)

Similarly, herein, the principle of law, which was enunciated by the Supreme Court in *Seidel, supra*, and *Kearny, supra*, at a time when no statutes, rules, nor delineated categories were extant, remains viable and is controlling in the matter herein controverted. The Board's desire to reduce its staff is not questioned and appears in the interests of economy within the district. Nevertheless, the Board, doubtless through nescience, when effecting that economy, failed to consider petitioner's tenure rights when it did not offer her the twelve-month position held by a nontenured secretary in its employ. That the Board had no improper reasons for terminating petitioner is apparent, as evidenced by its offer of reemployment when a vacancy fortuitously occurred in August. It is important to observe that petitioner possessed the secretarial skills to serve efficiently in the twelve-month position since she was, in fact, assigned to the Board office in September.

The Board is directed to provide petitioner, for the period from July 1 through August 9, the wages and attendant emoluments which she would have received for that period if she had begun to work in the twelve-month secretarial position on July 1, 1974. Petitioner's remaining prayer for relief for compensation from August 10 through August 31 is denied for the reasons hereinbefore expressed.

The Commissioner advises this Board and all other local boards of education that in similar disputes, given the continued posture of the law and State Board rules, the entitlement of a tenured secretary to a position held by a nontenured secretary will be adjudged by the Commissioner to be viable only if the tenured secretary possesses the skills and necessary qualifications to efficiently perform the duties of such secretarial position.

COMMISSIONER OF EDUCATION

December 17, 1976

**In the Matter of the Tenure Hearing of**

**Joseph Criscenzo,**

**School District of the City of Paterson, Passaic County.**

**COMMISSIONER OF EDUCATION**

For the Complainant Board, Robert P. Swartz, Esq.

For the Respondent, Edward G. O'Byrne, Esq.

Written charges by the Board of Education of the City of Paterson, Passaic County, hereinafter "Board," were certified to the Commissioner of Education pursuant to *N.J.S.A. 18A:6-10* stating that the charges would be sufficient if true in fact to constitute conduct unbecoming a teacher and warrant the dismissal of Joseph Criscenzo, hereinafter "respondent," a tenure teacher.

A hearing was held in the office of the Acting Passaic County Superintendent of Schools, Pompton Lakes, on March 22, 1976 before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

**CHARGE NO. 1**

"1. In the latter part of 1975, the said Joseph Criscenzo did knowingly and willingly allow his place of residence to be used by a fellow teacher of Kennedy High School and students from Kennedy High School for improper purposes, in that:

- (a) While he was present at his place of residence, he did allow photographs to be taken of a fellow teacher staff member of Kennedy High School who was in a complete state of undress; said photographs being taken by a student of Kennedy High School, and said photographs being for no lawful or valid purpose.
- (b) That prior thereto, the said Joseph Criscenzo was aware of the activities of a fellow teaching staff member who was improperly advising male students of Kennedy High School as to the formation and operation of a prostitution ring, and the said Joseph Criscenzo did aid and abet in the continuation of the improper conduct by the fellow teaching staff member."

**CHARGE NO. 2**

"2. That as a result of the aforesaid conduct by the said Joseph Criscenzo, it is stated that he is unable to conduct himself in a manner becoming a

member of the teaching staff of the City of Paterson, and has demonstrated a lack of moral rectitude.” (Statement of Charges, Exhibit A)

Respondent denies these charges.

The principal testified that respondent complained to him that he was being harassed and that his car had been vandalized by certain pupils, and that he believed that he knew the identity of the pupils involved. As the principal questioned respondent further about the identity of the pupils he suspected, and the reason behind the harassment and vandalism, the following sordid tale emerged in a series of allegations:

During the late spring and summer of 1975, three pupils were induced by Howard Baldwin, a teaching staff member of Kennedy High School, to join a male prostitution ring. Each was asked to fill out a form which required personal information, *e.g.*, telephone number, physical description, sexual preferences, experiences, desires, and other information. The pupils falsified their ages, each claiming to be in his early twenties, and gave their telephone numbers and addresses in a simple code. (Tr. 3-18; C-3A, 3B) Each pupil was later taken to a hotel or motel and photographed in the nude by Baldwin so that their pictures could be shown to women clients. (Tr. 97-99)

Sometime in the fall of the year, the pupils became disenchanted with their predicament and felt uneasy because Baldwin had their nude photographs and the information they supplied on application forms for the prostitution ring. (Although barely mentioned in the record, the hearing examiner has learned that Howard Baldwin resigned his teaching position and the matter of the alleged prostitution ring is being investigated by the Passaic County Prosecutor's office.)

It is not clear how respondent became involved in this matter between the pupils and Baldwin; however, the vice-principal of the school began investigating respondent's complaints about being harassed by the pupils as part of his duties as school disciplinarian. The vice-principal testified that respondent complained to him that he was trying to help "somebody else" and the pupils were taking it out on him. (Tr. 64-65) In any event, respondent acquired the forms and the photographs of the pupils from Baldwin and arranged to meet two of them in his apartment one evening so that he could return them, hoping that the entire episode would end. (Tr. 70-75) Respondent had already returned the photographs and forms belonging to the third pupil. (Tr. 70-73)

Three pupils, two involved in this matter and a friend who agreed to act as an intermediary, went to respondent's apartment at the arranged time to recover the contested materials. (Tr. 74-78) "J.P." noticed that some of his photographs were missing and demanded that respondent call Baldwin to come over to have his (Baldwin's) photograph taken in the nude for insurance and protection so that if any other pictures of J.P. existed, they would not be used. (Tr. 95-98) Respondent called Baldwin, arranged to have him come over and went to pick him up. (Tr. 96) Baldwin objected to having two of the pupils present in the apartment while he was there (it appears that he was afraid of

them); however, he entered the apartment to be photographed by the third one because he trusted him. (Tr. 76) This pupil, "T.T.," testified that he took the four nude photos of Baldwin (C-2) in respondent's bedroom while respondent was in the apartment and that respondent had come into the bedroom while Baldwin was putting his clothes back on. (Tr. 77) Exhibit C-2 also contains a fifth photo, that of respondent himself in his kitchen taken on the same evening. (In that photograph respondent is not nude.) The record reveals that the camera flash cube did not work the first time and that one of the boys tried it out again by taking a photograph of respondent. (Tr. 81)

The Board rested its case after eliciting the testimony of the principal, vice-principal and the four pupils involved in this matter. Three other documents submitted in evidence were not considered relevant by the hearing examiner. (C-1, C-3C, 3D) Respondent did not testify, nor was any testimony offered in his behalf; therefore, none of the testimony elicited has been refuted.

The issue to be resolved is whether or not respondent knowingly and willingly allowed his apartment to be utilized for the purpose of having nude photos taken of a fellow teaching staff member by school pupils and, if he did, does such a finding constitute conduct unbecoming a teacher. (Charges Nos. 1, 2, *ante*)

The hearing examiner finds that the record clearly reveals that respondent knew, and even arranged for the photographs to be taken of his colleague, Howard Baldwin. Respondent invited the pupils to his apartment to return their photographs and their applications which they had previously filled out and given to Baldwin. Thereafter, respondent called Baldwin, at the behest of one of the pupils, and went to pick him up. Respondent was in the apartment while the photographs were being taken, and by chance he was photographed there. The record reveals that he was in his bedroom when Baldwin was putting his clothes on after being photographed.

As unfortunate as the circumstances appear to be in this matter, in that respondent may have been trying to bring the sordid affair to an end, he had knowledge enough of the matter to know about illicit sexual activities of a fellow teacher which involved high school pupils. Whenever it was that he gained that knowledge, he should not have tried to cover it up and hope that it would go away; rather, he should have taken an affirmative action to notify school officials so that they could have taken an appropriate action concerning Howard Baldwin and the boys involved.

The Commissioner commented *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97*, as follows:

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

hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.\*\*\*

“The public interest demands the public trust of those teachers entrusted to care for and mold the character and attitudes of the pupils of this State.\*\*\*”  
(at pp. 98-99)

Parents have a right to expect that their children are in good hands when they go to school and that the teachers entrusted to care for them will truly act *in loco parentis*. The hearing examiner finds, therefore, that respondent’s actions in this matter constitute conduct unbecoming a teacher.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions filed thereto by respondent pursuant to *N.J.A.C. 6:24-1.17(b)*.

The Commissioner finds that respondent has demonstrated a lack of moral rectitude because of his conduct in the instant matter. The record reveals that a fellow male teacher improperly involved some high school pupils in a male prostitution ring. When respondent became involved in an attempt to end this activity, he used his apartment as a meeting place to return nude photographs and application forms previously filled out for the other teacher. Respondent was in possession of such knowledge and acted as a go-between for the pupils and the other teacher which, standing alone, is a sufficiently flagrant action for the Commissioner to determine that the proper penalty for respondent is dismissal from his teaching position. Unfortunately, respondent’s involvement did not stop there, and the events of that evening culminated in the taking of nude photographs of the other teacher by a high school pupil in respondent’s own bedroom. (C-2) Respondent not only knew that the photographs were to be taken, but he, in fact, brought the other teacher to his apartment for the purpose of being photographed in the nude.

The Commissioner commented *In the Matter of the Tenure Hearing of Jacqueline L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302* as follows:

“\*\*\*[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree a self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.\*\*\*”  
(at p. 321)

It was also said *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County*, 1971 S.L.D. 284 that:

“\*\*\*A teacher, as any citizen, who decides to take any form of action or interaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions\*\*\*.”  
(at p. 296)

The State Board of Education said in *George R. Good v. Board of Education of the Township of Union, Union County*, 1938 S.L.D. 354 (1935), aff'd State Board of Education 357, that:

“\*\*\*[The board of education] may reasonably require of one holding the important position of principal of its high school conduct in conformity with commonly accepted ethical standards. He is, in a measure, a guide and pattern for the adolescent boys and girls under his charge. He should teach by example as well as by precept. The inculcation of those qualities and attributes which we call 'character' is a responsibility of our schools.\*\*\*”  
(at p. 359)

See also *Tordo, supra*.

In *Ruth Schroeder v. Board of Education of Lakewood, Ocean County*, 1960-61 S.L.D. 37 the Commissioner quoted the Supreme Court of Wyoming in *Tracy v. School District No. 22, 70 Wyo. 1, 243 P.2d 932* (1952) with respect to the relationship between a teacher and pupil:

“\*\*\*‘The peculiar relationship between the teacher and his pupils is such that it is highly important that the character of the teacher be above reproach. \*\*\* The Court of Appeals of Kentucky has said that both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils, and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicions of immorality. (*Gover v. Stovall*, 237 Ky. 172, 35 S.W. 2d 24). Even charges of or reputation for immorality, although not supported by full proof, might in some cases be sufficient ground for removal. Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools.’ (at p. 937)\*\*\*”  
(at p. 45)

Further, it has long been held that unfitness to hold a teaching position may be shown by a series of incidents or by one incident, if sufficiently flagrant. *Redcay v. State Board of Education*, 130 N.J.L. 369 (*Sup. Ct.* 1943), aff'd 131 N.J.L. 326 (*E. & A.* 1944); *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County*, 1971 S.L.D. 566, aff'd State Board of Education 1973 S.L.D. 773, aff'd as *Emma Matecki v. Board of Education of the City of New Brunswick*, Docket No. A-1680-72 New Jersey Superior Court, Appellate Division, November 28, 1973 (1973 S.L.D. 773)

The Commissioner finds that respondent's behavior herein was unconscionable, inexcusable, and violative of the trust the community placed in him as a teacher.

Respondent has exhibited gross misconduct which is conduct unbecoming a teaching staff member. *N.J.S.A.* 18A:28-5 Thus, he must forfeit his tenure status.

Respondent is hereby dismissed from his position as a teacher as of the date of his suspension by the Board.

The Commissioner further determines that the matter herein is found to be sufficiently flagrant to necessitate an inquiry into the possible revocation of respondent's teaching certificate. The authority for such inquiry is found in *N.J.A.C.* 6:11-3.7 which reads as follows:

“Any certificate that has been issued, or that may hereafter be issued under the regulations of the State Board of Education, may be revoked by the State Board of Examiners for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, provided that no certificate shall be revoked unless the holder thereof shall have been given opportunity to be heard.”

Accordingly, this decision shall be forwarded to the State Board of Examiners for appropriate proceedings pursuant to the above-cited rule.

COMMISSIONER OF EDUCATION

December 17, 1976

**Laurence Plessis, Lillian Williams and Serafina Piscitelli,**

*Petitioners,*

v.

**Board of Education of the City of Newark, Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, John Cervase, Esq.

For the Respondent, Robert T. Pickett, Esq.; Barry A. Aisenstock, Esq.

Petitioners Plessis and Williams filed separate Petitions of Appeal before the Commissioner of Education, each alleging that the Board of Education of the City of Newark, hereinafter "Board," had violated their employment rights. The Board thereafter filed a Notice of Motion to Dismiss stating, *inter alia*, that the Commissioner lacks jurisdiction and that the matter herein controverted belongs before the Department of Civil Service. It was agreed at the oral argument held at the State Department of Education, Trenton, on February 19, 1976, to include Petitioner Piscitelli and that the three Petitions of Appeal would be consolidated solely for the purpose of deciding the question of jurisdiction in this matter.

Petitioner Williams alleges in her Petition of Appeal that she was certified by Civil Service as a custodial worker for a position in the Newark School System and was granted permanent appointment by Board resolution on June 28, 1972. She alleges further that because of her physical disability, caused by a job related accident while employed by the Board, the Board has refused to place her in a position in which she is now able to serve. (Williams' Petition of Appeal) Petitioner Plessis alleges that the Board has refused to properly compensate him in his position as a Senior Bus Attendant. (Plessis' Petition of Appeal)

Petitioners do not deny that they have been certified in their respective positions by Civil Service (Plessis and Williams, Exhibit A), but they state that the Commissioner has jurisdiction over local boards of education pursuant to *N.J.S.A.* 18A:6-9, and that, since these matters arise under their employment with the Board, the Commissioner must assert his jurisdiction.

The authority of the Commissioner to hear controversies and disputes which arise under the school laws is not contested. *N.J.S.A.* 18A:6-31 is relevant in the instant matter and reads as follows:

"Nothing contained in this title shall be construed to affect the *tenure or civil service rights* of any person presently existing, or hereafter obtained, under this or any other law." *(Emphasis added.)*

Further, *N.J.S.A.* 18A:11-1 reads, in part, as follows:

“The board shall -

“\*\*\*c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, *subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes*<sup>1</sup>\*\*\*.”  
(*Emphasis added.*)

<sup>1</sup>Section 11:1-1 *et seq.*

Petitioners are not teaching staff members. *N.J.S.A.* 18A:1-1 Nor do they claim tenure under *N.J.S.A.* 18A:17-3 or any other statute. The Commissioner determines that the matters herein controverted do not arise under the school laws. Rather, the protections to which petitioners are entitled are clearly in Title 11 of the Revised Statutes. In that regard, *N.J.S.A.* 11:5-1 provides in part as follows:

*N.J.S.A.* 11:5-1

“The commission, in addition to the other duties imposed upon it by law, shall, as a body:

\*\*\*

“d. Hear appeals, either as a body or through one or more members designated by a majority thereof to hear such appeals, of persons in the classified service sought to be removed, demoted in pay or position, suspended, fined or otherwise discriminated against contrary to the provisions of this subtitle, and render decisions thereon and require observance of the decisions as herein provided\*\*\*.”

*N.J.S.A.* 11:22-38 provides in part for removal, reductions, and for applications of employees for investigation by the Department of Civil Service for the competitive class of employees.

Further, *N.J.S.A.* 11:22-39 and 22-46 also provide for a hearing and due process before the Department of Civil Service in the noncompetitive class. The right to appeal a discharge or reduction may be appealed pursuant to *N.J.S.A.* 11:22-47. It is quite clear, and the Commissioner so holds, that the matters herein should be properly brought before the Department of Civil Service since they are not controversies arising under the school laws.

If, as petitioners suggest, this is a matter arising under the school laws because they are employed by the Board, then there would be no need for exceptions or the exclusionary language found in *N.J.S.A.* 18A:11-1 and 6-31 and all Board employees having disputes would appeal them directly to the

Commissioner. In the matters herein controverted, petitioners were approved for appointment by the Department of Civil Service as shown in Plessis' Exhibit A, which reads in part as follows:

**“NOTIFICATION TO APPOINTING AUTHORITIES**

“Permanent appointment approved, pending satisfactory completion of working test period, in the title and as of effective date shown above. Salary has been recorded.”

Thus, it appears that the legislative intent is that certain classes of employees are protected by Title 11 statutes, as well as rules and regulations set forth by the Department of Civil Service. It is illogical to conclude that the Commissioner of Education should interpret those rules regarding petitioners' employment status. The Commissioner's authority is found in Title 18A, Education.

The Commissioner finds and determines that petitioners are protected under Title 11 of the revised statutes and that he lacks jurisdiction in the instant matter. For these reasons, Respondent Board's Notice of Motion to Dismiss is granted and the Petitions of Appeal are hereby dismissed.

COMMISSIONER OF EDUCATION

December 20, 1976

**Mae S. Hedrick and Winifred E. Quinn,**

*Petitioners,*

*v.*

**Board of Education of the City of Jersey City, Hudson County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioners, Philip Feintuch, Esq.

For the Respondent, William A. Massa, Esq.

Petitioners, tenured employees of the Board of Education of the City of Jersey City, hereinafter "Board," on or about June 12, 1975, were advised that they would be retired involuntarily by the Board. Petitioners ask that this alleged discriminatory action of the Board be set aside and that they be restored to their former duties with full back pay. The parties agree to submit the

principal matters in controversy herein for Summary Judgment based on a Stipulation of Facts and Briefs.

Petitioners Quinn and Hedrick have been continuously employed by the Board since 1953 and 1951, respectively. Both are eighty years of age. The Board at its meeting of March 24, 1975, because of stringent budgetary problems, determined to invoke the provisions of the Noncontributory Pension Act, *N.J.S.A.* 43:8B-1 *et seq.*, in order to retire those employees who fell within the provisions of said Act. (Board's Brief, at p. 1) The Board states further that, in addition to the retirement of petitioners, a total of twenty other employees similarly situated were retired and did not contest their retirement. (Board's Brief, at p. 2)

Subsequent to this action of the Board, petitioners were advised that they would be retired involuntarily. Petitioners allege that this involuntary retirement violates federal law and New Jersey law. (Petitioner's Brief, at p. 2)

The Board maintains that it has the right to implement the provisions of the General Noncontributory Pension Act as interpreted by the Court in *Board of Education of Jersey City v. Cuff et al.*, 38 *N.J.* 430 (1962) wherein the Court determined "\*\*\*that the retirement did not amount to removal or dismissal.\*\*" (Board's Brief, at p. 2)

Petitioners contend that the decision rendered in *Jersey City, supra*, has been clearly reversed by *N.J.S.A.* 10:5-3, amended effective June 2, 1970, by the underscored words "sex" and "marital status" as follows:

"The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, *sex, marital status* or because of their liability for service in the Armed Forces of the United States, are a matter of concern to the government of the State, and thus such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State."

(*Emphasis supplied.*)

Petitioners further contend that what was not necessarily discrimination in 1962 became discrimination in 1970 and additionally point out that the Board did not take action against others similarly situated, *i.e.*, over 65 years of age. (Petitioner's Brief, at p. 4)

The Board argues that if such contention has merit, then all service-connected retirements in which age is a factor must be challenged under Civil Rights legislation as being discriminatory. (Board's Brief, at p. 3)

The Commissioner finds no evidence that the Legislature by its amendment of *N.J.S.A.* 10:5-3 intended to set aside the service age limits in either the Teachers' Pension and Annuity Fund or the Public Employees' Retirement System.

The Teachers' Pension and Annuity Fund, *N.J.S.A. 18A:66-1 et seq.*, states at 18A:66-43(b):

"Any member in service who attains 70 years of age shall be retired by the board of trustees on a service retirement allowance forthwith on the first day of the next calendar month or at such time within one year thereafter as it deems advisable."

Additionally, the Public Employees' Retirement System, *N.J.S.A. 43:15A-1 et seq.*, states at 43:15A-47(b):

"Any member in service who attains 70 years of age shall be retired by the board of trustees on a service retirement allowance forthwith on the first day of the next calendar month, or at such time within 1 month thereafter as it finds advisable, except that an employee attaining 70 years of age may be continued in service on an annual basis upon written notice to the retirement system by the head of the State department or employer where the employee is employed."

Since the amendment of the Civil Rights statute (*N.J.S.A. 10:5-3 et seq.*), effective June 2, 1970, the statutes in governance of the Teachers' Pension and Annuity Fund (*N.J.S.A. 18A:66-1 et seq.*) and the Public Employees' Retirement System (*N.J.S.A. 43:15A-1 et seq.*) have both been amended. The amendments for the Teachers' Pension and Annuity Fund, *L. 1971, c.121*, effective April 29, 1971, and the Public Employees' Retirement System, *L. 1971, c.213*, effective June 17, 1971, do not remove the service age limits in either plan which manifestly shows the intent of the Legislature that such service age limits remain. Petitioners' do not bring forward credible evidence showing that the criterion for retirement was discriminatory. Rather, the proof shows that the criterion used was petitioners' eligibility, along with twenty other employees, for retirement under the provisions of the Noncontributory Pension Act. *N.J.S.A. 43:8B-1 et seq.*

The Commissioner finds no discrimination evidenced by the Board in exercising its options detailed in the Noncontributory Pension Act and, whereas no relief can be granted petitioners, the Petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

December 21, 1976

**Louis Ciccone,**

*Petitioner,*

*v.*

**Board of Education of the Township of Weehawken, Hudson County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, Le Roy D. Safro, Esq.

Petitioner, a nontenure teaching staff member who had been employed for three academic years by the Board of Education of the Township of Weehawken, hereinafter "Board," alleges that he was not given the true reasons why his employment was not continued by the Board for the 1975-76 academic year and, on this basis demands immediate reinstatement together with compensation he would have received had his employment continued. The Board denies the allegations and asserts that its action with respect to the non-reemployment of petitioner is in all respects proper and legal. The Board seeks dismissal of the matter by way of Summary Judgment for an alleged failure of petitioner to state a cause of action for which relief could be granted.

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

The Commissioner has considered the total record herein and finds that petitioner has failed to state a cause of action upon which his requested relief could be granted. Petitioner was employed by the Board for three academic years as a teacher of physical education. During his third academic year he was notified by letter (C-1) dated April 10, 1975, that his employment was not to be continued for the 1975-76 academic year. Petitioner was advised that this action was taken because of declining pupil enrollment, financial constraints, and a reordering of priorities. The affidavits of petitioner (C-2) and of the Superintendent (C-3) establish that the two met and thoroughly discussed the stated reasons and that the Superintendent advised petitioner he would be considered for reemployment should a vacancy occur.

Petitioner argues that he discovered the Board at its July 1975 meeting had employed two physical education teachers for the 1975-76 academic year. Petitioner concludes that because the Board employed two physical education teachers at this July meeting, the reasons given him for his non-reemployment are not the true reasons. The Superintendent explains that petitioner was one of thirty-eight teaching staff members who had not been offered reemployment for

1975-76. Twenty of those thirty-eight persons were subsequently offered reemployment for 1975-76. The Superintendent further explains that when the Board determined not to offer reemployment to petitioner for 1975-76 the stated reasons of declining pupil enrollment, fiscal constraints, and a reordering of priorities were in fact the reasons for its action. The Superintendent attests that when the Board decided to reemploy certain of those thirty-eight persons it originally notified it would not reemploy, the Superintendent did not recommend petitioner because of his failure to participate in extracurricular activities during his three years of employment by the Board. (C-3)

The Commissioner observes that the declining pupil enrollment was due to the June 30, 1976 phase out of its sending-receiving relationship with the Secaucus Board of Education in which it was the receiving district. The uncertainty with respect to the Board's fiscal plan was due to a municipal reduction of \$225,000 imposed upon the Board's proposed school budget for 1975-76. The Board was successful in having established its need for \$171,620 of the \$225,000 reduction in litigation before the Commissioner. (See *Board of Education of the Township of Weehawken v. Municipal Council of the Township of Weehawken, Hudson County*, 1976 S.L.D. (decided January 20, 1976); affirmed State Board of Education, May 5, 1976; Motion for Reconsideration denied, State Board of Education, June 2, 1976; appeal pending New Jersey Superior Court, Law Division.)

The Commissioner determines that the reasons afforded petitioner for his non-reemployment for 1975-76 by the Board are valid reasons. There is no provision in the school laws that would preclude the Superintendent and the Board from considering petitioner's total record of employment performance, e.g. extracurricular performance, in selecting applicants for employment. As a nontenure teacher, petitioner has no right under these circumstances to demand reemployment. *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County*, 1975 S.L.D. 848; *Donaldson v. Board of Education of the City of North Wildwood, Cape May County*, 65 N.J. 236 (1974); *George Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 S.L.D. 7

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 22, 1976

**Gloria Marturano, Patricia Dolecki, Violet Michalik and  
Education Association of Passaic,**

*Petitioners,*

v.

**Board of Education of the City of Passaic, Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Louis Marton, Jr., Esq.

Petitioners, all of whom are members of the Education Association of Passaic, hereinafter "Association," and all of whom are employed as school nurses by the City of Passaic Board of Education, hereinafter "Board," allege that the Board has improperly established their individual salaries since July 1, 1972 in contravention of *N.J.S.A. 18A:29-4.2*. Petitioners now demand judgment of the Board in the form of moneys they allege they should have received, and they request an Order of the Commissioner of Education requiring the Board to henceforth comply with the provisions of law with respect to their salaries. The Board denies the allegations and asserts that its determinations in regard to each of petitioners' salaries since July 1, 1972 have been and are in all respects proper and legal. Furthermore, the Board moves for dismissal on the grounds that the Commissioner has no jurisdiction to hear a controversy or dispute which is purely financial in nature.

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

The undisputed facts of the matter are these. During the 1972-73 academic year each of the named petitioners was employed as a school nurse by the Board and assigned to a federal program. Although Petitioner Michalik retired at the conclusion of the 1972-73 academic year, Petitioners Marturano and Dolecki continued in their employment as school nurses until the present time. At all times material herein, each petitioner has been in the possession of a standard school nurse certificate, but no one of them has possessed or possesses a baccalaureate degree. Petitioners allege that since the 1972-73 academic year their respective salaries have been determined by the Board according to rates set forth in a nurses' salary scale, while other non-degree teaching staff members are and have been compensated since that time according to higher rates set forth in the various bachelor's degree scales of the Board's salary policies. Petitioners argue that this different method of salary establishment by which they receive less remuneration than similarly qualified teaching staff members not only contravenes the intent of *N.J.S.A. 18A:29-4.2* but also is in diametric

opposition to prior rulings of the Commissioner in *Evelyn Lenahan v. Board of Education of Lakeland Regional High School District*, 1972 S.L.D. 577 and *Passaic Education Association et al. v. Board of Education of the City of Passaic, Passaic County*, 1975 S.L.D. 425. The Board stipulates that since 1972-73 it has established petitioners' respective salaries according to its nurses' salary scale and that such rates are lower than the rates set forth in its bachelor's degree scale of its teachers' salary guide. It is also stipulated by the Board that since 1972-73 it did establish the salaries of other non-degree teaching staff members according to the higher rates of its bachelor's degree scale. (Conference Agreements, at p. 1)

The statute of reference, *N.J.S.A. 18A:29-4.2*, provides in full as follows:

“Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers.”

Subsequent to the enactment of this legislation, the Commissioner held in *Lenahan, supra*, its entendment to be as follows:

“\*\*\*a school nurse holding a standard school nurse certificate *and a bachelor's degree, or an academic degree higher than a bachelor's*, shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.\*\*\*”

(*Emphasis in text.*) (1972 S.L.D. at 581-582)

The principles articulated in *Lenahan, supra*, have been reaffirmed by the Commissioner in a series of subsequent decisions: *Betty Ascough et al. v. Board of Education of the Toms River Regional School District, Ocean County*, 1975 S.L.D. 389; *Passaic Education Association et al., supra*; *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County*, 1975 S.L.D. 19; *Shirley A. Martinsek v. Board of Education of the Eastern Camden Regional School District, Camden County*, 1974 S.L.D. 1210, rev'd and rem'd State Board of Education June 4, 1975; *Elizabeth Stiles and Grace Ferraioli v. Board of Education of Borough of Ringwood, Passaic County*, 1974 S.L.D. 1170; *Julia Anne Sipos et al. v. Board of Education of the Borough of Manville, Somerset County*, 1973 S.L.D. 434.

It can be discerned from these citations that the matter herein is the third time the Board has been involved in litigation with respect to the application of *N.J.S.A. 18A:29-4.2*. Furthermore, the issues controverted herein are identical to the issues adjudicated by the Commissioner in *Passaic Education Association et al., supra*. There, four petitioners were employed as school nurses by the Passaic Board. Each possessed a standard school nurse certificate; no one of them possessed a baccalaureate degree. They complained that their salaries since 1972 had been established according to the lower rates of the Board's nurses' salary scale, while other teaching staff members who did not possess a degree had their salaries established according to the higher rates of the Board's bachelor's scale of the teachers' salary guide. They complained that the Board's action of establishing their salaries at the lower rates constituted improper discrimination and that such action was in direct contravention of *N.J.S.A. 18A:29-4.2* and the Commissioner's ruling in *Lenahan, supra*.

The Commissioner found and determined in *Passaic Education Association et al., supra*, that the Board established the salaries of the four petitioners for 1972-73, 1973-74 and 1974-75 in contravention of *N.J.S.A. 18A:29-4.2*. The Commissioner also held:

“\*\*\*There is no question that the Board employs eleven teaching staff members who do not possess baccalaureate degrees, but all of whom are properly certified. For the Board to compensate seven of these eleven persons, excluding the four named petitioners who are school nurses, according to the higher rate set forth in the bachelor's scale of its salary policy, but, on the other hand, to confine petitioners to the lower rates of the 'school nurse scale' is, on its face, discriminatory. The Commissioner recognizes, however, that local boards of education may establish a non-degree salary schedule as part of their salary policies through proper negotiations. Once such a salary schedule is established, however, all teaching staff members who do not possess degrees are to be compensated according to its terms. In the instant matter, the Board discriminated against four persons by holding them to a non-degree salary schedule while compensating the remaining seven according to the bachelor's degree schedule when, in fact, these latter did not possess bachelor's degrees.\*\*\*”  
(at pp. 429-430)

The Commissioner granted the request relief and directed the Board to compensate the named petitioners the difference between their actual salaries for 1972-73, 1973-74 and 1974-75 and the amounts their salaries would have been according to the bachelor's degree scale of its salary guide.

Consequently, the legal issue raised herein with respect to whether the Board has violated the provisions of *N.J.S.A. 18A:29-4.2* within the framework of the identical factual pattern presented in *Passaic Education Association et al., supra*, has been rendered *stare decisis* by the adjudication of that issue in *Passaic Education Association et al.* The Commissioner finds and determines that the Board has violated the provisions of *N.J.S.A. 18A:29-4.2* with respect to its establishment of Petitioners Marturano and Dolecki's salaries since 1972-73,

and with respect to its establishment of Petitioner Michalik's salary for 1972-73. This is so for during the same periods of time, the Board compensated other non-degree teaching staff members according to its higher rates set forth in the bachelor's degree scale of its teachers' salary guide.

Two other issues remain. First, the Board argues that because Petitioner Michalik retired on June 30, 1973, the Commissioner has no authority to award her the requested relief of additional money. The Board in this regard relies on *Irving Thielle et al. v. Board of Education of the Borough of Fair Lawn et al., Bergen County*, 1968 S.L.D. 245 and supports its argument that the Commissioner has no authority to award money damages by citing *Jackson v. Concord Company*, 101 N.J. Super. 126 (App. Div. 1968) as relied on by the Commissioner *In the Matter of "T" by her parents and natural guardians v. Board of Education of the Borough of Tenafly, Bergen County*, 1974 S.L.D. 420, aff'd State Board of Education, March 5, 1975.

The Commissioner does not agree with the Board's argument that he has no authority to grant the relief Petitioner Michalik requests because she retired on June 30, 1973. Furthermore, the principles set forth in the cases cited by the Board are inapplicable in the instant matter. In the *Thielle* matter, petitioners were members of the Fair Lawn Committee for Peace in Vietnam who applied for and were granted the use of the Board's school facilities for meetings they had planned. The Board, fearing that physical harm to its buildings and to its personnel might result from the meetings, demanded that petitioners secure appropriate public liability insurance before they could use the school facilities. Petitioners secured such insurance at a cost of \$550 which petitioners sought to recover because of a subsequent court-ordered restraint against implementation of the Board's rule by which the insurance requirement was imposed. The Commissioner declined jurisdiction because the matter dealt with a purely commercial matter and was in no way related to an educational issue. In the case of *In the Matter of "T," supra*, the parents of T, who was the subject of several special education classifications, laid claim against the Board for the reimbursement of out of pocket educational expenses in the amount of \$35,746 for private services rendered to T. These services included various testing procedures, therapy sessions, appliances, materials, and educational trips all of which had been privately secured by the parents without the approval of the Board. The Commissioner held that he had no authority to award monetary damages to the parents of T for expenditures for educational services they had privately obtained rather than availing themselves of the instructional program provided by the Board. The Commissioner then cited *Jackson, supra*, as support for his conclusion.

In the instant matter, Petitioner Michalik was employed as a school nurse by the Board during the 1972-73 academic year. The statute of reference, N.J.S.A. 18A:29-4.2, became law on June 9, 1972 as *Chapter 29, Laws of 1972* with an effective date of July 1, 1972. Thereafter, on November 15, 1972 the *Lenahan, supra*, decision was rendered. Thus, the Board knew or should have known during the 1972-73 academic year that it had established each of petitioners' salaries contrary to law. Petitioner's retirement from the employ of

the Board on June 30, 1973, does not, by itself, restrict the jurisdiction of the Commissioner to grant appropriate relief for a wrong caused by the Board.

Next, the Commissioner will address the question of his jurisdiction in the whole of the matter. Simply stated, the Board argues that the matter controverted herein is purely a financial dispute between it and petitioners and as such it is a commercial matter over which the Commissioner has no jurisdiction. Furthermore, the Board argues that because petitioners are employed through federal funds, they may not expect nor have attached to them the same rights and benefits which attach to other regularly employed teaching staff members and cites *White et al. v. City of Paterson*, 137 N.J. Super. 798 (App. Div. 1975). The Board argues that the ruling of the Court in *White* inferentially reverses the Commissioner's prior rulings in *Jack Noorigian v. Board of Education of Jersey City, Hudson County*, 1972 S.L.D. 266, aff'd in part/rev'd in part State Board of Education, 1973 S.L.D. 777 and *Ruth Nearier, Gloria Marturano, and Arlyne Schneider v. Board of Education of the City of Passaic, Passaic County*, 1975 S.L.D. 604. In both instances, the Commissioner held that the source of funds used to compensate teaching staff members may not be the basis to set one group apart from others similarly qualified and with similar professional duties. The Commissioner notices that the *White* decision deals with the employment of a fireman within the framework of rules and regulations of the Civil Service Commission. As such, the ruling of the Court in the *White* matter has no bearing on the matter, *sub judice*. The Commissioner affirms once again that the source of funds used to compensate teaching staff members may not be the basis to set one group apart from others similarly qualified and with similar professional duties.

The Commissioner has jurisdiction to hear and determine controversies and disputes arising under school laws pursuant to *N.J.S.A. 18A:6-9*. Boards of education may employ teaching staff members by its authority in *N.J.S.A. 18A:27-1*; its authority to make rules for the employment of personnel is in *N.J.S.A. 18A:27-4*; boards may adapt salary policies in *N.J.S.A. 18A:29-4.1*; and finally, boards of education may employ school nurses in *N.J.S.A. 18A:40-1*. The matter controverted herein arises from the Board exercising its authority pursuant to the authorizing legislation of *Title 18A, Education Law*. The matter is not wholly commercial, as argued by the Board; rather the matter does concern education by raising the precise issue of whether a Board may discriminate in its practices against various groups of professional employees assigned to carry out the total educational program. The Commissioner does have, and he asserts, jurisdiction in the matter.

Finally, the Commissioner observes that the precise amounts of money owed petitioners by the Board are as follows: (P-1)

	<b>Petitioners</b>		
	<b>Michalik</b>	<b>Marturano</b>	<b>Dolecki</b>
<b>1972-73</b>			
Should have received	\$13,800	\$13,800	\$10,050
Received	<u>11,450</u>	<u>11,450</u>	<u>9,350</u>
Difference	\$ 2,350	\$ 2,350	\$ 700
<b>1973-74</b>			
Should have received		\$14,559	\$10,603
Received		<u>12,080</u>	<u>9,864</u>
Difference		\$ 2,479	\$ 739
<b>1974-75</b>			
Should have received		\$15,505	\$11,685
Received		<u>12,865</u>	<u>10,899</u>
Difference		\$ 2,640	\$ 786
<b>1975-76</b>			
Should have received		\$16,435	\$12,803
Received		<u>13,637</u>	<u>11,970</u>
Difference		\$ 2,798	\$ 833
<b>Total Owed by Board</b>	<b>\$ 2,350</b>	<b>\$10,267</b>	<b>\$ 3,058</b>

Accordingly, the Board is directed to pay at the next regularly scheduled pay date to Petitioner Michalik the sum of \$2,350; to Petitioner Marturano the sum of \$10,267; and to Petitioner Dolecki the sum of \$3,058. The Commissioner also directs the Board to consult with the New Jersey Teachers' Pension and Annuity Fund, Division of Pensions, Department of the Treasury, with respect to Petitioner Michalik's annual final compensation as set forth above so that adjustments, if any, may be made to her pension allowance pursuant to *N.J.S.A. 18A:66-44*.

Finally, with respect to Petitioners Marturano's and Dolecki's 1976-77 annual salary, the Commissioner observes that such salaries may not be less than their salaries for 1975-76. Furthermore, if the Board is continuing to compensate other non-degree teachers according to its bachelor's degree scale, then Petitioners Marturano and Dolecki are to have their 1976-77 salaries established according to the terms of the bachelor's degree scale and at their proper experience levels.

COMMISSIONER OF EDUCATION

December 22, 1976

**Margaret W. Hussey,**

*Petitioner,*

*v.*

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

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Daniel J. Hussey, Esq.

For the Respondent, Nichols, Thompson & Peek (William D. Peek, Esq., of Counsel)

Petitioner, a tenured teacher employed by the Board of Education of the Town of Westfield, hereinafter "Board," claims entitlement to higher placement on the salary guide by reason of her years of service to the Board. The Board denies that petitioner has such entitlement and asserts that she has been and is being fully compensated in accord with its salary policies.

A hearing was conducted on April 23, 1976 at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner of Education. Thereafter, Briefs of counsel and an affidavit with accompanying records of the Board as required by the hearing examiner (C-1) were filed to complete the record. (Tr. 19) The matter comes directly before the Commissioner for determination upon waiver by the litigants of a hearing examiner report.

Those relevant facts which were stipulated are herewith recited to provide the contextual background of the dispute.

Petitioner's service to the Board since 1964 was interrupted by maternity leaves from October 1967 to September 1968 and from July 1973 to February 1974. Petitioner returned to the school on January 31, 1974 to review class registers, courses of study and teaching materials but was not paid for that day. At the center of the dispute is the issue of whether or not that day must be allowed by the Board in determining whether her service during the 1973-74 school year exceeded one semester. It has been a long accepted practice in the district that service from February 1 through the end of the school year constitutes one semester and does not trigger a step advancement on the following year's salary guide. It has been a similarly prevailing practice that service beginning on or prior to January 31 and continuing through June does entitle the teacher to one additional step on the guide in the following September.

Petitioner had been compensated for the 1972-73 academic year at the ninth step of the guide when she went on maternity leave in July 1973. Upon her return she was paid at the tenth step of the guide from February 1, 1974 through June 1974 and for the entire 1974-75 school year. Thereafter, she was advanced in September 1975 to the eleventh step of the guide. Petitioner's grievance of the matter, wherein she sought placement on the eleventh step of the salary guide in February 1975, was denied at all levels including advisory arbitration on the basis that neither the negotiated agreement nor the Board's salary policies or practices required such midyear advancement. (See August 23, 1975 Arbitration Award, at pp. 1-8)

Documentary evidence reveals that the Board on February 5, 1974, retroactively approved petitioner's early return from maternity leave for the second semester of 1973-74 effective February 1, 1974. On the following day the Board Secretary so advised petitioner in writing. Therein it was stated, *inter alia*, that she would be teaching for a teacher on sabbatical leave "\*\*\*effective February 1, 1974\*\*\*." (R-2) Documents in evidence further reveal that the Board, in denying petitioner's grievance, advised her as follows:

\*\*\*[T]he prior practice has been to advance a teacher on the guide *only* if the teacher taught more than one semester of the academic year. In the instant matter Mrs. Hussey did not teach more than one semester in the 1973-1974 academic year and in conformity with the regular employment policies and practices she is not entitled to be elevated to Step Eleven until the academic year 1975-1976.

"The Grievant's main argument is based upon 'the alleged inequity' of the situation. In the absence of specific contract language, prior procedures and practices prevail and the Grievant's application should be denied on that basis.\*\*\*" *(Emphasis in text.)* (R-3)

Petitioner's principal stated in a document in evidence that when he learned of petitioner's desire to return to teaching prior to expiration of her maternity leave he contacted the Board's personnel office asking that her return be approved and that in keeping with past practice "\*\*\*January 30 and 31, be scheduled \*\*\* at substitute's pay so that a proper and efficient transition could take place.\*\*\*" (R-1; Tr. 5) He testified that he advised petitioner he would attempt to get authorization to pay her for those two days. (Tr. 22) The principal testified further that his request for transitional time at substitute's pay was denied but that petitioner, nevertheless, appeared on January 31. He testified further that it was his understanding that petitioner knew when she arrived at the school on January 31 that she would not be paid for that day. (Tr. 9)

Documents in evidence from the Board's files reveal that petitioner requested in writing that her maternity leave be terminated February 1, 1974. (C-1-5) They further show that the principal requested in writing that petitioner's maternity leave be "concluded as of January 31, 1974" and that she be authorized to resume teaching "for the duration of the 1973-74 school

school year.” (C-1-6) Similar written request by the personnel director was approved by the Assistant Superintendent on January 25, 1974. (C-1-7) Thereupon, the personnel director notified petitioner in writing on January 25, 1974 that she would be “\*\*\*nominated for appointment at the next regular meeting of the Board of Education as a teacher \*\*\* for the remainder of the 1973-74 school year effective February 1, 1974.\*\*\*” (C-1-8)

Petitioner contends that she was directed by the principal to report for teaching duties on January 31 and that she was never advised that she would not be paid nor receive credit for her services on that date. (Petitioner’s Brief, hereinafter “PB,” at pp. 1-3) In support of these contentions petitioner submits the report of a polygraph examiner which, in this regard, corroborates her testimony only to the extent that she was not so advised by her principal. (PB, Attachment)

Petitioner argues that the principal as an agent of the Board directed petitioner to report for duty on January 31, which, under the legal theory of principal and agent binds the Board. To buttress this argument petitioner cites *Ross v. Realty Abstract Co.*, 50 N.J. Super. 147 (App. Div. 1958) wherein the Court stated:

“\*\*\*A principal is bound by acts of his agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out as possessing\*\*\*. The precise question is whether the principal has placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of a particular business, is justified in presuming that such agent has authority to perform the particular act in question.\*\*\*” (at pp. 154-155)

Petitioner argues that nine years of service under her principal caused her to assume that he had authority to tell her to report on January 31. She further contends that she was unaware until the arbitration hearing that she had not in fact been paid for January 31. (PB, at pp. 6-7) Petitioner argues that she acceded to the apparent authority of her principal, that she worked on January 31, and that the Board is bound thereby to credit her for work performed in excess of one semester during 1973-74, thus entitling her to placement one step higher on the Board’s salary scale for the ensuing academic years. (PB, at p. 8)

Conversely, the Board maintains in its Brief, hereinafter “RB,” that while petitioner may have worked on January 31, she did so voluntarily, on her own time, and was neither engaged, employed, nor paid by the Board for that day. Thus, the Board contends that “\*\*\*her attendance that day does not qualify as employment for a part semester which would support movement on the salary guide.\*\*\*” (RB, at p. 4) In further support of this contention the Board calls attention not only to the written communication from its personnel office to petitioner confirming her nomination effective February 1, 1974 (C-1-8), but also to the subsequent written confirmation of her appointment by the Board wherein petitioner was advised, *inter alia*, that:

“\*\*\*[T]he Board approved your request to terminate your maternity leave effective January 31, 1974 rather than June 30, 1975 as previously requested and approved.

“\*\*\*[T]he Board of Education has reappointed you \*\*\* for the remainder of the 1973-74 school year beginning February 1, 1974\*\*\*.

“You will be teaching, effective February 1, 1974 \*\*\* for the second semester\*\*\*.” (R-2)

The Board argues that, petitioner having received such advisements, it must be concluded that her appearance on January 31 was voluntary, that her actual employment resumed on February 1 and that her placement on the salary guide thereafter was fully in accord with long established, albeit unwritten, salary practices of the district.

The hearing examiner, having carefully reviewed the stipulations of facts, the testimony elicited at the hearing, the Briefs of counsel and the documentary evidence makes the following finds of relevant facts:

Petitioner was at no time assured by her principal or any other responsible agent of the Board that she would be paid for working for either one or two days prior to February 1, 1974. She was, however, advised by the principal that he would request approval of his superiors for two transitional days. His request was denied on the grounds that petitioner was an experienced employee familiar with school procedures and that such transitional days were not necessary. (R-1) Nevertheless, petitioner as a conscientious teacher came to school on one of the two days to acquaint herself with records, pupils and materials. When she did so, she had not been assured either that she would or that she would not be employed or paid for that day.

It was prevailing practice in the district that, when such transitional days were approved, a teacher performing those transitional duties was paid the prevailing substitute teacher wage rather than the salary received later under the teacher's contract. (R-1)

Documents from the Board's files of official records establish the fact that petitioner was advised by the personnel director by letter of January 25, 1974, that she would be nominated at the Board's next meeting (February) to return from maternity leave "effective February 1, 1974." (C-1-8) The contents of that letter are in full accord not only with other relevant documentation connected with petitioner's return but with her own letter requesting that her maternity leave be "terminated February 1, 1974." (C-1-5) See also C-1-3, 6, 7.

\* \* \* \*

The Commissioner having carefully reviewed the above findings of fact and the entire record before him, determines that petitioner is not entitled to the relief which she seeks and that she has been properly compensated in accord

with the salary policies and practices prevailing in the district. This determination is grounded on the finding that no agent of the Board assured petitioner that she would be employed or paid for January 31, 1974. It is further grounded on the finding that even if, *arguendo*, she had been employed or promised employment on that day it would have been as a daily substitute according to the Board's prevailing practice. Such a practice, of effecting an orderly transition, appears fully consistent with the Board's responsibility to expend public funds in an efficient and economical manner. Petitioner, in any event, assumed a teaching position which was not vacated until February 1. Therefore, she was not performing the full duties of a teacher until that date.

It is a well accepted and often enunciated principle of law that employment as a substitute is neither considered to be synonymous with the work of a teacher nor productive of the same rights and benefits. *N.J.S.A. 18A:29-16*; *Biancardi v. Waldwick Board of Education*, 139 *N.J. Super.* 175 (*App. Div.* 1976); *Schulz v. State Board of Education*, 132 *N.J.L.* 345 (*E. & A.* 1945); *Kathy A. Wolf v. Board of Education of the Borough of Norwood, Bergen County*, 1975 *S.L.D.* 494; *Joan Driscoll v. Board of Education of the City of Clifton, Passaic County*, 1976 *S.L.D.* 7, *aff'd* State Board of Education 14 Thus, even if petitioner, *arguendo*, were found to have been employed on January 31, the Board's existing policy and practice indicated that she could only have been employed on that date as a substitute rather than as a teacher. Such employment would not have extended her service as a teacher in 1973-74 to a period in excess of one semester or entitled her to the relief which she seeks.

The Commissioner finds no necessity to consider the merits of the Board's argument that petitioner's polygraphic report is inadmissible as evidence. The report deals only with petitioner's response to two questions concerning whether the principal told her to report to work on January 31, and whether he advised her that she would not be paid for that day. (PB, Attachment) The more relevant questions would be whether she had in fact been advised by the principal, or his superiors, or the Board that she would be employed on that date as a teacher. Accordingly, the Commissioner finds nothing within the polygraphic report which has crucial bearing on the determination of the dispute.

The Commissioner determines that there is no applicability herein of the doctrine of principal and agent. This determination is grounded on the observation that neither the documents in evidence nor the total record in any way indicate that petitioner was so naive or uninformed as to assume that the principal was endowed with authority to terminate her maternity leave which had been approved by the Board. Such assumption is contradicted by the fact that she wrote to the Board to ask that it terminate her leave on February 1. The Commissioner, in *Wolf, supra*, said of such matters:

“\*\*\*When parties enter into agreements of employment, they are free agents seeking a meeting of the minds regarding such matters as responsibilities, duties, compensation and other involvements pertaining

to such employment. While neither party may properly resort to a subterfuge, they are bound by such agreements as they have entered into for the duration of such employment.\*\*\*” (at p. 500)

Petitioner was a free agent seeking to effect a modification of her maternity leave and resume her teaching duties. Although more careful written records of understandings reached would have been in order to prevent such costly and prolonged litigation as has ensued, it must be recognized that petitioner as a contracting party bore fully as much responsibility as did the Board and its agents for requiring that such written records be made. *Wolf, supra; Driscoll, supra; Eleanor Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County, 1974 S.L.D. 706*

Absent a showing of subterfuge, arbitrariness or capriciousness on the part of the Board or its agents, it is ordered, for the reasons hereinbefore expressed, that the Petition of Appeal be dismissed.

COMMISSIONER OF EDUCATION

December 22, 1976

**In the Matter of the Tenure Hearing of**

**Wesley L. Myers,**

**School District of Gloucester City, Camden County.**

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Complainant Board, William E. Hughes, Esq.

For the Respondent, Goldberg, Simon & Selikoff (Joel Selikoff, Esq., of Counsel)

Petitioner, the Board of Education of Gloucester City, hereinafter “Board,” has certified a charge of unbecoming conduct against respondent, a tenure teacher in its employ. The charge was certified to the Commissioner of Education by the Board on its resolution dated October 14, 1975. Subsequently, a copy of the charge and the resolution was mailed to respondent by the Board. The complainant Board certified that the charge would be sufficient, if true in fact, to warrant respondent’s dismissal from the school system.

Respondent, a suspended teacher in the employ of the Board of Education of Gloucester City, moves before the Commissioner for an Order to Dismiss the tenure charge currently certified by the Board against respondent in accordance with *N.J.S.A.* 18A:6-11.

By Cross-Motion, the Board moves for the dismissal of respondent's Amended Motion of Dismissal of the tenure charge.

On March 12, 1976, the return date of the Notice of Motion and Cross-Motion, counsel for both parties presented oral arguments. Counsel for respondent filed a Memorandum of Law and counsel for the Board filed a supporting Brief. The oral argument was heard by a representative of the Commissioner at the State Department of Education, Trenton. The report of the representative is as follows:

On August 11, 1975, the Superintendent of Schools forwarded a letter to respondent wherein respondent was informed that he was suspended from his teaching duties and told that the Superintendent would recommend to the Board that a charge of "conduct unbecoming a teacher" be served upon him. The Superintendent further stated in this letter that the reason for such suspension was information gathered by him concerning respondent's arrest by the Gloucester County Narcotics Unit. The letter further informed respondent of his right to an appearance before the Board. (R-1)

Subsequently, on October 14, 1975, the Board certified a charge against respondent and suspended him without pay. The charge forwarded to the Commissioner reads as follows:

"That the said Wesley L. Myers did, on May 7, 1975 and on May 13, 1975, sell marijuana to Detective Norman Reeves of the Gloucester County Prosecutor's Office for \$15.00 on the first occasion and \$40.00 on the second occasion, thus demonstrating conduct unbecoming a teacher."

Respondent contends that the charge certified against him by the Board was the result of respondent's arrest by proper law enforcement authorities for the alleged sale of a quantity of marijuana. Respondent asserts that a board of education should not be allowed to certify charges against a tenured teacher when those charges are based upon facts leading to an arrest until such time as the teacher has been either proven innocent or guilty of the alleged criminal charges. Respondent argues that if a board of education is allowed to certify tenure charges before adjudication ends the criminal process, then the same facts which led to the arrest could also be the subject of concurrent litigation before the Commissioner. Respondent further argues that if it is alleged that a teacher committed a crime, the judicial process should be allowed to run its course as to the truth or falsity thereof before a board of education can certify as tenure charges that the same facts which led to the arrest also lead to a conclusion of conduct unbecoming a teacher.

In support of his contention, respondent cites *In the Matter of the Tenure Hearing of William Megnin, School District of the Township of Wayne, Passaic County*, 1973 S.L.D. 641, wherein the Commissioner held that he did not have jurisdiction to preside over concurrent litigation pending adjudication in the courts when the substance of the tenure charges certified by a board of education reflect or relate to a previously made arrest. In the instant matter, respondent asserts that the substance of the certified charge against him and before the Commissioner relates to allegations then pending before the court.

Respondent seeks the following relief:

1. That the Commissioner dismiss the instant charges without prejudice to the Board re-certifying charges at a time when the criminal matter is no longer pending resolution before the court.

2. That respondent is to be afforded all benefits due him which he has lost during the period between the matter then pending before the courts and the subsequent time the Board re-certifies the charge against him.

The Board asserts that, contrary to the arguments advanced by respondent, it did not rely upon the fact that respondent was arrested and subsequently pleaded guilty to two indictments filed against him. The Board avers that the basis for the tenure charge is that the pupils of Gloucester should not be exposed to a teacher who sells marijuana. Further, the Board avers that such an action is one of unbecoming conduct and that a teacher guilty of such conduct should be dismissed from his teaching position in order that he not have the opportunity to corrupt those pupils under his charge now or in the future.

It is the Board's position that it is also in full agreement with the Commissioner's conclusions in *Megnin, supra*, but that the matter, *sub judice*, is distinguishable from that decision. The Board asserts that its action to certify a charge against respondent was not based upon the action taken by the Prosecutor of Gloucester County or the courts but, rather, the direct testimony before the Board of the two detectives involved with the sale of marijuana by respondent. (Tr. 15) Notwithstanding the fact that respondent did indeed plead guilty to the criminal charges filed against him in the court, his indictment and subsequent guilty plea were not the basis for the Board's certification of the charge.

Based upon the foregoing assertions, counsel for the Board respectfully submits that respondent's Amended Motion to Dismiss the tenure charge be dismissed.

Respondent relies upon the argument that boards of education may not certify charges against a tenured teacher who has been arrested, while the criminal charges are pending in litigation before the courts. Respondent cites *Megnin, supra*, as controlling in the instant matter.

The Commissioner takes notice of *Megnin, supra*, and concurs that therein he set aside a charge against a tenured teaching staff member without prejudice

pending determination by a court of proper jurisdiction with regard to the allegations. In *Megnin*, the specific charge set forth alleged that William Megnin was named defendant in a criminal complaint which was then pending adjudication before the Bergen County Grand Jury. The Commissioner was without knowledge of the truth or falsity of the allegation; therefore, he set aside the Board's charge without prejudice. The Commissioner further stated in *Megnin* that in the event the allegation embodied in the Board's charge was found to be true by the courts, the Board was free to subsequently re-certify the charge for further consideration by the Commissioner.

In the instant matter, the record reveals that the Board did not rely upon alleged criminal indictments filed against respondent but, rather, the direct testimony of two narcotics agents with respect to the sale of marijuana on two separate occasions by respondent. The undisputed fact that respondent subsequently pleaded guilty to the two criminal indictments filed against him lend credibility to the Board's charge; however, the charge by the Board did not recite the alleged arrest or indictment of respondent. Notwithstanding the Board's determination to exclude respondent's arrest, indictment and subsequent guilty plea, the Commissioner is constrained to observe that the conviction of a criminal offense is admissible evidence toward a tenure charge. *In the Matter of the Tenure Hearing of Alex Smollok, Passaic County Technical and Vocational Board, Passaic County, 1976 S.L.D. 361* The Commissioner, therefore, finds no similarity between *Megnin, supra*, and the instant matter. Further, he finds that the Board was in compliance with *N.J.S.A. 18A:6-11 et seq.* when it determined to file a charge of conduct unbecoming a teaching staff member. The Commissioner takes notice that respondent entered a plea of guilty to indictments numbered 592-74 and 593-74 and that on January 23, 1976 it was ordered and adjudged by the Gloucester County Criminal Court that respondent be sentenced to the New Jersey Reformatory for an indeterminate term not to exceed five years, said sentence suspended, and respondent placed on probation for two years and fined \$500 for each of the two indictments (C-1, C-2)

Accordingly, the Commissioner finds and determines that respondent's arguments are without merit and hereby dismisses respondent's Amended Motion for Dismissal of the tenure charge against him. The Commissioner hereby directs that oral argument be heard on the question whether Summary Judgment should be granted to the Board, determining that respondent is guilty of conduct unbecoming a teacher. The Commissioner, therefore, directs that his representative proceed as expeditiously as possible.

COMMISSIONER OF EDUCATION

June 29, 1976

**In the Matter of the Tenure Hearing of**

**Wesley L. Myers,**

**School District of Gloucester City, Camden County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board of Education, William E. Hughes, Esq.

For the Respondent, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

The Board of Education of Gloucester City, hereinafter "Board," filed charges of conduct unbecoming a teacher with the Commissioner of Education on October 20, 1975, certifying that the charges would be sufficient, if true in fact, to warrant dismissal of respondent as a teacher in the School District of Gloucester City.

The facts of the matter are not in dispute. Briefs were filed and oral argument on the Board's Motion for Summary Judgment was held on September 20, 1976.

Respondent was suspended without pay subsequent to a determination by the Board on October 14, 1975, which reads as follows:

"That the said Wesley L. Myers did, on May 7, 1975 and on May 13, 1975, sell marijuana to Detective Norman Reeves of the Gloucester County Prosecutor's Office for \$15.00 on the first occasion and \$40.00 on the second occasion, thus demonstrating conduct unbecoming a teacher."

The Board asserts that it certified its charge of conduct unbecoming a teacher before the Commissioner prior to respondent's arrest, the certification of the two indictments, the guilty plea and the subsequent judgment of the Gloucester County Court. (Tr. II-3) The Board relies upon the Commissioner's prior determination *In the Matter of the Tenure Hearing of Wesley L. Myers, School District of Gloucester City, Camden County, 1976 S.L.D. 1025*, wherein the Commissioner held:

\*\*\*Notwithstanding the Board's determination to exclude respondent's arrest, indictment and subsequent guilty plea, the Commissioner is constrained to observe that the conviction of a criminal offense is admissible evidence toward a tenure charge.\*\*\*  
(at P. 1028)

Respondent was found guilty of the charge of distribution of a controlled dangerous substance on two separate occasions. His sentence by the Honorable Paul F. Cunard, Judge of the Gloucester County Criminal Court, Woodbury, is summarized as follows:

“It is, therefore, on January 23, 1976

“Ordered and Adjudged that the defendant be and is sentenced to the New Jersey Reformatory for an indeterminate term not to exceed five years. Sentence suspended and defendant placed on probation for two years and fined \$500 [C-1] \*\*\* and defendant placed on probation for two years to run concurrently with sentence imposed on indictment #592-74. Defendant fined \$500.” (C-2)

Respondent argues that the plea which later found its way into the Court Order was entered pursuant to plea bargaining contained in “Rules Governing Criminal Practice” of the *Rules Governing the Courts of the State of New Jersey, 1976* (rev. 5th ed. 1975). *Rule 3:9-2 Pleas* provides, *inter alia*, as follows:

“\*\*\*For good cause shown the court *may*, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding.\*\*\*”  
(*Emphasis supplied.*) (at p. 192)

Respondent asserts that *Rule 3:9-2* provides for plea bargaining and contains the condition that the plea may not be used in any civil proceeding as evidence. Respondent avers that the administrative hearing before the Commissioner is a civil proceeding, and therefore, the plea and the resulting order may not be used as evidence against him. Respondent cites *In re Sanders*, 40 *N.J. Super.* 477 (*App. Div.* 1956) and *Kravis v. Hock*, 137 *N.J.L.* 252 (*Sup. Ct.* 1948). (Tr. II-5-7)

The Commissioner observes that the Court did not exercise its discretion to order respondent’s guilty plea not be evidential in any civil proceeding. Accordingly, the Commissioner does not agree with respondent’s argument and finds that respondent’s conviction resulted from the commission of the crime, on two occasions, of the distribution of a controlled dangerous substance which, in the Commissioner’s judgment, involves moral turpitude. The crime occurred while he was a teaching staff member.

*Black’s Law Dictionary* (rev. 4th ed. 1968) defines “moral turpitude” as follows:

“An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.\*\*\*”

“Conduct contrary to justice, honesty, modesty, or good morals.\*\*\*”  
(at p. 1160)

Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

In making a determination in the instant matter, the Commissioner must consider not only the effect of his decision on respondent, but on the pupils, their parents, other teaching staff members, and the community at large.

The Commissioner finds also that the construction of *N.J.S.A. 2A:135-9* is applicable in the instant matter. That statute reads as follows:

“Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea.

“If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture.”

The conviction and sentencing of a teacher to jail for criminal offense is sufficient reason for a finding of unbecoming conduct and the teacher's subsequent dismissal from his position. *In the Matter of the Tenure Hearing of Raymond Exum, School District of the City of East Orange, Essex County, 1971 S.L.D. 259; In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97* In *Exum*, the crimes committed clearly involved moral turpitude, although there was no need to discuss them as such at that time.

The Commissioner has consistently pointed out that those who enter the teaching profession have a significant influence upon those they teach, and therefore, should exhibit exemplary behavior. The Commissioner stated *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302* as follows:

“\*\*\*Of\*\*\*concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities, which are inimical to the public interest and which are designed to impede the orderly process of public education.\*\*\*He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and

custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.\*\*\*” (at p. 321)

The Commissioner determines that respondent has not continued to serve and exhibit “good behavior” as described in *N.J.S.A.* 18A:28-5 which reads in part as follows:

“The services of all teaching staff members including all teachers \*\*\* shall be under tenure during good behavior \*\*\* and they shall not be dismissed \*\*\* except for \*\*\* conduct unbecoming such a teaching staff member or other just cause\*\*\*.”

Additionally, the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, reads in pertinent part as follows:

“No person shall be dismissed or reduced in compensation,

“(a) if he is or shall be under tenure of office, position or employment during good behavior \*\*\* in the public school system of the state \*\*\* except for \*\*\* unbecoming conduct, or other just cause\*\*\*.”

The Commissioner determines, therefore, that respondent’s guilt, conviction and sentence are sufficient proof that his behavior represents conduct unbecoming a teacher. The Commissioner further determines that Wesley L. Myers must forfeit his right to tenure and employment in the School District of the City of Gloucester, Camden County, as of the date of his suspension.

COMMISSIONER OF EDUCATION

December 22, 1976

**Maurice S. Kaprow,**

*Petitioner,*

v.

**Board of Education of the Township of Howell, Monmouth County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Kaye & Davison (Duane O. Davison, Esq., of Counsel)

For the Respondent, Bathgate & Wegener (Peter H. Wegener, Esq., of Counsel)

Petitioner was employed by the Board of Education of the Township of Howell, Monmouth County, hereinafter "Board," as a supervisor of instruction for three consecutive academic years and was not reemployed for a fourth. Petitioner prays for reinstatement in his former position, together with any back pay to which he is entitled, on the grounds that the Board's action in terminating his employment is procedurally and statutorily defective and violative of his rights guaranteed by the United States Constitution.

A hearing in this matter was conducted on October 15, 1975 in the office of the Monmouth County Superintendent of Schools, Freehold, before a hearing examiner appointed by the Commissioner of Education. Briefs were filed before and after the hearing and several documents were accepted in evidence. The report of the hearing examiner follows:

Petitioner was employed by the Board as a supervisor of instruction beginning September 1, for the three academic years 1972-73, 1973-74, and 1974-75. He was not reappointed for a fourth academic year; therefore, his last contract expired on June 30, 1975. The record discloses that he performed his functions as a supervisor of instruction in a satisfactory manner. The only written evaluation (P-1) was made during his second year of employment and it was positive. There is no showing of unsatisfactory performance of his duties. Petitioner contends that he was not reemployed by the Board because he sent a letter memorandum dated October 10, 1974 (P-4) to the Superintendent of Schools. This memorandum was sent when petitioner interceded on behalf of one of his subordinate teachers who was denied a leave of absence to complete a master's degree. It is reproduced here in its entirety:

"Yesterday, while I was in Southard School, [P.R.] approached me and showed me your letter of recent date wherein you denied her a leave from February 1, 1975 to June 30, 1975 to enable her to complete the requirements for her Master's degree at Monmouth College. There are several points which I feel must be made, *as her supervisor.*

“It is my considered professional opinion based on my direct knowledge of her work, her class, and [P.R.] herself, that the best interests of the children in her class, in Southard School, and in the district as a whole would be served by allowing the leave. [P.R.] is willing to make a personal sacrifice (loss of pay for six months) to better her abilities to serve *all* the children of this district. I am certain that when she returns she will be a far better teacher, and, as she has done so many times in the past, will share her newfound knowledge with her fellow teachers.

“Secondly, the logic of why she was denied the leave is hard to comprehend. I realize that [P.R.] has much to offer the children in Southard because of her involvement in T4C. I also know that last year a similar situation arose in Taunton School. Last year, in Taunton, the third grades were staffed with the following teacher experience levels:

- a) [L.S.] – 6 years experience Grade 3
- b) [J.B.] – no experience Grade 3
- c) [S.P.] – new teacher – no experience
- d) [P.B.] – new teacher – no experience

“When [L.S.] applied for a leave from March 15, 1974 to September 1, 1975 for study at a school in St. Maarten, N.A. (a Caribbean island) no one said that would leave the third grades at Taunton without an experienced teacher. That leave was granted without question. The logic of granting one while denying the other fails me.

“Further, I understand that [L.S.] (who also is familiar with T4C programs and had demonstrated a high level of creativity) would like to return to active duty in our schools as soon as possible. As [L.S.’] former supervisor, I feel she would be a strong asset to Southard School and could easily continue with the T4C program now in operation in [P.R.’s] classroom.

“Of course, there are numerous other examples of leaves granted for ‘educational’ reasons – even leaves in mid-year.

“To name but a few:

- 1 – [E.G.] – 1/1/75 – 2/1/75
- 2 – [R.C.] – 3/16/74 – 9/1/74
- 3 – [H.L.] – 1/2/73 – 6/30/73

“In fact, at the Board meeting of December 11, 1972 [H.L.’s] leave was granted, ‘so that he may complete his Master’s degree.’ Sabbaticals often are only for ½ year. Note this year’s sabbatical leaves:

- 1 – [N.P.] – 9/1/74 – 1/31/75
- 2 – [W.M.] – 2/1/75 – 6/30/75

"I am certain that given these facts along with my professional recommendation you will reconsider your action re: [P.R.'s] request for a leave.

"I have discussed this matter with Mrs. [W.] and she concurs fully with my recommendations.

"Thank you for your consideration." (Emphasis in text.) (P-4)

This memorandum thereafter came to the attention of the Board when P.R. processed a grievance because her requested leave was denied.

Petitioner testified that subsequent to the grievance hearing, he was approached by a Board member who said "\*\*\*\*if you worked for me and did that I'd [threatening expletive deleted].\*\*\*\*" He testified that other Board members also expressed their dissatisfaction with his memorandum. (Tr. 13-14) Petitioner testified also, that the Superintendent spoke to him immediately after the grievance hearing for P.R. and told him that it would be difficult for petitioner to get another contract of employment in the school district. (Tr. 14) Petitioner testified that he met again with the Superintendent in his office in February 1975, prior to the annual school election and was told that the Board was considering dropping a supervisor's position. He testified further that the Superintendent told him in that same meeting that the Assistant Superintendent was recommending that he should fire petitioner because he was becoming another T.J. (T.J. is a staff member for the New Jersey Education Association.) (Tr. 34)

A Board member testified on petitioner's behalf and stated that prior to the memo (P-4) petitioner had been the Board's "fair haired boy" and that after the memo and the resultant grievance hearing, there was a definite difference in attitude among all Board members toward petitioner. (Tr. 43-45) He testified that petitioner was released because of a negotiated agreement and pursuant to a recommendation from a former Board member.

Petitioner contends that his release was caused in part by a series of written communications he had with the Assistant Superintendent. These communications were started by petitioner's written request of the Assistant Superintendent dated October 22, 1974 to supply certain curriculum materials for two of his subordinate teachers. (P-5) When this request went unanswered, a reminder memorandum was sent to the Assistant Superintendent on November 1, 1974. (P-6) This memorandum was answered on November 4, 1974 by the Assistant Superintendent in a critical and somewhat sarcastic memorandum to petitioner. (P-7) Petitioner on November 6, 1974, sent the Assistant Superintendent a vituperative and sardonic memorandum (P-9), after which, he testified, the Assistant Superintendent refused to talk to him for several weeks. (Tr. 22)

It is this series of exchanges of memoranda, alleges petitioner, that led to the eventual recommendation of the Assistant Superintendent to eliminate his position as a supervisor of instruction.

Petitioner avers that he was a union organizer on behalf of the district's administrators, and that through his efforts as secretary of the union in the months of October, November and December 1974, he was able to get thirteen of the fourteen district administrators to join the union. (Tr. 23-24, 27-29) Petitioner alleges that the Board was upset that its administrators had joined a union and that the Board took vindictive action toward the three nontenure administrators who had joined that newly-formed group. (Tr. 53-56)

Finally, petitioner states that the Board meeting held on March 25, 1975 at which the vote was taken not to offer him a contract for the 1975-76 school year was illegal in that the meeting began at 8:07 p.m. in violation of *N.J.S.A.* 18A:10-6 which reads as follows:

"All [board] meetings shall be called to commence not later than eight P.M. of the designated day but, if a quorum be not present at the time for which the meeting is called, the member or members present may recess the meeting to a time not later than nine P.M. of said day\*\*\*."

(See also P-1, at p. 50)

Believing that the meeting was illegal because it began at 8:07 p.m., petitioner notified the Board pursuant to *N.J.S.A.* 18A:27-11 that he was accepting their offer of employment for the coming school year. (Tr. 7) Petitioner asserts that the voice vote taken regarding his employment status was illegal in that a recorded majority roll call vote was required.

Although the statutes require that a majority roll call vote be taken to employ teaching staff members (*N.J.S.A.* 18A:27-1), there is no statutory requirement for such a vote when the Board determines not to offer a contract. See *Iris Sachs v. Board of Education of the Township East Windsor Regional School District et al.*, 1976 S.L.D. (decided February 25, 1976).

The Board denies each of petitioner's allegations concerning the reasons he was not reemployed. The Board asserts that petitioner was released for purely economic reasons.

The Board Secretary testified that subsequent to the annual school election in March 1975 in which the budget was defeated, the Board was instructed by the municipal governing body to reduce its budget by \$950,000. He testified that the Board considered this reduction and thereafter replied to the governing body that it could reduce its budget by \$375,000 without affecting any personnel; however, this recommendation was not accepted by the governing body. After provisions were considered for reducing personnel, the governing body accepted the Board's determination that it could reduce its budget by \$564,000. (Tr. 69-73) The Board Secretary testified, further, that each of the administrative staff members was asked to recommend reductions which the Board might consider, and that he had recommended a \$35,000 reduction in the transportation line item. (Tr. 69)

Introduced in evidence at this juncture is a line item budget (R-2) which discloses the Board's proposed budget, its total reductions, and its authorized budget. An examination of R-2 shows that thirty-seven line items were reduced, among them line item 212 Instruction (Salaries — supervisors). It is significant to note that this line item was reduced by \$45,484, which is a far greater sum than the \$18,000 salary petitioner would have received had his position not been eliminated. (See R-3.)

The Board Secretary's testimony was corroborated by the testimony of the Assistant Superintendent who testified that the finance chairman of the Board asked the administrative staff to submit lists of probable staff reductions if the Board had to go that far in reducing its budget. (Tr. 88) The Assistant Superintendent thereafter prepared a list of possible budget reductions in which he recommended eliminating at least eleven professional positions and at least seven aide positions at a budget savings of \$154,200. Included in these recommendations was the elimination of one supervisor. (R-3) The Assistant Superintendent testified that he and petitioner had resolved their differences in November 1974 when petitioner came to see him in his office. In this regard, he testified that "\*\*\*\*we had an amicable discussion and at the end of it I recall saying can we stop the fun and games now and get down to business and [petitioner] agreed. No more fun and games. Those were his exact words.\*\*\*\*" (Tr. 92) He testified that he advised petitioner that his chances for reemployment were not bright since there had been a great deal of public pressure applied to the Board which indicated that four supervisory positions were not needed in the district, and that he believed the budget would be in trouble this year as it had been the previous year. (Tr. 93-94)

The Superintendent testified that he directed petitioner and the Assistant Superintendent to settle their differences (Tr. 107) and that they came out friends. He testified that petitioner's release was purely for reasons of economy. (Tr. 111)

The hearing examiner finds that petitioner has been unable to sustain his burden of proof to show that the determination of the Board in not reemploying him was improper in any aspect.

Petitioner's allegation that he was not reemployed because of the exchange of letters with the Assistant Superintendent and the letter he sent to the Superintendent in support of a teacher's request for a sabbatical leave is not supported by the evidence. Nor is his claim supported that he was not reemployed in violation of his constitutional rights because he organized the district's administrators contrary to the wishes of the Board. Petitioner's allegation that the Board took a negative action against each one of the nontenure administrators who joined the union is not supported by the facts. It is true that a nontenure assistant principal was returned to a classroom teaching assignment; however, that teacher has filed his own appeal before the Commissioner and his appeal will be dealt with on its own merits. (P-1) The other nontenure principal was returned to his post as a principal. (Petitioner's Brief II, at p. 17) It is clear that when there is a reduction in personnel, nontenure teaching staff members, by law, must be released before those with a tenure status. *N.J.S.A. 18A:28-9 et seq.*

Although the record discloses that several Board members may have been very dissatisfied with petitioner's involvement concerning a teacher's request for a sabbatical leave, the record is devoid of proof that this involvement was a contributing reason for his non-reemployment. Instead, the record shows quite clearly that there was a drastic reduction in the budget subsequent to its defeat at the annual school election in March 1975, and that petitioner was the only nontenure supervisor of instruction of the four supervisors who were employed by the Board. (Tr. 94-95) The record shows that the last hired were the first to be released. (Tr. 96-97)

Finally, petitioner demands reinstatement on the grounds that the meeting held by the Board in which his contract was not renewed was an illegal meeting because it began at 8:07 p.m., instead of 8:00 p.m. as required by *N.J.S.A.* 18A:10-6.

The statute clearly requires that public meetings of the Board begin at 8:00 p.m. and not later than 9:00 p.m. The intent of this legislative requirement is to prevent boards of education from adjourning meetings, once begun, until such a late hour that the majority of the public cannot attend.

In *Eluria Milliken v. Board of Education of the City of Camden et al.*, 1957-58 *S.L.D.* 53, in which the Commissioner decided that a meeting commencing after 8:00 p.m. did not comply with the requirements of *R.S.* 18:5-47 [*N.J.S.A.* 18A:10-6], he quoted the following from *Frank H. O'Brien v. Board of Education of the Town of West New York*, 1938 *S.L.D.* 31 (1912), aff'd State Board of Education 33:

“\*\*\*At four o'clock in the afternoon of the 30th the Board met and adjourned to 8:15 P.M. It was at this adjourned meeting that the Board resolved that Mr. O'Brien had forfeited his membership. No question has been raised as to the legality of this meeting, which commenced after 8 P.M., contrary to law, and in view of the conclusion which we have read, it is necessary for us to rule on it. Needless to say, if a board can convene at four and then lawfully take a recess until 8:15, there would seem to be no reason why it could not do so until 9:15, 10:15, 11:15, or even midnight, and the spirit, if not the letter, of the law would be just as clearly broken if a meeting was called for any such hours. The law is very clear.

Meetings of the Board of Education shall be public, and shall commence not later than 8 P.M. The object of the law, viz., full publicity, can be defeated almost as well by holding meetings when the great majority of the public is asleep as by a star chamber proceeding.\*\*\*” (at pp. 33-34)

In *Victor W. DeBellis v. Board of Education of the City of Orange, Essex County*, 1960-61 *S.L.D.* 148, 154, the Commissioner held as follows:

“\*\*\*The Commissioner does not charge that it was the purpose of the respondent Board of Education to hold star chamber proceedings, but if the practice of adjourning a regular meeting and convening a special

meeting later in the same evening were upheld, it would make it possible for any board of education to hold such star chamber proceedings and thereby evade the intent of the Legislature to require actions of boards of education to be taken in public.\*\*\*”

The action of the Board in this matter commencing its public meeting at 8:07 p.m. does not meet the strict letter of the law; however, it cannot be successfully argued that the Board’s intent was to delay its actions until the majority of the public left the meeting. Rather, the minutes show that the full Board, about four hundred citizens, employees, and two reporters were in attendance. Many matters were acted on that evening including enrollment and tuition matters, resignations of three teachers, reinstatement of teachers returning from leaves, salary adjustment matters, tuition refunds and others. (P-1) To hold, now, that these matters and the Board’s determination not to reemploy petitioner are null and void because the Board did not convene at precisely 8:00 p.m. would merely be placing form over substance.

The hearing examiner recommends, therefore, that the Commissioner find that the Board meeting held on March 25, 1975, was a valid meeting and that the Commissioner admonish the Board to hereafter begin all meetings no later than the required statutory time. The hearing examiner concludes that there is no further relief to which petitioner is entitled and that the Petition of Appeal should be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions filed thereto by petitioner pursuant to *N.J.A.C. 6:24-1.17(b)*.

Petitioner’s exceptions to the hearing examiner’s report state that the meeting of the Board on March 25, 1975, should be held as invalid because it started at 8:07 p.m. in violation of *N.J.S.A. 18A:10-6*; that the budget defeat played no part in the Board’s determination not to reemploy him; that the hearing examiner used inadmissible evidence; and, finally, that the combination of the following three occurrences resulted in his not being reemployed. They are: petitioner’s authorship of a memorandum requesting leave of absence for a teacher [P.R.]; his exchange of memoranda with the Assistant Superintendent; and his organization of the administrators’ association.

The Commissioner accepts the finding of the hearing examiner concerning the starting time of the Board meeting and holds that the Board meeting on March 25, 1975, was a valid meeting. At the same time, however, the Commissioner directs the Board to hereafter begin all meetings prior to 8:00 p.m. The Commissioner finds in the report, also, that the budget defeat and resultant staff and other reductions by the Board adequately support the Board’s reason for not offering petitioner reemployment, irrespective of petitioner’s contention that there was an actual increase in the Board’s budget. The

Commissioner cannot find in the record that inadmissible evidence was used by the hearing examiner. The record reveals that there was no objection to the testimony given by the Assistant Superintendent, and that petitioner's objection which was sustained by the hearing examiner was merely to that part of the testimony referring to a "committee man" appearing and to "public sentiment." (Tr. 93-94)

The record does not support petitioner's exceptions that it was the combination of petitioner's letter memorandum on behalf of [P.R.], his exchange of memoranda with the Assistant Superintendent, and his organization of the administrators' association which led to his termination. Rather, the hearing examiner found, and the Commissioner confirms, that it was the defeated school budget and the resultant reductions in that budget which ultimately led to petitioner's termination. R-2 is persuasive in that it details thirty-seven line item reductions made by the Board in its effort to resolve its budget dispute with the municipal governing body. As the hearing examiner also pointed out, supervisors' salaries was merely one of those line items (J212), and unfortunately for petitioner, he had the least seniority of all the district's supervisors. (Tr. 95-96) Memoranda prepared by the Assistant Superintendent and the Superintendent, R-3 and R-4, give further direct proof that budgetary considerations alone caused the elimination of petitioner's position and, concurrently, his employment. Also, other personnel were not reemployed for budgetary reasons and, in each case, the last ones hired were the first ones not offered reemployment. (Tr. 96)

After his review of this entire record, the Commissioner is constrained to make further observations. Petitioner's memoranda to his superiors were unnecessary, for the most part, when a simple telephone conversation would have sufficed in some instances. A personal meeting with the Superintendent should have been requested by petitioner when he sought to assist a teacher in obtaining a leave of absence. Instead, in that instance he wrote P-4, *ante*, which, to say the least, is contemptuous of the determination made by the Superintendent, and implies that petitioner knew better than the Superintendent what was best for the school district. Further, the memorandum written to the Assistant Superintendent was improper both in tone and usage of language.

The Commissioner has commented previously about the relationship which must exist on a highly professional level between educators if there is to be a thorough and efficient system of education in each school district. *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, School District of the Township of Brick, Ocean County*, 1972 *S.L.D.* 387; *aff'd in part, rev'd in part* State Board of Education 1973 *S.L.D.* 782; *aff'd, rev'd in part* 128 *N.J. Super.* 149 (*App. Div.* 1974); *cert. den.* 65 *N.J.* 573 (*Sup. Ct.* 1974); *cert. den.* United States Supreme Court December 9, 1974, the Commissioner commented as follows:

“\*\*\*[T]he Commissioner holds that the speech (P-1), even standing alone, warrants a finding that respondent has forfeited her right to continued employment in Brick Township. This holding is grounded on the belief

that *local boards of education which are required by constitutional prescription to operate thorough and efficient systems of public education, cannot be expected to carry out this mandate in an atmosphere of turmoil and conflict between school administrators and other employees.* When such an atmosphere clearly exists, as herein, and when the atmosphere was created by a teacher acting in a premeditated and calculated manner (the speech, P-1) the Commissioner believes that the tenure rights of the teacher are forfeit to the needs of the district as a whole for a cooperative effort in the education of children. *It is this effort of local boards of education, the representatives of the people through the electoral process, and of school administrators, entrusted by the boards with duties of school management, which, in the Commissioner's judgment, must be supported.\*\*\*"*

(*Emphasis added.*) (1972 S.L.D., at pp. 427-428)

Pietrunti thus forfeited her tenure.

In the Commissioner's judgment, the Board would have had good and adequate reason in this instance to deny reemployment to petitioner even if its determination were not based on budgetary considerations, but instead on petitioner's several memoranda. Petitioner had not attained a tenure status and the Board's determination not to reemploy him was, however, based upon its budgetary reduction.

The Commissioner determines that the Board acted within its statutory and discretionary authority when it determined that it would not reemploy petitioner. When a local board has so acted, there is no authority conferred on the Commissioner to interpose his discretion for that of the Board in the absence of evidence of discrimination or of evidence that the Board's actions have been arbitrary, capricious, or unreasonable. *Boult and Harris v. Passaic Board of Education*, 136 N.J.L. 521 (E. & A. 1948) There is no such evidence in the record before the Commissioner. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 22, 1976

John G. Nelson,

*Petitioner,*

v.

Board of Education of the Town of Kearny, Hudson County,

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Philip Feintuch, Esq.

For the Respondent, Koch and Koch (Kenneth P. Davie, Esq., of Counsel)

Petitioner, a nontenured teacher, alleges that the compensation he received from the Board of Education of Kearny, hereinafter "Board," was less than the Superintendent of Schools had advised that he would receive for the 1974-75 and 1975-76 school years and that the amounts he did receive were contrary to established Board policy. He seeks an Order of the Commissioner of Education directing the Board to compensate him at a higher salary for those years. The Board contends that petitioner was legally compensated in full for his teaching services for the period in question.

A hearing in the matter was conducted and items marked into evidence on July 13, 1976 at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows, setting forth first those uncontroverted facts necessary to provide a contextual understanding of the controversy.

Petitioner, a former industrial supervisor, completed his academic requirements to teach in June 1974. He applied, was interviewed and hired by letter agreement to fill a vacancy created by a teacher on leave during the 1974-75 school year. The salary he received from the Board was \$9,277, an amount then paid to all permanent substitutes in the Board's employ. (Tr. 49-51; P-1, at p. 54) In April 1975, petitioner was notified that he would not be reemployed for the ensuing year. Soon thereafter he was advised of an opportunity to teach industrial electricity. He applied, was accepted and paid at the rate of \$11,611 at the fifth step of the bachelor's degree salary guide for the 1975-76 school year, having been granted credit for two years of military service, one year of industrial experience and one year of teaching. (C-2)

Petitioner testified that he had already begun to work for, but was not under contract to, another school district in August 1974, when he was advised by the Board's career vocational education supervisor, hereinafter "supervisor," of a vacancy in Kearny. He related that the supervisor told him that his proper place on the salary guide would be the eleventh step, or \$14,088. Petitioner testified that, since this was an amount greater than that offered by the other school district, he reluctantly notified that district's superintendent that he was

accepting employment in Kearny. (Tr. 10) He stated that he was then informed by the Kearny Superintendent that he would be recommended for employment. He was also informed that in keeping with school policy, he would be paid \$9,277 as a permanent substitute for the absent teacher. Petitioner said he reluctantly agreed. (Tr. 11)

Petitioner testified that when he was later notified of a teaching position for 1975-76, the Superintendent advised him that he would recommend that petitioner be given credit for his military service, industrial experience and one year of teaching experience. Petitioner stated that this, coupled with his knowledge of the Board's past hiring practices, caused him to believe that he would be placed on the fourteenth step of the salary guide at a salary of \$16,866. (Tr. 13, 19; P-1, at p. 71) He testified that no contract was issued to him prior to September 1975, but that after he began teaching the Board finally authorized a contract to employ him and compensate him \$11,611 as specified for the fifth step of the salary guide.

The supervisor testified that he did advise petitioner in August 1974 of provisions of the Board's salary scale. Nevertheless, he asserted that at no time did he notify him that he would be hired at \$14,088 for 1974-75 or that he would in the ensuing year be paid \$16,866. He further testified that he had advised petitioner that, although experienced persons had in the past been hired at the eleventh step of the guide, he did not know what credit would be accorded him for his industrial experience and military service. (Tr. 30-33, 44) The supervisor stated that he not only had no authority to fix salaries but that, although he expected petitioner to be hired at the eleventh step, he made no recommendation as to what his salary should be. (Tr. 34, 44, 46)

The Superintendent testified that, when he met with petitioner in August 1974, he explained the benefits accorded a permanent substitute and provided him with a letter detailing those benefits, which letter required no affirmative statement of acceptance. (C-1; Tr. 52) He testified further that when a position opened for the 1975-76 school year he probably advised petitioner that it had, in fact, been the past practice of the Board in every instance to allow up to ten years' credit for industrial experience. (Tr. 59)

The Superintendent also testified that, when the Board became aware in the summer of 1975 of a shortage in State aid of \$185,000, he was instructed by the Board that in hiring he should endeavor to "\*\*\*\*do a little better in salary than [he] had done in the past.\*\*\*\*" (Tr. 54, 62) He testified that he thereupon advised petitioner that, since this was the Board's instruction he might not be placed as high on the salary scale as others with similar industrial experience had been placed in the past. (Tr. 64) The Superintendent testified that the Board resolved to employ petitioner on August 28, but deferred setting his salary until its September meeting, subsequent to the opening of school. The Superintendent testified that in no instance had he ever advised petitioner what his actual salary would be for 1975-76. In this regard he testified as follows:

\*\*\*\*[I]n every case, it was a matter of [B]oard discretion \*\*\*\* even though they were pretty constant in their position. I always indicated

what I would recommend, what I thought the [B]oard will do, but never said to anybody [he] would get X-amount of dollars, as I might to a teacher coming to us with three years teaching experience\*\*\*.” (Tr. 68)

The hearing examiner has carefully reviewed the testimony of witnesses and the documents in evidence and makes the following finds of fact:

1. Petitioner was not advised by either the Superintendent or the supervisor that he would be employed by the Board for 1974-75 at a salary higher than the \$9,277 which he was paid. Although the supervisor, through nescience, erroneously expected that petitioner would be employed at the eleventh step of the bachelor's degree guide, he did not categorically state that he would be. Nor could he legally have done so, since he was not vested with such powers.

2. The Superintendent informed petitioner prior to his reporting for work in September 1974, that he would be employed as a permanent substitute for 1974-75 at a salary of \$9,277.

3. Neither the supervisor nor the Superintendent ever told petitioner that he would be employed at a salary higher than the \$11,611 which he was paid during 1975-76. The Superintendent correctly concluded that the Board alone had discretionary authority to allow credit for industrial experience. Although the Superintendent advised petitioner that he would recommend that the Board validate his experience as it had for other candidates in the past, he did not assure petitioner that the Board would do so. Thus, any advice which he gave does not rise to the level of a contractual obligation.

4. Petitioner assumed that the Board would give credit for his industrial experience as it had to others in past years. Such assumption was not grounded on any oral or written salary policy of the Board or on a contractual agreement, but on the Board's past practice in granting up to ten years for industrial experience. (Tr. 66)

Absent a finding of contract violation or a misapplication of salary policy by the Board for the 1974-75 or 1975-76 school year, the hearing examiner recommends that the Commissioner determine that petitioner's expectations that he would receive higher salaries were not properly grounded on contractual agreements and provide insufficient grounds for the granting of the relief which he seeks. Accordingly, it is recommended that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the entire record of the controverted matter and notes that on November 22, 1976 an extension of time was granted

for the filing of exceptions to the hearing examiner report, originally due on October 13, 1976 pursuant to *N.J.A.C.* 6:24-1.17(b). No exceptions were filed by the extended date of December 4, 1976. A careful review of the written evidence and oral testimony reveals no acts of the Board's administrative officers upon which petitioner had reason to rely with assurance that he would be paid salaries higher than those which he did receive from September 1974 to June 1976. Accordingly, no treatise of applicability of the doctrine of principal and agent is required.

Petitioner has failed to produce the quantum of credible evidence which is required to validate his allegations that supervisors or administrative agents made, on the Board's behalf, salary commitments upon which he reasonably could rely.

The Board legally compensated petitioner for 1974-75 in accord with its then existing policy of paying a teacher, serving in place of an absent tenured teacher, at the first step of the teachers' salary scale. *N.J.S.A.* 18A:29-9 Petitioner was a free agent when he voluntarily accepted this valid offer. *Joan Driscoll v. Board of Education of the City of Clifton, Passaic County*, 1976 *S.L.D.* 7, aff'd State Board of Education 14 he was, thereafter, encouraged to believe, by reason of the Board's past practice of granting credits for industrial experience, that he would be paid at a higher rate than \$11,611 for the 1975-76 school year. Nevertheless, in full accord with its statutory discretionary authority, and without violating its stated salary policies, the Board, as an austerity measure, limited its salary offer to \$11,611, which valid offer petitioner, as a free agent, accepted and received as salary. *N.J.S.A.* 18A:29-10 See *Alfred Zitani v. Board of Education of the Township of Willingboro, Burlington County*, 1975 *S.L.D.* 439.

Absent proof of statutory violation or other impropriety, the Commissioner finds no reason to substitute his discretion for that of the Board whose determination is entitled to a presumption of correctness. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, aff'd State Board of Educa. 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1974), aff'd 136 *N.J.L.* 521 (*E & A* 1948) Accordingly, the Petition of Appeal, being found to be without merit, is dismissed.

COMMISSIONER OF EDUCATION

December 28, 1976

Mary Taccone,

*Petitioner,*

v.

Board of Education of the City of Newark, Essex County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Cohen and Meshulam (David J. Meshulam, Esq., of Counsel)

For the Respondent, Barry A. Aisenstock, Esq.

Petitioner, originally employed as a full-time teaching staff member for the 1968-69 school year by the Board of Education of the City of Newark, hereinafter "Board," alleges that the Board improperly withheld sick leave benefits from her during the 1971 academic year. Petitioner now seeks to recover those benefits in the form of a lump sum payment from the Board. The Board denies the allegations and avers that its action with respect to sick leave benefits afforded petitioner is in all respects a proper one and legally correct.

A hearing was conducted in the matter on September 2, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The matter was originally filed on January 24, 1974. Agreement was reached that the Commissioner would issue an Order of Remand to the Board for its determination upon receipt of petitioner's request for the sick leave benefits contained herein. (See *Mary Taccone v. Board of Education of the City of Newark, Essex County*, 1974 S.L.D. 380.) Prior to the issuance of this Order, the Board sought to have the matter adjudicated by way of Declaratory Judgment on March 13, 1974. The hearing examiner determined that the record was insufficiently developed for that Motion. Subsequent to the Board taking formal action (C-1) denying the requested benefits, a hearing into the merits of the matter was scheduled for November 11, 1974. However, petitioner's then attorney-of-record withdrew from the matter citing a possible conflict of interest. (Tr. I-3)

The hearing examiner was advised by letter dated April 11, 1975, that petitioner engaged different counsel who also withdrew from the matter on May 5, 1975. Petitioner did secure counsel, the present attorney-of-record, and the matter proceeded to a hearing on September 2, 1975. Documents necessary for the adjudication of the matter were subsequently filed by the Board.

Petitioner was originally employed as a full-time teaching staff member for the 1968-69 academic year. Prior to that time, the Board had engaged

petitioner as a substitute teacher. (Tr. II-49) Subsequent to the completion of the 1968-69 academic year, petitioner requested and was granted maternity leave for the entire 1969-70 academic year. (Tr. II-50) Petitioner returned to her teaching duties for the 1970-71 academic year. During that year petitioner became ill in the latter part of December 1970, and was hospitalized until the middle of April 1971. (Tr. II-17, 34) Petitioner's illness was diagnosed as Guillain-Barre (P-6A) from which petitioner is still incapacitated. She is still under a physician's care. (Tr. II-38) It is this testimony upon which the hearing examiner concludes that petitioner has not assumed regular teaching duties with the Board since December 1970.

Petitioner, by letter (C-2) dated April 14, 1971, requested a leave of absence "\*\*\*effective the date my substitute coverage benefits expire.\*\*\*" It is observed that the "substitute coverage" which petitioner cited in her letter request was with respect to a then existing Board policy (C-10) which covered personal illness and provided, *inter alia*, that:

\*\*\*

"(i) Any teacher employed in the Newark School System for fewer than ten years shall be allowed an absence beyond sick leave not greater than forty days in any one school year, during which he shall forfeit the per diem substitute's pay for the position.\*\*\*" (C-10)

At this juncture, the hearing examiner observes that it is this kind of blanket policy, applicable in equal measure to a large segment of the Board's teaching staff membership without Board scrutiny on an individual basis, which the Commissioner has heretofore held to be *ultra vires*. (See *Marjorie B. Hutchenson v. Board of Education of the Borough of Totowa, Passaic County*, 1971 *S.L.D.* 512, *aff'd* State Board of Education, 1972 *S.L.D.* 672.) In *Hutchenson* the Commissioner held that a board of education must consider *each* request for prolonged absence beyond the allowable sick leave and accumulated sick leave benefits provided eligible employees by *N.J.S.A.* 18A:30-2 and 30-3 on an individual basis consistent with *N.J.S.A.* 18A:30-6 which provides:

"When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary."

Petitioner's husband testified that during the hospitalization of his wife, he contacted the office of the Board Secretary, the office of Personnel, and the office of Payroll to determine whether the Board had any policies with respect to sick leave benefits to which his wife may have been entitled. He also testified he was informed that the only sick leave benefits available to his wife were with

respect to the allowable sick leave days accorded her by statute, *N.J.S.A. 18A:30-2*, and the benefits accorded her by virtue of the then existing Board policy (C-10) by which she received the difference between her regular salary, on a per diem basis, less the cost for a substitute teacher, up to forty days. (Tr. II-15-16)

Petitioner's husband testified that during the 1971 summer months, both he and his wife had learned of a Board policy with respect to relief from forfeiture or loss of salary for extended periods. Neither party had submitted a copy of this policy at the time of hearing, however, and the hearing examiner subsequently requested that a copy be provided.

The Board submitted a copy of a Section 513.3, Relief from Forfeiture or Loss of Salary, of its rules and regulations which provides the following:

"All applications for relief from forfeiture or loss of salary shall be submitted to the Superintendent of Schools who shall present same to the Board of Education with his recommendations." (C-12)

Additionally, the Board submitted a copy of Article X, Section Two, subparagraph D of its then existing Agreement with its teachers which provides:

"In the event that a teacher's accumulated sick leave has been exhausted and the teacher certifies to the Board that he is unable to teach due to an extended illness, then the Board may, consistent with its present practice, grant additional sick leave to such teachers *with pay*." (Emphasis supplied.) (C-11)

Petitioner, in response to the hearing examiner's request for a copy of the Board's policy in regard to relief from forfeiture or loss of salary in relation to sick leave benefits submitted a copy of Section 511.41, *Ill Health*, of the Board's rules and regulations which provides in pertinent part as follows:

"Furlough for ill health will only be granted if the absence does not exceed the following:

"(1) a continuous period of absence for ill health amounting to the equivalent of more than two academic years, or

"(2) \*\*\*; or

"(3) a total absence of ill health within four consecutive academic years amounting to the equivalent of more than three academic years \*\*\* an application [for furlough and, in the hearing examiner's view based on the evidence, relief from forfeiture or loss of salary or, in fact, a leave of absence with pay for ill health] shall be accompanied by a physician's certificate\*\*\*. The Superintendent [will submit] his recommendation [to the Board] \*\*\*." (C-13)

Subsequent to the time petitioner learned of the Board's policy with respect to relief from forfeiture or loss of salary, petitioner's husband testified that he contacted the Superintendent's office during September 1971. (Tr. II-17) He was advised to have his wife submit a letter to the Superintendent requesting relief from loss of salary. Petitioner did submit a letter request (P-8) dated November 1, 1971. Petitioner's husband testified that after a period of one month elapsed, he contacted the Superintendent's office to determine the disposition of his wife's letter request and was advised that the letter request had not been received by the Superintendent's office. (Tr. II-17) A second letter request for relief from loss of salary was then submitted (Tr. II-18) which request was approved by the Board on March 28, 1972 for the period March 1, 1972 through June 30, 1972. (P-1) The relief granted petitioner was to resume regular salary payments while she was on leave of absence but limited to the period March 1 through June 30, 1972.

When petitioner and her husband were informed of the effective dates with respect to the Board's action, petitioner's husband testified he was advised that March 1, 1972 was selected as the starting date because that was the date her letter request (P-8) was received by the Board. Petitioner's husband, however, reminded the Superintendent that the original letter request was dated November 1, 1971. Thereafter, petitioner's husband testified that they were then notified that the effective date of the relief granted by the Board's action (P-1) would be amended so that the effective dates would be November, 1, 1971 through June 30, 1972. The date of November 1, 1971, was selected, petitioner's husband explained, because that was the date petitioner first requested the relief from loss of salary. (Tr. II-19) Consequently, petitioner began receiving her regular pay subsequent to the Board's action of March 28, 1972, retroactive to November 1, 1971. Her pay was to cease on June 30, 1972.

Petitioner, by letter (P-2) dated April 27, 1972, and during the effective dates she was receiving relief from loss of salary, requested an extension of such relief for the entire 1972-73 academic year. Petitioner was advised, by letter (P-3) dated May 23, 1972, from the Assistant Superintendent in Charge of Personnel that her request for a continuation of relief from loss of salary for the 1972-73 academic year was denied. Furthermore, by letter (C-9) dated July 26, 1972, the Board Secretary advised petitioner that the Board, at its meeting on July 25, 1972, had granted her a leave of absence, without pay, for the 1972-73 academic year.

Petitioner's husband testified that he subsequently had a conversation with the Acting Superintendent in regard to petitioner's belief that the relief from loss of salary approved by the Board on March 28, 1972 for the period November 1, 1971 through June 30, 1972, should have begun on January 1, 1971 when his wife was hospitalized. (Tr. II-21) The hearing examiner observes that this meeting must have occurred during the summer of 1972, because petitioner submitted a letter dated September 15, 1972 to the Acting Superintendent in which she stated, in pertinent part:

“Confirming our [obviously petitioner herself also talked with the Acting Superintendent] recent discussions, I am formally requesting ‘Relief From Loss of Salary,’ as prescribed under Paragraph 513.3, Rules, By-Laws and Regulations [*ante*] of the \*\*\* Board \*\*\* for the period of January 1, 1971 thru October 31, 1971. During this period, I did receive substitute coverage benefits [*ante*] which should be deducted from any salary granted.\*\*\* (P-4)

“During the four month period of my hospital confinement, many attempts were made to determine my eligibily for such benefits but I [through her husband] was misinformed of my rights by various department heads at the Board\*\*\*. (P-4)

The Acting Superintendent responded to petitioner’s request for relief from loss of salary for the period January 1, 1971 through October 31, 1971 by letter (P-5) dated September 25, 1972 in which he requested petitioner to forward a physician’s statement with respect to the nature and severity of the illness, the time of hospitalization, and medical expenses incurred. Petitioner submitted the requested data (P-6; P-6A) on October 26, 1972. The Acting Superintendent informed petitioner by letter (P-7) dated November 22, 1972, that her request for relief from loss of salary between January 1 and October 31, 1971 was not warranted.

The hearing examiner observes that petitioner’s request in this regard was not considered by the Board. Rather, the then Acting Superintendent made the administrative decision that petitioner’s requested relief was not warranted. It was this lack of Board action that precipitated the Commissioner’s earlier Order of Remand, *supra*. Subsequent thereto, the Board Secretary advised petitioner by letter (C-1) dated June 4, 1974, that the Board had denied her request on May 28, 1974. It is this denial that petitioner challenges herein and the relief she requests is to receive her regular pay, less the amount she already received by way of the substitute coverage benefits policy, *ante*, for the period of January 1 through October 31, 1971.

Petitioner alleges that the Board’s action of May 28, 1974 by which her request was denied is improper because it acted without sufficient knowledge of her request. (Tr. II-69) Petitioner complains that, notwithstanding her efforts to establish why the Board refused her request, she still has not learned the basis for denial. (Tr. II-69-70) Consequently, petitioner argues that its action was an arbitrary and capricious abuse of discretion. Petitioner contends the Board’s action of May 28, 1974, must be set aside and her prayer for relief must be granted. Petitioner also anchors her request for relief on what she asserts is the misleading information her husband received from the offices of the Board Secretary, Personnel and Payroll during the time of her hospitalization. The hearing examiner, does not place great weight on this argument for it is petitioner’s responsibility to accurately determine fringe benefits allowed her by her employer.

In its filed Answer, the Board raises as its sixth separate defense the argument that petitioner is attempting to have the Commissioner enforce a Board policy which in similar instances in the past he ruled to be invalid and cites *Marriott v. Board of Education of the Township of Hamilton, Mercer County*, 1949-50 *S.L.D.* 57, aff'd State Board of Education 1950-51 *S.L.D.* 69; *Hutchenson v. Totowa, supra*.

The hearing examiner finds nothing in the Board's policy or Agreement recited herein, excepting its substitute coverage benefits policy (C-10) already addressed, which requires uniform application of sick leave benefits to its teaching staff members. In fact, the Board's policy, Section 513.3, Relief from Forfeiture or Loss of Salary (C-12), specifically requires what appears to be individual application. There is no evidence before the hearing examiner to conclude that all applications are automatically approved. Moreover, the benefits pursuant to Article X, Section Two, subparagraph D (C-11) of the Agreement are discretionary with the Board.

While there is no direct testimony from the Acting Superintendent that he related the precise conditions of petitioner's request for relief from loss of salary for January 1, 1971 through October 31, 1971 to the Board prior to its determination to deny the request, it is clear that he did recommend (R-2) to the Board that her request be denied.

In summary, the hearing examiner finds that:

1. Petitioner received a paid leave of absence from her teaching duties for the period November 1, 1971 through June 30, 1972;
2. Such leave followed her specific requests but a similar request was denied by the Acting Superintendent and the Board with respect to the period January 1, 1971 to October 31, 1971;
3. The reasons for such denial were never afforded petitioner.

The question that remains for determination is whether or not this denial of reasons, when standing alone, should cause the Commissioner to grant the relief which petitioner seeks.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the replies filed thereto by the parties.

A brief review of the established facts is in order. Petitioner was employed for the 1968-69 academic year. Subsequent to the completion of that year, petitioner spent the 1969-70 academic year on maternity leave. Petitioner returned to her teaching duties in September 1970 and thereafter became ill on

or about December 20, 1970. Petitioner has not resumed her teaching duties since that time. Subsequent to the onset of her illness, petitioner applied for and received full pay between November 1, 1971 and June 30, 1972. The date November 1, 1971 was selected because that is the date petitioner's letter application was first submitted to the Board. Thereafter, petitioner sought to recover full salary for the initial period between January 1, 1971 and October 31, 1971. The Board denied this latter request without expressing its reasons for its denial.

Thus the issue before the Commissioner is whether the Board's failure to give petitioner reasons for its denial of her application for full sick leave pay between January 1 and October 31, 1971, constitutes an arbitrary action and, if so, is petitioner now entitled to be compensated for that period of time.

The Commissioner observes that the Board's policy, Section 513.3, Relief from Forfeiture or Loss of Salary (C-12), *ante*, whereby the Board granted petitioner full sick leave pay between November 1, 1971, and June 30, 1972 and under which petitioner now seeks her specific relief, was adopted by the Board pursuant to its authority at *N.J.S.A.* 18A:30-7 which provides, in pertinent part, as follows:

"Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration \*\*\*to grant sick leave [with pay] over and above the minimum sick leave\*\*\*."

The Commissioner holds that the provisions of this permissive statute may be exercised by a board of education at its discretion whenever it determines that it is right and appropriate to do so.

In the instant matter, the Board elected to exercise its discretionary authority to grant petitioner full sick leave salary between November 1, 1971, the date her application was received, and June 30, 1972. The denial by the Board of her application for full salary during her initial period of illness between January 1 and October 31, 1971, is within the Board's prerogative consistent with its authority at *N.J.S.A.* 18A:30-7. Absent a specific allegation that the Board's denial was based on some proscribed reason, the Commissioner will not intervene.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 28, 1976

**Mae Stack and Luretha Wilson,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Elmwood Park, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

**ON REMAND**

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Bartlett & Turitz (Stanley Turitz, Esq., of Counsel)

Petitioners Mae Stack and Luretha Wilson having opened the matter before the Commissioner of Education on August 22, 1973 through the filing of a verified Petition of Appeal alleging that the Board of Education of the Borough of Elmwood Park, Bergen County, hereinafter "Board," improperly established their salaries from July 1, 1972 as school nurses in its employ; and

The Board having filed its Answer on September 7, 1973 by which it denies the allegations; and

The Commissioner having found that the Board did in fact improperly establish petitioners' respective salaries for 1972-73 (See *Mae Stack and Luretha Wilson v. Board of Education of Elmwood Park, Bergen County*, 1975 S.L.D. 843); and

Petitioners having appealed the Commissioner's decision to the State Board of Education on February 3, 1976; and

The State Board of Education having affirmed the decision of the Commissioner on July 14, 1976 and having further remanded the matter to the Commissioner for clarification and determination of petitioners' salaries for the years subsequent to 1972-73; and

The parties having filed the necessary documents for such clarification and determination, the facts of the matter are these:

Petitioners are school nurses in the employ of the Board and each has acquired a tenure status. While each petitioner possesses a standard school nurse certificate, neither petitioner possesses a baccalaureate degree. The Commissioner had held, *inter alia*:

“\*\*\*[P]etitioners' salaries were improperly established for 1972-73 according to the lower rates set forth in the Board's non-degree salary guide. (J-1) This is so by virtue of the fact that at least one other teaching staff member without a degree was compensated by the Board according to its bachelor's degree salary guide for 1972-73.

“Consequently, Petitioner Stack, by reason of her experience (Tr. 6) should have been compensated during 1972-73 according to the thirteenth step of the then existing bachelor's scale, or \$12,500. Petitioner Wilson, by reason of her experience (Tr. 7) should have been compensated during 1972-73 according to the fourteenth step of the then existing bachelor's scale, or \$12,850. The rates of compensation for both petitioners were erroneously established at \$10,150 for 1972-73. (Tr. 6-7) Therefore, Petitioner Stack should be compensated in the amount of \$2,350 and Petitioner Wilson the amount of \$2,700.

“The Commissioner also finds that while the Board could have continued on the non-degree guide for 1973-74 and subsequent years so long as they were not being discriminated against, their respective 1972-73 salaries may not be diminished except pursuant to the tenure law. *N.J.S.A. 18A:28-5, et seq.*\*\*\*”

(*Mae Stack and Luretha Wilson, supra*, at pp. 846-847)

Consequently, since 1972-73 Petitioner Stack's salary may not have been less than \$12,500. Petitioner Wilson's salary may not have been less than \$12,850.

The following table, however, sets forth the salaries paid each petitioner by the Board and in addition it sets forth the amounts each petitioner has been underpaid for each year from 1972-73:

	<u>1972</u> <u>73</u>	<u>1973</u> <u>74</u>	<u>1974</u> <u>75</u>	<u>1975</u> <u>76</u>	<u>1976</u> <u>77</u>	<u>Total</u>
<b>Petitioner Stack</b>						
Salary Paid	\$10,150	\$10,650	\$11,291	\$11,491	*	
Proper Salary	<u>12,500</u>	<u>12,500</u>	<u>12,500</u>	<u>12,500</u>		
Underpaid	\$ 2,350	\$ 1,850	\$ 1,209	\$ 1,009		<u>\$6,418</u>

\*On leave of absence

	<u>1972</u> <u>73</u>	<u>1973</u> <u>74</u>	<u>1974</u> <u>75</u>	<u>1975</u> <u>76</u>	<u>1976</u> <u>77</u>	<u>Total</u>
<b>Petitioner Wilson</b>						
Salary Paid	\$10,150	\$10,650	\$11,291	\$11,591	\$11,591	
Proper Salary	<u>12,850</u>	<u>12,850</u>	<u>12,850</u>	<u>12,850</u>	<u>12,850</u>	
Underpaid	\$ 2,700	\$ 2,200	\$ 1,559	\$ 1,259	\$ 1,259	<u>\$8,977</u>

The Commissioner finds and determines that since 1972-73 until the present 1976-77 school year, Petitioner Stack has been underpaid in the amount of \$6,418 and Petitioner Wilson has been underpaid in the amount of \$8,977.

Accordingly, the Commissioner of Education hereby directs the Board of Education of the Borough of Elmwood Park, Bergen County, to forthwith pay to Mae Stack the amount of \$6,418 and to pay to Luretha Wilson the amount of \$8,977.

It is ordered on this 29th day of December, 1976.

COMMISSIONER OF EDUCATION

**Board of Education of the City of South Amboy,**

*Petitioner,*

v.

**City Council of the City of South Amboy, Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, John J. Vail, Esq.

Petitioner, the Board of Education of the City of South Amboy, hereinafter "Board," appeals from an action of the City Council of the City of South Amboy, hereinafter "Council," taken pursuant to *N.J.S.A. 18A:22-37* certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1976-77 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on September 13, 1976 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 9, 1976, the Board submitted to the electorate a proposal to raise \$1,797,579 by local taxation for current expense of the school district. This item was rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in South Amboy for the 1976-77 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A. 18A:22-37*.

After consultation with the Board, Council made its determinations and certified to the Middlesex County Board of Taxation an amount of \$1,400,000 for current expense, a reduction of \$397,579. Council, however, in its Answer filed to the Board's Petition of Appeal, delineated only \$94,267 in line item reductions which it believed could be effected as economies in the Board's budget. Council further agreed to certify the additional amount of \$34,467 to the Board's J810 account in the event the State of New Jersey failed to fully fund the required contributions to the Teachers' Pension and Annuity Fund. Accordingly, of Council's line item reductions, only \$59,800 need be treated herein as in dispute since full funding of TPAF contributions was provided by the State with enactment into law of *c. 113, L. 1976* on November 9, 1976.

The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its need for restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also supports its position with written testimony. As part of its determination, Council suggested the following specific line items of the budget in which it believed economies could be effected:

**CHART I**

<b>Account Number</b>	<b>Item</b>	<b>Board's Proposal</b>	<b>Council's Proposal</b>	<b>Amount Reduced</b>
<b>CURRENT EXPENSE:</b>				
J110	Sal., Adm.	\$ 50,050	\$ 47,950	\$ 2,100
J130	Other Adm. Exps.	20,300	17,800	2,500
J211	Sal., Prins.	64,047	62,547	1,500
J213	Sal., Tchrs.	6,500	5,500	1,000
J230	Lib. & A-V	10,500	8,000	2,500
J240	Teaching Supls.	41,000	38,000	3,000
J610	Sum. Help/Overtime	5,000	4,000	1,000
J630	Heat	\$ 20,000	\$ 19,000	\$ 1,000
J640	Utilities	20,000	18,000	2,000
J720	Contr. Servs.	36,425	20,425	16,000
J730	Repl. Equip.	20,700	14,000	6,700
J810	Empl. Retire. Cont.	51,461	16,994	34,467
J1010	Sal., Stud. Activ.	15,000	12,500	2,500
J1020-1	Stud. Activ. Exps.	11,500	10,000	1,500
J1020-2	Adult Eve. Sch.	10,000	-0-	10,000
J1020-3	Summer School	6,500	-0-	6,500
<b>SUBTOTAL – CURRENT EXPENSE</b>		<b>\$388,983</b>	<b>\$294,716</b>	<b>\$ 94,267</b>
<b>Undelineated Reduction</b>		<b>303,312</b>	<b>-0-</b>	<b>303,312</b>
<b>TOTAL – CURRENT EXPENSE</b>		<b>\$692,295</b>	<b>\$294,716</b>	<b>\$397,579</b>

The hearing examiner has carefully considered the written and oral testimony and exhibits in evidence and proceeds to set forth to the Commissioner his recommendations concerning those line items in contention which, in his judgment, require narrative treatment:

- J111 Salary, Administration*
- J211 Salary, Principals*

It is noted that the Superintendent's salary has been negotiated. (P-1-1) Accordingly, it must be honored pursuant to *N.J.S.A. 18A:29-4.1*. See also *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon, Passaic County*, 1974 S.L.D. 712; *Board of Education of the City of New Brunswick v. Mayor and Council of the City of New Brunswick, Middlesex County*, 1976 S.L.D. 92. While the principals' salaries had not yet been fixed at the time of the hearing, they are negotiated to be in fixed ratio to teachers' salaries. (J-1-2) An analysis of the line item reveals that funds provided therein will support only modest percentage increases (P-1-35; J-1) Council's further argument that the Board will not employ the same custodian of funds for the entire 1976-77 year appears without merit, since it in no way obviates the requirement of the Board to employ a replacement. Accordingly, it is recommended that the entire amounts of Council's proposed reductions be restored to these salary line items as set forth in Chart II, *post*.  
forth in Chart II, *post*.

#### *J730 Replacement Equipment*

The hearing examiner takes notice that the Board has increased the amount in this sector of its budget by \$7,000 over that budgeted in 1975-76. Such increase is necessitated by the Board's loss of grants-in-aid which had enabled it to reduce its 1974-75 budgeted amount for this line item by more than fifty percent. (J-1; Tr. 29) In consideration of inflationary costs of teaching equipment and the loss of grants, it is recommended that the Board's proposal for this line item be determined necessary and that the entire amount of the \$6,700 reduction be restored thereto. (Chart II, *post*)

#### *J810 Employees Retirement Contributions*

The amount of \$34,467, as budgeted by the Board for Teachers' Pension and Annuity Fund contributions, has been funded by the State of New Jersey, obviating the need for the expenditure of that amount which was budgeted in this line item by the Board. Accordingly, the entire amount of the reduction is sustained. (Chart II, *post*)

#### *J1020 Adult Evening School*

Testimony at the hearing and a communication from Council thereafter indicates a receptivity on the part of Council to support an adult evening school in the interests of the needs of residents of South Amboy if and when additional data on curriculum is developed by the Board. (Tr. 53) Absent a firm agreement by Council, however, it is recommended that the Commissioner not restore Council's reduction of \$10,000. This recommendation is grounded on the fact that this proposed evening school is not a continuation of an established program. Thus, in consideration of the voters' expressed desire for economy, it is recommended that the reduction be sustained in full. (Chart II, *post*) In the event that Council becomes convinced of the efficacy of such a proposed program, it may, of course, certify additional funds to the Middlesex County Board of Taxation for the Board's use in this sector of its budget.

There appears no necessity to deal *seriatim* with each of the remaining areas in which Council recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County, 1968 S.L.D. 139*:

“\*\*\*The problem is one of total revenues available to meet the demands of a school system\*\*\*. The Commissioner will indicate, however, the areas where he believes all or part of Council’s reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.\*\*\*” (at p. 142)

The hearing examiner recommends that, in addition to those items previously treated in narrative form, the following restorations and sustainments be established as appropriate to the sustenance of an adequate school program in the school district.

**CHART II**

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
<b>CURRENT EXPENSE:</b>				
J110	Sal., Adm.	\$ 2,100	\$ 2,100	\$ -0-
J130	Other Adm. Exps.	2,500	1,300	1,200
J211	Sal., Prins.	\$ 1,500	\$ 1,500	\$ -0-
J213	Bedside Tchr. Sals.	1,000	1,000	-0-
J230	Lib. & A-V	2,500	2,500	-0-
J240	Teaching Supls.	3,000	3,000	-0-
J610	Sum. Help/Overtime	1,000	1,000	-0-
J630	Heat	1,000	1,000	-0-
J640	Utilities	2,000	2,000	-0-
J720	Contr. Servs.	16,000	14,000	2,000
J730	Repl. Equip.	6,700	6,700	-0-
J810	Empl. Retire. Cont.	34,467	-0-	34,467
J1010	Sal., Stud. Activ.	2,500	1,500	1,000
J1020-1	Stud. Activ. Exps.	1,500	1,250	250
J1020-2	Adult Eve. Sch.	10,000	-0-	10,000
J1020-3	Summer School	6,500	5,500	1,000
<b>SUBTOTAL</b>				
<b>CURRENT EXPENSE</b>		<b>\$ 94,267</b>	<b>\$ 44,350</b>	<b>\$49,917</b>
<b>Undelineated Reduction</b>		<b>303,312</b>	<b>303,312</b>	<b>-0-</b>
<b>TOTAL CURRENT EXPENSE</b>		<b>\$397,579</b>	<b>\$347,662</b>	<b>\$49,917</b>

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has carefully reviewed the recommendations of the hearing examiner in light of both the documentation in evidence and the oral testimony elicited at the hearing. It is observed that both parties have agreed to waive receipt of a hearing examiner report as provided by *N.J.A.C.* 6:24-1.17(b). Accordingly, the matter proceeds directly to an adjudication.

The Commissioner accepts and adopts with the single exception of that pertaining to line item J810 the recommendations of the hearing examiner regarding those line items in contention. (Chart II, *ante*) He further accepts the recommendation of the hearing examiner regarding restoration of the full amount of the reduction of \$303,312 for which Council did not delineate line items which it believed could be reduced to effect economies. Absent such action by Council, the Commissioner determines that Council has not met its obligation with regard to the reduction in certification of \$303,312. *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966)

In regard to line item J810, however, the Commissioner observes that the enactment of *c.* 113, *L.* 1976 (Senate Bill No. 1503) on November 9, 1976, particularly section 3, paragraphs a, b, and c, has provided the following adjustments to the Board's 1976-77 school budget as proposed to the voters of the district:

Proposed Current Expense Expenditures	\$1,797,579
Less 25% TPAF Expenditure	<u>33,542</u>
Subtotal	\$1,764,037
J810 Reduction by Governing Body	<u>\$ 34,467*</u>
Adjusted 1976-77 School Budget	\$1,729,570

\*Estimated TPAF Expenditure

It may be seen that the adjustments required in accordance with *c.* 113, *L.* 1976 accomplished the reduction of the proposed TPAF expenditure, which was the stated intention of the governing body. The Commissioner observes that the governing body's reduction of line item J810 by \$34,467 results in a reduction in excess of 200% of the TPAF amount, which result was not the intention of the governing body. Were such a result allowed to stand, the Board's programs other than the line item in contention would inevitably suffer.

Accordingly, and in consideration of the fact that the record is barren of proof that the Board has substantiated its need for restoration of an amount greater than \$33,542 (the actual amount equal to 25% of the TPAF obligation), the Commissioner determines that the amount of \$33,542 must be restored to line item J810. This amount, when added to the recommended restoration of \$347,662 as set forth in Chart II, *ante*, results in a total insufficiency of \$381,204 which amount must be added to the Board's current expense budget for 1976-77 in order that the Board may conduct a thorough and efficient education for the 1976-77 school year. In consideration thereof, the Commissioner hereby authorizes the expenditure by the South Amboy Board of Education of \$370,350 of unbudgeted current expense State aid available to the Board pursuant to *c. 113, L. 1976* for current expenses of the 1976-77 school year. The remaining amount of \$10,854 is herewith certified by the Commissioner to the Middlesex County Board of Taxation as an additional amount necessary to be raised by local taxation for current expenses of the Board for the 1976-77 school year so that the total amount of local taxes for current expense purposes shall be \$1,410,854.

COMMISSIONER OF EDUCATION

December 29, 1976

**In the Matter of the Annual School Election**

**Held in the School District of the Borough of**

**Rutherford, Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

Petitioner is a resident of the Borough of Rutherford, Bergen County, who challenged the validity of a Nominating Petition for Annual School Election, hereinafter "Nominating Petition," submitted on behalf of Thomas Vaughan, a successful candidate for election to a three-year term as a member of the Board of Education of the Borough of Rutherford, hereinafter "Board," in the annual school election held March 9, 1976. Petitioner alleges that one of the ten signatures on the Nominating Petition was rendered a nullity by the fact that the signature was different from the signature that appeared on the voter permanent registration card on file with the Bergen County Board of Elections. Petitioner prays that, if in fact the signature on the Nominating Petition was a falsification, the election of Candidate Vaughan be set aside.

An inquiry concerned with the contentions, *ante*, was conducted on March 25, 1976 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a representative of the Commissioner of Education. The report of the representative is as follows:

The Secretary of the Board received the prescribed form, "Nominating Petition for Annual School Election," which endorsed the candidacy of Thomas Vaughan for a three-year term on the Board. The form (C-3) contained the signatures of ten endorsers, as required by statute (*N.J.S.A. 18A:14-9 et seq.*), and the signature of Steve Masone was affixed on two separate lines and notarized as the "Signature of Petitioner."

The Board Secretary testified that he inspected the signatures on the Nominating Petition of Tommie Linda Masone and detected that the signatures of Steve Masone "appeared to be different." (Tr. 15) He then contacted Mrs. Masone by letter dated February 6, 1976, as follows:

"In examining your petition as a candidate for a member of the School Board, I have a question to ask the petitioner--your husband Steve.

"I have tried calling and guess I have been calling the wrong times. Kindly have Steve stop by the office and I'm sure that it would take only a few moments to satisfy my inquiry."  
(C-5)

The Board Secretary stated that Steve Masone subsequently contacted him and informed the Board Secretary that the "other" Steve Masone was his son and that there should not have been any question as to the validity of the signatures. The Board Secretary testified that he did not contact Candidate Vaughan with respect to the signatures which similarly appeared on his Nominating Petition. The Board Secretary stated:

“\*\*\*My ultimate goal in pursuing this was not to question the candidates themselves but due to the fact that Mr. Steve Masone had sworn to and witnessed the signatures on both petitions, I was primarily involved in questioning him rather than the candidates.” (Tr. 33)

The Board Secretary testified that he had raised the question of the validity of the signatures on the Nominating Petitions with the Superintendent of Schools, the Board attorney and the office of the Bergen County Superintendent of Schools. He also testified that he did not believe that he was sufficiently qualified as a handwriting expert to press the issue further, nor did he believe that it was his responsibility to assume such authority. (Tr. 16)

Subsequent to the Board election held on March 9, 1976, petitioner, an unsuccessful candidate, testified that she had learned of the alleged discrepancy of the signatures that appeared on the Nominating Petitions. (Tr. 5) She requested and received copies of the Nominating Petitions from the Board, dating back to the 1972 annual election. Upon review of the Nominating Petitions, she testified that the name of Steve Masone appeared on the Nominating Petitions of Tommie Linda Masone and Thomas Vaughan. Also, the signatures of Steve Masone were found to be affixed to the two Nominating Petitions and the signatures appeared to have been written differently. Petitioner further stated that she was not aware that Steve Masone had a son, also named Steve Masone. (Tr. 4)

Petitioner avers, however, that the signature of Steve Masone (son) which appeared on the Nominating Petitions did not comport with the signature as it appeared on the permanent registration card on file with Bergen County Clerk of Elections. (Exhibit C)

The Commissioner's representative requested that the permanent registration cards, on file with the Bergen County Clerk of Elections, with signatures of Steve Masone be brought forth for inspection at the time of the inquiry. The representative of the Bergen County Clerk of Elections appeared with the documents and testified as to their authenticity. Permanent Registration H274211 was issued in the name of Steve A. Masone, 422 Edgewood Place, Rutherford, New Jersey, and Permanent Registration H718638 was issued in the name of Steven Masone, of the same address. (Tr. 18)

Steve A. Masone (father) testified that the signature which appeared on Permanent Registration H274211 was his signature. (Tr. 23) He further identified signatures as his which appeared on copies of four separate Nominating Petitions, one of which was the controverted Nominating Petition for Thomas Vaughan. (Tr. 22-23)

The copy of the Nominating Petition of Thomas Vaughan contained four signatures of Steve Masone. (C-3) The witness, Steve Masone (father), identified two of the signatures on the Nominating Petition as his:

“\*\*\*my signature appears twice, once as one of the petitioners and the other one, the petitioner.” (Tr. 22)

Steven Masone (son) was not available for the inquiry. Counsel for the Masones stated for the record that he had attempted to contact the younger Masone without success. (Tr. 37) In the absence of Steven Masone, his father presented two documents with his son's signature as Steve Masone. One such document, entitled “How Good A Student Are You?” (C-6) had a signature affixed similar to the signature which appeared on Permanent Registration H718638 and the Signature Comparison Record of Steven Masone. The second document was a check drawn against the National Community Bank, Rutherford Office, with a signature of Steve Masone which did not appear to be similar to the signature on Permanent Registration H718638. (C-7; Tr. 32)

The Commissioner's representative has examined the evidence and arguments and sets forth his principal findings as follows:

1. The Board Secretary was made aware on February 6, 1978 of alleged discrepancies in the signatures of the Steve Masones on the Nominating Petitions and, although by his own admission he possessed no expertise in handwriting analysis, he attempted to contact a signer of the Petition. He did not, however, convey knowledge of the allegation to the candidate for election.

2. The Commissioner's representative also claims no expertise in handwriting analysis except that possessed by an average citizen. On the basis of this limited expertise, however, the Commissioner's representative finds that the allegations with respect to the signature of Steve Masone appear to have merit. Such signature on the Nominating Petition does not appear to be similar to the one appearing on Signature Comparison Record H718638 on file with the Bergen County Clerk of Elections.

The Commissioner's representative leaves to the Commissioner a decision with respect to petitioner's plea to set aside the election of Candidate Thomas Vaughan. The representative recommends referral of the evidence concerned with the signatures which appeared on the Nominating Petitions to the Bergen County Prosecutor for review and consideration.

This concludes the report of the Commissioner's representative.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and considered such report in the context of the statutory mandate applicable to the

handling of defective nominating petitions. Such mandate is set forth in the statute *N.J.S.A.* 18A:14-12 as follows:

“When a nominating petition is found to be defective, *the secretary of the board shall forthwith notify the candidate* of the defect and the date when the ballots will be printed and the candidate endorsing the petition may amend the same in form or substance so as to remedy the defect at any time prior to said date.”  
(*Emphasis supplied.*)

In the instant matter there was a lack of compliance with this statutory prescription and further possible violation of the statutes *N.J.S.A.* 18A:14-65, 66 and 68. These statutes provide:

*N.J.S.A.* 18A:14-65

“Any person interfering with the orderly conduct of a school election or destroying, falsifying or altering any of the records of a school election in any manner whatsoever shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding \$500.00, or by imprisonment not exceeding one year, or both.”

*N.J.S.A.* 18A:14-66

“Any person signing any affidavit pursuant to section 18A:14-52, which includes a false statement of fact, shall be guilty of a misdemeanor.”

*N.J.S.A.* 18A:14-68

“No person shall falsely make oath to, or fraudulently deface or fraudulently destroy any nomination petition, or any part thereof, or file, or receive for filing, any nomination petition, for any office to be voted for at any election, knowing the same or any part thereof to be falsely made, or suppress any such nomination petition which has been duly filed, or any part thereof. A person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than five years.”

No evidence was presented at the hearing, however, that the alleged irregularities altered the election results and, accordingly, the election may not be vitiated. As the Court said *In re Clee*, 119 *N.J.L.* 310 (*Sup. Ct.* 1938):

“\*\*\*Irregularities on the part of election boards having no effect upon the voting \*\*\* will never vitiate an election.\*\*\*” (at p. 329)

and in *Love v. Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871)

“\*\*\*Elections should never be held void unless clearly illegal. It is the duty of the Court to give effect to them, if possible.\*\*\*” (at p. 277)

The decision herein is that the election must be given effect.

The Commissioner is constrained, however, to caution boards of education, and particularly board secretaries, to give scrupulous attention and conformance to the statutes governing school elections. A strict and meticulous observance of election laws is required of all persons having responsibility for the conduct of such elections. A strict and meticulous observance of election laws is required of all persons having responsibility for the conduct of such elections.

Finally, the Commissioner directs that a copy of the report of his representative and of this decision be forwarded to the Bergen County Prosecutor for scrutiny with respect to possible violation of the statutes *N.J.S.A.* 18A:14-65, 66, and 68. Such direction is founded on the premise that the penalty for violation of these statutes is one only a court of proper jurisdiction may impose after consideration of all factors.

COMMISSIONER OF EDUCATION

December 29, 1976

Zavan A. Mazmanian,

*Petitioner,*

v.

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

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, John J. Pagano, Esq.

Petitioner is a nontenured teacher who was employed by the Board of Education of the City of Bayonne, hereinafter "Board," and was not reemployed for the 1974-75 academic year. Petitioner avers that the failure of the Board to reappoint him was illegal and violative of his right to due process of law in accordance with the Fourteenth Amendment of the Constitution of the United States because the Board failed to give him reasons why he was not reemployed. The Board denies petitioner's allegations and states that he has been given due process and all other rights guaranteed by the Constitution and the applicable law in matters of this kind.

A hearing in this matter was conducted on July 19, 1976 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

Petitioner was employed by the Board to serve from October 1, 1971 through June 30, 1972. He was thereafter employed for the 1972-73 and 1973-74 academic years. (Board's Answer, at pp. 1-2; Petition of Appeal, at p. 1; Exhibit 1) Petitioner was notified in writing on April 12, 1974, as follows:

"The Board of Education will not provide to you a teaching contract for September 1st, 1974, for the academic year 1974-75.

"Your School Principal will personally deliver to you a copy of this letter.

"Your teaching duties and the salary and benefits provided to you by the Bayonne Board of Education will continue in force through June, 1974.

[signed]  
Superintendent of Schools." (P-1)

The applicable statutes in this regard, *N.J.S.A.* 18A:27-10, 11, 12, read as follows:

*N.J.S.A.* 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered."

*N.J.S.A.* 18A:27-11

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

*N.J.S.A. 18A:27-12*

“If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.”

Petitioner demands that the Board give him reasons why he was not reemployed and an opportunity for an appearance to dissuade the Board from its determination not to offer him employment. The Board asserts that petitioner never made a request for reasons or a “hearing,” nor does he have such an entitlement pursuant to the applicable law and decisions rendered by the Commissioner, the State Board of Education, and the courts.

The narrow issues to be determined, therefore, are:

“1. Did Petitioner request orally, or in writing, a hearing from the Board pertaining to his non-reemployment?

“2. Is Petitioner entitled to a hearing and to reasons?”

(Conference Agreements)

The record reveals that on April 4, 1974, petitioner’s name was on a list of teachers who would not be offered contracts for the 1974-75 academic year and that the Board approved the list at a meeting of the Board on May 9, 1975; however, a resolution was offered by a Board member to remove petitioner’s name from such list and offer him a contract for the 1974-75 academic year. The resolution failed for lack of a second. Thereafter, a colloquy ensued between petitioner and the Vice-President of the Board in which petitioner set forth his impressions of the meaning of his teaching evaluations, and questioned the Board with respect to an alleged lack of opportunity to express his teaching philosophy when it differed from that of his superiors. (R-1, at pp. 64-65, 102-104) However, nowhere does the transcript of the Board meeting of May 9, 1974, or any other document in evidence, offer any proof that petitioner made an oral request for a statement of reasons why he was not reemployed. (R-1, specifically at pp. 102-104) Nor is there any evidence that petitioner made such a request in writing. Further, the Superintendent, the Bayonne High School Principal, the Director of Music and Art, and the President of the Board testified that petitioner never requested from any one of them, orally or in writing, a hearing pertaining to his non-reemployment. (Board’s Brief, at pp. 4-5) Witnesses on behalf of petitioner testified that petitioner asked for reasons why he was not being reemployed at the public meeting of the Board on May 9, 1974. The transcript of the proceedings of that meeting does not, however, support that testimony. (R-1, at pp. 102-104)

Petitioner offered in evidence, over the objection of the Board, a photocopy of a letter dated April 30, 1974, in which he accepted the Board’s offer of employment for the coming school year. (P-2) (See *N.J.S.A. 18A:27-12*.) In this regard, the Superintendent testified that no such letter had ever been

received by him. (Tr. 61, 66) The hearing examiner does not accept this letter (P-2) as proof of acceptance of an alleged job offer by the Board. Further, P-1, *ante*, is conclusive evidence, offered by petitioner, that he was properly notified by the Board pursuant to *N.J.S.A.* 18A:27-10; and thus P-2 is rendered meaningless.

The hearing examiner finds in the testimony and the evidence that petitioner has failed to sustain his burden of proof to show that he had a valid or legal offer of employment which he accepted, or that he requested orally or in writing a statement of reason or a hearing from the Board with respect to his non-reemployment. Having made these findings of fact, it therefore follows that petitioner is not entitled to a statement of reasons why he was not reemployed, nor is he entitled to an appearance (“hearing”) before the Board.

In *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 (1974), the Court specifically predicated the requirement for a statement of reasons upon receipt of a request for such reasons from a nontenure teacher. The Court said that when a teacher is initially engaged

“\*\*\*he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure. If he is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, *when he asks*, he be told why.\*\*\*”  
(*Emphasis added.*) (at p. 245)

Thus an initial request is required.

The Court also said in *Donaldson*:

“\*\*\*Many boards by collective contracts under *N.J.S.A.* 34:13A-1 *et seq.* have already agreed to furnish reasons and those which have not will, under this opinion, *hereafter* be obliged to do so.\*\*\*”  
(*Emphasis added.*) (at p. 248)

“\*\*\*The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or ‘other just cause.’ *N.J.S.A.* 18A:28-5. *The board’s determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board \*\*\* may conclude that tenure should not be granted.\*\*\**”  
(*Emphasis added.*) (65 *N.J.* at 240-241)

When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.*, race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff

member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield, Middlesex County*, 1972 S.L.D. 323, aff'd State Board of Education 327, reversed and remanded 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974)

In *Winston, supra*, the Court stated that:

“\*\*\*It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl*, 63 N.J. 1 (1973).\*\*\*” (125 N.J. Super. at 144)

Nowhere does the record disclose a constitutional deprivation of petitioner's rights, nor is there any specific allegation of such a showing. Therefore, petitioner's allegations of violations of his right to due process and the protection guaranteed him by the Constitution is not supported by the evidence and the record.

The Commissioner has considered a number of requests for a statement of reasons which are pending at the time the Court decided *Donaldson, supra*. The Commissioner held that since these requests had been pending, *Donaldson* triggered the requirement that those petitioners be given the requested statements of reasons. *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County*, 1975 S.L.D. 332; *Virginia Bennette et al. v. Board of Education of the Township of Hopewell, Cumberland County*, 1975 S.L.D. 746 The record does not disclose that a request for a statement of reasons from the Board has ever been made by petitioner.

The testimony of several witnesses discloses that the meeting of May 9, 1974 was extremely noisy and disorderly (Board's Brief, at p. 1), but petitioner's contention that the meeting was not properly adjourned is not supported by the evidence. The record shows that despite the admitted pandemonium in the conduct of the meeting that evening, there was a proper adjournment. (R-1, at p. 104)

For the aforementioned reasons, and in the context of the finding of facts, the hearing examiner recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto pursuant to N.J.A.C. 6:24-1.17(b). Petitioner personally filed a letter critical of the hearing examiner's "decision" which he stated is the first step in his "appeal" which will be pursued by his attorney.

The Commissioner adopts the findings of fact in the hearing examiner's report as his own. There has been no showing that petitioner's constitutional rights have been denied as he alleges. Nor is there any showing that petitioner was improperly notified that he would not be reemployed. He was not given reasons why he was not reemployed because he never asked for them. *Donaldson, supra; Hicks, supra; Bennette, supra*

For these reasons, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 29, 1976

**Board of Education of the Watchung Hills Regional High School District,**

*Petitioner,*

v.

**Mayor and Council of the Borough of Watchung, Township Committee of  
the Township of Warren, Somerset County, and Township Committee of  
the Township of Passaic, Morris County,**

*Respondents.*

COMMISSIONER OF EDUCATION

**AMENDED ORDER**

For the Petitioner, Buttermore and Mooney (Robert J.T. Mooney, Esq., of Counsel)

For the Respondents, Mattson, Madden, Polito & Loprete (LeRoy H. Mattson, Esq., of Counsel)

An Order of the Commissioner of Education having been issued in this matter under date of November 1, 1976, whereby the Commissioner consented to a Stipulation of Dismissal accompanied by appropriate resolutions adopted by the Board and by the municipal governing bodies; and

The governing bodies' resolutions having certified to the appropriate County Boards of Taxation a supplemental appropriation of \$194,183 to be raised by local taxation for the Board's 1976-77 current expense budget;

Therefore, the Commissioner had considered this matter to be closed.

As a result of the enactment of *c. 113, L. 1976* (Senate Bill No. 1503) on November 9, 1976, unbudgeted State aid moneys are available to the Board in the amount of \$172,063 of which \$9,938 is allocated for compensatory and

bilingual aid, thus leaving a balance available of \$162,125. This is an amount \$32,058 less than the restoration by the governing bodies in the form of a supplemental certification to the County Boards of Taxation. Therefore, such supplemental certification is unnecessary to the extent of \$162,125 and the governing bodies are directed to so notify the respective County Boards of Taxation immediately.

The Stipulation of Settlement and Dismissal which provided that the sum of \$194,183 for current expenses would be added to the amount previously certified to be raised by local taxation for current expenses of the Watchung Hills Regional High School District for the 1976-77 school year is hereby modified as follows:

The sum to be added to the amount previously certified during March 1976 to the respective County Boards of Taxation to be raised for current expenses of the Watchung Hills Regional High School District for the 1976-77 school year shall be \$32,058.

The Commissioner concurs with the amount of money found necessary for utilization by the Board in the litigants' agreement. Accordingly the amount of \$162,125 will be made available to the Board from unbudgeted State aid. The remaining amount of \$32,058 will be raised as the result of additional tax certification for school purposes for the 1976-77 school year.

It Is ORDERED that the matter be and is hereby dismissed.

Entered this 29th day of December 1976.

COMMISSIONER OF EDUCATION

December 29, 1976

**Board of Education of the Borough of Bergenfield,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Bergenfield, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**AMENDED ORDER**

For the Petitioner, James A. Major, II, Esq.

For the Respondent, Marvin Olick, Esq.

An Order of the Commissioner of Education having been issued in this matter under date of November 1, 1976, whereby the Commissioner consented to a Stipulation of Dismissal accompanied by appropriate resolutions adopted by the Board and by the municipal governing body; and

The governing body's resolution having certified to the Bergen County Board of Taxation a supplemental appropriation of \$155,479 to be raised by local taxation for the Board's 1976-77 current expense budget;

Therefore the Commissioner had considered this matter to be closed.

As a result of the enactment of c. 113, L. 1976 (Senate Bill No. 1503) on November 9, 1976, unbudgeted State aid moneys are available to the Board in excess of the amount restored by the governing body in the form of a supplemental certification to the Bergen County Board of Taxation. Therefore, such supplemental certification is unnecessary and the governing body is directed to so notify the Bergen County Board of Taxation immediately.

The Stipulation of Settlement and Dismissal which provided that the sum of \$155,479 for current expenses would be added to the amount previously certified to be raised by local taxation for current expenses of the Borough of Bergenfield for the 1976-77 school year is hereby set aside.

The Commissioner concurs with the amount of money found necessary for utilization by the Board in the litigants' agreement. The amount of \$155,479 will be made available to the Board from unbudgeted State aid. Accordingly, there will be no additional tax certification for school purposes for the 1976-77 school year.

It Is ORDERED that the matter be and is hereby dismissed.

Entered this 30th day of December 1976.

COMMISSIONER OF EDUCATION

**Board of Education of the Borough of Sea Girt,**

*Petitioner,*

v.

**Mayor and Council of the Borough of Sea Girt, Monmouth County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Maguire & Wetzel (Richard A. Maguire, Esq., of Counsel)

For the Respondent, Gilbert H. Van Note, Jr., Esq.

Petitioner, the Board of Education of the Borough of Sea Girt, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Sea Girt, hereinafter "Council," taken pursuant to *N.J.S.A. 18A:22-37* certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1976-77 school year than the amount proposed by the Board in its budget which was rejected by the voters.

The matter is referred directly to the Commissioner of Education for adjudication on the record, including the pleadings, written documentation and affidavits of the parties. The facts of the matter are these:

At the annual school election held on March 9, 1976, the Board submitted to the electorate proposals to raise \$695,284 by local taxation for current expense and \$1,000 for capital outlay costs of the school district for 1976-77. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system pursuant to the mandatory obligation imposed on Council by *N.J.S.A. 18A:22-37*.

After consultation with the Board, Council made its determinations and certified to the Monmouth County Board of Taxation an amount of \$639,670 for current expense and a zero amount for capital outlay. The pertinent amounts in dispute are shown as follows:

	<b>Current Expense</b>	<b>Capital Outlay</b>
Board's Proposals	\$695,284	\$1,000
Council's Proposals	<u>639,670</u>	<u>-0-</u>
Amount Reduced	\$ 55,614	\$1,000

The Board asserts that Council's action was arbitrary, capricious, and unreasonable and documents its need for restoration of the reductions recommended by Council with written testimony and supporting affidavits. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
Current Expense				
J213.1	Sals., Tchrs. Othr.	\$238,786	\$219,786	\$19,000
J213.3	Sals., Tchrs. Supp. Instr.	10,170	6,670	3,500
J214C	Sals., Ch.St. Tm.	5,600	2,100	3,500
J215A	Sals., Sec. Clc.	9,596	9,096	500
J215C	Sals., Othr. Sec. Cler.	5,538	-0-	5,538
J310A	Sals., Attend. Pers.	500	-0-	500
J410A3	Sals., Sch. Nurse	12,758	6,482	6,276
J520C	Trips-Othr. to Sch.	3,000	1,200	1,800
J870	Tuition	258,500	251,500	7,000
	<b>TOTAL</b>			<u>\$47,614</u>

Council also proposes that the Board apply an additional amount of \$8,000 from its unappropriated current expense balance which amount, added to its specific line item reduction of \$47,614, results in Council's total reduction of \$55,614.

Council determined that with respect to the Board's capital outlay proposal of \$1,000 that amount be appropriated from the unappropriated capital outlay balance.

The Commissioner notices that the enactment of *c.113, L.1976* (Senate Bill No. 1503) on November 9, 1976, provides that the Board, upon proper documentation of need, may be authorized to expend up to Council's reduction of \$55,614 from its total unbudgeted current expense State aid of \$85,242 for the 1976-77 year. Such an authorization, if granted, would have no effect upon the local tax levy for school purposes.

The Commissioner observes with respect to the reduction of \$1,000 imposed by Council on the Board's capital outlay proposal, that the Board has no unbudgeted capital outlay State aid available to it. The 1975-76 audit report shows that the Board has an unexpended capital outlay balance of \$14,026 from which the Board may appropriate the \$1,000 reduced by Council. The Commissioner finds no basis upon which to grant the Board's request to have the \$1,000 for capital outlay purposes restored to it by increasing the local tax levy.

The Commissioner has reviewed the written documentation of the parties and affidavits in support of their respective positions. The Commissioner finds and determines that the Board has established its need for the \$55,614 reduction imposed upon its 1976-77 current expense budget by Council.

Accordingly, the Commissioner hereby authorizes the Board of Education of the Borough of Sea Girt to expend an additional amount of \$55,614 from its unbudgeted current expense State aid for school purposes for 1976-77.

COMMISSIONER OF EDUCATION

December 30, 1976

Carol Sulovski,

*Petitioner,*

v.

Board of Education of the Town of West Orange, Essex County,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Samuel A. Christiano, Esq.

Petitioner, a nontenure teacher employed by the Board of Education of the Town of West Orange, hereinafter "Board," contends that the Board's failure to renew her employment for the 1974-75 academic year was based on the fact that she was engaged in activities on behalf of the West Orange Education Association, hereinafter "Association." Petitioner alleges that she communicated her opinions and positions publicly, participated in petitioning and assembling for the purpose of communication, and exercised constitutionally protected activities; therefore, the Board's failure to reemploy her violates her constitutional rights as guaranteed by the Federal and State constitutions. Petitioner prays for reinstatement in her position.

Six days of hearing were conducted in this matter on September 19, November 13, 1974, and on February 25, April 15, 16 and July 17, 1975 in the office of the Essex County Superintendent of Schools, East Orange, before a hearing examiner appointed by the Commissioner of Education. Thirty documents were accepted in evidence and Briefs were filed subsequent to the hearing. The report of the hearing examiner follows:

Petitioner was employed as a physical education teacher for the 1971-72, 1972-73, and 1973-74 academic years and was assigned to teach in the Roosevelt and the Lincoln Junior High Schools. She was notified in April 1974 that she would not be reemployed for the 1974-75 academic year. Petitioner holds certificates issued by the State Board of Examiners which make her eligible to teach health and physical education in grades kindergarten through twelve, and she is certificated to teach the classroom phase of driver education. (Petition of Appeal; Answer; Tr. III-84-85) Petitioner asserts that she was not reemployed because she engaged in union activities to the displeasure of her supervisors and that she was admonished for participating in these constitutionally protected activities. Petitioner contends, specifically, that her involvement in (a) a 50/50 raffle, (b) an incident in which she was passing out name tags to other union members who were gathered to protest the fact that negotiations had not been settled, and (c) a meeting of the Association to plan a "job action" against the Board constituted the reasons that her superiors recommended to the Board that she should not be reemployed. (Tr. III-87-89; Tr. IV-26-29)

Petitioner alleges also that positions for which she was eligible to teach were available through the spring and summer of 1974 and that a decision by the Board against an offer of one of these positions to her was an arbitrary, capricious and unreasonable action.

At the conference between counsel and the hearing examiner on June 24, 1974, the issues and agreements to be considered in this matter were set forth as follows:

- "1. Was petitioner dismissed because of her association activities?
- "2. Must the reasons given for petitioner's non-reemployment be the real reasons?
- "3. If such reasons are given sincerely and honestly in the Board's judgment even though erroneous, can there be any relief for the petitioner?
- "4. Counsel stipulate that petitioner was a competent teacher during her three years of employment."

Although it is stipulated that petitioner was a competent teacher during her three years' employment with the Board, it is pointed out that she worked in two different junior high schools under the direction of two different principals. The principal of the Roosevelt Junior High School was generally dissatisfied with her performance and he gave her negative evaluations. However, the principal of the Lincoln Junior High School was pleased with her performance as a teacher and his evaluations were generally positive. The Director of Health, Physical Education and Athletics, hereinafter "Director," reviewed the evaluations made by petitioner's principals, and in conjunction with his own evaluations gave petitioner positive evaluations. (Tr. IV 34-35; P-5)

Petitioner testified that as a result of her activities with the 50/50 raffle the Director upbraided her stating that if she didn't get her "\*\*\*\*a\_\_ out of the Association, [she] would never receive tenure in West Orange.\*\*\*\*" (Tr. III-87) Regarding the name tag incident, petitioner testified that the principal of Lincoln told her that she should not make herself so conspicuous if she wanted to continue to work in West Orange. (Tr. III-88) She testified, further, that the principal of Roosevelt asked her if she were planning to stay out of school on June 11 (1973) because if she were, it could seriously affect further employment in West Orange. (Tr. III-89)

The principal of Roosevelt testified that he initially found petitioner to be a competent physical education teacher; however, he developed serious concerns about her relationship with the pupils and with other related non-classroom activities such as study halls, cafeteria duty and "\*\*\*\*relationships in general out of the classroom\*\*\*\*." (Tr. IV-132-133) This principal was clearly dissatisfied with petitioner's performance, and made it known that he did not want petitioner to teach in his building. He denied, however, that he ever objected to petitioner's Association activities. (Tr. IV-133; Tr. V-8-9)

The principal of Lincoln, at all times concerned in this matter, considered petitioner a competent teacher and gave her good evaluations; however, he denied ever making any statement to her regarding her activities in the Association. (Tr. V-91-96)

The Director admitted objecting to petitioner's involvement in a 50/50 club raffle; however, he denied using the language attributed to him by petitioner when he spoke to her regarding his reservations. In this regard, he testified that he checked with a police officer who told him that he believed that such raffles were illegal. The Director then approached another teacher besides petitioner who was a member of the physical education department. (Tr. IV-24-27) He testified in this regard as follows:

\*\*\*\*Basically, this [50/50 raffle] personally offended my sense of decency. I felt that in Physical Education we're involved in teaching kids to live within the rules of the game, fair play, sportsmanship, and to apply those rules, of course, to later life. I do not think that we were setting a good example in this particular matter.\*\*\*\* (Tr. IV-27)

And further,

\*\*\*\*I asked [petitioner] what she was doing with her name on this particular thing, on this 50/50 raffle, and actually what her business was in regard to it. She informed me that this was a 50/50 operation that was being conducted to raise funds for Mr. [F] to attend the National Education Association Conference which I believe was in Seattle. And I told her that I felt if Mr. [F] wanted money to travel to Seattle that perhaps he ought to be the one who sends around this directive; and that I had just finished fighting a battle on behalf of [petitioner] with [the principal of Roosevelt] for her job and that this kind of thing was not-it was just not beneficial to her.\*\*\*\* (Tr. IV-28)

The hearing examiner notices that the two alleged confrontations with the principals of the Roosevelt and Lincoln Junior High Schools, and the confrontation petitioner had with her Director regarding the 50/50 raffle, occurred in the spring of 1973; nevertheless, the record does not disclose any negative recommendation to the Board and petitioner was reemployed by the Board for the 1973-74 academic year. (Tr. III-88-89; Tr. V-92-93)

The Director testified that he believed there existed a personality problem between petitioner and the principal of Roosevelt and that he could solve the problem by assigning petitioner full time to Lincoln where she got along well with the principal. (Tr. IV-14-16) However, that opportunity was foreclosed when a teacher on maternity leave, "D.C.," decided to return early; therefore, no position was then available which petitioner could fill for the 1974-75 academic year. (Tr. IV-17) The record shows that petitioner had some difficulty with the principal of Roosevelt during her first year of teaching in West Orange (1971-72) and that the Director offered her an opportunity to teach at the high school. The Director testified that petitioner refused to accept his offer because D.C. told her she'd be leaving in the future to start a family; therefore, petitioner remained in the split position she held. He testified also that at the end of the 1972-73 academic year he again offered petitioner a position in the high school, but she again refused, repeating that D.C. had told her that she would be leaving soon to start a family. The administration then interviewed twenty-two or twenty-three persons for the high school vacancy and subsequently petitioner notified the Director that she had been advised by a New Jersey Education Association representative to accept the high school vacancy. At that time, however, the high school principal objected to her assignment to his building. He adopted the position that he had spent considerable time and energy interviewing candidates and that he had found the person he felt would "\*\*\*do an excellent job and that this person, in turn, had invested time in getting to know the kids and working with the kids and that he wouldn't consider it." (Tr. IV-19-22)

Petitioner alleges that after she received her notice that she would not be reemployed and even at the time of the filing of her Petition of Appeal on June 13, 1974, there were still vacancies for which she was qualified and to which she should have been appointed. (Petition of Appeal, at p. 2)

The Board contends that it developed a long range program to change the emphasis and to upgrade its health program. In this regard, the Superintendent of School's *Annual Report* to the Board, 1972-73, set forth the need to reevaluate the health education curriculum in grades K-12 and to have a workshop for that purpose during the summer of 1974. (R-1, at p. 24 par. 6) In its proposed school budget for the 1974-75 school year, a statement was made that:

"The increase in nursing services will permit assignment of a full-time nurse at each secondary school with the resulting improvement in the presentation of health courses." (R-2, at p. 14)

The Board introduced a document issued by the former Acting Commissioner of Education which reads in pertinent part as follows:

“TO: County Superintendents  
Superintendents of Schools  
Administrative Principals

“SUBJECT: Health Education Resolution

“At its meeting on May 2, 1973, the New Jersey State Board of Education approved the enclosed resolution regarding health education. My concern and that of the State Board is expressed in this resolution. Health education needs to be given a higher priority in the school program.\*\*\*” (R-3)

The resolution cites the statutory authority governing the teaching of health education and recommends that the course or curriculum should be taught by a “*health education specialist*.” (State Board of Education Resolution, May 2, 1973; R-3) Further, in this regard, the Director’s evaluation of petitioner dated February 14, 1974, reads in part as follows:

“[Petitioner] will not be offered a contract for the 1974-1975 school year since the position she now holds will be eliminated. With increased emphasis on health education we will be seeking a replacement with nursing and health major background to assume both the nursing and the instructional health duties on the junior high school level.” (P-5)

The testimony offered by Board members and administrators was, essentially, that after petitioner was notified that she would not be reemployed she was not offered other positions which became vacant because she did not possess the qualifications they sought; namely, a nursing background or a minimum of thirty credits in health. (Tr. I-59; Tr. IV-48-49)

The Director of Personnel testified that the Board decided to hire a substitute who taught in a West Orange elementary school for the months of May and June 1974, to replace a teacher taking a maternity leave for the 1974-75 academic year. That decision was grounded on the fact that the substitute had an early childhood education background and some experience in the elementary school building where she would be replacing the teacher. Further, since the contract was for one year only, after which time the teacher on maternity leave might return, there was no possibility of an accrual of tenure by hiring the long term substitute. If petitioner were hired for that position she would have earned tenure. (Tr. I-76-77, 101-102, 109-111)

The Director testified that after petitioner was notified that she would not be reemployed, he tried to find her a position for the coming school year. He testified that he announced to other directors at an area directors’ meeting that he was seeking an opening for petitioner. (Tr. IV-29) He testified that he called several people in an attempt to find a position for her. (Tr. IV-30) He testified

that he recommended her highly to the school district of Millburn and arranged coverage for her classes in West Orange so that she could go to Millburn for an interview. When she called for permission to return to Millburn the next morning to continue her interview, he approved and again made arrangements so that she could keep her appointment. (Tr. IV-30-31) The Director testified that he filled out a reference form for petitioner and that his recommendation was very positive. That summer, he testified finally, the Board received another inquiry from Millburn regarding petitioner and he tried to reach her by placing three or four calls to hotels in Chicago where he understood she had gone to attend a convention. (Tr. IV-32)

Petitioner did not attempt to refute this testimony; however, she asserted that the principal of Roosevelt warned the personnel director in Millburn not to employ her because she was a controversial figure. (Petitioner's Brief, at p. 2) Petitioner also presented the testimony of a witness, who stated that when her name came up for a vacancy in the city of Belleville, the Superintendent of Schools there stated that, petitioner was "bad news." The Superintendent of Belleville flatly denied ever having made such a statement and testified that, in any event, his Board deleted that vacant position from its budget and that it has not been filled by anyone. (Tr. IV-70)

In the hearing examiner's judgment, petitioner has failed to sustain the burden of proof that a failure to employ her was grounded in improper reasons. It must be pointed out that there is no obligation on the part of a board of education to reemploy its nontenure employees whether or not a position is available, absent any showing of discrimination or other constitutional deprivation. The record does not support petitioner's claim that the Board's determination not to offer her a contract was based on the fact that she was active in the Association. Here, the Board relied on the recommendation of its administrators. The two Board members who testified stated that the Board's determination was based on its need for a new health education program. The Superintendent's testimony corroborated this. (Tr. I-41, 59-61, 124) One Board member testified that the Board investigated petitioner's charges that she was not being recommended because of her union activities and that that investigation, carried out by the Superintendent, showed the allegations were not supported by the facts. The Board thereafter determined that there was no substance to petitioner's charges, accepted the advice of the Superintendent and determined not to reemploy petitioner. (Tr. I-120-126)

The hearing examiner makes no determination with respect to the charge that the principal of Roosevelt actively sought to "black-ball" petitioner and actually prevented her from being hired in Millburn. If it is true, it occurred after the fact and there is no relief which the Commissioner can offer. However, such a practice is to be condemned and boards of education should take independent internal precautions to make certain that such practices do not exist in their districts.

Finally, the Board offered substantial documented evidence that it determined in good faith that it would not offer reemployment to petitioner for the

1974-75 academic year. The evidence shows that a change was contemplated in its health program and that different certification requirements were applicable to new positions. The record shows that petitioner had been offered other positions in the district which would have taken her away from contact with the principal of Roosevelt and that she refused the transfer offers. The record shows that, after her termination notice was served, her Director tried to find other employment for her and that the principal of Lincoln was willing to have her appointed full time to his building. Petitioner testified that the Lincoln principal wanted to keep her. (Tr. III-106)

The hearing examiner concludes that the record does not support petitioner's allegations and he recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions filed thereto by petitioner pursuant to *N.J.A.C. 6:24-1.17(b)*.

The exceptions are lengthy and critical of the hearing examiner's treatment of the testimony of some of the Board's witnesses. The exceptions are also critical of the fact that the hearing examiner failed to consider the testimony of the president of the Association and a representative of the New Jersey Education Association, hereinafter "NJEA." Included in these exceptions is a further exposition of petitioner's assertion that her constitutionally protected rights have been violated. The Commissioner has reviewed the record, and finds that petitioner's assertions cannot be supported by the evidence.

In *Barbara Hicks v. Board of Education of Pemberton, Burlington County*, 1975 *S.L.D.* 332, the Commissioner stated that nontenure teachers are entitled to an appearance before boards of education after receipt of a statement setting forth the reasons why they were not reemployed. During the time the matter herein controverted was developing, including the winter and spring of 1974, there was no body of law which required written reasons and a later appearance by a teacher before a board of education if requested. Nevertheless, petitioner was given reasons why she was not being reemployed (Petition of Appeal, paragraph 2) and she has attempted to refute those reasons. Further, petitioner alleges that the Board violated her constitutionally protected rights; specifically, that her non-reemployment was due to her activities on behalf of the Association in that she communicated her opinions and positions publicly, and that she participated in petitioning and assembling for the purpose of communication of Association business.

The Commissioner has commented previously on teachers' claims that their constitutional rights were violated. When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons, *i.e.* race, color, religion, etc., or in violation of constitutional rights such

as free speech or freedom of assembly, or that the board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member is entitled to full adversary proceedings, such as occurred in the instant matter. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield, Middlesex County*, 1972 S.L.D. 323, aff'd State Board of Education 327, reversed and remanded 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974), dismissed with prejudice, 1974 S.L.D. 999

A sequential development of the instant matter reveals that petitioner's involvement in the 50/50 club raffle to which her supervisor objected and in distributing name tags to Association members in a Board meeting while the Association was protesting the Board's failure to complete contract negotiations both occurred during the spring of 1973. This evidence is found in the testimony of the Association president and the NJEA representative. (Tr. I-3-5; Tr. II-157-158) The Association president testified that the athletic director expressed his concern about petitioner's involvement in the 50/50 raffle since he believed that such an activity was an illegal lottery. (Tr. I-11-14) Petitioner testified that her job was threatened because of her 50/50 club activities. The NJEA representative testified that an administrator told petitioner at a Board meeting on April 12, 1973, that she would not be reappointed if she kept "doing this kind of thing." This testimony referred to petitioner's distributing name tags to Association members inside the Board meeting while the Association members were picketing outside the building. (Tr. II-157-158) Nevertheless, earlier, petitioner was reemployed for the 1973-74 academic year.

The Commissioner observes from his review of the record that petitioner's supervisors did not approve of her involvement in what they considered to be an illegal lottery; however, there is no proof that recommendations were made to the Board not to offer her reemployment because of Association activities. Further, even if it were true that petitioner was prevented from being appointed as a teacher in Millburn by a school principal in West Orange, that event took place long after the Board determined not to offer her reemployment. The record reveals that she was notified she would not be reemployed in April 1974, and the alleged Millburn incident occurred in late June or July. (See Petitioner's Exceptions, at p. 5.) Therefore, even if such an invidious incident occurred as charged by petitioner, the Commissioner cannot conclude that the named principal conspired with other administrators and the Board in such a manner as to preclude petitioner from an offer of reemployment.

The record shows that several attempts were made to reassign petitioner within the school district irrespective of her problems. The athletic director attempted to reassign petitioner full time to the Lincoln School where she had a good professional relationship with the principal; however, a teacher returned early from maternity leave and that position was no longer available. (Tr. IV-14-17) The record, reveals, also, that the director twice offered petitioner an opportunity to transfer to the high school at the conclusion of the 1972 and 1973 academic years, and she refused.

From his review of the record, the Commissioner cannot conclude, nor has petitioner shown, that she was denied employment for constitutionally proscribed reasons. Nor has it been demonstrated that the Board acted in an arbitrary, capricious, or discriminatory manner.

The Commissioner has at various times reviewed actions of local boards of education and, in certain instances, finding that the protected rights of teaching personnel were violated, has set aside the actions of boards wherein they violated those protected rights of nontenure employees or otherwise abused their discretionary powers. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County*, 1974 S.L.D. 260, 1975 S.L.D. 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976; *North Bergen Federation of Teachers Local 1060, American Federation of Teachers, AFL-CIO and Beth Ann Prudente v. Board of Education of the Township of North Bergen, Hudson County*, 1975 S.L.D. 138

At other times the Commissioner has upheld the actions of boards of education when no abuse of discretion was found. *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood, Cape May County*, 1973 S.L.D. 351, aff'd State Board of Education 360, aff'd Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975

The discretionary powers of education boards are well recognized by both the Commissioner and the courts. The Commissioner has said in numerous instances that he will not substitute his discretion for that of a board absent a clear showing of bad faith, statutory violation, or violation of constitutional rights.

The Commissioner stated in *John J. Kane v. Board of Education of the City of Hoboken, Hudson County*, 1975 S.L.D. 12 as follows:

“\*\*\*[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is *affirmatively shown* that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County*, 1973 S.L.D. 167; *James Mosselle v. Board of Education of the City of Newark, Essex County*, 1973 S.L.D. 197, aff'd State Board of Education 1974 S.L.D. 1414; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County*, 1973 S.L.D. 217, affirmed State Board of Education March 6, 1974.\*\*\*”  
(*Emphasis added.*) (at p. 16)

See also *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County*, 1975 S.L.D. 168.

In *Winston, supra*, the Court stated that:

“\*\*\*It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl*, 63 *N.J. 1* (1973)\*\*\*”  
(125 *N.J. Super.* at 144)

Absent a finding that the Board has violated petitioner's constitutionally protected rights or that the Board has been arbitrary, capricious, or discriminatory in not offering her reemployment, the Commissioner adopts the findings and conclusions of the hearing examiner. For the reasons stated, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 30, 1976

In the Matter of the Tenure Hearing of

Fred J. Hoffman,

School District of the City of Asbury Park, Monmouth County.

COMMISSIONER OF EDUCATION

ORDER

For the Complainant Board, McOmber & McOmber (John W. Wopat, III, Esq., of Counsel)

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

This matter having been opened before the Commissioner of Education (August E. Thomas, Director, Division of Controversies and Disputes) by Michael D. Schottland, Esq., counsel for respondent, on a Notice of Motion for an Order dismissing the tenure charges pending before the Commissioner of Education and directing that respondent be reinstated immediately in his teaching position, and further directing that he be paid for the 120 (one hundred twenty) days' pay previously withheld pursuant to *N.J.S.A. 18A:6-14*, in the presence of John W. Wopat, III, Esq., counsel for Complainant Board; and

It appearing that the Board has reinstated respondent in his position as a teacher; and

It appearing that the only issue is whether or not respondent is entitled to the one hundred twenty days' pay previously withheld by the Board; and

It appearing that Complainant Board's refusal to pay respondent pursuant to *N.J.S.A.* 18A:6-14 is grounded on its assertion that the delay in final adjudication of this matter was caused by respondent's refusal to take a psychiatric examination as directed by the Board; and

It appearing that Complainant Board's contention is not supported by the facts; and

It appearing that respondent appealed the Board's directive to submit to a psychiatric examination in several jurisdictions before finally acceding to the Board's directive; and

It appearing that the Board has not shown any delay in this matter which was caused by respondent merely exercising his right to appeal the Board's directive; and

It further appearing that respondent is therefore entitled to full reimbursement of his salary pursuant to the provisions of *N.J.S.A.* 18A:6-14; now therefore,

IT IS ORDERED on this 30th day of December 1976 that the Board of Education of the City of Asbury Park pay respondent his full salary entitlement pursuant to *N.J.S.A.* 18A:6-14 for the one hundred twenty days his salary was withheld during his suspension.

COMMISSIONER OF EDUCATION



SUBJECT INDEX TO COMMISSIONER'S DECISIONS – 1976

	Page
ABANDONMENT OF POSITION	
Driscoll v. Clifton . . . . .	7
ABOLISHMENT OF POSITIONS	
Cordano v. Weehawken . . . . .	761
Hyun v. Wharton . . . . .	763
Kaprow v. Howell . . . . .	1032
Kuett v. Westfield . . . . .	601
Marotta v. Sayreville . . . . .	767
Morer v. Teaneck . . . . .	963
Oros v. South Bound Brook . . . . .	685
Payne v. Ridgewood . . . . .	605
Roe <i>et al.</i> v. Mine Hill . . . . .	672
Ubelhart v. Fair Lawn . . . . .	851
Vanderbeck v. Hamburg . . . . .	970
Wexler v. Hawthorne . . . . .	309
ADMINISTRATIVE PROCEDURE ACT	
Fishberg v. Princeton Regional . . . . .	55
ADVERSARY HEARINGS	
Roy v. Middle . . . . .	569
ADVISEMENTS—COMMISSIONER OF EDUCATION	
Cafarelli <i>et al.</i> v. Long Beach Island . . . . .	989
AFFIDAVITS	
Karamessinis v. Wildwood . . . . .	473
ALTERNATIVE SCHOOL PROGRAMS	
“H.A.” v. Warren Hills Regional . . . . .	336
Jones <i>et al.</i> v. Leonia <i>et al.</i> . . . . .	495
APPEALS—REJECTIONS	
Orr v. Caldwell—W. Caldwell . . . . .	264
ARBITRATION	
Brick Board v. Heinzman <i>et al.</i> . . . . .	921
Cafarelli <i>et al.</i> v. Long Beach Island . . . . .	989
Willett <i>et al.</i> v. Freehold Regional . . . . .	282
BIDS AND BIDDING	
AZ Transportation Inc. v. Woodbridge . . . . .	561
BIDS AND BIDDING—TRANSPORTATION	
Wall v. Bureau of Pupil Transportation . . . . .	643
BOARDS OF EDUCATION—HEARINGS	
Finkle v. Paterson . . . . .	726
“H.A.” v. Warren Hills Regional . . . . .	336
Mullely v. Maple Shade . . . . .	388
BOARDS OF EDUCATION—MEETINGS	
Feigen <i>et al.</i> v. Livingston . . . . .	886
Kaprow v. Howell . . . . .	1032
Nowak v. Manville . . . . .	43
Roe <i>et al.</i> v. Mine Hill . . . . .	672
BOARDS OF EDUCATION—MEMBERS	
Gambatese v. West Paterson <i>et al.</i> . . . . .	616
Karamessinis v. Wildwood . . . . .	473
BOARDS OF EDUCATION—ORGANIZATION MEETINGS	
Nowak v. Manville . . . . .	43
Wisner v. Bills . . . . .	845

	Page
<b>BOARDS OF EDUCATION—POLICIES</b>	
Arzberger v. Neptune . . . . .	835
Bradley v. Freehold . . . . .	590
Dooner v. Toms River . . . . .	619
Dunwoody v. Moorestown . . . . .	667
Hamilton Election . . . . .	444
Hussey v. Westfield . . . . .	1019
Lavin Tenure, Lower Camden County Regional . . . . .	796
Nutley Election . . . . .	612
“O.P.” v. Paterson . . . . .	658
Siegfried v. Shrewsbury . . . . .	2
Taccone v. Newark . . . . .	1045
Wachstein v. Medford . . . . .	928
Willett <i>et al.</i> v. Freehold Regional . . . . .	282
<b>BOARDS OF EDUCATION—POWERS AND DUTIES</b>	
Coombs v. Plumsted . . . . .	629
Dunwoody v. Moorestown . . . . .	667
Gambatese v. West Paterson <i>et al.</i> . . . . .	616
Green Village Road v. Madison . . . . .	700
“H.A.” v. Warren Hills Regional . . . . .	336
Hyun v. Wharton . . . . .	763
Martz Tenure, Franklin . . . . .	773
Masone Tenure, Rutherford . . . . .	902
McCormack, Yundzel, Spangler v. Northern Highlands Regional or Fair Lawn . . . . .	754
Nowak v. Manville . . . . .	43
Parachini v. Union City . . . . .	515
Payne v. Verona . . . . .	543
Roe <i>et al.</i> v. Mine Hill . . . . .	672
Union Beach Budget . . . . .	574
Vanderbeck v. Hamburg . . . . .	970
Wall v. Bureau of Pupil Transportation . . . . .	643
Wexler v. Hawthorne . . . . .	309
<b>BOARDS OF EDUCATION—RESOLUTIONS</b>	
Gambatese v. West Paterson <i>et al.</i> . . . . .	616
Green Tenure, Warren County Vocational . . . . .	722
Wexler v. Hawthorne . . . . .	309
<b>BOARDS OF EDUCATION—ROLL CALL VOTES</b>	
Payne v. Ridgewood . . . . .	605
<b>BOARDS OF SCHOOL ESTIMATE</b>	
Asbury Park . . . . .	148
East Orange . . . . .	290
New Brunswick . . . . .	92
Orange . . . . .	315
Perth Amboy . . . . .	39
Plainfield . . . . .	136
<b>BUDGETS—CERTIFICATION CHANGES</b>	
Asbury Park . . . . .	148
Central Regional v. Berkeley <i>et al.</i> . . . . .	874
Clark Township . . . . .	679
East Brunswick Township . . . . .	84
East Orange . . . . .	290

	<b>Page</b>
East Windsor Regional . . . . .	416
Elizabeth . . . . .	244
Holmdel Township . . . . .	71
Marlboro Township . . . . .	237
Maywood Borough . . . . .	381
New Brunswick . . . . .	92
North Arlington Borough . . . . .	126
Oradell Borough . . . . .	259
Orange . . . . .	315
Plainfield . . . . .	136
South Amboy . . . . .	156
South Amboy . . . . .	1055
South Plainfield Borough . . . . .	252
Totowa Borough . . . . .	300
Union Beach Borough . . . . .	574
Verona Borough . . . . .	111
Watchung Hills Regional . . . . .	1070
Weehawken Township . . . . .	18
Willingboro Township . . . . .	101
<b>BUDGETS—OVEREXPENDITURES</b>	
East Brunswick Township . . . . .	84
<b>BUDGETS—PAYMENTS BY GOVERNING BODIES</b>	
Demarest Borough . . . . .	834
<b>BUDGETS—RESTORATIONS—UNBUDGETED STATE AID</b>	
Bergenfield Borough . . . . .	1072
Sea Girt . . . . .	1073
South Amboy . . . . .	1055
Watchung Hills Regional . . . . .	1070
<b>BUDGETS—SURPLUS</b>	
East Orange . . . . .	290
Lakewood Township . . . . .	27
Manalapan—Englishtown Regional . . . . .	49
Marlboro . . . . .	237
Orange . . . . .	77
Oxford . . . . .	374
Perth Amboy . . . . .	39
South Plainfield . . . . .	252
Union Beach . . . . .	574
<b>BUILDINGS AND GROUNDS—USE</b>	
Green Village Road v. Madison . . . . .	700
<b>BUSINESS MANAGERS—DISMISSALS</b>	
Smollok Tenure, Passaic County Technical . . . . .	361
<b>BUSINESS MANAGERS—TENURE EMPLOYEE HEARINGS</b>	
Smollok Tenure, Passaic County Technical . . . . .	361
<b>CERTIFICATES—REVOCATION</b>	
Criscenzo Tenure, Paterson . . . . .	1000
<b>CERTIFICATION</b>	
Cordano v. Weehawken . . . . .	761
Jones <i>et al.</i> v. Leonia <i>et al.</i> . . . . .	495
Kuett <i>et al.</i> v. Westfield . . . . .	601
Martz Tenure, Franklin . . . . .	773
Mina v. Hoboken . . . . .	365

	Page
Morer v. Teaneck . . . . .	963
Newark Teachers Union (Graves) v. Newark . . . . .	72
Sydnor v. Englewood . . . . .	113
Vieland v. Princeton Regional . . . . .	892
<b>CERTIFICATION—CONDITIONAL</b>	
Chianese v. Bordentown . . . . .	804
Morer v. Teaneck . . . . .	963
<b>CHARGES &amp; RESPONSES</b>	
Dennis v. Long Branch . . . . .	14
Ford Tenure, Linden . . . . .	243
Jeffers Tenure, Keansburg . . . . .	979
Konowitch Tenure, Middle . . . . .	936
Martz Tenure, Franklin . . . . .	773
<b>CHILD STUDY TEAMS</b>	
“M.D.” <i>et al.</i> v. Rahway . . . . .	323
<b>CIVIL SERVICE</b>	
Plessis v. Newark . . . . .	1006
<b>CLERICAL WORKERS—ACCRUED VACATION</b>	
Arzberger v. Neptune . . . . .	835
<b>CLERICAL WORKERS—CONTRACT CANCELLATIONS</b>	
Arzberger v. Neptune . . . . .	835
<b>CLERICAL WORKERS—LEAVES OF ABSENCE, SICK</b>	
Arzberger v. Neptune . . . . .	835
<b>CLERICAL WORKERS—POWERS AND DUTIES</b>	
White <i>et al.</i> v. Boonton . . . . .	876
<b>CLERICAL WORKERS—TENURE CLAIMS</b>	
Sheridan v. Ridgefield Park . . . . .	995
<b>COACHES AND COACHING</b>	
Foster <i>et al.</i> v. Neptune . . . . .	693
<b>CONDUCT UNBECOMING A JANITOR</b>	
Jeffers Tenure, Keansburg . . . . .	979
<b>CONDUCT UNBECOMING A TEACHER</b>	
Campbell Tenure, Manasquan . . . . .	65
Criscenzo Tenure, Paterson . . . . .	1000
Lefakis Tenure, Midland Park . . . . .	816
Myers Tenure, Gloucester City . . . . .	1024
Rinaldi Tenure, Orange . . . . .	344
<b>CONFLICT OF INTEREST</b>	
Gambatese v. West Paterson <i>et al.</i> . . . . .	616
<b>CONTRACTS</b>	
Bowers <i>et al.</i> v. Burlington . . . . .	865
Coombs v. Plumsted . . . . .	629
Finkle v. Paterson . . . . .	726
Wall v. Bureau of Pupil Transportation . . . . .	643
<b>CONTRACTS—PAYMENTS</b>	
Feit v. Hazlet . . . . .	677
<b>COUNTY SUPERINTENDENTS OF SCHOOLS</b>	
Fieldsboro Election . . . . .	298
Finkle v. Paterson . . . . .	726
Green Village Road v. Madison . . . . .	700
Nutley Election . . . . .	612
Wall v. Bureau of Pupil Transportation . . . . .	643
Wisner v. Bills . . . . .	845

	Page
<b>COURT ACTION</b>	
Cafarelli <i>et al.</i> v. Long Beach Island . . . . .	989
Criscenzo Tenure, Paterson . . . . .	1000
Hamilton Election . . . . .	444
Hoboken Election . . . . .	464
Karamessinis v. Wildwood . . . . .	473
Kearny Election . . . . .	791
“M.T.C.” v. Lower Camden County Regional . . . . .	274
Myers Tenure, Gloucester City . . . . .	1024
Rhen Tenure, North Caldwell . . . . .	647
Rinaldi Tenure, Orange . . . . .	344
Union City Election . . . . .	335
Warren Election . . . . .	828
Weehawken Election . . . . .	307
Willett <i>et al.</i> v. Freehold Regional . . . . .	282
<b>CRIMINAL CHARGES</b>	
Myers Tenure, Gloucester City . . . . .	1024
<b>CURRICULUM</b>	
Cordano v. Weehawken . . . . .	761
Dooner v. Toms River . . . . .	619
South Amboy Budget . . . . .	156
<b>DISCIPLINE</b>	
Hochman v. Newark <i>et al.</i> . . . . .	492
<b>DISCRIMINATION</b>	
Means v. Newark . . . . .	133
<b>DIVISION OF YOUTH &amp; FAMILY SERVICES</b>	
Orr <i>et al.</i> v. Caldwell-West Caldwell . . . . .	264
Trenton, In the Matter of . . . . .	699
<b>DOCTRINE OF ABSTENTION</b>	
Gambatese v. West Paterson <i>et al.</i> . . . . .	616
<b>DRUGS</b>	
“M.T.C.” v. Lower Camden County Regional . . . . .	274
Myers Tenure, Gloucester City . . . . .	1024
“O.P.” v. Paterson . . . . .	658
<b>DUE PROCESS</b>	
Banchik v. New Brunswick . . . . .	78
Chianese v. Bordentown . . . . .	804
Foster <i>et al.</i> v. Neptune . . . . .	693
“H.A.” v. Warren Hills Regional . . . . .	336
“M.T.C.” v. Lower Camden County Regional . . . . .	274
Marotta v. Sayreville . . . . .	767
Nettles v. Bridgeton . . . . .	555
Palydowycz v. Clifton . . . . .	984
Quay <i>et al.</i> v. Haddon . . . . .	118
<b>ELECTIONEERING</b>	
East Amwell . . . . .	460
<b>ELECTIONS—BALLOTS, ABSENTEE</b>	
Hoboken . . . . .	464
Pittsgrove . . . . .	342
Weehawken . . . . .	307
<b>ELECTIONS—BALLOTS, AFFIDAVITS</b>	
Bedminster . . . . .	438
Westfield . . . . .	425

	Page
ELECTIONS—BALLOTS, DRAWING FOR POSITION	
Edgewater Park . . . . .	123
Pittsgrove Township . . . . .	585
ELECTIONS—BALLOTS, IRREGULAR	
Cumberland County Regional . . . . .	30
Deptford Township . . . . .	449
Fieldsboro Borough . . . . .	298
Hopatcong Borough . . . . .	441
ELECTIONS—BALLOTS, PAPER	
Deptford Township . . . . .	449
ELECTIONS—CAMPAIGN ACTIVITIES	
Pittsgrove Township . . . . .	585
ELECTIONS—CAMPAIGN LITERATURE	
Carteret Borough . . . . .	456
Kearny . . . . .	791
Nutley . . . . .	612
Westfield . . . . .	425
ELECTIONS—MECHANICAL FAILURES	
Dunellen . . . . .	624
Hillside Election Inquiry . . . . .	429
ELECTIONS—NOMINATING PETITIONS	
Monroe Township . . . . .	233
Rutherford Borough . . . . .	1061
ELECTIONS—PRINTED MATERIALS—REQUIREMENTS	
Carteret Borough . . . . .	456
East Amwell Township . . . . .	460
Hamilton Township . . . . .	444
Warren Township . . . . .	828
ELECTIONS—RECOUNTS	
Bedminster Township . . . . .	438
Cherry Hill Township . . . . .	459
Cumberland County Regional . . . . .	30
Deptford Township . . . . .	449
Evesham Township . . . . .	436
Fieldsboro Borough . . . . .	298
Hillside Election . . . . .	428
Hillside Election Inquiry . . . . .	429
Hoboken . . . . .	464
Hopatcong Borough . . . . .	441
Mount Laurel Township . . . . .	435
Pennsauken Township . . . . .	333
Pittsgrove Township . . . . .	342
Union City . . . . .	335
Weehawken Township . . . . .	307
ELECTIONS—RESIDENCY REQUIREMENTS	
Westfield . . . . .	425
Cumberland County Regional . . . . .	30
ELECTIONS—VOTING MACHINES	
Hillside Election . . . . .	428
Hillside Election Inquiry . . . . .	429
EMANCIPATION	
Dooner v. Toms River . . . . .	619
ESTOPPEL	
White <i>et al.</i> v. Boonton . . . . .	876

	Page
EVIDENCE	
Green Village Road v. Madison . . . . .	700
Karamessinis v. Wildwood . . . . .	473
Palydowycz v. Clifton . . . . .	984
EVIDENCE, NEW	
Oxford Budget . . . . .	374
EXTRA PAY	
Bowers <i>et al.</i> v. Burlington . . . . .	865
Marotta v. Sayreville . . . . .	767
Mina v. Hoboken . . . . .	365
Willett <i>et al.</i> v. Freehold Regional . . . . .	282
FEDERAL AID TO EDUCATION	
Hazlet Teachers Assoc. <i>et al.</i> v. Hazlet . . . . .	578
Marturano <i>et al.</i> v. Passaic . . . . .	1013
FEES—TUITION	
Avon-by-the-Sea Sending-Receiving . . . . .	465
Elizabeth v. Roselle . . . . .	641
“M.D.” & R.D.” <i>et al.</i> v. Rahway . . . . .	323
Trenton, In the Matter of . . . . .	699
Union Beach Budget . . . . .	574
White <i>et al.</i> v. Boonton . . . . .	876
FIRST AMENDMENT	
Foster <i>et al.</i> v. Neptune . . . . .	693
FITNESS OF JANITORS	
Stephenson Tenure, Bridgeton . . . . .	869
GRADING SYSTEMS	
Dooner v. Toms River . . . . .	619
GUIDANCE COUNSELORS—PROMOTIONS	
Means v. Newark . . . . .	133
GUIDANCE COUNSELORS—SALARIES—DEDUCTIONS	
Bowers <i>et al.</i> v. Burlington . . . . .	865
GUIDANCE COUNSELORS—SALARIES—RESTITUTIONS	
Bowers <i>et al.</i> v. Burlington . . . . .	865
HEARINGS—ADVERSARY	
Donaldson v. Wildwood . . . . .	59
HOLIDAYS	
Siegfried v. Shrewsbury . . . . .	2
IN LOCO PARENTIS	
Orr <i>et al.</i> v. Caldwell-West Caldwell . . . . .	264
INEFFICIENCY	
Gill v. Clifton . . . . .	661
Martz Tenure, Franklin . . . . .	773
Rhen Tenure, North Caldwell . . . . .	647
INTIMIDATION OF PERSONNEL	
Bradley v. Freehold . . . . .	590
Sulovski v. West Orange . . . . .	1075
JANITORS, DISMISSALS	
Jeffers Tenure, Keansburg . . . . .	979
Stephenson Tenure, Bridgeton . . . . .	869
JANITORS—SUSPENSIONS—COMPENSATIONS	
Stephenson Tenure, Bridgeton . . . . .	869

	Page
<b>JANITORS--TENURE EMPLOYEE HEARINGS</b>	
Jeffers Tenure, Keansburg . . . . .	979
Stephenson Tenure, Bridgeton . . . . .	869
<b>JURISDICTION--COMMISSIONER OF EDUCATION</b>	
Bloomingdale v. Butler . . . . .	944
Cafarelli <i>et al.</i> v. Long Beach Island . . . . .	989
Cinnaminson v. Silver . . . . .	738
Coombs v. Plumsted . . . . .	629
Dennis v. Long Branch . . . . .	14
East Windsor Regional Sending-Receiving . . . . .	479
Green Village Road v. Madison . . . . .	700
Hamilton Election . . . . .	444
Kearny Election . . . . .	791
Marturano <i>et al.</i> v. Passaic . . . . .	1013
Mina v. Hoboken . . . . .	365
Plessis v. Newark . . . . .	1006
South Amboy Budget . . . . .	156
Union Beach Budget . . . . .	574
<b>LACHES</b>	
DeChiaro v. Morris School District . . . . .	751
Mina v. Hoboken . . . . .	365
Quay <i>et al.</i> v. Haddon . . . . .	118
Whidden v. Paterson . . . . .	356
<b>LIBRARIES</b>	
East Brunswick v. New Brunswick . . . . .	484
<b>LONGEVITY PAY</b>	
Wall Education Association <i>et al.</i> v. Wall . . . . .	269
<b>MEETINGS--PUBLIC</b>	
East Amwell Election . . . . .	460
<b>MOOTNESS</b>	
"F.G." v. Caldwell-West Caldwell . . . . .	582
<b>MORAL TURPITUDE</b>	
Criscenzo Tenure, Paterson . . . . .	1000
Myers Tenure, Gloucester City . . . . .	1024
<b>MOTIONS--COMMISSIONER OF EDUCATION</b>	
McCormack, Yundzel, Spangler v. Northern Highlands Regional or Fair Lawn . . . . .	754
<b>MOTIONS--DISMISSALS</b>	
Means v. Newark . . . . .	133
<b>NOTICE OF RESIGNATION</b>	
Kozak v. Waterford . . . . .	633
<b>NURSES--REDUCTION OF TEACHING ASSIGNMENT</b>	
Roe <i>et al.</i> v. Mine Hill . . . . .	672
<b>NURSES--SALARIES--ERRONEOUS PLACEMENTS ON SALARY GUIDE</b>	
Marturano <i>et al.</i> v. Passaic . . . . .	1013
Miller v. Lakewood . . . . .	960
Stack and Wilson v. Elmwood Park . . . . .	1052
<b>NURSES--SALARIES--INEQUITIES</b>	
Marturano <i>et al.</i> v. Passaic . . . . .	1013
<b>NURSES--SALARIES--PENALTIES</b>	
Baley Tenure, Mansfield . . . . .	841

	Page
<b>NURSES--SALARIES--RESTITUTIONS</b>	
Marturano <i>et al.</i> v. Passaic . . . . .	1013
Miller v. Lakewood . . . . .	960
Stack and Wilson v. Elmwood Park . . . . .	1052
<b>NURSES--SUSPENSIONS</b>	
Baley Tenure, Mansfield . . . . .	841
<b>NURSES--TENURE EMPLOYEE HEARINGS</b>	
Baley Tenure, Mansfield . . . . .	841
<b>PARTY IN INTEREST</b>	
Jones <i>et al.</i> v. Leonia <i>et al.</i> . . . . .	495
Kochman <i>et al.</i> v. Keansburg . . . . .	748
Means v. Newark . . . . .	133
Orr <i>et al.</i> v. Caldwell-West Caldwell . . . . .	264
<b>PETITIONS--DEFECTIVE</b>	
McCormack, Yundzel and Spangler v. Northern Highlands Regional or Fair Lawn . . . . .	754
<b>PETITIONS--STIPULATION OF DISMISSAL</b>	
Konowitch Tenure, Middle . . . . .	936
<b>PLEA BARGAINING</b>	
Myers Tenure, Gloucester City . . . . .	1024
<b>PLENARY HEARINGS</b>	
Banchik v. New Brunswick . . . . .	78
Foster <i>et al.</i> v. Neptune . . . . .	693
Jannarone v. Asbury Park . . . . .	520
Karamessinis v. Wildwood . . . . .	473
McCorkle v. South Amboy . . . . .	732
McCormack, Yundzel and Spangler v. Northern Highlands Regional or Fair Lawn . . . . .	754
Sachs v. East Windsor Regional . . . . .	170
<b>PRINCIPALS--CONTRACT NONRENEWALS</b>	
Banchik v. New Brunswick . . . . .	78
<b>PRINCIPALS--EVALUATIONS</b>	
Rhen Tenure, North Caldwell . . . . .	647
<b>PRINCIPALS--SALARIES--PENALTIES</b>	
Rhen Tenure, North Caldwell . . . . .	647
<b>PRINCIPALS--SALARIES--REDUCTIONS</b>	
Gamvas v. Lakewood . . . . .	509
<b>PRINCIPALS--SALARIES--RESTITUTIONS</b>	
Gamvas v. Lakewood . . . . .	509
<b>PRINCIPALS--TENURE EMPLOYEE HEARINGS</b>	
Rhen Tenure, North Caldwell . . . . .	647
<b>PRINCIPALS--TRANSFERS</b>	
Gamvas v. Lakewood . . . . .	509
<b>RACIAL IMBALANCE</b>	
Avon-by-the-Sea Sending-Receiving . . . . .	465
Roselle Imbalance . . . . .	187
<b>REGIONAL SCHOOL DISTRICTS</b>	
Bloomingdale v. Butler . . . . .	944
DeChiaro v. Morris School District . . . . .	751
<b>REMAND--DECISION ON</b>	
Fallon v. Mount Laurel . . . . .	75
Stack and Wilson v. Elmwood Park . . . . .	1052
Union Beach Budget . . . . .	574

	Page
<b>RIGHT TO KNOW LAW</b>	
Feigen <i>et al.</i> v. Livingston . . . . .	886
<b>SAFETY OF STUDENTS</b>	
Baldanza v. Tinton Falls <i>et al.</i> . . . . .	362
<b>SCHOOL DISTRICTS—REDISTRICTING BOUNDARY LINES</b>	
Feigen <i>et al.</i> v. Livingston . . . . .	886
Hornik v. Marlboro . . . . .	987
<b>SCHOOL PSYCHOLOGISTS—SALARIES—RESTITUTIONS</b>	
Oros v. South Bound Brook . . . . .	685
<b>SCHOOL PSYCHOLOGISTS—TENURE CLAIMS</b>	
Oros v. South Bound Brook . . . . .	685
<b>SCHOOL PSYCHOLOGISTS—TRANSFERS</b>	
Vieland v. Princeton Regional . . . . .	892
<b>SECRETARY OF THE BOARD</b>	
Pittsgrove Election . . . . .	585
<b>SECRETARY OF THE BOARD—DISMISSALS</b>	
Parachini v. Union City <i>et al.</i> . . . . .	515
<b>SECRETARY OF THE BOARD—REDUCTION OF POSITION</b>	
Vanderbeck v. Hamburg . . . . .	970
<b>SECRETARY OF THE BOARD—SALARIES—REDUCTIONS</b>	
Vanderbeck v. Hamburg . . . . .	970
<b>SECRETARY OF THE BOARD—SALARIES—RESTITUTIONS</b>	
Parachini v. Union City <i>et al.</i> . . . . .	515
<b>SENDING—RECEIVING RELATIONSHIPS</b>	
Avon-by-the-Sea/Asbury Park . . . . .	465
Bloomingdale/Butler . . . . .	944
East Windsor Regional/Roosevelt and Cranbury . . . . .	479
Milltown/New Brunswick . . . . .	854
Phillipsburg/Alpha <i>et al.</i> . . . . .	176
<b>SENIORITY RIGHTS</b>	
Gamvas v. Lakewood . . . . .	509
Kuett <i>et al.</i> v. Westfield . . . . .	601
Morer v. Teaneck . . . . .	963
Payne v. Ridgewood . . . . .	605
Sheridan v. Ridgefield Park . . . . .	995
Vieland v. Princeton Regional . . . . .	892
<b>SPECIAL EDUCATIONAL SERVICES</b>	
Chianese v. Bordentown . . . . .	804
Finkle v. Paterson . . . . .	726
Kuett <i>et al.</i> v. Westfield . . . . .	601
Trenton, In the Matter of . . . . .	699
<b>STARE DECISIS</b>	
Marturano <i>et al.</i> v. Passaic . . . . .	1013
<b>STATE AID TO EDUCATION</b>	
Perth Amboy Budget . . . . .	39
Verona Budget . . . . .	111
Willingboro Budget . . . . .	101
<b>STATE BOARD OF EXAMINERS</b>	
Criscenzo Tenure, Paterson . . . . .	1000
<b>STATEMENTS OF REASONS</b>	
Banchik v. New Brunswick . . . . .	78
Bradley v. Freehold . . . . .	590

	Page
Donaldson v. Wildwood . . . . .	59
Fishberg <i>et al.</i> v. Princeton Regional . . . . .	55
Mazmanian v. Bayonne . . . . .	1065
McCorkle v. South Amboy . . . . .	732
McCormack, Yundzel and Spangler v. Northern Highlands Regional or Fair Lawn . . . . .	754
Mullely v. Maple Shade . . . . .	388
Nettles v. Bridgeton . . . . .	555
Wachstein v. Medford . . . . .	928
<b>STATEMENTS OF REASONS—ECONOMY</b>	
Ciccone v. Weehawken . . . . .	1011
Kaprow v. Howell . . . . .	1032
Roe <i>et al.</i> v. Mine Hill . . . . .	672
Vanderbeck v. Hamburg . . . . .	970
<b>STATEMENTS OF REASONS—REORGANIZATION</b>	
D'Ambrosio v. Palisades Park <i>et al.</i> . . . . .	717
<b>STUDENT ACTIVITY FUNDS</b>	
Palydowycz v. Clifton . . . . .	984
<b>STUDENTS—CLASSIFICATION</b>	
“M.D.” <i>et al.</i> v. Rahway . . . . .	323
Orr <i>et al.</i> v. Caldwell-West Caldwell . . . . .	264
<b>STUDENTS—DISCIPLINE</b>	
Krill <i>et al.</i> v. Red Bank . . . . .	245
<b>STUDENTS—DISTRIBUTION OF MATERIALS</b>	
Hamilton Election . . . . .	444
Nutley Election . . . . .	612
Warren Election . . . . .	828
<b>STUDENTS—DOMICILE &amp; RESIDENCE</b>	
Elizabeth v. Roselle . . . . .	641
White <i>et al.</i> v. Boonton . . . . .	876
<b>STUDENTS—EXCLUSION FROM GRADUATION</b>	
Dooner v. Toms River . . . . .	619
<b>STUDENTS—GRADE PLACEMENTS</b>	
“F.G.” v. Caldwell-West Caldwell . . . . .	582
<b>STUDENTS—GRADES</b>	
Martz Tenure, Franklin . . . . .	773
<b>STUDENTS—NONRESIDENTS</b>	
White <i>et al.</i> v. Boonton . . . . .	876
<b>STUDENTS—ORGANIZATIONS</b>	
Willett <i>et al.</i> v. Freehold Regional . . . . .	282
<b>STUDENTS—SUSPENSIONS AND EXPULSIONS</b>	
“H.A.” v. Warren Hills Regional . . . . .	336
“M.T.C.” v. Lower Camden County Regional . . . . .	274
“O.P.” v. Paterson . . . . .	658
<b>SUBSTITUTE TEACHERS</b>	
Driscoll v. Clifton . . . . .	7
Hussey v. Westfield . . . . .	1019
Payne v. Ridgewood . . . . .	605
<b>SUPERINTENDENTS—CONTRACT CANCELLATIONS</b>	
Karamessinis v. Wildwood . . . . .	473
<b>SUPERINTENDENTS—POWERS AND DUTIES</b>	
Jannarone v. Asbury Park . . . . .	520

	Page
<b>SUPERINTENDENTS—SALARIES—RESTITUTIONS</b>	
Green Tenure, Warren County Vocational . . . . .	722
<b>SUPERINTENDENTS—SUSPENSIONS</b>	
Green Tenure, Warren County Vocational . . . . .	722
<b>SUPERINTENDENTS—TENURE CLAIMS</b>	
Jannarone v. Asbury Park . . . . .	520
<b>SUPERINTENDENTS—TENURE EMPLOYEE HEARINGS</b>	
Green Tenure, Warren County Vocational . . . . .	722
<b>SUPERVISORS OF INSTRUCTION—CONTRACT NONRENEWALS</b>	
Kaprow v. Howell . . . . .	1032
<b>SUPERVISORS OF INSTRUCTION—DUTIES</b>	
Vieland v. Princeton Regional . . . . .	892
<b>SUPERVISORS OF INSTRUCTION—QUALIFICATIONS</b>	
Martz Tenure, Franklin . . . . .	773
<b>SUPERVISORS OF INSTRUCTION—TENURE CLAIMS</b>	
Vieland v. Princeton Regional . . . . .	892
<b>TEACHERS—ASSIGNMENTS</b>	
Payne v. Ridgewood . . . . .	605
<b>TEACHERS—CONTRACT CANCELLATIONS</b>	
Chianese v. Bordentown . . . . .	804
Hochman v. Newark <i>et al.</i> . . . . .	492
Payne v. Verona . . . . .	543
Sachs v. East Windsor Regional <i>et al.</i> . . . . .	170
<b>TEACHERS—CONTRACT NONRENEWALS</b>	
Bitzer v. Boonton . . . . .	376
Ciccione v. Weehawken . . . . .	1011
D'Ambrosio v. Palisades Park <i>et al.</i> . . . . .	717
Dougherty v. Hamilton . . . . .	412
Fishberg <i>et al.</i> v. Princeton Regional . . . . .	55
Foster <i>et al.</i> v. Neptune . . . . .	693
Krill <i>et al.</i> v. Red Bank . . . . .	245
Mazmanian v. Bayonne . . . . .	1065
McCorkle v. South Amboy . . . . .	732
McCormack, Yundzel and Spangler v. Northern Highlands Regional or Fair Lawn . . . . .	754
Morer v. Teaneck . . . . .	963
Mullely v. Maple Shade . . . . .	388
Nettles v. Bridgeton . . . . .	555
Roy v. Middle . . . . .	569
Sulowski v. West Orange . . . . .	1075
Wachstein v. Medford . . . . .	928
<b>TEACHERS—CONTRACTS</b>	
Roy v. Middle . . . . .	569
Sydnor v. Englewood . . . . .	113
<b>TEACHERS—DISMISSALS</b>	
Criscenzo Tenure, Paterson . . . . .	1000
Ford Tenure, Linden . . . . .	243
Lefakis Tenure, Midland Park . . . . .	816
Martz Tenure, Franklin . . . . .	773
<b>TEACHERS—DISMISSALS—INSUBORDINATION</b>	
Hochman v. Newark <i>et al.</i> . . . . .	492
<b>TEACHERS—DUTIES, LUNCH</b>	
Finkbiner Tenure, Audubon . . . . .	392

	Page
<b>TEACHERS—EDUCATION</b>	
Cafarelli <i>et al.</i> v. Long Beach Island . . . . .	989
<b>TEACHERS—EVALUATIONS</b>	
Chianese v. Bordentown . . . . .	804
Finkbiner Tenure, Audubon . . . . .	392
Jones <i>et al.</i> v. Leonia <i>et al.</i> . . . . .	495
Krill <i>et al.</i> v. Red Bank . . . . .	245
McCorkle v. South Amboy . . . . .	732
Martz Tenure, Franklin . . . . .	773
Payne v. Ridgewood . . . . .	605
Payne v. Verona . . . . .	543
Quay <i>et al.</i> v. Haddon . . . . .	118
Sachs v. East Windsor Regional . . . . .	170
Sulovski v. West Orange . . . . .	1075
<b>TEACHERS—LEAVES OF ABSENCE</b>	
Nettles v. Bridgeton . . . . .	555
Siegfried v. Shrewsbury . . . . .	2
<b>TEACHERS—LEAVES OF ABSENCE, MATERNITY</b>	
Cinnaminson v. Laurie Silver . . . . .	738
Hussey v. Westfield . . . . .	1019
<b>TEACHERS—LEAVES OF ABSENCE, SABBATICAL</b>	
Lavin Tenure, Lower Camden County Regional . . . . .	796
<b>TEACHERS—LEAVES OF ABSENCE, SICK</b>	
Cinnaminson v. Silver . . . . .	738
Kochman <i>et al.</i> v. Keansburg . . . . .	748
Lefakis Tenure, Midland Park . . . . .	796
Taccone v. Newark . . . . .	1045
Warren v. Brooklawn . . . . .	980
<b>TEACHERS—LEAVES OF ABSENCE, VACATION</b>	
Warren v. Brooklawn . . . . .	980
<b>TEACHERS—MEDICAL EXAMINATIONS</b>	
Finkbiner Tenure, Audubon . . . . .	392
<b>TEACHERS—MILITARY SERVICE</b>	
Wall Education Assoc. <i>et al.</i> v. Wall . . . . .	269
Whidden v. Paterson . . . . .	356
<b>TEACHERS' PENSION AND ANNUITY FUND</b>	
Hedrick and Quinn v. Jersey City . . . . .	1008
<b>TEACHERS—RECORDS</b>	
Bradley v. Freehold . . . . .	590
<b>TEACHERS—REDUCTION OF TEACHING ASSIGNMENTS</b>	
Hyun v. Wharton . . . . .	763
Roe <i>et al.</i> v. Mine Hill . . . . .	672
Wexler v. Hawthorne . . . . .	309
<b>TEACHERS—RESIGNATIONS</b>	
Cafarelli <i>et al.</i> v. Long Beach Island . . . . .	989
Konowitch Tenure, Middle . . . . .	936
<b>TEACHERS—RETIREMENTS</b>	
Hedrick and Quinn v. Jersey City . . . . .	1008
<b>TEACHERS—SALARIES—DEDUCTIONS</b>	
Mina v. Hoboken . . . . .	365

	Page
<b>TEACHERS—SALARIES—ERRONEOUS PLACEMENTS ON GUIDE</b>	
DeChiaro v. Morris School District . . . . .	751
Hussey v. Westfield . . . . .	1019
Nelson v. Kearny . . . . .	1041
Whidden v. Paterson . . . . .	356
<b>TEACHERS—SALARIES—GRADUATE CREDITS</b>	
Cafarelli <i>et al.</i> v. Long Beach Island . . . . .	989
<b>TEACHERS—SALARIES—INCREMENTS</b>	
Gill v. Clifton . . . . .	661
Nicholas v. Chatham . . . . .	901
Payne v. Ridgewood . . . . .	605
Quay <i>et al.</i> v. Haddon . . . . .	118
Wall Education Assoc. <i>et al.</i> v. Wall . . . . .	269
Warren v. Brooklawn . . . . .	980
<b>TEACHERS—SALARIES—INTEREST ACCRUAL</b>	
Dunwoody v. Moorestown . . . . .	667
<b>TEACHERS—SALARIES—PAYMENTS</b>	
Roy v. Middle . . . . .	569
<b>TEACHERS—SALARIES—PENALTIES</b>	
Campbell Tenure, Manasquan . . . . .	65
Rinaldi Tenure, Orange . . . . .	344
Warren v. Brooklawn . . . . .	980
<b>TEACHERS—SALARIES—REDUCTIONS</b>	
Hyun v. Wharton . . . . .	763
Mina v. Hoboken . . . . .	365
Wexler v. Hawthorne . . . . .	309
<b>TEACHERS—SALARIES—RESTITUTIONS</b>	
Bitzer v. Boonton . . . . .	376
Fallon v. Mount Laurel . . . . .	75
Feit v. Hazlet . . . . .	677
Konowitch Tenure, Middle . . . . .	936
Lavin Tenure, Lower Camden County Regional . . . . .	796
Payne v. Verona . . . . .	543
Taccone v. Newark . . . . .	1045
Whidden v. Paterson . . . . .	356
<b>TEACHERS—SALARIES—TERMINATION PAYMENTS</b>	
Feit v. Hazlet . . . . .	677
Sachs v. East Windsor Regional <i>et al.</i> . . . . .	170
<b>TEACHERS—SUSPENSIONS</b>	
Foster <i>et al.</i> v. Neptune . . . . .	693
Hochman v. Newark <i>et al.</i> . . . . .	492
Myers Tenure, Gloucester City . . . . .	1024
Rinaldi Tenure, Orange . . . . .	344
<b>TEACHERS—SUSPENSIONS—COMPENSATIONS</b>	
Hoffman Tenure, Asbury Park . . . . .	1084
<b>TEACHERS—TENURE CLAIMS</b>	
Hazlet Teachers Assoc. <i>et al.</i> v. Hazlet . . . . .	578
Sydnor v. Englewood . . . . .	113
<b>TEACHERS—TENURE EMPLOYEE HEARINGS</b>	
Campbell Tenure, Manasquan . . . . .	65
Criscenzo Tenure, Paterson . . . . .	1000
Finkbiner Tenure, Audubon . . . . .	392
Ford Tenure, Linden . . . . .	243

	Page
Hoffman Tenure, Asbury Park . . . . .	1084
Konowitch Tenure, Middle . . . . .	936
Lavin Tenure, Lower Camden County Regional . . . . .	796
Lefakis Tenure, Midland Park . . . . .	816
Martz Tenure, Franklin . . . . .	773
Masone Tenure, Rutherford . . . . .	902
Myers Tenure, Gloucester City . . . . .	1024
Rinaldi Tenure, Orange . . . . .	344
<b>TEACHERS—TRANSFERS</b>	
Bradley v. Freehold . . . . .	590
Marotta v. Sayreville . . . . .	767
Payne v. Ridgewood . . . . .	605
<b>TEACHERS—UNION ACTIVITIES</b>	
Sulovski v. West Orange . . . . .	1075
<b>TENURE—POSITION TITLE AND EFFECT ON</b>	
Hazlet Teachers Assoc. <i>et al.</i> v. Hazlet . . . . .	578
<b>TESTIMONY</b>	
“H.A.” v. Warren Hills Regional . . . . .	336
South Plainfield Budget . . . . .	252
<b>THOROUGH AND EFFICIENT</b>	
Bloomington v. Butler . . . . .	944
<b>TRANSPORTATION OF STUDENTS—BUS DRIVERS</b>	
Coombs v. Plumsted . . . . .	629
<b>TRANSPORTATION OF STUDENTS—CONTRACTS</b>	
AZ Transportation Inc. v. Woodbridge . . . . .	561
Finkle v. Paterson . . . . .	726
<b>TRANSPORTATION OF STUDENTS—REIMBURSEMENT</b>	
“M.D.” <i>et al.</i> v. Rahway . . . . .	323
<b>TRANSPORTATION OF STUDENTS—ROUTES</b>	
Baldanza v. Tinton Falls . . . . .	362
<b>TRANSPORTATION OF STUDENTS—SAFETY CONDITIONS</b>	
Coombs v. Plumsted . . . . .	629
<b>UNION ACTIVITIES</b>	
Kaprow v. Howell . . . . .	1032
Means v. Newark . . . . .	133
<b>UNIONS</b>	
Means v. Newark . . . . .	133
<b>UNTIMELY NOTICE</b>	
Bitzer v. Boonton . . . . .	376
Brick Board v. Heinzman <i>et al.</i> . . . . .	921
Fishberg <i>et al.</i> v. Princeton Regional . . . . .	55
Roy v. Middle . . . . .	569
Wachstein v. Medford . . . . .	928
<b>VICE—PRINCIPALS</b>	
Newark Teachers Union (Carole Graves) v. Newark . . . . .	72
<b>VOCATIONAL EDUCATION</b>	
Nelson v. Kearny . . . . .	1041
<b>VOCATIONAL EDUCATION—BOARDS OF EDUCATION</b>	
Smollok Tenure, Passaic County Technical . . . . .	361
<b>WITNESSES</b>	
Hochman v. Newark <i>et al.</i> . . . . .	492
Nettles v. Bridgeton . . . . .	555
Rinaldi Tenure, Orange . . . . .	344

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**Ronnie Abramson,**

*Petitioner-Appellant,*

v.

**Board of Education of the Township of Colts Neck, Monmouth County,**

*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, May 28, 1975

Decided by the State Board of Education, October 1, 1975

Argued September 13, 1976—Decided September 27, 1976

Before Judges Bischoff, Morgan and Collester.

On appeal from State Board of Education.

Mr. Michael D. Schottland argued the cause for appellant (Messrs. Chamlin, Schottland & Rosen, attorneys; Messrs. Michael D. Schottland and Thomas W. Cavanagh, Jr., on the brief)

Mr. Henry J. Saling argued the cause for respondent (Messrs. Saling, Moore, O'Mara & Coogan, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, filed a Statement in lieu of Brief on behalf of State Board of Education (Ms. Susan P. Gifis, Deputy Attorney General, of counsel).

**PER CURIAM**

The action taken by the State Board of Education affirming the decision of the Commissioner of Education not to renew appellant's teaching contract for the 1973-74 school year which, if approved, would have conferred tenure, is affirmed substantially for the reasons given in the Commissioner's decision dated May 28, 1975.

**Sarah Armstrong,**

*Respondent-Cross-Appellant,*

v.

**Board of Education of the Township of East Brunswick, Middlesex County,**

*Appellant-Cross-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, February 26, 1975

Decided by the State Board of Education, June 4, 1975

Argued June 8, 1976—Decided June 21, 1976

Before Judges Matthews, Lora and Morgan.

On appeal from decision of the State Board of Education.

Mr. Frank J. Rubin argued the cause for appellant-cross-respondent (Messrs. Rubin & Lerner, attorneys; Mr. Dennis Auciello, of counsel).

Mr. Sidney Birnbaum argued the cause for respondent-cross-appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent, State Board of Education, filed a statement in lieu of brief; Ms. Susan P. Gifis, Deputy Attorney General, of counsel.

**PER CURIAM**

We affirm the action taken by the State Board of Education substantially for the reasons set forth in the opinion of the Commissioner of Education dated February 26, 1975, as modified by the opinion of the State Board of Education dated June 4, 1975.

Appellant's contention that the 60 day cancellation clause (which both parties conceded was part of appellant's contract) was violative of the controlling collective bargaining agreement is without merit. The agreement makes no mention of reserved rights of cancellation although it was admitted that similar rights of cancellation have routinely been part of employment contracts for many years past. See *Canfield v. Board of Education of Pine Hill Borough*, 51 N.J. 400 (1968) and *N.J.S.A. 18A:27-9*. In light of the parties' presumed knowledge of such clauses and the statutory recognition given them, the absence of a provision in the collective bargaining agreement denying their validity is persuasive of the parties' intention to retain them.

Similarly without merit is appellant's contention that the 60 day cancellation clause is repugnant to the statutory requirements of *N.J.S.A.* 18A:27-10, 11, and 12 because it takes away what the cited statutory provisions purport to give, a one year contract of employment on failure to give notice of non-renewal by April 30th of the pre-contract year. Failure to give timely notice of nonrenewal results in giving the teacher "continued employment for the next succeeding school year *upon the same terms and conditions*" as contained in the previous year's contract. Hence, the 60 day cancellation clause reserved to both contracting parties is as much of the renewed contract as it was of the previous contract. Since the previous contract was capable of cancellation by either party on 60 days notice, the renewed contract must be viewed as similarly subject to cancellation on the same terms and conditions. To accept appellant's position would place the contract renewed for failure of timely notice on a higher level of invulnerability than the contract voluntarily entered into by both parties. Such a result is not warranted by either the contract terms, the governing collective bargaining agreement or by the terms of *N.J.S.A.* 18A:27-11.

Affirmed.

**Arthur Barber and Barry Kelner,**

*Petitioners-Appellants,*

*v.*

**Board of Education of the Town of Kearny, Hudson County,**

*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, February 10, 1975

Submitted: March 9, 1976—Decided March 17, 1976

Before Judges Halpern, Crane and Michels.

On appeal from the decision of the State Board of Education.

Mr. George Savino, attorney for appellants.

Messrs. Koch and Koch, attorneys for respondent.

Mr. William F. Hyland, Attorney General, attorney for New Jersey State Board of Education, filed a Statement in Lieu of Brief (Mr. Stephen Skillman, Assistant Attorney General, of counsel; Ms. Susan Pollard Gifis, Deputy Attorney General, on the brief).

PER CURIAM

Petitioners filed a notice of appeal from a decision of the Commissioner of Education and from a determination of the State Board of Education refusing to grant petitioners leave to appeal from the decision of the Commissioner of Education at a time later than 30 days after the decision had been filed.

The Commissioner decided in an opinion filed on February 10, 1975, that the Board of Education of the Town of Kearny would be permitted to continue to employ Ralph Borgess as a football coach if he were appointed to school business administrator. Petitioners did not file an appeal with the State Board of Education within the 30 day time period prescribed by *N.J.S.A. 18A:6-28*, but filed a letter requesting leave to appeal out of time. The request was denied.

Insofar as the notice of appeal relates to the decision of the Commissioner of Education, it was improvidently filed. The proper avenue of appeal is to the State Board of Education pursuant to *N.J.S.A. 18A:6-28*. Since petitioners' efforts to appeal were not commenced within the period provided by the Legislature, the State Board of Education was without power to entertain the appeal. *Cf. Lowden v. Bd. of Rev., Div. of Emp. Sec., 78 N.J. Super. 467 (App. Div. 1963)*.

Affirmed.

**Nicoletta Biancardi,**

*Petitioner-Respondent,*

v.

**Waldwick Board of Education,**

*Respondent-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, April 9, 1974

Decided by the State Board of Education, November 6, 1974

Submitted: December 9, 1975—Decided: February 6, 1976

Before Judges Lynch, Larner and Fulop.

On appeal from decision of the State Board of Education.

Messrs. Honig and Honig, attorneys for appellant (Mr. Steven M. Honig, on the brief).

Messrs. Goldberg and Simon, attorneys for respondent (Mr. Theodore M. Simon, on the brief).

The opinion of the courts was delivered by LYNCH, P.J.A.D.

This is an appeal by the Waldwick Board of Education from a decision of the State Board of Education. The State Board affirmed a determination of the Commissioner of Education holding that Nicoletta Biancardi had acquired tenure in the Waldwick school system by reason of her employment in the system from April 27, 1970 to June 30, 1970 and her continued employment thereafter for the three academic years beginning in September 1970 and ending in June 1973. Two members of the State Board of Education dissented from the decision of the majority on the ground that respondent was employed merely as a "substitute teacher" in the spring of 1970.

We reverse substantially for the reasons stated in the dissenting opinion of Calvin J. Hurd, Esq. in the State Board of Education, which was joined in by Mrs. Ruth Mancuso. However, we add the following comments.

The decision of our former highest court in *Schulz v. State Board of Education*, 132 *N.J.L.* 345 (E. & A. 1945), is binding upon us until overruled by competent authority. It was there held, as our dissenting colleague concedes, that time served as a "substitute teacher" is not to be counted toward tenure for the reason that such substitutes are not "teaching staff members" within the meaning of the tenure statute, now *N.J.S.A.* 18A:28-5.

The dissent herein accords the obeisance customarily given a finding of fact by an administrative agency to the finding by the Commissioner that respondent was hired not as a substitute but as a regular teacher in the period from April to June 1970. With due respect to our dissenting colleague we believe such deference is inappropriate here. As in *Schulz* there are no disputed facts in this case, and our task is to apply the law to these undisputed facts. *Schulz*, *supra*, 132 *N.J.L.* at 349. Where the issue is one of law, the Commissioner's decision does not carry a presumption of validity, and it is for the court to decide whether his decision (and that of the State Board) is in accordance with the law. See *Fanwood v. Rocco*, 59 *N.J. Super.* 306, 315 (App. Div.), *aff'd* 33 *N.J.* 404 (1960); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 296 (App. Div. 1960). As was said in *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85, 93 (1973): "An appellate tribunal is \*\*\* in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue."

Here it is uncontroverted that: (1) respondent wrote a letter dated May 18, 1970, expressing her desire for a "full time teaching position" in the upcoming year; respondent thus implicitly admitted that, as stated in the Board's resolution, she had been hired as a substitute to fill the two month

period of vacancy caused by the departure of a regular teacher; (2) respondent was not hired at the rate of pay established by the salary guide for a regular teacher (\$11,385 per year), but was paid at the rate of \$40 per day; (3) respondent did not receive any of the benefits afforded a regular teacher such as sick-leave, paid holidays and vacation periods, and paid absences for attendance at teachers' conventions (indeed respondent was absent two days during the period from April to June 1970 and was not paid for those days); (4) respondent was not enrolled in the Teachers' Pension and Annuity Fund during the period in question. The Teachers' Pension and Annuity law, *N.J.S.A. 18A:66-1 et seq.*, expressly provides that "No person shall be deemed a teacher within the meaning of this article who is a substitute teacher \*\*\*." *N.J.S.A. 18A:66-2(p)*. The fact that respondent was not enrolled in the pension plan is additional evidence that she knew she was taking a temporary appointment and was working as a substitute teacher.

The dissent cites *Downs v. Hoboken Bd. of Ed.*, 13 *N.J. Misc.* 853 (Sup. Ct. 1935), and *Jersey City Bd. of Ed. v. Wall*, 119 *N.J.L.* 308 (Sup. Ct. 1938), as authority for the proposition that it is the nature of the work that determines whether a teacher is working as a substitute or regular teacher. *Downs and Wall* are clearly distinguishable from the instant situation. In both cases the teachers involved were really regularly employed teachers and use of the label "substitute" was a mere subterfuge to evade the tenure act. *Schulz, supra*, 132 *N.J.L.* at 353. Here there is no evidence or claim of such subterfuge or bad faith on the part of the Waldwick Board. As the court said in *Schulz*:

[W]e think that the *Downs* decision assumes and that the *Wall* decision concedes the legality of employment and service, in good faith, as substitute teacher and, further, the cleavage between the *status* of such a substitute teacher and that of a regularly employed teacher. The offense in the cited cases was the attempt to conceal the real situation by employing in the guise of substitute teachers those who were really teachers, doing the work of teachers. [132 *N.J.L.* at 353].

Respondent argues that in the April to June period she was doing the same work as a regular teacher. As the dissent in the State Board pointed out, all substitutes do the work of regulars when the need to perform those duties arises.

We recognize that in *Schulz* the teacher involved did not possess a Newark city teaching license. That factor was merely an added reason for the decision, expressed by the court after it had already reached its conclusion that the teacher was not entitled to tenure. 132 *N.J.L.* at 355. It is clear that the court based its decision on the independent grounds set forth in its opinion before it reached the question of the certificate.

It is undisputed that a Board of Education has the right to hire teachers as substitute teachers. *N.J.S.A. 18A:29-16*. Presumably when the Waldwick Board hired respondent in that capacity it did so with knowledge of the decision in *Schulz, supra*, that such a hiring from April to June 1970 was not to be counted toward tenure. Respondent accepted the appointment as a "substitute" without

protest, and it would be unfair to retroactively grant her tenure based on that appointment. We agree with the dissent in the State Board that to ascribe permanency to respondent's employment from April to June 1970 would effectively negate and contravene the Board's statutory authority to hire respondent as a substitute teacher.

For the foregoing reasons the decision of the State Board is reversed.

Fulop, J.S.C. T/A Dissenting

Plaintiff-Respondent Nicoletta Biancardi is the holder of a Permanent Teacher's Certificate authorizing her to teach in the public schools of the State of New Jersey in grades kindergarten through eight. Effective April 27, 1970, she was employed to teach first grade in a Waldwick school for the rest of the school year through June 30, 1970, in place of a teacher who had left. She had applied for a permanent position but was hired under the title "substitute" with the understanding that her continuation depended on her performance. During this initial period she received \$40 per day, a sum greater than the usual *per diem* rate paid to substitutes but less than the full salary she would have been paid on appointment under contract. She was not then granted pension rights or fringe benefits.

She was regularly appointed under contract effective September 1, 1970 and annually thereafter through the 1972-1973 academic year. She served in the system until June 30, 1973. Thereafter she was refused further employment in the Waldwick schools.

She appealed to the Commissioner of Education claiming tenure. The Commissioner held that she had acquired tenure as a teacher in the Waldwick schools and ordered her reinstated with back pay.

The Waldwick Board of Education appealed to the State Board of Education. The Law Committee recommended that the Board affirm the Commissioner's determination and the Board affirmed with two members dissenting. The Waldwick Board of Education appeals.

The case arises under the Teachers' Tenure Law, *N.J.S.A.* 18A: 28-1 *et seq.* *N.J.S.A.* 18A: 28-5 provides in part as follows:

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

- \*\*\*(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;

It is established law that time spent teaching in a school system as a substitute teacher does not count toward tenure. *Schulz v. The State Board of Education*, 132 N.J.L. 345 (E. & A. 1945). It is equally well settled that the designation of a teacher as a substitute by the employing board of education does not control. It is the nature of the employment in fact that determines whether a teacher is working as a substitute or a regular teacher. *Downs v. Hoboken Bd. of Education*, 13 N.J. Misc. Rep. 853, 854, 181 A. 688 (Sup. Ct. 1935); *Jersey City Board of Ed. v. Wall*, 119 N.J.L. 308 (Sup. Ct. 1938).

The Hearing Examiner found and the Commissioner of Education specifically adopted the finding that the Petitioner-Respondent was not employed as a substitute but as a regular teacher for the period from April 27, 1970 through June 30, 1970. He found that she was employed to teach a class which had no regular teacher, for the rest of the term. She did not temporarily take the place of a teacher. She was permanently certified to teach grades from kindergarten through eight.

During the initial period she:

1. Prepared and used her own lesson plans.
2. She prepared report cards.
3. She corrected assignments.
4. She conferred with parents.
5. She participated in Back to School Night.
6. She performed all other usual teaching duties.

She continued to perform the same duties in the same grade under annual contracts for two additional years and in kindergarten for the third additional year. She originally applied for and anticipated continued employment. She was in fact steadily employed for three school years and 2 months.

The facts that for the first two months petitioner was paid on a *per diem* basis, paid less than regular teachers but more than substitutes in that school system, that she did not participate in pension rights and fringe benefits, did not establish her to be a substitute. A substitute is one acting for or taking the place of another. One performing the full duties of a teacher for the balance of the school year is not a substitute.

The Examiner held:

\*\*\*there can be no question herein about the duties performed by petitioner during all of the period April 27, 1970 through June 1973. They were clearly the duties of a regular teaching staff member employed by the Board, and this clear fact is not tarnished in any way by the Board's nomenclature for the work or the rewards it offered when the work was performed.

Thus, having completed an employment "\*\*\*of more than three academic years within a period of four academic years\*\*\*" *N.J.S.A. 18A: 28-5*, petitioner has complied with the statutory prescription and is "under tenure."

The Commissioner held:

The Commissioner is in agreement in all points with the findings of the hearing examiner and holds them as his own. Most important are the findings that petitioner, although designated by Board resolution as a substitute teacher (P-3), did in all respects perform the work of a regular teacher from April 27, 1970 through June 1970. Her continued employment thereafter, for an uninterrupted period of three academic years, establishes that she performed the duties of a regular teacher uninterruptedly for the equivalent of more than three academic years within a period of four consecutive academic years. *N.J.S.A. 18A: 28-5*.

The Commissioner has consistently construed the tenure statute not to include substitute teachers employed to do particular substitute work for absent teachers. Herein there was no absent teacher, however, and no evidence that the Board sought to replace petitioner from April 27, 1970 through June 19, 1970. Rather, the evidence leads to the conclusion that the Board properly evaluated her teaching performance during the controverted period and on June 8, 1970, offered her a contract for the subsequent school year. (P-4).

The recognized purpose of the probationary period prior to acquisition of tenure is to afford the employing board an opportunity to properly evaluate its employee.

In the instant matter, the Commissioner, having weighed the evidence herein presented, concludes that the necessary probationary period in excess of three academic years within a four-year period was served by petitioner as a regular teacher. Nomenclature chosen at the convenience of the Board, attendant emoluments connected with employment, or the lack thereof, may in no way deprive petitioner of the statutory cloak of protection provided by tenure resulting from her years of service.

The Board could easily have avoided the acquisition of tenure by petitioner, had it so chosen, by the termination of her employment at any time prior to April 27, 1973.

The Waldwick Board appealed to the State Board of Education. The Law Committee of the State Board reported in part as follows:

After review of the record in this matter, the Law Committee finds that: (1) petitioner-appellee's initial salary and employment period from April 27, 1970 until the end of the school year 1970, was sanctioned by unanimous vote of the Board of Education; (2) petitioner-appellee is a fully-certified teacher who was continuously employed as a regular, full-time teacher from April 27, 1970 until the end of the 1970 school year; and (3) petitioner-appellee was continuously employed as a regular, fully-certified teacher for three academic years thereafter-1970-71, 1971-72 and 1972-73.

We do not find the absence of a written contract from April 27, 1970 until the end of 1970 school year to be dispositive of the ultimate question of petitioner-appellee's tenure accrual.\*\*\*And, further, the amount and method of salary payments for the period from April 27, 1970 until the end of the 1970 school year may not deprive her of her rights as a teacher having tenure.

The Law Committee recommended affirmance. The State Board affirmed for the reasons stated in the Commissioner's decision. Two members of the Board dissented. In their opinion they argued that petitioner-respondent was a substitute teacher for the first two months of her employment. The reasoning is not persuasive.

It is argued that the appointment of petitioner-respondent under the designation "substitute teacher" was not a subterfuge but good faith, regular policy of this Board. It is understandable that the Board may wish to save money by hiring a teacher at less than full pay, and may wish to avoid placing an employee in the pension system and under fringe benefits for less than a school year since such an appointee may not be appointed for the following year or years. No evil intent need be ascribed to the school authorities. An appointee would not obtain tenure or any right to reemployment at the end of two months of probationary service no matter whether denominated a substitute or a regular teacher. It is the continuation of this employment for three additional years that gives rise to tenure. The Board has a full three years in which to terminate an unsatisfactory teacher. It is absurd to suggest that an affirmance of this case would curtail the right of the Board to legitimate employment of substitutes. The employment of a substitute teacher to teach a class continuously for more than three years is inherently a violation of the intent of the Teachers' Tenure Law.

In *Viemeister v. Bd. of Education of Prospect Park*, 5 N.J. Super. 215, 218 (App. Div. 1949), Judge (later Justice) Jacobs said:

The tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after

years of service. They represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy.

In *Downs v. Hoboken Bd. of Education, supra*, the former Supreme Court said:

The Teachers' Tenure Act \*\*\* is not a gesture, but a provision of law to protect teachers in their positions by reason of years of service.

In *Bd. of Ed. of Jersey City v. Wall, supra*, Justice Bodine said:

The petitioner, like many of the other so-called substitutes, was assigned to a regular position in the same manner as teachers with tenure. The device adopted cannot defeat the purpose of the act, which was designed to give a measure of security to those who served as teachers three consecutive academic years.

Whether Petitioner-Respondent was employed as a regular teacher or as a substitute teacher during the critical first two months is not a question of law. It is a question of fact to be determined by those with expert knowledge of school practices. The Commissioner of Education subject to the supervision of the State Board of Education is charged with the responsibility of administering the school system as an expert executive and finder of fact. His determinations on school matters are inherently more persuasive than the determination of a trial jury.

The determinations of a judge sitting without a jury must be affirmed if it "could reasonably have been reached on sufficient credible evidence present in the record." *State v. Johnson*, 42 *N.J.* 146 (1964). That is true even though the appellate judges are presumably as well or better informed on the subject matter than the trial judge. The same rule has been applied to the review of appeals from administrative boards, with one addition "\*\*\*in the case of agency review, with due regard also to the agency's expertise where such expertise is a pertinent factor." *Close v. Kordulak Bros.*, 44 *N.J.* 589 (1965); *Mayflower Securities Co., Inc. v Bureau of Securities*, 64 *N.J.* 85, 92-93 (1973).

These rules have been specifically applied to the State Board of Education. In *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd.* with irrelevant reservation at 46 *N.J.* 581 (1966), Judge (now Justice) Sullivan held:

We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence. *Quinlan v. Board of Ed. of North Bergen Tp.*, 73 *N.J. Super.* 40 (App. Div. 1962); *Schinck v. Board of Ed. of Westwood Consol. School Dist.*, 60 *N.J. Super.* 448 (App. Div. 1960).

The State Board there denied tenure to a local superintendent of schools and the Appellate Division affirmed on the basis of "substantial credible evidence in the totality of the facts and circumstances from which the State Board could have reasonably found" as the State Board did find.

In the case before us there is adequate evidence supporting the determination of the Hearing Examiner, the Acting State Commissioner of Education, and the Law Committee and a large majority of the State Board. Under the law, affirmance is commanded.

I vote to affirm.

Pending before Supreme Court of New Jersey.

**Charles H. Bihler et al.,**

*Petitioners-Appellants,*

*v.*

**Mayor and Council of the Township of Scotch Plains et al.,**

*Respondents-Respondents.*

**Charles Bihler,**

*Plaintiff-Appellant,*

*v.*

**Mayor and Council of the Township of Scotch Plains,  
Mayor and Council of the Borough of Fanwood, Board of  
Education of the Scotch Plains-Fanwood Regional School District,**

*Defendants-Respondents  
and Cross-Appellants,*

**And**

**Union County Board of Taxation and Commissioner  
of Education of the State of New Jersey,**

*Defendants.*

**Charles Bihler,**

*Plaintiff-Respondent,*

*v.*

**Mayor and Council of the Township of Scotch Plains,  
Mayor and Council of the Borough of Fanwood,  
Board of Education of the Scotch Plains-Fanwood  
Regional School District,**

*Defendants-Appellants,*

And

**Union County Board of Taxation and Commissioner  
of Education of the State of New Jersey,**

*Defendants.*

**Kathy Britton et al.,**

*Petitioners-Respondents,*

v.

**Board of Education of the  
Scotch Plains-Fanwood Regional School District, et al.,**

*Respondents-Appellants.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued March 16, 1976 and April 6, 1976—Decided August 9, 1976

Before Judges Kolovsky, Bischoff and Botter.

On Appeals from Commissioner of Education, Superior Court, Law Division, Union County and State Board of Education.

Mr. Theodore M. Simon argued the cause for appellants Charles H. Bihler, et al. (Messrs. Goldberg, Simon & Selikoff, attorneys).

Mr. Paul L. Tractenberg argued the cause for respondents Kathy Britton, et al. (Mr. Stephen Eisdorfer, on the brief).

Mr. John F. Malone argued the cause for respondent-appellant Board of Education of the Scotch Plains-Fanwood Regional School District (Messrs. Johnstone & O'Dwyer, attorneys)

Mr. Lewis M. Markowitz argued the cause for respondents-appellants Mayor and Council of the Township of Scotch Plains (Messrs. Epstein, Epstein, Brown, Bosek & Turndorf, attorneys).

Mrs. Susan P. Gifis, Deputy Attorney General, argued the cause for respondents State Department of Education and Commissioner of Education (Mr. William F. Hyland, Attorney General of New Jersey, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel).

Messrs. Crane, Beglin & Vastola filed a brief on behalf of respondents-appellants Mayor and Council of the Borough of Fanwood (Mr. Edward W. Beglin, Jr., on the brief).

## PER CURIAM

These separate appeals involve budgets for the 1974-1975 and 1975-1976 school years for the Scotch Plains-Fanwood Regional School District (hereinafter School District). The appeals have a common background. Although the procedural histories differ and not all points in issue are identical, we have determined to grant the pending motions for consolidation of the appeals.

The regional school district is composed of the Township of Scotch Plains and the Borough of Fanwood. On February 5, 1974 the voters of the School District rejected the budget proposed by the Board of Education (hereinafter the Board) for the 1974-75 school year. The proposed budget called for the sum of \$9,975,311 for current expenses to be raised by local taxes. The budget was then submitted to the governing bodies of both municipalities (hereinafter Councils). Thereafter, on March 5, 1974, pursuant to *N.J.S.A.* 18A:13-19, the Councils certified the sum of \$9,006,311 to be raised by local taxes for current expenses. This represented a reduction of \$969,000 from the Board's proposed budget. (The accounts for capital outlay and debt service were not changed.)

On March 20, 1974 the Board filed a petition with the Commissioner of Education (hereinafter Commissioner) to review the Councils' budget. After a hearing and receipt of the Hearing Examiner's report, the Commissioner, in December 1974, ordered \$714,260 restored to the budget. From this decision the Councils appealed to the State Board of Education (hereinafter State Board) and applied for a stay of the Commissioner's determination.

While that appeal was pending, on March 4, 1975, the voters rejected the Board's proposed budget for 1975-76. The proposed budget provided for current expenses in excess of \$12 million, of which \$10,608,630 was to be raised by local taxation. Following the rejection at the polls, the Board submitted this budget to the Councils for their consideration. *N.J.S.A.* 18A:13-19.

After negotiations, the Board and the Councils decided to settle the dispute pending before the State Board involving the 1974-1975 budget and to agree upon a budget for the 1975-1976 school year. Pursuant thereto, a written stipulation of dismissal of the appeal was filed with the State Board in March 1975. The stipulation called for the restoration of \$534,260 of the budget cuts made by the Councils in the 1974-75 budget, which was to challenge the budgets finally settled upon the Councils and the Board for the school years of 1974-1975 and 1975-1976. The dispositions of those proceedings have spawned these appeals.

### *Appeal No. A-3984-74*

By petition of appeal dated June 23, 1975 addressed to the Commissioner, Bihler and co-petitioners sought to review the budgets which were finally accepted by the Board for the 1974-1975 and 1975-1976 school years. The petition asserted that the budget for the 1975-1976 school year accepted by the Board on March 20, 1975 "does not account for inflation and requisite increases in costs and salaries." It also recites that the decision of the Commissioner for

the 1974-1975 school year “must be maintained in order to provide a thorough and efficient education.” There is a general allegation that the actions of respondents, the Councils and the Board, “do not provide thorough and efficient education\*\*\*.” In a separate statement petitioners “appeal[ed] the \$820,000 school budget cut for the 1975-1976 school year.”

By letter dated July 9, 1975, the Commissioner dismissed the petition of appeal. The Commissioner stated that the Board of Education is considered the legal representative of all citizens in the School District, is responsible for the “government and management” of the schools (*N.J.S.A.* 18A:11-1), is responsible for determining what funds are needed for a thorough and efficient system of education, and has not taken an appeal from the 1975-1976 budget found acceptable by the Councils. The Commissioner noted also that the challenge to the 1974-1975 budget was also asserted in an action brought by Bihler in the Law Division and, accordingly, the Commissioner concluded that the issue was not properly before him.

An appeal to this court was filed on August 1, 1975 from the Commissioner’s order of dismissal.

*Appeals No. A-418-75 and A-775-75*

On June 23, 1975 (the same date as that of the petition of appeal to the Commissioner in A-3984-74) Charles Bihler filed an action in lieu of prerogative writs in the Superior Court, Law Division. He recited that he is a taxpayer and parent of children attending the schools in the School District and is also an officer of a division of the Scotch Plains-Fanwood Education Association. The complaint reviewed the history of the 1974-1975 budget dispute and its settlement by the Councils and the Board in early March 1975. It alleged that by “conspiring and agreeing to deprive [the District] of the \$180,000 as required by the Commissioner of Education,” the defendants, the Councils, the Board, the Union County Board of Taxation and the Commissioner “are continuing to deprive the children of [the District] of a thorough and efficient education.”

The Councils and the Board moved to dismiss the complaint for failure to state a claim upon which relief can be granted. By similar orders dated September 29, 1975 and October 1, 1975 the court dismissed the action against the Councils, the Board and the County Board of Taxation, and ordered the complaint against the Commissioner transferred to the Appellate Division. An appeal from the dismissal portion of the order was filed by plaintiffs (Docket No. A-775-75). A cross-appeal was taken by the Councils and the Board from the transfer portion of the order, and a separate notice of appeal was also filed to appeal the order transferring the action to the Appellate Division (Docket No. A-418-75).

*Appeal No. A-1323-75*

On July 31, 1975 a petition was filed with the Commissioner by Kathy Britton, a student in the School District, and other students, their parents and taxpayers. The respondents were the Board and the Councils. The petition

reviewed the history of the adoption of the 1974-75 school budgets and complained of the amounts finally provided by the Board and Councils in those budgets because of their alleged "educational" consequences. These included the elimination of certain positions of "academic directors," "academic coordinators," and a high school assistant principal, a reduction of funds for school supplies and other changes. It charged a failure to provide a thorough and efficient educational system, the elimination of administrative and supervisory positions held by women in the district and the inability to provide specific programs required by State regulations. It alleged a violation of the Commissioner's order of December 13, 1974 which had restored certain funds to the 1974-75 school year budget.

The Commissioner dismissed the petition of appeal primarily for the same reason that he dismissed the Bihler petition, namely, lack of standing. The petitioners then appealed the dismissal to the State Board. By decision rendered on December 3, 1975, the State Board reversed and remanded the case to the Commissioner and ordered him "to assume jurisdiction." The decision contains no discussion and gives no reasons. From this decision the Councils and the Board have appealed to this court.

Representing the State Board, the Attorney General has moved to dismiss this appeal for the failure to obtain leave to appeal pursuant to *R. 2:2-4*, inasmuch as the order of remand which is being appealed is an interlocutory order. Petitioners in the Britton appeal, but not the appellants, have filed a motion requesting that the appellants' notice of appeal be treated as a motion for leave to appeal and that such leave be granted. While we doubt that such a motion can be brought by a respondent on appeal, nevertheless we have the power to grant leave to appeal *nunc pro tunc* from an interlocutory order or decision where, as here, a timely notice of appeal has been filed. *R. 2:4-4(b) (2)*. Since related issues are already before us, we have decided to grant leave to appeal *nunc pro tunc* in this case, and we have accelerated these appeals.

The Attorney General has also moved for a dismissal of the appeal in A-3984-74 and for a remand of that matter to the Commissioner. It is noted that appellants did not appeal the Commissioner's dismissal of their petition to the State Board pursuant to *N.J.S.A. 18A: 6-27*, and, hence, have not exhausted their administrative remedy. See *Roadway Express, Inc. v. Kingsley*, 37 *N.J.* 136, 140 (1962). Nevertheless the Attorney General has noted the decision of the State Board in the *Britton* appeal which remanded that case to the Commissioner for his consideration. Accordingly, on behalf of the Commissioner, the Attorney General has moved for a remand so that the Commissioner may consider the Bihler petition as well.

The Attorney General has also moved on the Commissioner's behalf for a dismissal of the appeal (A-418-75) from the Law Division's order transferring the complaint *against the Commissioner* to the Appellate Division. He asserts that the Complaint in the Law Division did not state a claim for relief against the Commissioner and should not have been transferred to the Appellate Division as in the case where final action by a state administrative agency is to be reviewed.

We agree that the actions taken by the Board and the Councils regarding the 1974-75 and 1975-76 budgets were reviewable, if at all, by the Commissioner. *N.J.S.A.* 18A:6-9. Accordingly, the Law Division properly dismissed the action brought against the Board, the Councils and the Union County Board of Taxation, but it should also have dismissed that action against the Commissioner since no relief could be granted against him.

The erroneous premise of the Law Division action is that the Board and the Councils had no right to agree upon a budget for 1974-75 on an amount differing from that fixed by the Commissioner. This position ignores the fact that the Commissioner's decision was subject to review in the appeal that was then pending before the State Board. *N.J.S.A.* 18A:6-27. Acting in good faith and in the exercise of their discretion, the Board and the Councils had the right to agree to resolve the disputed 1974-75 budget. There was no basis, therefore, for the complaint in the Law Division to compel them to appropriate the full sum previously ordered by the Commissioner. Nor was there any basis for the complaint against the Commissioner.

What remain, therefore, are the appeals from the Commissioner's dismissal of the "Bihler" petition and the State Board's reversal of the Commissioner's dismissal of the "Britton" petition.

In our view, whether or not the petitioners as students, parents and taxpayers had the right to appeal to the Commissioner after the Board and the Councils resolved their dispute over the budgets, these appeals should be dismissed as moot in the present circumstances.

We note at the outset that these petitions might have been dismissed as untimely. The final settlement of the 1974-75 budget dispute occurred in March 1975. It was effectuated by resolutions of the Board and the Council of Scotch Plains on March 20, 1975, and by the Council of Fanwood on March 21, 1975. The 1975-76 budget disputes were resolved by resolutions adopted by the Councils on the same dates. More than three months passed before the Bihler petition was filed with the Commissioner and more than four months passed before the Britton petition was filed with him. By contrast, a Board desiring to appeal from the budget fixed by a governing body after the voters have rejected the Board's budget must give notice of its intention to appeal within 20 days after the budget has been certified to the County Board of Taxation. *N.J.S.A.* 18A:22-37.

The 1974-75 school year ended on June 30, 1975, and the 1975-76 school year has ended on June 30, 1976. *N.J.S.A.* 18A:36-1. Moreover, by the Public School Education Act of 1975 (*L.* 1975, c. 212; *N.J.S.A.* 18A:7A-1 *et seq.*) the Legislature has enacted substantial revisions of the school laws to assure a thorough and efficient system of education. This statute has been upheld in *Robinson v. Cahill*, 69 *N.J.* 449 (1976). Recent legislative action has also been taken to provide for its financing. *L.* 1976, c. 47.

The new law provides guidelines for the definition and effectuation of a "thorough and efficient" system of public schools. *N.J.S.A.* 18A:7A-5. It places responsibility on the State Board and local boards of education to adopt goals and standards to fulfill the purposes of the law. *N.J.S.A.* 18A:7A-6 and *N.J.S.A.* 18A:7A-7. A statewide system for evaluating the performance of each school is mandated, "based in part on annual testing for achievement in basic skill areas\*\*\*." *N.J.S.A.* 18A:7A-10.

In the case at hand the Board was satisfied with the budgets for 1974-75 and 1975-76 which were finally established by the Councils after consultation and negotiation with the Board. The broad, conclusory allegations of budgetary insufficiency contained in the *Bihler* petition is not a persuasive basis for attempting now to adjust the budget for a school year that has long expired. Although the *Britton* petition is more specific, we are satisfied that provisions in the new law provide assurance that positive action will be taken by the Commissioner to assure compliance with the responsibility cast upon the Board to provide proper educational facilities and opportunities in the current and future years.

Accordingly, the dismissal of the *Bihler* petition (in A-3984-74) is affirmed; the order of the State Board (in A-1323-75) remanding the *Britton* petition to the Commissioner is reversed, and the petition is dismissed; the dismissal of the action against the Board and the Councils (in A-775-75) is affirmed and the transfer of the complaint against the Commissioner to the Appellate Division (in A-418-75) is reversed and that complaint is dismissed.

No costs to any party.

**Hugh M. Blair,**

*Appellant,*

v.

**The Board of Education of the Town of West Orange;  
L. T. Ericsson, Secretary to the Board;  
Fred G. Burke, Commissioner of the New Jersey  
Department of Education;  
William F. Hyland, Attorney General  
of the State of New Jersey,**

*Respondents.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued January 22, 1976 – Decided January 22, 1976.

Before Judges Allcorn, Michels and Milmed.

On appeal from New Jersey Department of Education.

Hugh M. Blair argued the cause for the appellant, pro se (Accardi & Koch, attorneys; Conrad N. Koch, of counsel).

Susan P. Gifis, Deputy Attorney General, argued the cause for the respondents Commissioner of the New Jersey Department of Education and the Attorney General of New Jersey (William F. Hyland, Attorney General, attorney; Erminie L. Conley, Deputy Attorney General, of counsel).

Samuel A. Christiano filed a statement in lieu of brief on behalf of the respondents West Orange Board of Education and the Secretary to said Board.

#### PER CURIAM

A review of Chapter 267 of the Laws of New Jersey of 1975 satisfies us that, whatever the factors motivating its enactment, the legislation by changing the date for the holding of the 1976 annual school elections in Type II school districts from February 10, 1976 (the second Tuesday in February, *N.J.S.A.* 18A:14-2) to March 9, 1976, necessarily changes the date by which nominating petitions are required to be filed ("the fortieth day preceding the day of the election," *N.J.S.A.* 18A:14-9) and the date on which the drawings for ballot position are to be conducted ("the day following the last day for filing petitions," *N.J.S.A.* 18A:14-13), inasmuch as said dates are computed and determined by stated periods prior to the date fixed for the elections. The circumstance that Chapter 267 of the Laws of 1975 did not become effective until subsequent to the last day on which petitions of nomination had to be filed were the election to be held on February 10, 1976 instead of March 9, 1976, does not bar the filing of petitions of nomination "on or before the fortieth day preceding the date of the election" as fixed by the Legislature for the year 1976 for Type II districts, namely March 9, 1976.

Accordingly, that portion of the 1976 school elections calendar promulgated by the New Jersey Department of Education, fixing the date for the last day of filing of petitions of nomination and the date of the drawings for ballot position in Type II school districts, is affirmed.

**Patricia Bolger and  
Frances Feller,**

*Petitioners-Appellants,*

v.

**Ridgefield Park Board of Education,**

*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, February 27, 1975

Decided by the State Board of Education, May 4, 1975

Argued April 6, 1976 – Decided April 21, 1976

Before Judges Matthews, Lora and Morgan.

On appeal from the New Jersey State Board of Education.

Mr. Theodore Simon argued the cause for appellants (Messrs. Goldberg and Simon, attorneys).

Mr. Irving C. Evers argued the cause for respondents (Messrs. Parisi, Evers and Greenfield, attorneys).

Mr. Stephen Skillman, Assistant Attorney General, submitted statement in lieu of brief on behalf of the New Jersey State Board of Education (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

**PER CURIAM**

The decision of the State Board of Education affirming the decision of the Commissioner of Education that respondent's determination not to reemploy appellants for the 1974-75 academic year was made in conformance with statutory requirements, and the written notices mailed to appellants by the Superintendent of Schools of Ridgefield Park under dates of March 28, 1974 and March 25, 1974, respectively, were proper and timely, is affirmed substantially for the reasons expressed in the written decision of the Commissioner of Education.

**Board of Education of the City of Burlington,**  
*Petitioner-Respondent,*

v.

**Board of Education of Edgewater Park,**  
*Respondent-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, June 28, 1974

Decided by the State Board of Education, March 5, 1975

Argued June 14, 1976 – Decided June 23, 1976

Before Judges Fritz, Seidman and Milmed.

On appeal from New Jersey State Board of Education.

Mr. Steven Warm argued the cause for appellant.

Mr. John E. Queenan, Jr. argued the cause for respondent.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent State Board of Education, filed a statement in lieu of brief (Ms. Jane Sommer, Deputy Attorney General, of counsel and on the brief).

**PER CURIAM**

Appellant Board appeals from an adverse decision of the State Board of Education which wholly adopted the written decision of the Commissioner of Education. The arguments advanced on this appeal were fully dealt with by the Commissioner. His findings of fact might reasonably have been reached on sufficient credible evidence in the whole record and we will not disturb them. *Parkview Village Asso. v. Bor. of Collingswood*, 62 N.J. 21, 34 (1972). We are of the opinion that his conclusions of law, precisely and informatively articulated, are sound.

Affirmed.

**Henry Butler, Hans-Ulrich Karau,  
Eugene Bannon and Paul McElaney,**

*Petitioners-Respondents  
and Cross-Appellants,*

v.

**Board of Education of Jersey City, Hudson County,**

*Respondent-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, September 23, 1974

Decided by the State Board of Education, April 2, 1975

Argued May 4, 1976 – Decided July 9, 1976

Before Judges Matthews, Lora and Morgan.

On appeal from the decision of the State Board of Education.

Mr. Louis Serterides argued the cause for appellant (Mr. William A. Massa, attorney).

Mr. Robert A. Conforti argued the cause for respondents (Mr. Thomas F. Shebell, attorney)

A statement in lieu of brief was filed on behalf of the State Board of Education by Ms. Jane Sommer, Deputy Attorney General (Mr. William F. Hyland, Attorney General, attorney; Mr. Richard M. Conley, Deputy General, of counsel).

The opinion of the court was delivered by MATTHEWS, P.J.A.D.

Petitioners filed a petition with the Commissioner of Education alleging that they are entitled to back holiday and sick leave pay. Petitioner Karau sought tenure status and enrollment in the Teachers' Pension and Annuity Fund. All also sought legal fees, costs and interest as damages. The Commissioner granted the claims for holiday and sick leave pay and denied Karau's right to tenure. He also denied all requests for legal fees, costs and interest. On January 23, 1975, this matter was appealed to the New Jersey State Board of Education by all parties. On April 2, 1975, on appeal to the State Board of Education, the Commissioner's decision was affirmed for the reasons expressed therein. Respondent Board of Education now appeals from the decision of the State Board of Education.

In 1962 Congress enacted the Manpower Development Training Act (Act), 42 U.S.C. 2571 *et seq.*, in an effort to provide the unemployed with skills

required by the economy. To this end funds were appropriated to be disbursed among the several states for the development of programs for on-the-job training and supplementary classroom instruction. The Jersey City Multi-Skill Center was an agency set up to provide facilities for instruction pursuant to the Act. Respondent Board was given the authority to administer the program in Jersey City.

Commencing in 1965, and pursuant to the Act, the Board assigned petitioners to the Act Program, located at 760 Montgomery Street, Jersey City, which is totally funded by federal grants. The resolution adopted by the Board in the case of the employment of Karau read:

BE IT RESOLVED, that a course entitled Diesel Mechanic (Any Ind.) be and it hereby is established under the provision of the Manpower Development and Training Act, P.L. 87-415, and the following persons be and they hereby are assigned to said program to take effect December 10, 1965, at the hourly compensation as set forth below and to be subject to such further action as the Board of Education may direct:

\*\*\*Hans Ulrich Karau Teacher \$6.00 per hour, when employed \*\*\* 261 East James Place, Iselin, New Jersey.

Each of the petitioners was assigned by the Board by a similar resolution. There were no contracts of employment.

Bannon was assigned in the field of Guidance Counseling. He was employed at the Manpower Development Training Center in Jersey City during the years 1966 and 1967. He now claims the right to the sum of \$1,624 for twenty holidays and nine sick days.

Butler was also assigned in the field of guidance counseling at the Center during the years 1968-73. He claims the sum of \$2,850 as reimbursement for 46 holidays and 12 sick days.

McElaney was assigned as a basic education instructor at the center during 1967-69. He claims \$2,856 as reimbursement for 25 holidays and 26 sick days.

Karau, as noted, was assigned as instructor of diesel mechanics. He was employed at the Center during the years 1965-1972. He claims the sum of \$4,894.50 as reimbursement for 87 holidays and 21 sick days.

Bannon, Butler and McElaney do not have teacher's certificates issued by the State Department of Education. Karau was issued a Part-Time Vocational Teachers Certificate, dated February 2, 1967, licensing him to teach diesel mechanics. That certificate expired July 1, 1972. He now holds a lifetime state certificate as a part-time vocational teacher as of June 1975.

During their respective periods of employment, petitioners performed their teaching or counseling duties on a regular scheduled basis. However, they

were only paid for the hours worked. In February 1972, the Board authorized payment for eleven holidays per year with respect to the "teachers" at the center.

In July 1975 the Center passed from the administration and control of the Board to the City of Jersey City. Petitioner Karau is still performing his duties and receiving the same wage of \$6.00 per hour at the Center.

## I

Under *N.J.S.A.* 18A:30-2:

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 \*\*\* shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

The terms of this statute clearly grant to petitioners the right to be paid for sick days. Since it is undisputed that petitioners held steady employment with defendant Board, determination of whether they are teachers as contemplated by the school laws is irrelevant. *N.J.S.A.* 18A:30-3 permits the accumulation of sick days with pay to be used as needed in subsequent years. Accordingly, we agree with the commissioner's conclusions, and the affirmance thereof by the State Board with respect to sick days.

## II

The question of whether petitioners are entitled to back holiday pay involves *N.J.S.A.* 18A:25-3 which provides:

No *teaching staff member* shall be required to perform his duties on any day declared by law to be a public holiday and no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day and any term of any contract made with any such member which is in violation of this section shall be void. (Emphasis added)

A "teaching staff member" is defined as a member of the professional staff of any district or regional board of education who holds an 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 issued by the State Board of Examiners. *N.J.S.A.* 18A:1-1.

At the time of their appointments to the Center none of the petitioners had a teaching certificate. Karau acquired a Part-Time Vocational Teacher's Certificate in 1967. Thus, since a "teaching" position at the Center was not of such character as to require a valid certificate, plaintiffs can not be considered teaching staff members. Although petitioners were teachers, as that title is commonly understood, they were not teaching staff members as defined in the school laws, *N.J.S.A.* 18A:1-1 et seq., and therefore cannot benefit from the holiday pay provisions of *N.J.S.A.* 18A:25-3.

Finally, *N.J.S.A.* 18A:16-1 empowers each board of education to employ such teachers and other employees as it shall determine and fix their compensation and length of their terms of employment. Here, the compensation fixed by the Board when employing petitioners did not include payment for holidays. While it is true that in 1972 the Board allowed the teachers at the Center eleven paid holidays per year in accordance with the Board's power to fix compensation, that action cannot strengthen petitioners' claim to paid holidays during the preceding years.

### III

Petitioner Karau contends that he is entitled to tenure. *N.J.S.A.* 18A:28-5 sets forth the criteria which must be met before tenure attaches. The criteria pertinent to this appeal are:

- (a) *Those eligible* – teaching staff members and such other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners.
- (b) *Employment* – eligible individuals must be serving in a school district or under any board of education.
- (c) *Certificates* – eligible individuals must hold proper certificates in full force and effect.

There is no dispute that Karau has been employed for three consecutive calendar years, and, therefore, has satisfied the year requirement for tenure status.

Due to the peculiar program in which he was involved, he was neither a teaching staff member nor did he hold a position which required him to possess an appropriate teaching certificate. Thus, he cannot be classified as one who is eligible for tenure status. While he now possesses a valid state certificate, he does not have a certificate issued by the district board of examiners for Jersey City. This latter certificate is prerequisite to appointment as a teaching staff member of the Jersey City School District. *N.J.S.A.* 18A:26-6. Thus he still cannot meet the certificate requirement of the tenure statute.

Nor do we find merit in Karau's argument that the Board has made it impossible for teachers employed at the Center to obtain tenure by failing to require a teaching certificate as a necessary qualification for employment in this program.

It cannot be gainsaid that the courts will condemn evasions of the tenure statute. *Schulz v. State Bd. of Education*, 132 *N.J.L.* 345, 353 (E. & A. 1944). However, we cannot conclude under the facts presented that the Board sought to evade the tenure statute. The administration of the Center by the Board was separate from and in addition to its normal functions. Furthermore, the federal funding of the program was to be and was terminated as of June 30, 1973, with the exception of those obligations entered into prior to the date of termination. ¶ 2 *U.S.C.A.*, §2620. The program was clearly temporary, and in view of this

fact, the reasons for tenure, *i.e.*, the establishment of a competent and efficient school system through the availability of job security to teachers who have given satisfactory service over a period of years, were absent. See *Viemeister v. Bd. of Education of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949).

#### IV

Karau also requests that we order the Board to enroll him in the Teachers' Pension and Annuity Fund. The decision below, while recognizing Karau's position with regard to the Fund, does not resolve the question.

*N.J.S.A.* 18A:66-2 (p) defines those individuals who are teachers within the ambit of the Teachers' Pension and Annuity Fund law, as follows:

"Teacher" means any regular teacher, special teacher, helping teacher, teacher clerk, principal, vice-principal, supervisor, supervising principal, director, superintendent, city superintendent, assistant city superintendent, county superintendent, State Commissioner or assistant Commissioner of Education and other members of the teaching or professional staff of any class, public school, high school, normal school, model school, training school, vocational school, truant reformatory school, or parental school, and of any and all classes or schools within the State conducted under the order and superintendence, and wholly or partly at the expense of the State Board of Education, of a duly elected or appointed board of education, board of school directors, or board of trustees of the State or of any school district or normal school district thereof, and any persons under contract or engagement to perform one or more of these functions. No persons shall be deemed a teacher within the meaning of this article who is a substitute teacher or is a teacher not regularly engaged in performing one or more of these functions as a full-time occupation outside of vacation periods. In all cases of doubt the board of trustees shall determine whether any person is a teacher as defined in this article.

Karau was certainly a teacher in a school under the order and superintendence of the defendant Board for a period of years. However, at the present time he is a teacher in a school controlled by the municipal government of the City of Jersey City, rather than the Board. Therefore, Karau is not presently a member of that class of teachers who are eligible for membership in the Fund, and, accordingly, he can not be ordered enrolled therein.

Finally, we find no reason to interfere with the determination below that no costs, counsel fees or interest be awarded. *Cf. N.J.S.A.* 18A:6-9 which requires the Commissioner to hear and determine disputes and controversies without costs to the parties.

The determination of the State Board is affirmed insofar as it granted petitioners back sick pay and denied petitioner Karau tenure. It is reversed insofar as it granted petitioners back vacation pay.

No costs.

*Cert. den.* New Jersey Supreme Court November 16, 1976.

**Joseph Capella and  
Leonard D. Fitts,**

*Appellants,*

v.

**Board of Education of Camden County  
Vocational and Technical School, Camden County,**

*Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, March 14, 1975

Decided by the State Board of Education, September 10, 1975

Argued: October 6, 1976 – Decided: November 16, 1976

Before Judges Lynch, Milmed and Antell.

On appeal from the decision of State Board of Education.

Mr. Edward J. Butrym argued the cause for appellants (Messrs. Ruhlman and Butrym, attorneys).

Mr. William C. Davis argued the cause for respondent (Messrs. Hyland, Davis and Reberkenny, attorneys).

A Statement in Lieu of Brief was submitted by Mr. Robert J. Del Tufo, Acting Attorney General, attorney for respondent State Board of Education; Ms. Erminie L. Conley, Deputy Attorney General, of counsel; Ms. Jane Sommer, Deputy Attorney General, on the brief.

The opinion of the court was delivered by LYNCH, P.J.A.D.

The issue presented in this case is whether appellant guidance counsellors, employed for more than three academic years in an adult evening high school, working three hours per night for two evenings per week, may become tenured in such positions pursuant to *N.J.S.A. 18A:28-5*. Appellants are already tenured in their full-time employment in other school districts.

Appellant Fitts began his evening school job with respondent Board of Education of the Camden County Vocation School (Board) on October 16, 1968 and appellant Capella began on October 21, 1968. Thereafter they served on the two evenings per week basis throughout the intervening school years until their services were terminated on June 26, 1973. They thereupon filed a petition with the Commissioner of Education seeking an order declaring that they were tenured in their positions with the Board and directing their reinstatement in those positions.

The Hearing Examiner assigned to hear the petitions found that petitioners had met the statutory requirements for tenure in their positions with the Board but left to the Commissioner the determination as to whether petitioners, being tenured in other full-time public school positions, may also possess a tenured status in their part-time positions as guidance counsellors for the Board.

The Commissioner, noting that accredited adult evening high schools must necessarily be operated on a more flexible basis than are regular public high schools and that to confer tenure on part-time instructors would impede that flexibility, concluded that the “over-protection petitioners seek would be a disservice to the schools \*\*\* and is not intended by the school laws.” The State Board of Education affirmed for the reasons expressed by the Commissioner in his decision.

We respect the Commissioner’s expertise in this area and accept his finding of the impracticability of tenure being conferred on part-time employees in an adult evening high school. We affirm his decision. But we do so because we also conclude that analysis of the pertinent sections of the Education Law, *N.J.S.A.* 18A:1-1 *et seq.*, read in *pari materia*, evinces a legislative intent not to confer tenure in the part-time positions here involved.

It is true that the tenure statute (*N.J.S.A.* 18A:28-5) provides that “all” teaching staff members, occupying a position which requires possession of an appropriate certificate, employed for three consecutive academic years, and re-employed at the beginning of the fourth succeeding academic year are entitled to tenure. Since, appellants say, they have the necessary certificate and have been employed for the stated period of time they literally come within the terms of the statute. But the use of the word “all” prefixed to teaching staff members does not literally mean all persons who teach. Thus it was held by our former highest court that the phrase “all teachers” then in the tenure statute did not include a substitute teacher who had the appropriate certificate even though she was employed for more than three academic years with re-employment in the next succeeding such year. *Schulz v. State Board of Education*, 132 *N.J.L.* 345 (E. & A. 1944). The court there said:

There was nothing new in the use of the work “all” viz, “all teachers,” in the 1940 amendment; that terminology had been in the statute from the very beginning, chapter 243, *Pamph. L.* 1909, and the amendment merely preserved, in that respect, the structure of the statute as it had always been. That the legislative mind was not a stranger to the distinction between teachers and substitute teachers is shown by the precise language in the 1919 amendment (chapter 80, *Pamph. L.* 1919) incorporating the pension fund feature in the general public school statute of 1903) (chapter 1, *Pamph. L., Special Session*, 1903): “No person shall be deemed a teacher within the meaning of this article who is a substitute teacher \*\*\*” (*R.S.* 18:13-25). We find significance in the legislative recognition, in any respect, of “substitute teachers” as a class distinct from “teachers” and particularly in a respect which carries in favor of teachers a benefit or a protection which is denied to substitute teachers. The pension fund legislation and the Tenure Act (chapter 243, *Pamph. L.* 1909) were not

isolated statutes; they were both enacted as integral parts of the same school law and therefore may be said to be *in pari materia*. So, also, chapter 142, *Pamph. L.* 1942, incorporated within chapter 13 (re teachers) of title 18, Revised Statutes, which grants certain sick leave and the retained benefit of minimum unused sick leave absences to teachers “who are steadily employed by the Board of Education on a yearly appointment or who are protected in their positions under the provisions of sections 18:13-16 to 18:13-19 of the Revised Statutes” appears to exclude substitute teachers serving on a daily or monthly basis. And it will hardly be argued that *R.S.* 18:13-118, which provides for compulsory permission to a teacher to be absent at the annual teachers’ convention on full pay, or *R.S.* 18:13-1, providing for the selection of representative teachers on the State Board of Examiners, applies to the classification just mentioned. A related instance of legislative intent not to give tenure universally upon mere time of service without regard for attendant circumstances is to be found in the provision (chapter 226, *Pamph. L.* 1944) that the employment of persons temporarily filling the positions of teachers absent on war service shall immediately cease when the incumbent shall return. [at 351-352].

While the *Schulz* court found that the Pension Fund Act’s express exclusion of substitute teachers indicated a legislative intent to exclude them from tenure protection, we note that the current act also provides that no person shall be deemed a “teacher” within the meaning thereof who “\*\*\* is a teacher not regularly engaged in performing one or more of [teaching or administrative functions] as a *full-time* occupation outside of vacation periods.” *N.J.S.A.* 18A:66-2(p). (emphasis added). Clearly appellants are not engaged in a “full-time” occupation when they work for three hours on two nights a week. As in *Schulz*, the indication here is that appellants were not such teachers or members of the professional staff as are entitled to tenure.

*Schulz* also distinguished the status of persons employed in regular teaching positions who are entitled to tenure from the status of substitutes not so entitled on the basis of “seniority, compensated absences, with the rate and unit of compensation, and with the schedules of increases.” 132 *N.J.L.* at 347. The same differentials also distinguish appellants from regular teachers who are entitled to tenure.

In *Biancardi v. Waldwick Board of Education*, 139 *N.J.Super.* 175 (App. Div. 1976), this court, in a 2 to 1 decision, adhered to the holding of *Schulz v. State Board of Education*, *supra*, 132 *N.J.L.* 345, and again ruled that time served as a substitute teacher could not be counted toward tenure. In addition to the factors found to be significant in *Schulz*, we also noted the fact that the teacher there involved was not paid at the rate of pay established by the salary guide for a regular teacher but rather at a daily rate and that distinction was an indication that her time spent was not of such regular character as to count toward tenure. (We note that the Hearing Examiner who found appellants entitled to tenure under the statute cited the Commissioner’s decision in *Biancardi* in support thereof. Our decision in that case reversed the Commissioner’s decision).

The tenure law has been narrowly construed to protect only those positions expressly mentioned therein, *Moresch v. Bayonne Board of Education*, 52 *N.J. Super.* 105, 111 (App. Div. 1958). An analysis of the school laws indicate that tenure was to attach only in those school programs which are *required* to be provided by a school system, and not to such optional programs as an adult evening high school which a board of education "may" maintain. *N.J.S.A.* 18A:50-1. Thus *N.J.S.A.* 18A: 28-6.1 which provides for the protection of tenured persons in schools which have been discontinued and specifically lists the school programs in which tenured personnel were expected to be present does not list teachers at evening adult high schools. It enumerates only, "high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12." Likewise, *N.J.S.A.* 18A:28-9 which provides for the protection of tenured personnel in the event of a reduction in work force necessarily refers only to reductions resulting for reasons of economy, reductions of enrollment or organization in *required* school programs. Such a provision would have been unnecessary and meaningless if the tenure laws had been intended to protect teaching staff in optional programs, offered by a district at its discretion and subject to elimination at any time, such as the evening high school here involved.

Other instances of optional programs which a board may, or may not, maintain at its discretion are: evening schools for foreign born residents (*N.J.S.A.* 18A:49-1 *et seq.*), lectures for working people (*N.J.S.A.* 18A:52-1 *et seq.*), museum facilities (*N.J.S.A.* 18A:53-1 *et seq.*), and high school equivalency programs (*N.J.S.A.* 18A:50-12 *et seq.*). The tenuous nature of such programs dictates a need for flexibility in their operation. Adult evening school programs require this same flexibility. They are offered at the discretion of a school district. Attendance of the students is not required. And, as the Commissioner noted herein:

\*\*\*accredited adult evening high schools are necessarily operated on a more flexible basis than are public high schools. This flexibility is mandated by such factors as changing interests of the enrolled adults, varying financial capability of the school districts, changes in total enrollments, fluctuating job opportunities, the availability of qualified instructors, and cyclical changes in the nation's economy. Frequently, those who teach in such accredited evening high schools are also employed in the day school programs of the same school district or other school districts.

An accredited adult evening school must not be bound by such inflexibility as would be created were tenure to be conferred upon its part-time instructors, if it is to operate efficiently. Such a situation would create a plethora of scheduling problems and rigid priorities of assignments, critically hamper appropriate staff utilization, and hinder adaptability to changing problems\*\*\*.

As we have noted, appellants hold tenure in full-time school positions in other districts. We conclude that the school laws cannot be construed so as to confer tenure in these part-time positions. We agree that to do so would result, as the Commissioner said, in "over-protection" which was not within the legislative intent.

The decision of the State Board of Education is affirmed.

**Greta Chappell, individually and as  
Guardian of Muriel Chappell, an infant, et al.,**  
*Petitioners-Appellants,*

v.

**Commissioner of Education of New Jersey and  
The New Jersey State Board of Education,**  
*Respondents-Appellees.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, July 30, 1974

Decided by the State Board of Education, March 5, 1975

Submitted January 13, 1976 – Decided January 23, 1976

Before Judges Halpern, Crane and Michels.

On appeal from the New Jersey State Board of Education.

Messrs. Rothbard, Harris & Oxfeld, attorneys for appellants (Mr. Emil Oxfeld, of counsel).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondents (Mr. Stephen Skillman, Assistant Attorney General, of counsel; Ms. Mary Ann Burgess, Deputy Attorney General, on the brief).

**PER CURIAM.**

Appellants petitioned the Commissioner of Education, on December 20, 1973, to desist from disseminating the results of state-wide tests given in October 1973 to students in grades 4, 7 and 10. Following a hearing, the Commissioner dismissed the petition and directed that the results of the testing program be released on August 7, 1974.

The results were distributed in accordance with the Commissioner's order. Appellants made no attempt to enjoin such distribution, but merely appealed the Commissioner's order to the State Board of Education. The Board affirmed the Commissioner's decision, and this appeal is from the Board's determination.

We are here confronted with an accomplished fact, and no sound reason appears to compel us to render an advisory opinion. Under the circumstances, the appeal is moot and must be dismissed. See *Preiser v. Newkirk*, U.S., 45 L. Ed. 2d 272 (1975); *Oxford v. New Jersey State Bd. of Ed.*, 68 N.J. 301 (1975); *Sente v. Mayor and Mun. Coun. Clifton*, 66 N.J. 204 (1974).

Appeal dismissed.

Anne U. Clark,

*Petitioner-Appellant,*

v.

H. Francis Rosen, Superintendent of Schools of Margate City, N.J.,  
and Board of Education of the City of Margate, Atlantic County,

*Respondents-Respondents.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, June 28, 1974

Decided by the State Board of Education, March 5, 1975

Argued December 15, 1975 – Decided January 8, 1976

Before Judges Allcorn, Kole and King.

On appeal from New Jersey State Board of Education.

Patrick T. McGahn, Jr., argued the cause for the appellant (McGahn and Friss, attorneys; Gerard C. Gross, on the brief).

Leonard C. Horn argued the cause for the respondents (Horn, Weinstein & Kaplan, P.A., attorneys).

William F. Hyland, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education.

**PER CURIAM**

A review of the record reveals ample credible evidence to support and to justify the findings, conclusions and determination of the Acting Commissioner of Education, in turn adopted by the State Board of Education. *Parkview Village Asso. v. Bor. of Collingswood*, 62 N.J. 21, 34 (1972).

Accordingly, the determination of the State Board of Education is affirmed.

**Moses Cobb,**

*Petitioner-Appellant,*

v.

**Board of Education of the City of East Orange, Essex County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 31, 1975

For the Petitioner-Appellant, Saul R. Alexander, Esq.

For the Respondent-Appellee, Edward Stanton, Esq.

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

May 5, 1976

**Edward M. Corcoran, Andrew Knapik,  
and Anthony Dellanno, Sr.,**

*Petitioners-Appellants,*

v.

**Board of Education of the Hanover Park Regional  
High School District and Morris County Department  
of Education, Morris County,**

*Respondents-Appellees.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 8, 1975

For the Petitioners-Appellants, Edward M. Corcoran, Esq., *Pro Se*

For the Respondents-Appellees, Jacob Green, Esq.

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

January 7, 1976

**Edward M. Corcoran, Andrew Knapik  
and Anthony Dellanno, Sr.,**

*Plaintiffs-Appellants,*

v.

**Hanover Park Regional High School District  
and Morris County Department of Education,**

*Defendants-Respondents.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Submitted December 6, 1976 – Decided December 27, 1976

Before Judges Carton, Kole and Lerner.

On appeal from State Board of Education.

Mr. Edward M. Corcoran, attorney for appellants.

Mr. Jacob Green, attorney for respondent, Hanover Park Regional High School District (Mr. Allan P. Dzwilewski, on the brief).

Statement in lieu of brief filed on behalf of State Board of Education by Mr. William H. Hyland, Attorney General of New Jersey (Ms. Susan P. Gifis, Deputy Attorney General, of counsel).

**PER CURIAM**

The determination of the State Board of Education is affirmed essentially for the reasons expressed in the opinion of the Commissioner of Education.

**Kenneth Diffenderfer,**

*Petitioner-Appellant,*

v.

**Board of Education of the Borough of Washington, Warren County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, May 9, 1975

For the Petitioner-Appellant, Lawrence F. Costill, Jr., Esq.

For the Respondent-Appellee, Schumann and Seybolt (Harry K. Seybolt, Esq., of Counsel)

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

January 7, 1976

Pending before New Jersey Superior Court

**Salvador R. Flores,**

*Appellant,*

v.

**Board of Education of the City of Trenton, Mercer County,**

*Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, March 13, 1974

Decided by the State Board of Education, November 6, 1974

Submitted: February 18, 1976 – Decided: March 2, 1976

Before Judges Lynch, Larner and Horn.

On appeal from the State Board of Education.

Messrs. Pellettieri and Rabstein, attorneys for appellant (Mr. Bernard A. Campbell, Jr., on the brief).

Messrs. Merlino and Andrew, attorneys for respondent (Mr. Robert B. Rottkamp, Jr., on the brief).

Mr. William F. Hyland, Attorney General, attorney for State Board of Education (Mr. Stephen Skillman, Assistant Attorney General, of counsel; Ms. Mary Ann Burgess, Deputy Attorney General, on the brief).

PER CURIAM

On September 27, 1972 the Board of Education of the City of Trenton under a written contract employed the appellant as superintendent of public schools until June 30, 1975 at an annual salary with stated increments.

In June 1973 the respondent conducted an evaluation of appellant pursuant to the contract. Not being satisfied with the manner in which said evaluation was conducted the appellant successfully appealed to the Commissioner of Education. The State Board of Education sustained the Commissioner's decision but denied appellant's motion to compel the board of education to pay counsel fees.

Appellant then prosecuted the instant appeal on the ground that the state board erred in its denial of counsel fees. We affirm.

Counsel fees may be awarded in statutory proceedings such as presented by appellant only if there is specific authority to do so. Additionally, *N.J.S.A.* 18A:19-2 evinces special concern of the Legislature that no school district shall pay any claim or demand unless authorized by law. *Cf. Bor. of Highlands v. Davis*, 124 *N.J. Super.* 217 (Law Div. 1973).

Appellant's reliance on *N.J.S.A.* 18A:16-6 is misplaced. That statute provides for defraying the costs of counsel fees and expenses incurred in the defense of a civil action brought against a person holding any office, position or employment under the jurisdiction of any board of education for any act or omission arising out of and in the course of the performance of his duties. The counsel fees incurred by appellant clearly do not come within the broadest interpretation of this statute. We cannot accept appellant's strained view that suggests a different interpretation. Accordingly the decision of the State Board of Education is

Affirmed.

**Frank Giandomenico,**

*Petitioner-Appellant,*

v.

**Board of Education of the Township of Winslow, Camden County,**

*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, April 22, 1975

Argued October 26, 1976 – Decided November 9, 1976

Before Judges Lynch, Milmed and Antell.

On appeal from the Commissioner of Education.

Mr. Samuel A. Curcio argued the cause for appellant.

Mr. Joseph A. Maressa argued the cause for respondent Board of Education (Messrs. Maressa, Daidone & Wade, attorneys; Mr. John D. Wade on the brief).

A Statement in Lieu of Brief was filed on behalf of State Board of Education (Mr. William F. Hyland, Attorney General of New Jersey, attorney; Ms. Jane Sommer, Deputy Attorney General of counsel and on the statement).

**PER CURIAM**

This is an appeal from the decision of the Commissioner of Education affirming the determination of the Board of Education of the Township of Winslow denying the appellant's claim of tenure.

We have reviewed the record and conclude that the judgment below, determining appellant to have been appointed for a fixed term, was amply supported by substantial credible evidence, considering the proofs as a whole. *Close v. Kordulak*, 44 *N.J.* 589, 599 (1965). His claim that the classifications established deny him equal protection of the laws is without merit. He is therefore not entitled to the tenure protection accorded under *N.J.S.A.* 18A:17-3.

Affirmed.

**John Gish,**

*Petitioner-Appellant,*

v.

**The Board of Education of the  
Borough of Paramus, Bergen County,**

*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, December 2, 1974

Decided by the State Board of Education, June 26, 1975

Argued: October 13, 1976 – Decided: November 4, 1976

Before Judges Matthews, Seidman and Horn.

On appeal from New Jersey State Board of Education

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys)

Mr. Joseph A. Rizzi argued the cause for respondent (Messrs. Winne & Banta, attorneys; Mr. Robert M. Jacobs, on the brief).

**PER CURIAM**

This appeal represents another step in the continuing efforts of appellant John Gish to resist conformance to a directive of the Paramus Board of Education (Board) that he submit to a psychiatric examination. An earlier unsuccessful proceeding by which he challenged the constitutionality of the statutes under which the Board acted, *N.J.S.A. 18A:16-2 and 3*, is reported as *Kochman v. Keansburg Bd. of Ed.*, 124 *N.J. Super.* 203 (Ch. Div. 1973). These statutes read as follows:

**18A:16-2. Physical examinations; requirement**

Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.

18A:16-3. Character of examinations

Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof and of all laboratory tests and fluoroscopic or X-ray procedures shall be borne by the board or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by the board, in which case said examination shall be made at the employee's expense.

In affirming the constitutionality of these statutes Judge Lane appropriately stated: "Before a teacher is ordered to submit to a psychiatric examination, he is entitled to a statement of the reasons for such examination, *cf.*, *Monks v. N.J. State Parole Board*, 58 *N.J.* 238, 249-250 (1971), and to a hearing, if requested, *cf.* *Williams v. Sils*, 55 *N.J.* 178, 186 (1970), \*\*\*." *Kochman, supra*, at 213.

A brief history of the events constituting the prelude to this appeal is necessary. Appellant has been employed as a teacher in a high school under the jurisdiction of the Board since 1965. Until 1975 he taught classes in English and related subjects. In addition he was the advisor to the high school newspaper staff for several years, led the production of a school play and for a number of years led a discussion on "Great Books." In June 1972 Mr. Gish assumed the presidency of the New Jersey Gay Activists Alliance and thereafter he participated in a number of communications through various public media in which he promoted the Alliance. He also attended a convention of the National Education Association and helped organize a caucus there.

On July 10, 1972 following a meeting held that day the Board adopted a resolution directing appellant to undergo a psychiatric examination by Dr. Richard Roukema pursuant to the foregoing laws. This resolution recited as reasons for the directive that the Board had authorized its Superintendent (of Schools) and the Board attorney to consult with Dr. Roukema, the Board's consulting psychiatrist, as to his opinion whether the "overt and public behavior" of Gish indicated a strong possibility of potential psychological harm to students of the school district as the result of their continued association with him and that the doctor had given an affirmative reply.

Appellant then filed the above-mentioned action to test the constitutionality of the statutes under which the Board had acted. On June 7, 1973, after Judge Lane's opinion was entered, the Superintendent delivered to Gish by letter a copy of the July 10, 1972 resolution and a statement of reasons for the Board's requirement of the examination.

On June 28, 1973 the Board, by resolution, rescinded the directive that the examination be conducted by Dr. Roukema, reciting that it felt that it should be conducted by a psychiatrist "totally independent of the overt and public behavior" of Gish. It required the examination to be made by Dr. Edward Lowell instead of Dr. Roukema.

On August 9, 1973 the Board met privately with Gish and his two attorneys, at which time a letter containing additional reasons for the requested examination was given to him. At said meeting, the proceedings of which were recorded stenographically, Gish's attorney noted the absence of Dr. Roukema and that said absence "deprives Mr. Gish of that basic right to confront the witnesses against him." He then argued successively that the asserted reasons of July 9, 1972 constituted an attempted restriction on his client's right of free speech and free association, and that there was no finding by the Board that his client's activities as stated in the July 9, 1972 statement of reasons showed a significant deviation from mental health or adversely affected his ability to teach.

Since Gish and his counsel had not had an opportunity to study the additional reasons supplied by the Board, the Board and Gish agreed to meet again on August 22, 1973. Between these two meetings the Board presented a hypothetical set of facts, based on the reasons given theretofore to Gish, to Dr. Lowell for his opinion. On August 16, 1973 Dr. Lowell on the basis of said hypothesis reported that Gish showed evidence of deviation from normal health.

At the August 22, 1973 meeting, likewise stenographically recorded, a copy of the statement of hypothetical facts as well as the reply from Dr. Lowell was presented to Gish's counsel. Appellant's counsel argued that Dr. Roukema and Dr. Lowell must be produced for cross-examination, since their respective opinions were relied upon by the Board and their respective qualifications and credentials would be subject to questioning. Counsel indicated that following said cross-examination they might desire to produce opposing expert witnesses.

At the same meeting appellant's counsel again endeavored to persuade the Board that the examination was not properly sought. Counsel argued that the request for the examination was in violation of appellant's constitutional rights to free speech and free association; that one assigned reason was factually erroneous, and that others might furnish the basis for disciplinary action, if true, but would not support a determination that such an examination was reasonably appropriate.

On August 28, 1973 the Superintendent addressed another letter to Gish which again directed that he submit to the examination. The letter stated that the examination was sought on the basis of the earlier statements of reasons, the opinions of Drs. Roukema and Lowell, "upon a consideration of the evidence presented by counsel on your behalf [at the hearings held on August 9, 1973 and August 22, 1973]" and because "the Board of Education has determined that your conduct during said period evidences a harmful, significant deviation from normal mental health affecting your ability to teach, discipline and associate with students of the Paramus Public Schools \*\*\*."

Thereafter Gish appealed to the Commissioner of Education. When he affirmed the action of the Board after an administrative hearing, Gish next appealed to the State Board of Education.<sup>1</sup> That Board affirmed the decision of the Commissioner by a divided vote. The present appeal followed.

As has already been indicated, the reasons which caused the Paramus Board of Education to seek the psychiatric examination revolve around appellant's undisputed activities in the Gay Activists Alliance. Included in those activities was his encouragement of a "Hold Hands Demonstration" as part of the Alliance sponsorship, on the George Washington Bridge on May 6, 1973. The full panoply of specific instances needs not be recited, because in large measure they appear to be factually uncontroverted. The position of appellant in his challenge below and on this appeal depends on the application of constitutional and legal principles, rather than upon a dispute of the substantive facts. And as part of this premise it may be added for the sake of clarity that the reasons do not include a single instance of any undue conduct or actions in the classroom or out of the classroom with respect to a particular student.

With this background we now approach the arguments for relief which are advanced to us. The first is that the Board's directive to submit to the psychiatric examination constituted a violation of his constitutional rights under the First (freedom of speech and press) and Fourteenth (due process) Amendments as well as Article I of the New Jersey Constitution. Article I of the New Jersey Constitution vouchsafes rights and privileges which parallel in large degree those which are guaranteed by our federal constitution. However, our attention is not directed to any particular paragraph of Article I.

This contention is without substance. The right to speak freely has long been recognized as being not without some restriction. Whether or not it is constitutionally permissible may depend on its timing, its substance, its purpose, its truthfulness and other factors. It is certain that the guarantee is dependent on the circumstances of each particular instance. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), 89 S.Ct. 733, 21 L.Ed. 2d 731. See also *Pickering v. Board of Education*, 391 U.S. 563 (1968), 88 S.Ct. 1731, 20 L.Ed. 2d 811; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), 84 S.Ct. 710, 11 L. Ed. 2d 686; *Pietrunti v. Bd. of Ed. Brick Tp.*, 128 N.J. Super. 149 (App. Div. 1974), certif. den. 65 N.J. 573 (1974), cert. den. 419 U.S. 1057.

<sup>1</sup> In his written opinion the Commissioner denied Gish's motion for "summary judgment" and held that a plenary hearing was unnecessary because the facts were essentially undisputed. He also noted that in a parallel proceeding resulting from proceedings taken by the Board after Gish filed his appeal to the Commissioner he had on the same date set aside, without prejudice, tenure charges certified to him by the Board and had ordered Gish's reinstatement to his last-held position of employment, with full back salary, pending final determination of his status after the psychiatric examination and the results reported to and reviewed by the Board. Appellant contends that he is now back in the classroom. The Board disputes this statement insisting that he has since been employed in its administrative offices. This difference is not significant to the issues before us.

The Board does not question the right of Gish to say or to do any of the things which are mentioned in the statement of reasons. It simply contends that, as it had determined with the supportive corroboration of two psychiatrists, Gish's actions display evidence of deviation from normal mental health which may affect his ability to teach, discipline and associate with the students.

School boards are entrusted by our Legislature with the duty of determining the general issue of fitness of teachers. They are sufficiently equipped to conduct a fair and impartial inquiry whenever such issue legitimately comes into question. *Laba v. Newark Board of Education*, 23 N.J. 364, 384 (1957). Their obligation to determine the fitness of teachers is a reflection of their duties to protect the students from a significant danger of harm, whether it be physical (*In re Fulcomer*, 93 N.J. Super. 404 [App. Div. 1967]) or otherwise. See *Morrison v. State Board of Education*, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P. 2d 375 (Sup. Ct. 1969). And they need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action.

A teacher's fitness may not be measured "solely by his or her ability to perform the teaching function and ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency." *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 32 (App. Div. 1974), certif. den. 65 N.J. 292 (1974), and authorities cited therein.

In *Adler v. Board of Education of the City of New York*, 342 U.S. 485 (1952), 72 S.Ct. 380, 96 L.Ed. 517, it is stated:

\*\*\*A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. That the school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. \*\*\* [342 U.S. at 493; 72 S. Ct. at 385]

Human nature is such that beliefs and attitudes may not be shed by a teacher as he steps into the classroom.

In light of the foregoing, we are satisfied that the Board's determination was a fair and reasonable one, a determination which as stated by the Commissioner is "one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils." As noted, it was confirmed by two psychiatrists. It was based on credible evidence and did not constitute an abuse of discretion. *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974).

We do not subscribe to appellant's second and last point — that he was entitled to but not afforded Fourteenth Amendment protections of due process

because the two psychiatrists, Drs. Roukema and Lowell, were not produced for cross-examination. Although we observe that no advance warning or request for the presence of Dr. Roukema was given to the Board before the first meeting on August 9, 1973, that failure may be considered in assessing the sincerity of appellant's position, but it does not serve to defeat it.

At oral argument before us counsel candidly admitted that Gish was not entitled to the full sweep of due-process rights as contemplated by the Fourteenth Amendment. However, he first urges under this point that due process requires an impartial decision-maker who has the appearance of impartiality as well as actual impartiality.

The principles asserted are not in dispute. However, they are misapplied, for several reasons, First, they apply to an official or body whose purpose in conducting the hearing is to determine whether sanctions or penalties shall be imposed. A requirement that appellant subject himself to a psychiatric examination can hardly be classified as a penalty or a sanction. See *Morrissey v. Brewer*, 408 U.S. 471 (1972), 92 S. Ct. 2593, 33 L. Ed. 2d 484; *Goldberg v. Kelly*, 397 U.S. 254 (1970), 90 S. Ct. 1011, 25 L. Ed. 2d 287. What is due process depends upon what the State or governmental body seeks to take from or deprive a person of receiving.<sup>2</sup> *Monks v. N.J. State Parole Board, supra*, at 245. “\*\*\* [I]n determining what procedures [are] required, the competing interests of the individual teacher and the school board must be balanced.” *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1 Cir. 1970), cited with approval in *Monks, supra*, at 245. Appellant was afforded the opportunity to be heard after the specific reasons were furnished to him.

The submission by Gish to a psychiatric examination takes nothing from him except his time. His status as a teacher continues with full rights under the law. Therefore, from the standpoint of his being deprived of a right or privilege it is minimal, except as it may loom in his mind. But the subjective apprehension cannot control or limit the Board's right and obligation. As already indicated, the role of teachers in the shaping of young minds is a sensitive one. This very sensitivity adds weight to the side of the Board in the mentioned competing interests between it and the teacher.

In any event, appellant was not deprived of such due-process rights, even if applicable. The order of the Board was subject to a hearing and determination by the Commissioner, *N.J.S.A. 18A:6-9*, and a further review by the State Board, *N.J.S.A. 18A:6-27*, as was had in the instant case. The hearing before the Commissioner was *de novo* and not limited to a mere review of the proceedings before the Board. On appeal to the Commissioner, Gish filed a petition and the Board filed an answer. The proceedings, as stated by the Commissioner in his written decision, then became fully adversarial “with all the elements of due

<sup>2</sup> The Board attempted to scrupulously follow the directive from the Assistant Commissioner of Education dated February 2, 1972 which called to attention of local boards of education that any individual of whom such examination (under *N.J.S.A. 18A: 16-2*) is required should be given the reasons therefor by the board and also “the right to be heard the board” before the statute is applied.

process. \*\*\* [A] pre-hearing conference is held. The issues are defined and procedures are determined. If a fact-finding hearing is necessary, witnesses may be subpoenaed to testify and are submitted to cross-examination." *Winston v. Bd. of Ed. of So. Plainfield*, 64 N.J. 582 (1974); *Schwarzrock v. Board of Education of Bayonne*, 90 N.J.L. 370 (Sup. Ct. 1917). See also *Ludwig v. Massachusetts*, U.S. , 96 S.Ct. 2781 (1976); *North v. Russell*, U.S. , 96 S.Ct. 2709 (1976). Cf. *In re Fulcomer*, *supra*.

Finding no error in the decision of the State Board of Education, its determination is accordingly

AFFIRMED.

Cert. den. New Jersey Supreme Court March 15, 1977

**Board of Education of the Township of Hazlet, County of Monmouth,**

*Petitioner,*

vs.

**Township Committee of the Township of Hazlet, County of Monmouth,**

*Respondent.*

**STATE BOARD OF EDUCATION**

**CONSENT ORDER**

Decided by the Commissioner of Education, December 24, 1975

This matter being opened to the State Board of Education by Robert H. Otten, Esquire, Attorney for the Board of Education of the Township of Hazlet, and it appearing to the State Board of Education that the Township Committee of the Township of Hazlet and Board of Education of the Township of Hazlet in the County of Monmouth have agreed that the appeal of the Township Committee to the State Board of Education will be withdrawn and the restoration of the Commissioner of Education to the 1975-1976 academic year budget of the Board of Education in the amount of \$363,000.00 for the current expenses of said Township of Hazlet School District shall be affirmed, and in accordance therewith.

The New Jersey State Board of Education herewith affirms the decision of the Commissioner of Education directing the County Board of Taxation of Monmouth County to raise by local taxation an additional sum of \$363,000.00 for the current expenses of the Township of Hazlet School District in the 1975-1976 academic year.

May 5, 1976

**In the Matter of the Tenure Hearing of Ramona Hodgkiss,  
School District of Bridgewater-Raritan Regional, Somerset County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 26, 1975

For the Petitioner-Appellant, Daniel C. Soriano, Jr., Esq.

For the Respondent-Cross Appellant, Ruhlman & Butrym (Paul T. Koenig,  
Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In affirming that portion of the Commissioner's decision which held respondent's salary at the 1973-74 level for the following two years, the State Board of Education understands that the intent of the Commissioner's decision is that this reduction in salary is to be for the two years only and not cumulative in effect. It is expected that she will be returned to her regular step on the salary scale in subsequent years.

June 2, 1976

**Fred J. Hoffman,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the City of Asbury Park, Monmouth County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 29, 1975

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

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

For the Respondent-Appellee, Morgan, Melhuish, Monaghan, McCoid &  
Spielvogel (John Scott Donington, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We further direct that the stay with respect to the tenure case be vacated and that the tenure hearing proceed as expeditiously as possible.

Mr. Jack Slater abstained.

May 5, 1976

Appeal to New Jersey Superior Court dismissed with prejudice February 22, 1977

**Board of Education, Township of Little Egg Harbor,**

*Appellants,*

v.

**Boards of Education, Township of Galloway; City of Atlantic City;  
Township of Marlboro; Freehold Regional High School District;  
and The Bureau of Children's Services; Department of Institutions  
and Agencies, State of New Jersey,**

*Respondents,*

**SUPREME COURT OF NEW JERSEY**

Argued September 13, 1976 – Decided October 20, 1976

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 145 *N.J. Super.* 1 (1975)

*Mr. James L. Wilson* argued the cause for appellant.

*Mr. Thomas J. Demarest* argued the cause for respondent Freehold Regional High School District Board of Education (*Messrs. Cerrato, O'Connor, Mehr and Saker*, attorneys; *Mr. Dominic A. Cerrato* on the brief).

*Ms. Mary Ann Burgess*, Deputy Attorney General, argued the cause for respondents New Jersey State Board of Education and Division of Youth and Family Services (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Stephen Skillman*, Assistant Attorney General, of counsel).

PER CURIAM

The judgment is reversed substantially for the reasons expressed by Judge Morgan in her dissenting opinion. 145 *N.J. Super.* at 1 [1975 *S.L.D.* 1089].

Three members of the Court would affirm substantially for the reasons expressed in the majority opinion of the Appellate Division.

**Long Branch Education Association, Inc.,**

*Petitioner-Appellant,*

v.

**Board of Education of the City of Long Branch, Monmouth County,**

*Respondent-Appellee.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, December 10, 1974

Decided by the State Board of Education, April 2, 1975

Argued May 11, 1976; Decided May 20, 1976

Before Judges Halpern, Crane and Michels

On appeal from Decision of the State Board of Education.

Mr. Michael D. Schottland argued the cause on behalf of appellant (Messrs. Chamlin, Schottland & Rosen, attorneys; Mr. Thomas W. Cavanagh, Jr., on the brief).

Mr. Richard D. McOmber argued the cause on behalf of appellee (Messrs. McOmber & McOmber, attorneys).

Mr. William F. Hyland, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (Mr. Stephen Skillman, Assistant Attorney General, of counsel; Ms. Jane Sommer, Deputy Attorney General, on the brief).

**PER CURIAM**

Petitioner appeals from a determination of the State Board of Education affirming a decision of the Commissioner of Education concerning the supervision of elementary school pupils by teachers during the lunch period. Petitioner contends that the Commissioner did not properly deal with the issues in the case.

We have carefully reviewed the record and have concluded that the determination of the State Board of Education should be affirmed essentially for

the reasons expressed in the decision of the Commissioner. We are satisfied that the Commissioner had jurisdiction to determine the controversy. *Red Bank Bd. of Ed. v. Warrington, et al*, 138 N.J. Super. 564 (App. Div. 1976). We are also satisfied that he correctly held that the decision of the local board to assign teachers to lunchroom supervision was a matter of educational policy. We further find that there is substantial evidence in the record to support the conclusion of the Commissioner that the assignment of teachers to such duty was a change of form only and did not constitute the imposition of an additional work load. We agree that petitioner has not proven a breach of the collectively negotiated agreement.

Since petitioner did not appeal from the judgment of the Chancery Division, we decline to pass on the points raised with respect to the judgment.

We find no merit in petitioner's additional points, namely that he was deprived of due process because the Commissioner sits as secretary of the State Board of Education, because petitioner was not provided with a copy of a law committee report and because no oral argument was permitted.

Affirmed.

Pending before New Jersey Supreme Court

**Long Branch Education Association and William Cook,**

*Petitioners-Appellants,*

*v.*

**Board of Education of the City of Long Branch, Monmouth County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 31, 1975

For the Petitioners-Appellants, Chamlin, Schottland & Rosen (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellee, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

The State Board of Education has considered Petitioners-Appellants' request to expand the record to include a certified copy of the Order for Judgment entered by the Division of Workmen's Compensation on April 6, 1976, and has granted such request. The document has been incorporated in the record.

In the matter of reemployment of a nontenure teacher, it is not incumbent upon the Long Branch Board of Education to prove its reasons as in a hearing of charges against a tenured employee. As the Commissioner stated,

“\*\*\*Absent a showing of bad faith, arbitrariness, capriciousness, unreasonableness, statutory or constitutional violation, sham, or frivolity on the part of the Board, its discretionary determination must prevail.\*\*\*”

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

May 5, 1976

Pending before New Jersey Superior Court

**Pasquale Maffei,**

*Petitioner-Appellant,*

v.

**Board of Education of the City of Trenton et al., Mercer County,**

*Respondents-Appellees.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 17, 1975

For the Petitioner-Appellant, Polino and Williams (Joseph F. Polino, Esq., of Counsel)

For the Respondents-Appellees, Henry F. Gill, Esq.

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

August 4, 1976

**Peter Marshall,**

*Petitioner-Appellant,*

v.

**Board of Education of the Borough of North Arlington, Bergen County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, September 4, 1975

For the Petitioner-Appellant, Goldberg and Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellee, Frank Piscatella, Esq.

This matter is remanded to the Commissioner of Education for determination and clarification of the following: (1) Did Appellant accept the Board's offer of summer employment on or about June 1, 1974; and (2) What were the Board's grounds for its rescinding action of June 24, 1974? The State Board of Education requests that this matter be reconsidered in light of these additional factors.

February 4, 1976

**Board of Education of the Township of North Bergen,**

*Petitioner-Appellant,*

v.

**Board of Education of the Town of Guttenberg, Hudson County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, January 12, 1973

Decisions of the State Board of Education, December 5, 1973 and March 6, 1974

Remanded by Superior Court of New Jersey, Appellate Division, Docket No. A-2237-73, March 17, 1975

Remanded by State Board of Education, April 2, 1975

Decision on Remand by the Commissioner of Education, December 26, 1975

For the Petitioner-Appellant, Brigadier & Margulies (Seymour Margulies, Esq., of Counsel)

For the Respondent-Appellee, John Tomasin, Esq.

The Motion to Exercise Original Jurisdiction and Supplement the Record is hereby denied. The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

April 7, 1976

**Board of Education of the Township of North Bergen,**

*Appellant,*

*v.*

**Board of Education of the Town of Guttenberg, Hudson County,**

*Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued February 3, 1975 – Remanded March 17, 1975

Reargued June 3, 1976 – Decided June 16, 1976

Before Judges Michels, Morgan and Milmed.

On appeal from the New Jersey State Board of Education.

Mr. Seymour Margulies argued the cause for appellant (Messrs. Brigadier and Margulies, attorneys; Mr. Joseph V. Cullum, of counsel; Mr. Robert Margulies, on the brief).

Mr. John Tomasin argued the cause for respondent.

A statement in lieu of brief was filed by Ms. Jane Sommer, Deputy Attorney General, for State Board of Education (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

**PER CURIAM**

The nature of the controversy between the appellant Board of Education of the Township of North Bergen (North Bergen) and respondent Board of

Education of the Town of Guttenberg (Guttenberg) was outlined in the previous opinion of this court dated March 17, 1975 and will not therefore be repeated here. In that opinion, however, we remanded the matter to the State Board of Education with instructions to remand to the Commissioner for a plenary hearing relating to the role played by Superintendent Klein in the determination of the tuition rates billed to and paid by Guttenberg. Jurisdiction was retained. In accordance with these instructions, a plenary hearing was conducted by the hearing officer on the issue specified in the instructions on remand, after which he concluded, on the basis of testimony and numerous exhibits received, that North Bergen "failed to prove that Superintendent [of Schools of North Bergen] Klein influenced members of the North Bergen Board [of Education] to establish tuition rates in the years 1965-70 which accrued to the detriment of the taxpayers of North Bergen." After reviewing exceptions to the hearing officer's findings and conclusions, the State Commissioner of Education concurred in the hearing officer's conclusions, noting that in spite of North Bergen's repeated demands over a three year period for an opportunity to prove its charges, the hearing finally held disclosed a paucity of evidence to support them. The Commissioner accordingly determined "that there is no basis for a finding that tuition rates were established by the North Bergen Board in the years 1965-66 through 1970-71 as the result of influence exercised by the Superintendent of Schools, in a role which was in conflict with duties he performed as Mayor of Guttenberg." The State Board of Education affirmed the decision of the Commissioner for the reasons set forth in the latter's decision.

After reviewing the entire record on remand, we are satisfied that the findings and conclusions of the Commissioner of Education, affirmed by the State Board of Education, could reasonably have been reached on "substantial credible evidence on the whole record, allowing for agency expertise and evaluation of the credibility of witnesses." *Parkview Village Assoc. v. Bor. of Collingswood*, 62 N.J. 21, 34 (1972); *Close v. Kordulak Bros.*, 44 N.J. 589, 599 (1965). We discern no good reason or justification for disturbing them. *State v. Johnson*, 42 N.J. 146, 162 (1964).

With respect to the other issues raised on the principal appeal, resolution of which was deferred pending disposition of the hearing on remand, we affirm the determination by the State Board of Education substantially for the reasons set forth in the opinion of the Commissioner of Education dated January 12, 1973.

*Cert. denied New Jersey Supreme Court, October 19, 1976*

**In the Matter of the Special School Election Held in the  
School District of Ocean Township, Ocean County.**

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, December 31, 1974

Decided by the State Board of Education, May 7, 1975

Submitted April 13, 1976 – Decided May 6, 1976

Before Judges Kolovsky, Bischoff and Botter.

On appeal from State Board of Education.

Messrs. Kelly and Butensky, attorneys for appellants (Mr. Howard Butensky, on the brief).

Messrs. Haines, Schuman & Butz, attorneys for respondent Ocean Township Board of Education (Mr. Daniel Sugrue, on the brief)

Mr. William F. Hyland, Attorney General of New Jersey, submitted a Statement in lieu of brief on behalf of State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel; Ms. Jane Sommer, Deputy Attorney General, on the brief).

**PER CURIAM**

On October 15, 1974, the Ocean Township School District held a special election (*N.J.S.A.* 18A:14-3) at which there was submitted to the voters a proposal to issue bonds for the construction of a new school at a cost not to exceed \$1,425,000. The announced result of the referendum was that 631 voters had voted “yes” and 630 “no,” with 7 votes not counted. Pursuant to *N.J.S.A.* 18A: 14-63.3, 13 voters applied to the State Commissioner of Education (Commissioner) for a recount.

The recount took place under the supervision of a representative designated by the Commissioner. *N.J.S.A.* 18A:14-63.5. After considering the record, his representative’s report and exceptions filed by the present appellants, the Commissioner determined that there had been 632 valid “yes” votes and 630 valid “no” votes and concluded that “the referendum had been approved by a majority of voters” in the school district. On appeal, the Commissioner’s decision was affirmed by the State Board of Education for the reasons expressed therein. The appeal to this court followed.

Two preliminary matters may be summarily disposed of. Contrary to what is argued by the Township Board of Education, the decision of the State Board of Education is reviewable by this court as is any other final decision of an administrative agency.

Further, it is clear from the record that there is no substance to appellants' claim that they were not permitted to inspect the disputed ballots. Those ballots were produced at the hearing before the Commissioner's representative. Appellants were not entitled to be present and examine them again at the time the Commissioner of Education reviewed the record and his representative's report.

The argument on the appeal before us involves five ballots, identified as ballots I, L, U, X and Y, all of which were voided and not counted by the Commissioner.

*N.J.S.A.* 18A:14-55, dealing with school elections, provides in pertinent part:

\*\*\*to vote upon any public question printed upon a paper ballot, the voter shall indicate his choice by making a cross (X) or plus (+) to check (✓) mark in black ink or black pencil in the square at the left of either the word "Yes" or "No" of such public question.\*\*\*

A similar provision is contained in the statute dealing with general elections, *N.J.S.A.* 19:16-3, that section further providing in paragraph g. that:

If the mark made for any candidate or public question is substantially a cross X, plus + or check ✓ and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be. No vote shall be counted for any candidate in any column or for or against any public question unless the mark made is substantially a cross X, plus + or check ✓ and is substantially within the square.

It is settled law that it is mandatory, in order for a paper ballot to be counted in a referendum election, that the marking thereon comply with the statute requiring the voter's choice to be indicated by a cross (X), a plus (+) or a check (✓) in the square to the left of either the word "Yes" or "No." *In re Keogh-Dwyer*, 45 *N.J.* 117 (1965).

It is obvious from an examination of the disputed ballots that ballots I, L, U and X clearly do not conform to the statutory mandate and that the Commissioner and the State Board correctly ruled that they could not be counted. None of those ballots contain a cross, plus or check mark within or even substantially within the square at the left of either the word "Yes" or "No" appearing on the ballot.

No such mark appears on either ballot X or ballot L. All that appears on each is that a square has been filled in by pencil; on ballot X, the square opposite the word "No" and on ballot L, the square opposite the word "Yes."

While "X" marks do appear on ballots I and U, they are written over the word "No," with no part thereof being within the square opposite.

The only debatable question is presented by ballot Y which has diagonal lines drawn through the square opposite the word "No." We need not resolve whether, in light of *In re Keogh-Dwyer, supra*, those lines could be construed as constituting *substantially* a check mark. Even if ballot Y were counted as a "No" vote, it would not affect the ultimate result of the referendum. Counting Y as a "No" vote would merely increase the total of "No" votes to 631; the proposal would still have been approved by reason of the 632 "Yes" votes.

The decision of the State Board of Education is affirmed.

**Ellen Sue Oxfeld,**

*Petitioner-Appellant,*

v.

**Board of Education of the Township of  
South Orange-Maplewood, Essex County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 6, 1975

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

For the Respondent-Appellee, Lieb, Wolff & Samson (John E. Finnerty, Esq., of Counsel)

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

Mr. Daniel Gaby abstained.

January 7, 1976

**Ellen Sue Oxfeld,**

*Petitioner-Appellant,*

v.

**Board of Education of South Orange-Maplewood,**

*Respondent-Appellee.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued November 1, 1976 – Decided November 16, 1976

Before Judges Bischoff, Morgan and Collester.

On appeal from New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys; Mr. Sanford R. Oxfeld, of counsel and on the brief).

Mr. Ronald E. Wiss argued the cause for respondent (Messrs. Lieb, Wolff & Samson, attorneys)

Mr. William H. Hyland, Attorney General of New Jersey, submitted a statement in lieu of brief on behalf of New Jersey State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the brief).

**PER CURIAM**

The determination of the State Board of Education is affirmed substantially for the reasons set forth in the opinion of the Commissioner of Education dated August 6, 1975.

**Arthur L. Page,**

*Petitioner-Appellant,*

v.

**Board of Education of the City of Trenton  
and Pasquale A. Maffei, Mercer County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decision on Motion by the Commissioner of Education, December 27,  
1973

Decision on Stay by the State Board of Education, March 6, 1974

Decision on Motion by the Commissioner of Education, April 22, 1974

Decision on Motion dated December 27, 1973, affirmed but remanded on the tenure question by the State Board of Education, May 1, 1974

Decision on Remand by the Commissioner of Education, August 26, 1975

For the Petitioner-Appellant, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For Respondent-Appellee, Merlino & Andrew, Esqs. (Robert E. Rottkamp, Esq., of Counsel)

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

January 7, 1976

Appeal to New Jersey Superior Court dismissed September 16, 1976

**In the Matter of the Tenure Hearing of Michael A. Pitch,  
School District of the Borough of South Bound Brook, Somerset County.**

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, December 10, 1974

Decided by the State Board of Education, April 2, 1975

Argued March 16, 1976 – Decided April 2, 1976

Before Judges Halpern, Crane and Michels.

On appeal from a decision of the State Board of Education

Mr. Steven B. Hoskins argued the cause on behalf of appellant (Messrs. McCarter and English, attorneys; Mr. James A. Woller on the brief).

Mr. Nathan Rosenhouse argued the cause on behalf of respondent South Bound Brook Board of Education (Messrs. Rosenhouse, Cutler and Zuckerman, attorneys; Mrs. Elaine Ballai, on the brief).

Statement in lieu of brief filed by Mr. William F. Hyland, Attorney General, attorney for State Board of Education (Mr. Steven Skillman, Assistant Attorney General, of counsel; Miss Jane Sommer, Deputy Attorney General, on the brief).

PER CURIAM

This is an appeal from a determination of the New Jersey State Board of Education affirming the decision of the Commissioner of Education in which the appellant Michael A. Pitch was found guilty of unbecoming conduct pursuant to *N.J.S.A.* 18A:6-10 and ordered dismissed from his position as Superintendent of Schools in the Borough of South Bound Brook. The matter was previously remanded to afford appellant an opportunity to supplement the record.

The Commissioner found that Mr. Pitch had misrepresented his academic credits to the school board and had misused his office telephone for personal calls. The essential thrust of the appeal is that the Commissioner misinterpreted the meaning of the term "MA + 30" appearing in the salary guide, that the evidence does not support the finding of misrepresentation, that the removal proceedings were barred by laches and that the penalty of removal was too severe.

We are satisfied from our review of the record that there was sufficient credible evidence before the Commissioner to warrant the findings that the term "MA + 30" referred to the possession of a master's degree plus 30 graduate level credits, that Mr. Pitch represented to the school board that he possessed such credits and that he did not possess the required number of credits in graduate level courses. The appellant Pitch does not deny that he used his office telephone for making personal calls, but argues that the charge was improperly denominated as unbecoming conduct. We find no substance to the argument; it is clear from the evidence that appellant deliberately violated established school policy. There is no warrant to disturb the findings below. *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13 (App. Div. 1974), certif. den. 65 *N.J.* 292 (1974).

We are not persuaded that the State Board erred in its conclusion that appellant's misrepresentation of his academic credits and his misuse of his office telephone constituted unbecoming conduct. Nor are we persuaded that the State Board erred in rejecting appellant's contention that laches barred the removal proceedings. We do not agree with appellant's contention that the mandate of *Winston v. Bd. of Ed. of So. Plainfield*, 64 *N.J.* 582 (1974), was violated; appellant was afforded ample opportunity to present evidence and legal argument. The evidence demonstrated a continuing course of unbecoming conduct. The penalty of dismissal was fully warranted by the cumulative gravity of the offenses and is not an abuse of discretion. *Cf. In re Fulcomer*, 93 *N.J. Super.* 404, 421-422 (App. Div. 1967).

Affirmed.

**Frederick J. Procopio, Jr.,**

*Petitioner-Appellant,*

v.

**Board of Education of the City of the City of Wildwood, Cape May County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 15, 1975

For the Petitioner-Appellant, Wodlinger & Kell (E. Dennis Kell, Esq., of Counsel)

For the Respondent-Appellee, Bruce M. Gorman, Esq.

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

April 7, 1976

**“R.D.H.” and “J.D.H.,”**

*Plaintiff-Appellant,*

v.

**Board of Education of Flemington-Raritan  
Regional School District, Hunterdon County,**

*Defendant-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, February 26, 1975

Decided by the State Board of Education, June 4, 1975

Argued October 25, 1976 – Decided November 8, 1976

Before Judges Carton, Kole and Larner

On appeal from Decision of State Board of Education.

Mr. David Schechner argued the cause for appellant (Messrs. Schechner and Targan, attorneys; Mr. David Schechner of counsel and on the brief).

Mr. Wesley L. Lance argued the cause for respondent (Mr. Wesley L. Lance, attorney, of counsel and on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for State Board of Education, filed a Statement in Lieu of Brief on behalf of the State Board of Education (Ms. Jane Sommer, Deputy Attorney General, of counsel and on the brief).

#### PER CURIAM

From our examination of the record, we are satisfied that the parents of EDH are not entitled to the relief sought – EDH's reclassification by the respondent school district board of education (the district) as neurologically impaired, her placement in a private school at the expense of the district and reimbursement by the district for her past private school expenses.

Her parents should have pursued and exhausted the appellate hearing route under the school laws within a reasonable time after her initial classification in May 1971 by the school authorities or at least after they became aware of her assignment to the educable mentally retarded class for the school year 1971–1972. Instead, they unilaterally withdrew her from the district public school system, placed her in a private school and failed to pursue their remedies under the school laws until March 1, 1974, when their petition was filed with the Commissioner of Education. See *N.J.S.A. 18A:6-9, et seq.* She was never re-enrolled in the district public schools. Because of this unreasonable delay in pursuing their administrative remedies, EDH's parents forfeited such rights, if any, as they may have had to be reimbursed for the private school expenses prior to that date.

In any event, at the hearing on the petition, there was sufficient credible evidence in the record as a whole to support the conclusion that the initial classification was not so unreasonable as to constitute an abuse of discretion. In this setting, the classification issue separating the parents, on the one hand, and the district on the other, was a debatable one with respect to which the district acted reasonably; and, by statute and regulation, any further identification and classification of the child would be required only if EDH were in attendance at a public, not a private, school. *N.J.S.A. 18A:46-6; N.J.A.C. 6:28-1.8(a).*

Since EDH was still not in attendance at a public school in the district even at the time of the State Board's determination of June 4, 1975, and, admittedly, for the school year commencing September 1975, came under the jurisdiction of the Board of Education operating the Hunterdon Central Regional High School, neither she nor her parents were entitled to any of the monetary or other relief sought from the respondent district.

In view of our determination we need not pass on the question of whether circumstances may not exist under which the requirement of enrollment in the public school system may be deemed unnecessary as a condition precedent for an application for classification reclassification under *N.J.S.A. 18A:46-6, 18A:46-13* and *N.J.A.C. 6:28-1.8(a).*

Affirmed.

**Gladys S. Rawicz and Piscataway Township Education Association,**  
*Petitioners-Appellants,*  
v.  
**Board of Education of the Township of Piscataway, Middlesex County,**  
*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**  
**APPELLATE DIVISION**

Decided by the Commissioner of Education, May 29, 1973

Decided by the State Board of Education, June 5, 1974

Decided by the Commissioner of Education, December 13, 1974

Decided by the State Board of Education, April 2, 1975

Argued May 25, 1976 – Decided June 8, 1976

Before Judges Bischoff, Botter and E. Gaulkin.

On appeal from New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellants (Messrs. Rothbard, Harris & Oxfeld, attorneys; Mr. Sanford R. Oxfeld, of counsel).

Mr. Frank J. Rubin argued the cause for respondent (Messrs. Rubin & Lerner, attorneys for respondent).

Mr. William F. Hyland, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of respondent State Board of Education (Ms. Jane Sommer, Deputy Attorney General, of counsel).

**PER CURIAM**

This appeal concerns the denial of reemployment of appellant Rawicz as a fourth grade teacher for the 1971-1972 school year. A central contention on this appeal is that the agreement between the Piscataway Township Board of Education (the Board) and the Piscataway Township Education Association (the Association) was violated when Rawicz did not receive written notice from the Board on or before April 30, 1971 that reemployment would not be offered to her, although she was notified on April 30 by her school principal that he would not recommend her for reemployment.

Petitioner Rawicz had been employed by the Board for three successive years ending in June 1971, when her last employment contract expired. She had not yet acquired tenured status. *N.J.S.A.* 18A:28-5.

By letter dated April 5, 1971, received by Rawicz on April 20, 1971, the Board advised Rawicz that a decision regarding her reemployment would be delayed until April 30, 1971. This letter signalled the Board's ultimate decision. By its terms the letter did not seek a signed statement of her intention to return for reemployment in the school system for 1971-1972, although the letter referred to other categories of teachers whose reemployment had been "recommended by administration and approved by the Board\*\*\*." On April 20, Rawicz was also given Principal Wilkos' written evaluation dated April 19, 1971, of her classroom performance which was favorable in some respects and needed improvement in other respects.

Thereafter, on April 30, 1971, Rawicz received another written evaluation signed by Principal Wilkos. The evaluation graded her satisfactory in all respects, except that she "needs improvement" in the categories of teaching effectiveness dealing with teaching technique and attention to individual pupil differences. The evaluation stated that she would not be recommended for reemployment. The next day Rawicz wrote to the Director of Elementary Education, Burton Edelchik, appealing Mr. Wilkos' decision and requesting a statement of reasons for the "recommendation of non-employment, prior to a personal hearing." In response Edelchik sent Rawicz an evaluation prepared by Mr. Wilkos specifying five deficiencies in her teaching performance.

A "hearing" was held by Edelchik on May 13, and a decision was rendered by letter dated May 20 upholding Wilkos' decision. On May 24, Rawicz appealed to the Superintendent of Schools, Dr. Shor, and requested a further hearing. In the meantime, at the May 17 meeting of the Board, Rawicz' name was included on a list of employees who would not be reemployed in September.

Dr. Shor held a "hearing" on June 15 and ruled against Rawicz by letter dated June 28. This was followed by an appeal to the Board of Education which was heard on July 27. By letter dated September 14, 1971 the Board denied Rawicz' appeal. Finally, on October 14, the Association filed a statement of grievance with the Board on Rawicz' behalf. An attempt to submit the matter to arbitration was enjoined by court order obtained by the Board. Thereafter, Rawicz filed a petition of appeal to the Commissioner of Education seeking to compel her employment effective September 1, 1971 and seeking compensation for the period during which she should have been employed.

An administrative hearing was held in October and November 1972 and a thorough decision was rendered in May 1973 in favor of the Board. After further proceedings and the filing of exceptions, the decision was reaffirmed by order of the Commissioner in December 1974. On appeal to the State Board of Education that decision was affirmed for the reasons stated by the Commissioner. This appeal followed.

We affirm the determination below. We do not interpret the agreement to provide that the failure of the Board to notify a nontenured teacher of

non-reemployment on or before April 30 of the preceding school year automatically entitles that teacher to reemployment.<sup>1</sup>

As the Commissioner below noted, *N.J.S.A.* 18A:27-1 provides that no teacher shall be appointed except by a majority vote of the full membership of the board of education. The Agreement here also provides that the Board reserves the rights and duties conferred upon it by statute except as expressly provided otherwise by the Agreement, consistent with law. We need not decide, as the Commissioner's opinion seems to hold, that the Board could not legally contract to grant a nontenured teacher reemployment by its failure to give timely notice of non-renewal of the teacher's contract. *Cf. Zimmerman v. Board of Educ. of Newark*, 38 *N.J.* 65, (1962). The Agreement in question did not expressly provide this consequence for the Board's inaction.

The Agreement (Article XV) provides that the Board shall give each nontenured teacher a written offer of employment or a written notice that such employment shall not be offered, with reasons, on or before April 30 of each year. But the failure to do either need not be translated into a right of employment, and the Agreement does not expressly so provide. Therefore, we hold that Rawicz did not acquire that right despite the Board's failure to comply with the contract provision. *Cf. Canfield v. Board of Educ. of Pine Hill Boro.*, 51 *N.J.* 400 (1968), reversing on dissenting opinion, 97 *N.J. Super.* 483, 490 (App. Div. 1967) (Gaulkin, J.). Moreover, Rawicz was put on notice by April 30 that she would not be recommended for reemployment, and that position was ratified through review procedures which followed promptly thereafter and finally by action of the Board. In fact, as noted above, the Board's letter of April 5 had clearly indicated the unlikelihood of reemployment without recommendation by the administration *and* approval of the Board.

Article IV(B) of the Agreement provides in part:

Notwithstanding anything contained in this Article IV or in this Agreement, to the contrary, a nontenure teacher shall have no right to grieve by reason of his not being re-employed.

A grievance is defined as a complaint by an employee of a violation, misinterpretation or inequitable application of any provision of the Agreement. Nevertheless, Article XV provides for certain hearings in the event a nontenured teacher is notified of non-employment. Appellants contend that these provisions require full adversarial hearings. Again, we disagree. The Agreement first speaks of a hearing upon request before "the appropriate director." The Agreement also provides for a hearing before the Superintendent of Schools and, if the teacher is dissatisfied by the outcome, for submission of "the dispute" to the Board. In the light of the controlling provision that a nontenured teacher has no right to grieve his not being re-employed, and, therefore, no right to have the dispute arbitrated, the provisions for hearings could not have intended full adversary proceedings with the right of cross-examination. *Cf. Donaldson v. Board of*

<sup>1</sup> The provisions of *N.J.S.A.* 18A:27-10 to 13 (L. 1971, c. 436) were not in effect and do not apply to this case.

*Educ. of N. Wildwood*, 65 N.J. 236, 246 (1974). Moreover, the grievance procedures provided by the Agreement are limited to written submissions without personal appearances, except that the superintendent "may discuss the issue with the parties involved\*\*\*." Art. III(B) (4). By using the term "hearing" in Article XV the Agreement intended to provide for personal appearances and discussion, in contrast to the grievance procedures, but not necessarily a formal, adversary hearing. Certainly there is no right under the Due Process Clause to a trial-type procedure in all cases where a hearing is provided. See *Goss v. Lopez*, 419 U.S. 565, 579-583, 95 S.Ct. 729, 42 L. Ed. 2d 725 (1975); *Donaldson v. Board of Educ. of N. Wildwood*, *supra*.

We find no merit to other contentions advanced by appellants. R. 2:11-3(e)(1)(E).

Affirmed.

**Barbara Rockefeller,**

*Petitioner-Appellant,*

v.

**Board of Education of the Borough of River Edge, Bergen County,**

*Respondent-Appellee.*

**STATE OF BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 17, 1975

For the Petitioner-Appellant, Saul R. Alexander, Esq.

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

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

March 3, 1976

**Elizabeth Rockenstein,**

*Appellant and  
Cross-Respondent,*

v.

**Board of Education of the Borough of Jamesburg, Middlesex County,**

*Respondent and  
Cross-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, March 20, 1975

Decided by the State Board of Education, June 26, 1975

Argued June 14, 1976 – Decided July 1, 1976

Before Judges Fritz, Seidman and Milmed.

On appeal from New Jersey State Board of Education.

Mr. Sidney Birnbaum argued the cause for appellant and cross-respondent (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. William G. Brigiani argued the cause for respondent and cross-appellant (Messrs. Brigiani and Cohen, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of State Board of Education (Ms. Jane Sommer, Deputy Attorney General, of counsel and on the brief).

**PER CURIAM**

The appeal and cross-appeal here are limited to the nature and extent of the various sanctions imposed, after hearing, by the Commissioner of Education and affirmed by the State Board of Education.

We are satisfied that the findings of fact variously articulated below might reasonably have been reached on sufficient credible evidence in the whole record and we will not disturb them. *Parkview Village Asso. v. Bor. of Collingswood*, 62 *N.J.* 21, 34 (1972). We have no quarrel with the conclusions of law which eventuated. We will not overturn sanctions imposed in a reasonable exercise of administrative discretion and expertise unless we find them unwarranted in law or without justification in fact. *Butz v. Glover Livestock Commission Co.*, 411 *U.S.* 182 (1973), reh. den. 412 *U.S.* 933 (1973). Such is not the case here.

Affirmed.

**Elizabeth H. Rogers,**

*Petitioner-Appellant,  
Cross Respondent,*

v.

**Northern Burlington County Regional Senior and  
Junior High School Board of Education, et als.,**

*Respondents-  
Cross Appellants.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, December 24, 1974

Decided by the State Board of Education, April 2, 1975

Submitted June 14, 1976 – Decided June 24, 1976

Before Judges Carton, Crahay and Handler.

On appeal from New Jersey State Board of Education.

Messrs. Rogers & Smith, attorneys for appellant-cross respondent (Mr. Robert F. Rogers on the brief).

Messrs. Parker, McCay & Criscuolo, attorneys for respondent-cross appellant (Mr. Richard E. Gehret on the brief).

Statement in lieu of brief filed on behalf of State Board of Education filed by Mr. William F. Hyland, Attorney General of New Jersey (Ms. Jane Sommer, Deputy Attorney General, of counsel and on the brief).

**PER CURIAM**

Petitioner, a nontenure teacher, instituted this proceeding against her employer, the Northern Burlington Regional School District, asserting that her class assignments for 1973-1974 were inequitable and were given to her for partisan reasons in a discriminatory manner. The gist of her complaint is that she was singled out for undesirable teaching assignments in retaliation for her criticisms of school policies and practices.

After a hearing, the examiner filed a report that any variations in the teacher assignment patterns shown by the evidence did not support the charge of discriminatory treatment. This conclusion was upheld by the Commissioner in his order dismissing the petition. The State Board affirmed for the reasons expressed by the Commissioner in his written opinion and petitioner appeals to this court.

Our review of the record satisfies us that there was ample credible evidence in the record as a whole to support the determination of the Commissioner of Education in adopting the recommendations of the hearing examiner.

We see no merit to any of the arguments for reversing the decision or any substance to her claim that there was a lack of administrative due process.

We see no reason to pass upon the additional question raised on the cross appeal concerning the existence or nonexistence of a pattern of teacher and/or class assignments. A review on appeal is concerned with the validity of the judgment and not with an individual expression of opinion on this factual question.

Affirmed.

**Elsie Seybt,**

*Petitioner-Appellant,*

v.

**Board of Education of the Borough of Hawthorne, Passaic County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 21, 1975

For the Petitioner-Appellant, Planer & Kantor (Frank J. Planer, Esq., of Counsel)

For the Respondent-Appellee, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

The Motion to reinstate the excised sections of Petitioner-Appellant's Appendix to the Brief is hereby denied.

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

March 3, 1976

**Michelle Siderio,**

*Petitioner-Appellant,*

v.

**Board of Education of the Township of Riverside, Burlington County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 6, 1975

For the Petitioner-Appellant, Tomar, Parks, Seliger, Simonoff & Adourian  
(Howard S. Simonoff, Esq., of Counsel)

For the Respondent-Appellee, Christopher N. Peditto, Esq.

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

January 7, 1976

**Veronica Smith and Sayreville  
Education Association,**

*Petitioners-Appellants,*

v.

**The Board of Education of the Borough of Sayreville,**

*Respondent-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, November 21, 1974

Decided by the State Board of Education, April 2, 1975

Argued February 17, 1976 – Decided February 27, 1976

Before Judges Allcorn, Kole and Ard.

On appeal from New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellants (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. Casper P. Boehm, Jr. argued the cause for respondent.

Statement in lieu of brief filed on behalf of State Board of Education by Mr. William F. Hyland, Attorney General of New Jersey (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

The State Board of Education affirmed a decision by the Acting Commissioner of Education that petitioner, who is a tenured teacher, was not entitled to employment as a school nurse when that position became vacant in the Sayreville school district. The vacancy occurred after plaintiff's position as a teacher of practical nursing and vocational education had been abolished. Petitioner appeals.

We have examined the record before the agencies below and are satisfied that substantial credible evidence and the applicable law support the conclusions they reached. We have also considered petitioner's contentions, including the claimed applicability of *N.J.A.C.* 6:3-1.10(d) and *Seidel v. Bd. of Education of Ventnor City*, 110 *N.J.L.* 31 (Sup. Ct. 1933), *aff'd o.b.* 111 *N.J.L.* 240 (E. & A. 1933), and find them to be without merit.

The determination below is affirmed essentially for the reasons set forth by the Acting Commissioner of Education in his opinion of November 21, 1974. See *N.J.S.A.* 18A:28-12; *N.J.A.C.* 6:3-1.10(h); *Tp. Committee of Tp. of Morris v. Bd. of Ed. of Tp. of Morris*, 60 *N.J.* 186 (1972); *Chappell v. Comm'r of Education of N.J.*, 135 *N.J. Super.* 565 (App. Div. 1975).

Affirmed.

**Board of Education of the Township of Wayne,**

*Petitioner-Appellee,*

*v.*

**Municipal Council of the Township of Wayne, Passaic County,**

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 15, 1975

Application for Stay denied by the State Board of Education, March 3, 1976

For the Petitioner-Appellee, Greenwood, Weiss & Shain (Stephen G. Weiss, Esq., of Counsel)

For the Respondent-Appellant, G. Thomas Breur, Esq.

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

April 7, 1976

**Board of Education of the Township of West Milford,**

*Petitioner-Appellee,*

v.

**Township Council of the Township of West Milford, Passaic County,**

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 17, 1975

Application for Stay denied by the State Board of Education, February 4, 1976

For the Petitioner-Appellee, Evans, Hand, Allabough and Amoresano (Douglas C. Borchard, Jr., Esq., of Counsel)

For the Respondent-Appellant, Cole, Berman and Belsky (Morrill J. Cole, Esq., of Counsel)

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

March 3, 1976

State of New Jersey  
Department of Education  
225 West State Street  
P.O. Box 2019  
Trenton, NJ 08625