1-94

CAROL BEAM,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANTUA, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

JANUARY 7, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 6740-92
AGENCY DKT. NO. 310-7/92

CAROL BEAM,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MANTUA, GLOUCESTER COUNTY,
Respondent.

Steven R. Cohen, Esq., on behalf of petitioner (Selikoff & Cohen, attorneys)

Raymond T. Page, Esq., on behalf of respondent

Record Closed: November 23, 1993 Decided: November 23, 1993

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

This matter was transmitted to the Office of Administrative Law on September 1, 1992, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to -10.

The parties now seek to have the matter dismissed with prejudice (see attached stipulation of dismissal). Based on this representation, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov 23, 1993
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

11/23/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 02 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LA

RAYMOND T. PAGE, ESQUIRE
A Professional Association
19 Newton Avenue - P. O. Box 749
Woodbury, New Jersey 08096
(609) 853-5100
Attorney for Petitioner

Plaintiff:	:	COMMISSIONER OF EDUCATION STATE OF NEW JERSEY
MANTUA TOWNSHIP BOARD OF EDUCATION -vs-	:	Docket No.274-6/92
Defendant: CAROL BEAM	:	CIVIL ACTION
	:	STIPULATION OF DISMISSAL

THIS MATTER having been brought by Raymond T. Page, Esquire, attorney for the Petitioner, Mantua Township Board of Education, and the Respondent, Carol Beam, being represented by Steven Cohen, Esquire, and it appearing that the allegations listed in the Complaint and Counterclaim have been rendered moot by action taken by the Division of Pensions for the State of New Jersey, and for good cause otherwise shown:

IT IS on this 23 day of November, 1993, ORDERED AND ADJUDGED that all claims, counterclaims, crossclaims and matters currently before the Court entitled Mantua Township Board of Education v. Carol Beam and Carol Beam v. Mantua Township Board of Education be in here are hereby dismissed with prejudice.

Steven Cohen, Esquire
Attorney for Respondent

Raymond T. Pace, Esquire
Attorney for Petitioner

DATED: 11/18/93

OAL DKT. NO. EDU 6740-92

CAROL BEAM,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANTUA, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law, including the stipulation of the parties as to action having been taken by the New Jersey State Division of Pensions, have been reviewed.

Upon review, the Commissioner concurs that this matter has been mooted by action of the Division of Pensions and no longer constitutes a controversy before the Commissioner pursuant to N.J.S.A. 18A:6-9.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 7, 1994

DATE OF MAILING - JANUARY 7, 1994

2-94

IN THE MATTER OF THE TENURE HEARING OF DEDRA DERRICK, SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

JANUARY 7, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6756-93
AGENCY DKT. NO. 150-5/93

IN THE MATTER OF THE TENURE HEARING OF DEDRA DERRICK, SCHOOL DISTRICT OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

---

Alexis Tucci, Esq., for the Complainant Board, (Tucci, Iadanza & Reisner, attorneys)

Stephen B. Hunter, Esq. and Lawrence Van Wess, Esq., for the respondent, (Klausner, Hunter, Cige & Seid, attorneys)

Record Closed: November 15, 1993 Decided: November 16, 1993

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

This matter was transmitted to the Office of Administrative Law on July 19, 1993, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1to -15 and *N.J.S.A.* 52:14F-1 to -13.

The Board of Education of the Shore Regional High School District (Board) certified charges of unbecoming conduct of a school secretary with the Commissioner of Education (Commissioner) against respondent, Dedra Derrick. The Board alleges, among other things, that respondent had engaged in a pattern of absenteeism which interfered with the orderly operation of the school. Respondent denies the charge and set forth a series of affirmative defenses.

Prior to the tenure hearing, the parties arrived at an agreement to settle the matters in controversy, together with a remedial action plan for respondent.

I have reviewed the terms and conditions of the Agreement and **CONCLUDE** that it meets the State Board of Education guidelines, pursuant to *Cardonick v. Board of Education of the Borough of Brooklawn,* 1982 *S.L.D.* _____ (Comm. Dec. April 7, 1982; State Board Dec. August 4, 1982). (See attached Agreement).

I have also reviewed the *Remedial Action Plan for Dedra Derrick from May 24, 1993 to June 30, 1995* and **CONCLUDE** that its incorporation into the Agreement is appropriate. (See attached Remedial Action Plan).

I **FIND** that the parties have voluntarily agreed to the settlement terms and conditions as evidenced by their signatures.

I **FIND** that the Agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

Prior to the tenure hearing, the parties arrived at an agreement to settle the matters in controversy, together with a remedial action plan for respondent.

I have reviewed the terms and conditions of the Agreement and **CONCLUDE** that it meets the State Board of Education guidelines, pursuant to *Cardonick v. Board of Education of the Borough of Brooklawn,* 1982 *S.L.D.* _____ (Comm. Dec. April 7, 1982; State Board Dec. August 4, 1982). (See attached Agreement).

I have also reviewed the *Remedial Action Plan for Dedra Derrick from May 24, 1993 to June 30, 1995* and **CONCLUDE** that its incorporation into the Agreement is appropriate. (See attached Remedial Action Plan).

I **FIND** that the parties have voluntarily agreed to the settlement terms and conditions as evidenced by their signatures.

I **FIND** that the Agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

11-16-93
Date

Lillard E. Law ALJ
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11/30/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 03 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

A G R E E M E N T

The Shore Regional Board of Education, (hereinafter referred to as "Board" and Dedra Derrick, (hereinafter referred to as "Derrick"), an employee of the Shore Regional District have reached a tentative agreement with respect to a certification of tenure charges against Derrick and grievance filed by Derrick against Board.

The following issues have been addressed and agreed to:

1. The Board shall withhold the 1993-1994 salary increment of Derrick in the amount of $1,328.00. Derrick's 1993-1994 salary shall be $17,928.00.

2. A remedial action plan shall be mutually developed and agreed upon between Board and Derrick, which shall be strictly adherred to by Derrick.

3. The amount of $1,328.00 withheld from Derrick's 1993-1994 salary shall be restored on July 31, 1994, if the remedial action plan and criteria are completely met by Derrick. Her salary for 1994-1995 shall then be $20,875.00. If Derrick shall fail to meet criteria set forth in remedial action plan, then the amount of money withheld in 1993-1994 in the amount of $1,328.00 shall not be restored to her. Derrick agrees that she will not grieve or arbitrate the decision of the Board if Board decides not to restore increment.

4. Tenure charges brought by Board shall remain in effect until agreement and remedial action plan are executed by all parties.

5. Derrick agrees to dismiss her grievance against the Superintendent of Schools and Board and that no arbitration shall commence with respect to Board's decision. Superintendent's evaluation dated February 2, 1993 shall remain in full force and effect with no amendment.

6. Board and Derrick agree that she has three sick days remaining until June 30, 1993.

7. Derrick agrees that in addition to the remedial action plan to be developed and executed, that she will meet monthly with Mark Abramson, Linda Conway and Dan Sorkowitz to review her progress and status of employment with the Board. The first meeting shall take place during the month of June, 1993 and continue monthly thereafter until the termination of this plan. The remedial action plan shall terminate June 30, 1995. Results of conferences, on a monthly basis, shall be reduced to writing and signed off by all parties.

8. Derrick agrees that she has earned no vacation time for the time she missed since March 29, 1993.

9. Board agrees to reimburse Derrick for her salary missed from the time that the tenure charges were certified. Said gross amount of money shall be 2,790.00. Derrick will be responsible for repayment of all unemployment monies received from New Jersey Division of Unemployment and holds the Board harmless and indemnifies the Board from any responsibility with respect to same.

10. The remedial action plan shall have certain parameters to be developed. The maximum number of sick days to be allowed to Derrick during the school year 1993-1994 shall be eleven (11) days. The maximum number of sick days in the 1994-1995 school year shall be ten days, however, if there are any unused sick days from the 1993-1994 school year, they shall accrue and be available for use by Derrick during the 1994-1995 school year. The superintendent, in his sole discretion, may request a doctor's certificate for any sick time taken. Bereavement leave shall be in accordance with the contract entered into between the secretarial association at Shore Regional High School. Derrick shall be allowed three (3) days for court appearances in each school year provided she is subpoenaed to attend court and providing further that it is a school related matter. All absences, of whatever nature, must be called into Derrick's supervisor, Dan Sorkowitz. All absences, of whatever nature, must be fully documented in accordance with the remedial action plan to be developed and executed.

11. Nothing contained herein shall prevent Board from future certification of charges or increment withholdings for excessive absenteeism or improper job performance.

12. Parties agree that Derrick shall be allowed to return to work on May 24, 1993 until June 30, 1993. If for any reason the remedial action plan or the agreement is not executed, then Board shall relieve Derrick of her duties. Parties agree that Derrick's next work year shall begin September 1, 1993 and end on June 30, 1994.

13. This document constitutes the entire agreement between the parties and there have been no promises, agreements, stipulations or understandings that have not been incorporated into this Agreement.

14. Each of the parties represent that he or she has consulted legal counsel prior to the execution of this Agreement. Each of the parties further represents that he or she is entering into this Agreement voluntarily and that he or she understands and agrees to the terms contained in this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 4TH day of October, 1993.

Dedra Derrick

Dedra Derrick

Anne F. McNicol

As to Derrick

Marc Abramson

Marc Abramson

As to Abramson

Leonard G. Schnappauf

Leonard G. Schnappauf

Anne F. McNicol

As to Schnappauf

M. Girard Kelly

M. Girard Kelly, President
Shore Regional Board of Education

Anne F. McNicol

As to Kelly

ANNE F. McNICOL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires January 3, 1996

REMEDIAL ACTION PLAN FOR DEDRA DERRICK
FROM MAY 24, 1993 TO JUNE 30, 1995

TERMS

1. The maximum number of sick days permitted from May 24, 1993 to June 30, 1993 is three (3).

2. The maximum number of personal days permitted from May 24, 1993 to June 30, 1993 is one-half day (.5).

3. The maximum number of sick days permitted during the school year 1993-1994 shall be eleven (11) days. The maximum number of sick days shall be ten (10) days in the school year 1994-1995, unless there are unused sick days which remain from the school year, 1993-1994.

4. The maximum number of personal days in each year shall be three (3).

5. Bereavement leave shall be in accordance with contract entered into between the secretarial association and Shore Regional High School Board of Education.

6. Mrs. Derrick shall be allowed three (3) days for court appearances in each school year, providing she is subpoenaed to attend court and providing further that it is a school related matter.

7. Absences, of whatever nature, must be fully documented according to the following verification:

   a. All absences, of whatever nature, must be called into Dr. Sorkowitz, Assistant Principal, or designated supervisor.

   b. When requesting personal days, Mrs. Derrick must either explain in writing or verbally why her personal business cannot be completed outside school hours. This must be presented to the superintendent of schools.

   c. The superintendent of schools, may, at his sole discretion, request a doctor's certification at any time upon Mrs. Derrick's return to work from a sick day or sick days.

d. Bereavement days must be verified by some form of written documentation (i.e. newspaper clipping).

e. Court appearances must be verified by a subpoena submitted with the request.

f. Monthly conferences must be held with Mark Abramson, Linda Conway and Dan Sorkowitz to review Mrs. Derrick's progress. The first meeting shall take place during the month of June 1993 and continue monthly until June, 1995.

g. The results of the conferences must be reduced to writing and signed by both parties.

WHEREAS, the parties have hereunto set their hands and seals this 4TH day of October, 1993.

Dedra Derrick

Anne F. McNicol
As to Derrick

Marc Abramson

As to Abramson

Leonard G. Schnappauf

Anne F. McNicol
As to Schnappauf

M. Girard Kelly, President
Shore Regional Board of Education

Anne F. McNicol
As to Kelly

ANNE F. McNICOL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires January 3, 1996

OAL DKT. NO. EDU 6756-93

IN THE MATTER OF THE TENURE HEARING OF DEDRA DERRICK, SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY.	COMMISSIONER OF EDUCATION DECISION

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

Upon review, the Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters, and adopts the instant settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846). In so doing, however, the Commissioner notes that the agreement herein includes terms which appear to have been effectuated prior to the Commissioner's approval, and cautions the parties herein, and all litigants, against such action in that settlement agreements have no force and effect prior to such approval.

Notwithstanding this reservation, the settlement is approved and this matter is hereby dismissed, subject to compliance with the terms of the settlement.

JANUARY 7, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 7, 1994 -4-

3-94

ALFRED E. ARENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 7, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1695-92
AGENCY DKT. NO. 3-1/92

ALFRED E. ARENA,
Petitioner,

v.

MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Melissa Vance Kirsch, Esq., for petitioner

Louis J. Greco, Esq., for respondent

Record Closed: November 9, 1993 Decided: December 2, 1993

BEFORE **EDGAR R. HOLMES, ALJ:**

This matter was transmitted to the Office of Administrative Law on March 6, 1992, for determination as contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15, and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

12-2-93
Date

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

12/10/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

Louis J. Greco
Courtyard Suite 212
English Creek Center
McKee City, NJ 08232
(609) 383-0178
Attorney for Respondent

ALFRED E. ARENA , Petitioner vs. MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, ATLANTIC COUNTY , Respondent	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Dkt. No. EDU 1695-92 Agency Reference No. 1/92 STIPULATION OF DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs.

Dated: October 22, 1993

Louis J. Greco, Esquire
Attorney for Respondent

By: Melissa Vance Kirsch
Melissa Vance Kirsch, Esquire
Attorney for Petitioner

OAL DKT. NO. EDU 1695-92

ALFRED E. ARENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAIN-LAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal based on a joint stipulation of dismissal of the parties transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a settlement, pursuant to N.J.A.C. 1:1-19.1, by the ALJ in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal, this matter is more appropriately categorized as a withdrawal under N.J.A.C. 1:1-19.2.

The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

JANUARY 7, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 7, 1994

4-94

ALFRED E. ARENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAIN-LAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 7, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 493-93
AGENCY DKT. NO. 516-12/92

ALFRED E. ARENA,
Petitioner,

v.

MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Melissa Vance Kirsch, Esq., for petitioner

Louis J. Greco, Esq., for respondent

Record Closed: November 9, 1993 Decided: December 2, 1993

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

This matter was transmitted to the Office of Administrative Law on January 21, 1993, for determination as contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15, and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

12-2-93
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/10/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

Louis J. Greco
Courtyard Suite 212
English Creek Center
McKee City, NJ 08232
(609) 383-0178
Attorney for Respondent

ALFRED E. ARENA , Petitioner vs. MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, ATLANTIC COUNTY , Respondent	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Dkt. No. EDU 493-93 Agency Docket No. 526-12/92 STIPULATION OF DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs.

Dated: October 22, 1993

Louis J. Greco, Esquire
Attorney for Respondent

By: Melissa Vance Kirsch
Melissa Vance Kirsch, Esquire
Attorney for Petitioner

OAL DKT. NO. EDU 493-93

ALFRED E. ARENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAIN-LAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal based on a joint stipulation of dismissal of the parties transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a settlement, pursuant to N.J.A.C. 1:1-19.1, by the ALJ in his initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a joint stipulation of dismissal, this matter is more appropriately categorized as a withdrawal under N.J.A.C. 1:1-19.2.

The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

JANUARY 7, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 7, 1994

5-94

DELAWARE TOWNSHIP EDUCATION ASSOCIATION,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,		
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

JANUARY 13, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7265-93
AGENCY DKT. NO. 267-7/93

DELAWARE TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
DELAWARE TOWNSHIP BOARD OF EDUCATION, HUNTERDON COUNTY,
Respondent.

Richard A. Friedman, Esq., on behalf of petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

James P. Granello, Esq., on behalf of respondent

Record Closed: November 29, 1993 Decided: November 30, 1993

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

This matter was transmitted to the Office of Administrative Law on August 3, 1993 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On October 1, 1993, the parties requested that this case be placed on the inactive list for six months or more because the identical issue in this case was currently being decided by the Commissioner of Education. On October 4, 1993, I ordered this matter be placed on the inactive list.

On July 29, 1993, I issued an initial decision in Millstone Township Teachers Association v. Bd. of Ed. of Millstone, OAL Dkt. No. EDU 4175-92 and five other consolidated cases which determined the identical legal and factual issues as those

posed by the instant docket. On October 12, 1993, the Commissioner of Education issued her decision in these consolidated dockets (no. 237-93), and ordered withdrawal of all boards from participation in Grinspec Trust by the end of the 1993-94 school years.

I **FIND** that the respondent board of education here, among all other boards, is subject to the Commissioner's order in no. 237-93 and the result of any appeal thereon. I **CONCLUDE** there is no longer a contested case in this docket because all issues have been decided by the Commissioner in no. 237-93.

It is therefore **ORDERED** that the Clerk return the file to the agency.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov 30, 1993
Date

Naomi La Bastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

12/3/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 07 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

OAL DKT. NO. EDU 7265-93

DELAWARE TOWNSHIP EDUCATION ASSOCIATION,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,		
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that, in the wake of the Commissioner's decision in the matter of Millstone Township Teachers Association, supra, the instant matter no longer constitutes a controversy under the school laws pursuant to N.J.S.A. 18A:6-9.

Accordingly, this matter is dismissed as moot for the reasons expressed in the initial decision of the Office of Administrative Law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 13, 1994

DATE OF MAILING - JANUARY 13, 1994

6-94

MERCER COUNTY SPECIAL SERVICES EDUCATIONAL AND THERAPEUTIC ASSOCIATION,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
V.	:	DECISION
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

JANUARY 13, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3698-93
AGENCY DKT. NO. 35-3/93

MERCER COUNTY SPECIAL SERVICES EDUCATIONAL AND THERAPEUTIC ASSOCIATION,
Petitioner,
v.
MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

Richard A. Friedman, Esq., on behalf of petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Dennis M. DeSantis, Esq., on behalf of respondent (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: November 29, 1993 Decided: November 30, 1993

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

This matter was transmitted to the Office of Administrative Law on April 22, 1993 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On June 15, 1993, the parties requested that this case be placed on the inactive list for six months or more because the identical issue in this case was currently being decided before the Office of Administrative Law. On July 7, 1993, I directed that the matter be placed on the inactive list.

On July 29, 1993, I issued an initial decision in Millstone Township Teachers Association v. Bd. of Ed. of Millstone, OAL Dkt. No. EDU 4175-92 and five other consolidated cases which determined the identical legal and factual issues as those posed by the instant docket. On October 12, 1993, the Commissioner of Education issued her decision in these consolidated dockets (no. 237-93), and ordered withdrawal of all boards from participation in Grinspec Trust by the end of the 1993-94 school years.

I **FIND** that the respondent board of education here, among all other boards, is subject to the Commissioner's order in no. 237-93 and the result of any appeal thereon. I **CONCLUDE** there is no longer a contested case in this docket because all issues have been decided by the Commissioner in no. 237-93.

It is therefore **ORDERED** that the Clerk return the file to the agency.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 30, 1993
Date

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

12/2/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 07 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

OAL DKT. NO. EDU 3698-93

MERCER COUNTY SPECIAL SERVICES EDUCATIONAL AND THERAPEUTIC ASSOCIATION,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
V.	:	DECISION
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that, in the wake of the Commissioner's decision in the matter of Millstone Township Teachers Association, supra, the instant matter no longer constitutes a controversy under the school laws pursuant to N.J.S.A. 18A:6-9.

Accordingly, this matter is dismissed as moot for the reasons expressed in the initial decision of the Office of Administrative Law.

IT IS SO ORDERED.

JANUARY 13, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 13, 1994

7-94

GARFIELD BOARD OF EDUCATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE CITY OF GARFIELD, BERGEN COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Board appealed General Fund tax levy reductions made by governing body following voter rejection of proposed budget on April 20, 1993. Parties settled; however, Coordinating County Superintendent urged rejection of settlement.

Upon review, Commissioner determined that since district is a special needs district, the Board is required to dedicate the minimum amount required for its Educational Improvement Plan. (N.J.A.C. 6:8-9.4) Thus, Commissioner ordered $235,000 added to amount certified to Board of Taxation by governing body for General Fund school purposes for 1993-94 school year for total tax levy of $17,168,466.

JANUARY 14, 1994

GARFIELD BOARD OF EDUCATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE CITY OF GARFIELD, BERGEN COUNTY, : DECISION

RESPONDENT. :

:

Toni Belford Damiano, Esq., for petitioner (Damiano & Cerruti)

Lawrence J. Jaskot, Esq., for respondent (Jaskot and Evertz)

This matter was opened before the Commissioner through the City of Garfield Board of Education's (Board) filing of a notice on June 1, 1993 of its intent to appeal the reductions effectuated by the Mayor and Council of the City of Garfield (Council) to the 1993-94 proposed school budget upon defeat of same by the voters of that municipality on April 20, 1993.

On June 11, 1993 the Petition of Appeal was filed by the Board in accordance with the requirements of N.J.A.C. 6:24-7.4. In the petition the Board sought restoration of $1,399,765 in reductions made by the Council on May 13, 1993 ($1,183,823 to the General Fund portion that loss of same "***will not sustain Petitioner's objective and obligation of providing a 'Thorough and Efficient Education' program for the public school students of the City of Garfield." (Petition of Appeal, at p. 2) In addition, the

Board averred in its petition that

> a Thorough and Efficient system of schools cannot possibly be conducted with the funds remaining after the recommended line item cuts of the Respondent. The money allotted per line item is necessary for the Petitioner to operate properly. The position the Petitioner would be in if the recommendations of the Respondent were upheld would be greatly detrimental to the children of the school district***. (at p. 3)

The Board also averred in its petition that the budget reduction ordered by Council is "***arbitrary, capricious, unreasonable, premised upon political, noneducational factors***." (Id.)

On June 22, 1993 Council's Answer to the petition was filed in accordance with the requirements of N.J.A.C. 6:24-7.6. In its Answer, Council denies the allegations set forth by the Board relative to the reductions made to the Board's proposed budget and sets forth two affirmative defenses relative to the appropriateness of its actions with respect to that budget.

Subsequent to the filing of Council's Answer and before the expiration of the time within which the parties were required by N.J.A.C. 6:24-7.8 to file their position papers in this matter, the Board, on July 13, 1993, filed a letter indicating that as a result of a mediation conference conducted by the Office of the Bergen County Superintendent of Schools, a settlement had been reached between the parties. The settlement agreed to a budget reduction of $940,000, resulting in a total budget of $16,933,466 for the Garfield School District. It further notified the Commissioner that it was withdrawing its Petition of Appeal.

On July 20, 1993, Dr. Maureen Keller, Director of the Bureau of Controversies and Disputes, sent a letter to the Board acknowledging receipt of its letter regarding withdrawal of its

petition and informing it that pursuant to N.J.A.C. 6:24-7.3(e), no action could be taken on the withdrawal until the County Superintendent determined whether or not the settlement reached by the parties was sufficient to ensure a thorough and efficient system of education to the students of the Garfield School District.

Because the wife of Dr. Anthony Scalzo, Bergen County Superintendent of Schools, is employed by the Garfield School District, he recused himself by letter of July 26, 1993 from further involvement in the review of this matter so as to avoid any appearance of a conflict of interest. Dr. Sharon I.R. Clover, Coordinating County Superintendent for the North Region, was assigned by Assistant Commissioner Elena Scambio to review the proposed settlement in light of the requirements of N.J.A.C. 6:24-7.3(e) and (f).

On September 7, 1993, the Coordinating County Superintendent submitted an affidavit setting forth her findings and conclusions of the review conducted of the Garfield School District's budget for 1993-94, together with supportive documentation. In her affidavit, the Coordinating County Superintendent urged rejection of the settlement proposed by the parties based upon the fact that the school district is a special needs district as defined by N.J.S.A. 18A:7D-3 and, as such, the budget was not found to be adequate to fund the Educational Improvement Plan (E.I.P.) required by statute and code. (See attachment #8 of September 7, 1993 submission.)

The Coordinating County Superintendent's affidavit sets forth, inter alia, that:

On June 29, 1993, the two governing bodies reached an amicable settlement wherein the Mayor and Council restored $459,765 to the General Fund Budget and certified a General Fund Tax Levy of $16,933,466. The revised reduction to the General Fund was $940,000. (Attachment #2)

The Board of Education directed its Board Attorney to file a withdrawal of the Budget Petition of Appeal. (Attachment #3)

The Superintendent of Schools refused to sign the latest budget statement. Upon questioning by the County Superintendent, he stated that the new budget could not provide a thorough and efficient system of schools.

When I learned of this situation from Dr. Scalzo, I convened a conference on July 12, 1993 with Dr. Robert Van Zanten, Garfield Superintendent, Dr. Anthony Scalzo, Bergen County Superintendent, and Mr. Jay Doolan, Acting Director of Urban and Field Services to review the Garfield budget in light of cuts made by the town council and agreed to by the local board of education, and to determine if the provisions of the N.J.A.C. 6:24-7.3 sub para (f). should be invoked. At this point in time, Dr. Scalzo was present since he had not as yet received official notice not to participate. We also consulted with the county business official to go over specific line items in the revised budget and to determine if sufficient funds could be obtained through reallocation. An amount of $39,000 in the unemployment insurance account was found and we recommended it be reallocated to E.I.P. implementation.

Subsequent to that meeting, Jay Doolan forwarded a letter (attachment #4) to Dr. Scalzo recommending that the Garfield budget not be approved because the reductions seriously impact on the conditionally approved 1993-94 Educational Improvement Plan.

In addition, Dr. Van Zanten has refused to sign and approve the revised budget because he believes "cuts of this magnitude would prevent the district from carrying out the 1993-94 E.I.P. and meet its responsibility to provide a Thorough and Efficient Education." (attachments #5 and #6)

Copies of the district budget (attachment #7) and Educational Improvement Plan (attachment #8) are enclosed.

Therefore, it is our conclusion that the reduced Garfield budget is not adequate to meet the requirements of the Educational Improvement Plan and to provide thorough and efficient education and mandated programs. Specific concerns include:

1.a. Whole Language Teacher Training (obj. 4) $ 25,000

b. General supplies for kindergarten, middle school and high school - Advancement Placement courses (obj. 1, 2, 7, 8) 50,000

c. Equipment for above programs (obj. 1, 2, 7, 8) 100,000

d. Staff for A.P. program (obj. 1) 60,000

2. Budgetary cuts in teacher salary accounts 156, 157, 158 and 275 amount to $687,629. Of that total, at least the positions relating to mandated programs and EIP implementation should be reinstated. Superintendent's letter indicates these positions include:

   3 bilingual, 2 ESL, 2 Special Education, 1 Basic Skills and 1 Social Studies (for A.P.) teachers

3. General teaching supplies and equipment needed for maintaining existing programs were cut $140,000. (See budget lines 163, 165, 525, 526, 527, 528)

4. The reduced budget, in a special needs district, is now $956,561 under cap.

In summary, it has been well documented that special needs districts are underfunded and need a great deal of support from the education department. To approve a budget with nearly a $1 million reduction in such a district will continue to make it impossible to improve and provide a thorough and efficient education to its students. (Coordinating County Superintendent's Affidavit, at pp. 2-3)

On October 26, 1993, the Board submitted a letter responsive to the Coordinating County Superintendent's affidavit. The Board informs the Commissioner that through much diligence on the part of the new Superintendent, Thomas Cangiolosi, and in

conjunction with the governing body, a further agreement had been reached wherein the Superintendent had proposed a $50,000 increase which would restore the total amount of $509,765 to the General Fund Budget. Said increased restoration was approved by the Board at its October 21, 1993 meeting and is subject to the approval of the governing body. Set forth in the Board's response is a synopsis of the budget review, completed by the new Superintendent in conjunction with the School Business Administrator, which is incorporated herein by reference. It states in summation,

> In summation, it is the opinion of the new Superintendent of Schools, Thomas Cangiolosi, and the Business Administrator, that the Garfield School District can provide a thorough and efficient education within the limitations of the budget as presented, with <u>two</u> <u>exceptions</u>, as noted in this report; to wit: Objective IV - $7,630.00 and Objective VII - $36,000.00, for a total of $43,630.00. The Garfield School District is seeking to recover $50,000.00 to provide a proper allocation for the above mentioned areas, as well as to provide for a possible increase in the cost of the classroom computers. (emphasis in text) (Damiano Letter of 10/26/93, at p. 3)

On November 1, 1993, the governing body submitted its response to the Coordinating County Superintendent's affidavit. Initially, the governing body states that it had received a copy of the E.I.P. for the first time when preparing to submit its response herein. It also states among other things that

> We, of course, understand and realize that the action of the Commissioner was percipitated by the recommendation of the local superintendent, Dr. Van Santon, who not incidentially already made plans to leave the district for another position when he rendered his recommendation. Perhaps, the departing superintendent lacked the focus necessary to evaluate the budget economics compromised by the governing body and school board.

> The recent history of cooperation and compromise between the respective governing bodies, should not be overlooked. In the more distant past each took uncompromising positions which resulted in contesting hearings before the Office of Administrative Law where each side was urged to revaluate their positions so that the community could work toward a harmonious solution of what had been a vexing problem. Despite the leadership role a member of the city council chose, he or she was faced, in most instances, with an overwhelming rejection of the school budget by his or her own constituents. Without entering into a treatise on the role of an elected representative, the city council member could hardly ignore the clear choice of the people in exercising their prerogative at the polls. Now that both the city council and elected board of education have found means and methods of effectuating a compromise consistently urged by the county superintendent and the administrative law judge, they are now advised that their efforts are ephemeral since an itinerant superintendent has misjudged the sincerity and ability of the local board of education and the city council***.
>
> The newly appointed superintendent, who has tenure in the Garfield School system and has much more extensive experience in the Garfield Schools than the departing superintendent, had adjudged the compromise to be fair and reasonable. Furthermore, he proposes, based on a documented case submitted herewith by the Board of Education, to fulfill the E.I.P. with an additional $50,000. The undersigned is currently without authority to represent that this amount will be restored by the city council. However, the Garfield City Manager has led me to believe it will be and we are prepared to recommend it at the City Council meeting of November 9, 1993.
>
> (Governing Body's Response, at pp. 1-2)

The governing body also addresses the issue of settlements to litigated matters urging, inter alia, that

> There is little question that the law favors settlement which ranks high in public policy, Warren v. Employers' Fire Ins. Co. Boston, Mass. 100 N.J. Super. 464 (App. Div. 1968) rev'd 53 N.J. 308, Jannarone v. W.T. Co. 65 N.J. Super. 472 (App. Div. 1961)***.
>
> Although we concede that there exists circumstances under the law where a settlement

> may be rejected by the court. Where inequity and unfairness are clear, this is the case. More often judicial scrutiny finds fault with a settlement of a controversy where mistake or ignorance of a fact or law is established by a party, or where fraud or duress is found, Taylor v. Mitchell 90 N.J. Super. 312. (Ch. Div. 1966), Nevets C.M. Inc. v. Nissko Iwai American Corp. 899 F.2nd. 1218 (D.N.J. 1989), Chattin v. Cape May Greene Inc. 216 N.J. Super. 618, cert. den 107 N.J. 148, remd. 243 N.J. Super. 590, aff'd 124 N.J. 520. Absent these narrow exceptions, the courts have validated voluntary settlements Nolan v. Nolan 120 N.J. 465 (1990) and they are encouraged, almost to a fault. (Id., at pp. 2-3)

Upon review of the arguments of the parties in this matter and the affidavit with supportive documentation submitted by the Coordinating County Superintendent, the Commissioner finds and concludes that the settlement proposed by the parties cannot be approved. N.J.A.C. 6:8-9.4 requires that given that Garfield is a special needs district, the Board is required to dedicate a minimum of $1,349,052 for its E.I.P. Notwithstanding the narrative information from Superintendent Cangiolosi and the School Business Administrator submitted as part of the Board's response to the Coordinating County Superintendent's affidavit, the record sufficiently demonstrates that the Board has failed to dedicate the amount mandated by law to fund its E.I.P. It is unfortunate that the governing body did not have available a copy of the district's E.I.P. for review prior to making the reductions to the 1993-94 school budget given that such a document is indeed crucial to any informed decision making by the governing body relative to the budget. This is not to occur again in the future if the Garfield School District experiences a defeated budget necessitating review by the governing body.

Because the reductions effectuated by the governing body result in a $235,000 decrease in the district's Educational Improvement Plan, contrary to the requirements of N.J.A.C. 6:8-9.4, and given that the review conducted by the Coordinating County Superintendent finds that no reallocation within the 1993-94 school budget is possible, IT IS ORDERED that $235,000 be added to the amount certified to the Bergen County Board of Taxation by the governing body for General Fund school purposes for the 1993-94 school year. This results in a total tax levy for school purposes for the City of Garfield for the 1993-94 school year in the amount of $17,168,466.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 14, 1994

DATE OF MAILING - JANUARY 14, 1994

7-94

C # 7-94
SB #10-94

BOARD OF EDUCATION OF THE CITY OF GARFIELD,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MAYOR AND COUNCIL OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 14, 1994

For the Petitioner-Respondent, Damiano & Cerruti
(Toni Belford Damiano, Esq., of Counsel)

For the Respondent-Appellant, Salvatore Ingraffia, Esq.

On April 20, 1993, the voters of Garfield defeated the budget proposed by the Board of Education of the City of Garfield (hereinafter "Board") for the 1993-94 school year. On May 13, 1993, the City Council acted to reduce the budget pursuant to N.J.S.A. 18A:22-37, and the Board for this special needs district appealed the reductions to the Commissioner of Education.

Thereafter, the parties reached an agreement concerning the education budget, and, on that basis, the Board sought to withdraw its appeal to the Commissioner. However, upon her review, the Coordinating County Superintendent urged the Commissioner to reject the proposed settlement because the resulting budget was not adequate to meet the District's Educational Improvement Plan (EIP) and to provide a thorough and efficient education.

Nov. 2, 1994

On November 9, 1993, the Council resolved to restore additional funds to the District's education budget and thereby modified the terms of the proposed settlement. Relying upon its belief that the current District Superintendent had demonstrated that the District's EIP could be accomplished within the budget if the Council restored an additional $50,000, the Council acted to restore that additional amount.

Relying primarily on the Coordinating County Superintendents earlier recommendation, the Commissioner rejected the proposed settlement on January 14, 1994, finding that the Board was required to dedicate $1,349,052 to its EIP, but had not done so.

On appeal to the State Board, the City Council argues that the budget resulting from the proposed settlement as it had been modified by reallocation within the budget and its restoration of the additional amounts provided the funds necessary to fund the EIP. The district Board has advised us that it takes no position with respect to this appeal.

Upon our review, the State Board of Education approves the settlement as modified by reallocations made within the Board's budget and the restoration of the additional $50,000 by the Council. Our approval is, however, contingent upon review of the documentation by the Assistant Commissioner for the Division of Field Services and his assurance to us that, as represented by the parties, the budget resulting from the proposed settlement did in fact provide the funds required both to fund the District's EIP and to provide a thorough and efficient education.

November 2, 1994

Date of mailing NOV 04 1994

9-94

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	
RESPONDENT.	:	

JANUARY 18, 1994

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

PETITIONER,

V.

TOWNSHIP COUNCIL OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For Petitioner-Movant, Robert M. Tosti, Esq. (Rand, Algeier, Tosti & Woodruff)

For Respondent-Respondent, Lawrence P. Cohen, Esq. (Courter, Kobert, Laufer, Purcell & Cohen)

This matter was opened before the Commissioner of Education on December 3, 1993 by way of a Motion for Reconsideration filed by petitioner with reference to the Commissioner's decision of October 29, 1993 in the budget appeal of the same name. Specifically, the Board sought reconsideration of the Commissioner's decision to sustain a $350,000 reduction to surplus made by the governing body pursuant to N.J.S.A. 18A:22-37.

In its supporting papers, the Board argued that the Commissioner, in determining based on a prior year's audit that the Board's available surplus was $604,183.73, had overlooked that this amount had been depleted by the Board's appropriation of $309,958 in current expense Account No. 11-303 and capital outlay Account No. 12-303, thus leaving an actual surplus of only $294,225.73. The Board further contended that, in determining the percentage of surplus available to the Board,

the Commissioner compounded the first error by computing the percentage of the available surplus dollar amount against an erroneous total budget figure of $15,768,118 rather than the correct figure of $25,975,942. Thus, while the Commissioner calculated and deemed acceptable a 3.8% surplus even after governing body reduction, in actuality the reduction he sustained left the Board with a surplus of only 1.8%, well below the 3% generally deemed acceptable by the Commissioner in prior case law. In this regard, the Board observed, while a current audit report is now available and gives the district's surplus at $989,376, after allowing for the $309,958 appropriations noted above, the remaining $679,418 amounts to 2.6%, which the $350,000 reduction sustained by the Commissioner would decrease to $329,418 or 1.3%. Clearly, the Board concludes, this constitutes inadvertent error and does not represent the Commissioner's true intent.

In reply papers filed on December 20, 1993, the Township Council ("Township") acknowledged the correctness of the Board's contentions with respect to the calculations made by the Commissioner, but argued that the reduction at issue should be sustained nonetheless in that the remaining surplus was sufficient even if the correct figures had been used by the Commissioner. In support of its position, the Township presented a four-year analysis of surplus amounts and utilization, claiming that the Board had routinely functioned with surplus balances of 1% to 2% and cannot now be heard to claim that 3% is necessary for provision of a thorough and

efficient education ("T & E"). The Township further objected to the Board's insistence on reckoning its available surplus by subtracting subsequent year appropriations from prior year surplus balances, thus ignoring the likelihood (borne out by the Board's past experience as shown in the four-year surplus analysis) that the appropriated amounts would be covered by replenishments to surplus during the course of the year of expenditure. Moreover, if the Board did not routinely "hide" potential surplus by last-minute advance purchasing in unexpended accounts such as teaching supplies and textbooks, its year-end accrual would be even greater. Finally, the Township contended that, in light of the Board's request for reconsideration of the surplus issue, the Commissioner's entire decision should be reviewed in light of spending patterns which emerged after the Township's post-election review, both as they relate to surplus and otherwise.

Upon review of the arguments of the parties on motion, the Commissioner's prior decision in this matter and the record of that decision, the Commissioner concurs with the Board that errors were made in the calculation of surplus so as to produce a result other than the Commissioner intended. Specifically, the available surplus figure used by the Commissioner did not take into account appropriations therefrom for the 1993-94 budget and was applied to an erroneous total budget figure to obtain the percentage of that budget represented by surplus, so that the Commissioner's determination that the Board could sustain a $350,000 reduction was in fact based on inaccurate premises.

In revisiting that determination in light of the correct figures and the arguments of the township, the Commissioner notes that the method of surplus calculation used in this matter (that is, the prior year's final available amount less any appropriations therefrom in the current budget) has historically been employed by the Commissioner in determining surplus acceptability levels and that it is well established that a 3% surplus is deemed acceptable even where other line item accounts have reasonable contingency "cushions" included in the amounts sustained by the Commissioner, as is the case herein. Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, 1987 S.L.D. 2262; Board of Education of the Borough of Carteret v. Mayor and Council of the Borough of Carteret, Middlesex County, decided November 4, 1993. Nor does the fact that the Board may have functioned in the past with less than a 3% surplus alter this result where, as here, the Commissioner is satisfied that the dollar amounts remaining in disputed line items other than surplus are appropriate. Finally, to the extent that the Township's argument on motion would require reopening of the record of this matter, the general issues which it raises having been previously set forth in the record of the original appeal (Certification of June A. Cetro) and re-litigating of the appeal being inappropriate in the context of the within motion, the Commissioner declines this request.

Accordingly, the Commissioner finds and determines that, in light of the corrected calculations set forth above, the

previously sustained reduction of $350,000 to the Board's surplus account would leave the Board with a less than acceptable level of surplus for the 1993-94 school year, so that this reduction must be restored. The Morris County Board of Taxation is, therefore, directed to adjust the 1993-94 General Fund school tax levy for the Township of Jefferson to reflect an increase of $350,000 over and above the $15,069,350 previously ordered by the Commissioner.*

IT IS SO ORDERED.

JANUARY 18, 1994

DATE OF MAILING - JANUARY 20, 1994

COMMISSIONER OF EDUCATION

*In rendering this decision, the Commissioner is not unmindful of the January 5, 1994 decision of the State Board of Education in the matter of Board of Education of the Borough of New Milford v. Borough Council of the Borough of New Milford, Bergen County, wherein the State Board reversed a $100,000 restoration to surplus made by the Commissioner on grounds that the Commissioner had made such restoration because the resulting surplus was within the guidelines set by the Commissioner as reasonable for boards to carry rather than because the Board made a specific demonstration that the Council's reduction to surplus would impair its ability to provide a thorough and efficient education. (Slip op., at p.4) However, because this matter was litigated prior to enunciation of the State Board's heightened standard and the reconsideration herein is based solely on the Board's claim of technical error in surplus calculations, the Commissioner applies the standard in use and effect at the time of the original decision.

10-94

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE : DECISION
TOWNSHIP OF OLD BRIDGE, :
MIDDLESEX COUNTY. :
:

SYNOPSIS

Petitioning qualified voters sought inquiry into alleged violations/irregularities in school election proceedings. Two separate requests for inquiry were consolidated and heard as one matter. Petitioners conceded at the outset that they sought not to overturn the result of the election, but to obtain a determination that improprieties occurred.

ALJ dismissed petition, finding no support for allegations of Board or staff involvement in a letter purportedly from the "room mother" coordinator but not written by her and a flyer prepared by the Civic Action Committee, allegations of "candidate bashing" at Board meetings and allegations of harassment of one candidate's challenger; claims that election workers failed to call out voter names were rejected as not founded on any authority so requiring. Claims regarding early opening of polls at one school, failure to permit inspection of certain voting machines prior to election and preparation at public expense of a televised presentation advocating passage of the school budget were found to have merit to the extent that some small degree of error was demonstrated, but were not found sufficient to warrant directives from the Commissioner.

Commissioner concurred with ALJ's findings and conclusions regarding most allegations, but modified determination with respect to televised budget presentation. Commissioner determined that presentation, through inclusion of exhortations to vote "yes" in the context of overall positive presentation aired during the four days preceding election, crossed line separating information from advocacy contrary to standards of Citizens to Protect Public Funds. Board was cautioned and enjoined from future expenditure of public funds for programs or materials having the effect of advocating passage of budget and was further directed to adjust instruction and supervision of election workers to extent necessary to avoid repetition of errors demonstrated herein.

JANUARY 21, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 3978-93
AND EDU 3979-93
AGENCY DKT. NOS. 98-4/93
AND 96-4/93
(CONSOLIDATED)

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION, OLD BRIDGE TOWNSHIP, MIDDLESEX COUNTY

Elias L. Schneider, Esq., on behalf of petitioners Mitchel Geier, et al (Brigiani, Cohen and Schneider, attorneys)

Harold G. Smith, Esq., on behalf of respondent Old Bridge Township Board of Education (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: October 27, 1993 Decided: December 6, 1993

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of two complaints filed by Mitchel Geier, and nine other qualified voters of Old Bridge Township, alleging certain irregularities by the Board of Education (Board) leading up to and during the April 1993 School Board Election. *N.J.S.A.* 18A:14-63.12. The matters were separately transmitted to the Office of Administrative Law as contested cases and were heard as one.[1] A hearing was conducted on June 30 and October 14, 1993. The record closed on October 27, 1993, with receipt of the last post-hearing memorandum.

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1 No formal request for consolidation was made, however the cases were treated throughout as one, and are hereby formally consolidated.

Petitioners allege: (1) that the Board expended funds to produce and televise a one-sided budget presentation which improperly exhorted the public to vote for the budget; (2) that the Board authorized distribution of a letter purporting to be from Mary Ellen Zanfini urging "room mothers" to use their "call lists" to garner support for the proposed budget; (3) that school administrators made improper comments in presenting the proposed budget during a meeting at Cheesequake Village Civic Association; (4) that comments made by Board members during a televised Board meeting on February 16, 1993, constituted "candidate bashing"; (5) that Board members made improper comments during the Board meetings of March 16 and 23, 1993; (6) that early voting was permitted at the Schirra School on election day; (7) that Brenda Bjonnes, a challenger for defeated candidate Mitchel Geier, was harassed by an election worker at the Voorhees School; (8) that election workers failed to call out the names of persons as they appeared at the polls to vote; and (9) that election workers refused to allow Mr. Geier and his challengers to view the vote counter on the voting machines during the election.

Petitioners conceded at the outset that they were not seeking to overturn the election; rather, they believe that their allegations reveal a multiplicity of violations which require a corrective instruction from the Commissioner.

I

Respondent filed a motion to dismiss at the close of petitioners' case, which was granted in part during a subsequent telephone conference; an order was entered on October 14, 1993 (attached). I elaborate on the points of the order here to provide the Commissioner with an opportunity for review. At that stage of the proceedings, petitioners' proofs were entitled to all reasonable inferences. *R.* 4:37-2; *Dolson v. Anastasia*, 55 *N.J.* 2, 5-6 (1969).

The Zanfini Letter

Mary Ellen Zanfini testified that as "room mother" coordinator she had access to confidential class lists for purposes of calling homes in case of bad weather. Sometime prior to the election, she picked up a copy of a letter in her mailbox at the school, purportedly written by her, which urged room mothers to contact parents on their call lists to convey the message "that the PTA Executive Board has voted to support the school budget this year, and we hope that you will too" (P-1). Ms.

Zanfini testified that she did not write the letter and does not know who did. There is no indication that this letter was actually distributed to school mothers or that any such telephone calls were made. Ms. Zanfini did not know whether any Board members, administrators or employees of the district were involved in writing this letter. In the absence of any *prima facie* evidence connecting the Board or its staff to this letter, this charge was dismissed.

Cheesequake Village Civic Association Presentation

On April 13, 1993, Dr. Andrew Korshalla, superintendent of schools, Dr. R. Gregory Quirk, assistant superintendent of schools, and Dr. George, assistant superintendent of schools, appeared at Cheesequake Village, a senior citizens community, to make a budget presentation. Kathleen A. Quick and Mitchel Geier, candidates for election, were in the audience. They testified that Dr. Quirk and Dr. George made substantive presentations, but Dr. Korshalla warned people that defeat of the budget would simply require an appeal to the Commissioner, with its attendant costs. Petitioners also allege that a flyer was produced in connection with this meeting urging support for the budget (P-2). Neither charge is supported. Dr. Quirk's certification indicates that the administrators who appeared that night received no additional compensation for their talks, and this is undisputed. The New Jersey Supreme Court in *Citizens to Protect Public Funds v. Board of Educ. of Parsippany-Troy Hills*, 13 *N.J.* 172 (1953), concluded that it was improper for a board of education to expend public funds to promote its position on a referendum, because opponents of the question did not have access to such funds. Thus, while expenditures for advocacy are prohibited, advocacy is a legitimate part of the Board's annual effort to inform and persuade the public that it has acted wisely. Opponents are free to present a contrary position.

The flyer complained of states on its face that it was prepared by the Civic Action Committee of Cheesequake Village Civic Association; no connection to the Board was established.

The February 16, March 16 and March 23, 1993, Board Meetings

Petitioners allege that during the televised Board meeting of February 16, 1993, statements were made by Board members which constitute "candidate bashing." A videotape of this meeting was entered into evidence (P-9). This videotape shows a regular board meeting, at which general business was conducted.

A portion of the meeting was also given over to public comment and questions. Mr. Geier spoke during this segment, as did others. Toward the end of the meeting, a few Board members who were irked by some of the criticisms made during the public comment period suggested that these expressions were politically timed to be seen by the voters before the upcoming election. The public was reminded that the critics had not attended previous meetings, but that the Board had been diligently working on the District's problems throughout the year.

A review of the videotape reveals that the conduct complained of consumed a few minutes at the end of a long meeting. I would characterize this exchange as part of the give-and-take of electoral politics, and it was mild at that - no member of the public was even mentioned by name. Board meetings are videotaped as a matter of course, and anyone who wanted to speak had the opportunity.

The allegations with respect to the March 16 and 23, 1993, Board meetings were withdrawn by counsel prior to the commencement of respondent's case.

Bjonnes Harassment

Petitioners allege that one of Mr. Geier's challengers, Brenda Bjonnes, was harassed by an election worker. Ms. Bjonnes testified, however, that the incident did not occur while she was acting as a challenger, but while she was waiting to vote at the Voorhees School. She was talking and an election official yelled at her to be quiet. She does not know who the official was. There is no indication that Ms. Bjonnes was harassed in any way; it does appear that she was embarrassed. As it happens, chatter is discouraged at election polls and I am unaware of any rule that prohibits what occurred here.

Failure to Call Out Voter Names

Petitioners allege that election workers failed to call out the names of voters who presented themselves for purposes of voting. Assuming this to be true, petitioners have pointed to no authority which requires such announcement.

Respondent's position on the above charges was sustained, because petitioners failed to make a *prima facie* case. There was sufficient evidence to go forward on three allegations; the televised budget presentation prior to the election, the

question of early voting at the Schirra School, and the alleged refusal to allow inspection of voting machines. Respondent made two additional arguments for dismissal in connection with these charges, which were rejected. It argued first that since petitioners do not seek to overturn the election, and their proofs do not support such a finding, the case is moot. Second, if petitioners felt that the videotape produced and aired by the Board in advance of the election violated the law, it should have sought to enjoin its use; failing that, they are barred from attacking it after the election. *Kenilworth v. Raubinger*, 15 *N.J.* 581, 590 (1954).

An inquiry into election irregularities seeks to determine whether violations occurred and if so, whether they affected the outcome. *N.J.S.A.* 18A:14-63.12. Findings concerning the former are independent of the latter. Traditionally, the Commissioner has used adverse findings concerning election irregularities as a vehicle for instruction and admonition. *See, e.g., Matter of the Annual School Election, Town of Westfield*, 1976 *S.L.D.* 425; *Matter of the Annual School Election, Township of Hamilton*, 1976 *S.L.D.* 444. That is all that petitioners are seeking.

The *Kenilworth* decision appears to support the theory that injunctive relief should be sought prior to an election, rather than waiting to undo the result. Surprisingly, I have seen no case in the forty years since *Kenilworth* that builds on this point. Be that as it may, however, this incident occurred close to the election, and the argument assumes that opponents were aware that the tape was being aired. Moreover, as petitioners are not attempting to overturn the result, the question is only whether an instruction is necessary on the point to prevent a reoccurence.

I

The Televised Budget Presentation

From April 16 through April 19, 1993, the Board televised a pre-recorded presentation by a panel consisting of Dr. Korshalla, Dr. Quirk, Board president David Nash, and chairman of the Budget Committee Michael Haggerty on the dedicated cable television channel 15, which serves Old Bridge Township. A copy of this presentation was entered into evidence, as was an edited version reflecting the areas where petitioners felt violations had occurred (P-7, P-8). The unedited tape is approximately forty minutes in length. There is a brief introduction followed by Dr. Quirk's presentation, which consumes the bulk of the program. Dr. Quirk

acknowledged that he favored the budget and that his presentation was favorable, but at no time did he urge adoption of the budget and there was no political content in his message. At the end of Dr. Quirk's presentation, Mr. Nash, Mr. Haggerty and Dr. Korshalla summed up in a few minutes. The introductuory comments and summation were to the effect that the Board had worked hard to produce the budget, it had passed unanimously, it was a high accomplishment, and it should be passed.

Petitioners see these comments as converting the entire presentation into "propaganda" on behalf of the Board's position. Respondent believes that these comments were reserved, and consistent with its responsibility to present the budget and express some view on its content. It feels that the voters have a right to know where the Board stands. There is no question that the comments which offend here were reserved, brief and in no way derisive of the opposing point of view. The Board has an obligation to publicize the details of the budget and the videotape is one legitimate means to that end. Nevertheless, comments which urge passage of the question cross the line between factual presentation and advocacy, drawn by *Citizens, supra*, 13 *N.J.* 172. Recent decisions of the Commissioner tend to brighten this line. *Schettino v. Ridgefied Bd. of Educ.*, 93 *N.J.A.R.* 2d (Vol. 4A) 224 (Education); *Fenton v. Sullivan*, 1991 *S.L.D.* 677, 682. The Board should be on notice that urging the public to vote affirmatively under circumstances where funds are expended is inconsistent with precedent.

Voting at the Schirra School

It is undisputed that four or five people were permitted to vote early at the Schirra School. Dr. Quirk testified that he has been involved in public education since 1974 and he administers elections on the Board's behalf. He testified that election personnel are appointed from a list provided by the County; they are not Board employees. Dr. Quirk testified that he instructs these poll workers in election procedure through a training program (R-2). Angela Smith was in charge of the Schirra School polling place and he instructed her as he did all poll workers that the polls were to open at 2:00 p.m. Dr. Quirk testified that he learned during the day that polls had been opened early at Schirra School and he went there to inquire why. Ms. Smith told him that a few people arrived early and indicated to her that they had elsewhere to go; initially she refused to open the polls earlier, but they persisted and she relented.

The polls were opened at least a few minutes early at the Schirra School contrary to instructions from Dr. Quirk. Thus, petitioners have established that an error occurred, but in the absence of any pattern of early openings, I cannot say that the Board failed in its obligation to instruct poll workers or to conduct the election in a fair and orderly way.

Refusal to Allow Mr. Geier's Challengers to Inspect Voting Machines

Dr. Quirk testified that he instructs poll workers to allow inspection of counters on the back of machines, and it is undisputed that candidates were informed that voting machines could be inspected prior to the election (R-3). There were some voting locations in which challengers were not permitted to look at counters upon request. When this was brought to Dr. Quirk's attention, he informed poll workers to allow it and challengers had an opportunity to inspect counters before the polls closed. There is no indication that this affected the vote count at all. More intensive instruction of poll workers may improve this situation in the future, but again I see this as isolated, and insufficient to warrant any strong admonition.

Based on the foregoing, it is **ORDERED** that petitioners' action be dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/6/93
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

12/7/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1993
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

List of Witnesses

On behalf of Petitioners:

Mary Ellen Zanfini
Brenda Bjonnes
Kathleen A. Quick
Albert O'Neill
Walter G. Reed
George Landreth
Mitchell Geier
Bradley A. Mogol

On behalf of Respondent:

Dr. R. Gregory Quirk

List of Exhibits

OAL Exhibits:

OAL-1	Letter from Maureen R. Keller to Thomas F. Lowe, dated May 27, 1993

On behalf of Petitioners:

P-1	Letter to Room Mothers from Mary Ellen Zanfini, undated
P-2	Flier for School Election
P-3	Old Bridge Board of Education Agenda of June 30, 1993
P-4	Letter to Walter Reed, dated December 10, 1992
P-5	Letter from Carrie Shreder to Candidate, dated March 8, 1993
P-6	Old Bridge Board of Education monthly meeting (February)
P-7	Videotape
P-8	Videotape
P-9	Videotape

On behalf of Respondent:

R-1	Manual for Conduct of the School Election of Old Bridge Township Board of Education, dated April 20, 1993
R-2	Letter from R. Gregory Quirk, Ed.D., to Carmela DeFelice, dated February 11, 1993
R-3	Letter from Richard Plantec to All Board Secretaries, dated April 5, 1993
R-4	A33 Regular/Combined Statement of Result of School Election
R-5	Letter from Maureen R. Keller, Director, to George B. Landreth, dated May 26, 1993

OFFICE OF
ADMINISTRATIVE LAW

OCT 18 1 30 PM '93

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

NEW JERSEY OFFICE OF
ADMINISTRATIVE LAW
OAL Docket No. EDU-03978-93S and
OAL Docket No. EDU-03979-93S
Agency Docket No. 96-4/93 and
Agency Docket No. 98-4/93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY	**ORDER GRANTING PARTIAL DISMISSAL**

THIS MATTER having been opened to the Office of Administrative Law, the Honorable Solomon A. Metzger, A.L.J. presiding, upon the motion of the respondent Old Bridge Board of Education for an order dismissing the petitions filed in this matter; and Judge Solomon having considered the papers submitted in support of and in opposition to the said motion; and good cause appearing for the entry of this Order;

IT IS this 14th day of October, 1993,

292276

ORDERED AND ADJUDGED that the said motion is hereby granted in part and that the following claims of petitioners are hereby dismissed with prejudice: all claims based on the alleged harassment of challenger Brenda Bjonnes, all claims based on the alleged failure of election workers to call out names of voters as they arrived at the election polls to vote, all claims based upon the "Zanfini letter," all claims based on the presentation concerning the respondent's annual school budget made to the Cheesequake Village Association, all claims based on statements made by members of the respondent at their public meeting of February 16, 1993 which allegedly constitute "candidate bashing," all claims allegedly that the respondent publicly opposed any candidate for election to the respondent at the 1993 annual school election, and all claims based on statements made by members of the respondent at their public meetings of March 16 and 23, 1993; and

FURTHER ORDERED AND ADJUDGED that the said motion is hereby denied in part and that the following claims of the petitioners, and only the following claims, shall proceed to hearing, unless otherwise resolved by and between the parties: the alleged early voting at the respondent's Schirra School, the alleged refusal of election workers to allow challengers to view

the vote counters on voting machines and the respondent's televised presentation of its annual school budget.

SOLOMON A. METZGER, A.L.J.

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF OLD BRIDGE,	:	
MIDDLESEX COUNTY.	:	
	:	

The record of these consolidated matters and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.*

Upon such review, the Commissioner affirms in part and modifies in part the findings and conclusions of the ALJ.

Initially, the Commissioner fully concurs with, and adopts as her own, the ALJ's analysis, findings and conclusions with respect to dismissal of petitioners' allegations regarding the "Zanfini" letter, the Cheesequake Village Civic Association Presentation and the Board meeting of February 16, 1993. The Commissioner further concurs, for the reasons expressed in the

*On December 28, 1993, attorney for petitioner requested an extension of time within which to file exceptions to the initial decision. However, in view of the fact that such requests must be made prior to expiration of the filing period for exception, which in this case was December 23, 1993 (13 calendar days from mailing of the initial decision on December 10, 1993) and in the absence of any emergency or other unforeseen circumstance to warrant waiver of deadline, this request was denied. N.J.A.C. 1:1-1.4, N.J.A.C. 1:1-18.4 and N.J.A.C. 1:1-18.8.

initial decision, with the ALJ's determination not to dismiss this matter in its entirety because petitioners conceded at the outset that they sought not an invalidation of the results of the contested election, but rather a determination as to the propriety of alleged actions on the part of the Board and its agents.

Moreover, with respect to petitioners' allegations regarding early opening of polls at the Schirra School and refusal to allow challengers to inspect machines prior to opening of polls, the Commissioner concurs with the ALJ that, while errors clearly were made by poll workers, they appear to have been isolated incidents which occurred notwithstanding that the workers had been duly instructed by district staff as to proper procedures; therefore, remedies beyond admonition to the Board are unwarranted. Nonetheless, the Commissioner stresses that the Board must take special care to prevent a recurrence of such errors in future elections, both because they can potentially taint election outcomes and because, even where they do not, they can serve to undermine the integrity of the school election process and the confidence of citizens in it.

With respect to the televised budget presentation that serves as the center of petitioners' complaint, however, the Commissioner cannot fully concur with the ALJ's analysis and conclusions. Initially, the Commissioner notes upon review of the unedited tape that Assistant Superintendent Quirk's budget presentation does not consume the bulk of the approximately

40-minute program, nor is it merely preceded by a brief introduction and followed by a brief conclusion by the remainder of the panel. Rather, the "introduction" accounts for fully 20 minutes of the program, with three speakers spending about 5-6 minutes each addressing a distinct topic: a general introduction to school budgets (Superintendent Korshalla), a historical perspective on Old Bridge as it relates to development of the current budget (Board President Nash), an overview of the actual process used by the Board to develop the current budget (Finance Committee Chairman Haggerty) and concluding remarks by Dr. Korshalla. Then, following Dr. Quirk's presentation of approximately 10 minutes, each speaker is afforded a few minutes for concluding remarks.

The bulk of the content of the various speakers' presentations can, in isolation, fairly be characterized as an appropriate attempt to educate the public about the Board's budget and development of it, consistent with the principles enunciated in Citizens, supra. However, with the exception of Dr. Quirk, each of the speakers includes, in either his initial presentation or his concluding remarks, or both, a measured but direct exhortation to the viewing public to vote in favor of the budget. These comments, taken within the context of the very favorable approach embodied in the program overall and the strategic choice of its air time (daily for the four days preceding the election), are sufficient to color the character and general effect of the program in a way that pushes it, in the Commissioner's view, over the line that separates

information from advocacy. Thus, notwithstanding that the Board televises its regular meetings and frequently uses the cable access station in Board matters, the fact remains that public funds were expended--albeit modestly and with no apparent ill intent--to produce a special program that had the effect, through inclusion of comments such as "Give us your vote of support and vote 'yes' on April 20th" (several times) and "We appeal to you to please vote for the budget," of advocating passage of the budget. This the Board cannot be permitted to do. (In so holding, the Commissioner notes the Board's argument that its presentation was far more reserved than the pamphlets at issue in Citizens, supra, and was not argumentative or accusatory as were the flyers in Schettino, supra; however, programs and materials need not rise to the level of "scare tactics" or disparagement of opposing views to nonetheless constitute public-funded advocacy under circumstances such as were present herein. See, for example, Barbara Burghardt v. Board of Education of the Township of Mahwah et al., Bergen County, decided November 29, 1993.)

Accordingly, the Commissioner affirms the initial decision of the Office of Administrative Law except as modified above, and, as a consequence of said modification, cautions the Board and enjoins it from future expenditures of public funds in a manner that advocates, or has the effect of advocating, passage of the school budget. The Commissioner further directs that the Board make any necessary adjustment to the instruction and supervision of its poll workers in order to avoid repetition of

the errors found herein with respect to opening of polls and inspection of voting machines. In all other respects, the petition is dismissed consistent with the findings and recommendations of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 21, 1994

DATE OF MAILING - JANUARY 21, 1994

12-94

CHRISTINE BUBLIN,	:	
		COMMISSIONER OF EDUCATION
PETITIONER,	:	
		DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teacher who retired from the position of English Teacher on an accidental disability pension but was later found fit by TPAF to return to employment, appealed Board's refusal to appoint her pursuant to N.J.S.A. 18A:66-40 to vacancy in position of Librarian, which she held prior to her transfer to English Teacher and in which she had been tenured. Board contended petitioner had effectively resigned from district by voluntarily accepting disability pension, or alternatively, by accepting employment in another district following certification of ability to return to work by TPAF.

In light of Laing and Kopel, ALJ concluded petitioner effectively resigned and forfeited her tenure rights by accepting disability pension; Board, therefore, had no obligation to reemploy her notwithstanding provisions of N.J.S.A. 18A:66-40. Petition was dismissed.

Commissioner set aside initial decision, finding in light of Superior Court decisions in Allen and DiMuzio that N.J.S.A. 18A:66-40 obliged district to reemploy petitioner when a vacancy arose in her former position, i.e., the position of English Teacher from which she actually retired. Any other offer of employment, including the Librarian position sought herein, is discretionary on the part of the Board. Commissioner remanded matter for findings and recommendations on question of whether Board's refusal to appoint petitioner to Librarian position was arbitrary, capricious or unreasonable.

JANUARY 26, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6846-92
AGENCY REF. NO. 387-8/92

CHRISTINE BUBLIN,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,
Respondent.

Tanya Pushnack Friedman, Esq. and Richard A. Friedman, Esq., for petitioner, (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Daniel S. Popovitch, Esq., for respondent, (Popovitch & Popovitch, attorneys)

Record Closed: October 26, 1993 Decided: December 8, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges that the Board of Education of the Borough of Point Pleasant (Board) violated her tenure and seniority rights when it failed to reemploy her, pursuant to *N.J.S.A.* 18A:66-40 and, instead, employed two nontenured employees to positions to which she was entitled. The Board denies petitioner's allegations asserting, among other things, that petitioner resigned her tenured teaching

position when she voluntarily accepted a disability pension by the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) or, in the alternative, that she effectively resigned when she accepted employment with another board of education subsequent to the termination of her disability pension.

MOTIONS FOR SUMMARY DECISION

The parties cross-moved to have the matter determined by way of summary decision, pursuant to *N.J.A.C.* 1:1-12.5. Having determined that there are no genuine issues as to any material fact, I **CONCLUDE** that the matter meets the criteria for summary judgment, as established in *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67 (1957), and, therefore, is ripe for summary decision.

ISSUES

The issues to be determined by this administrative tribunal, as set forth in the Prehearing Order, are these:

1. Whether petitioner was entitled to placement in a vacant position by the Board when the position became available?
2. Whether petitioner resigned from the Board's employ when she received and accepted a disability retirement allowance issued by the Teachers Pension and Annuity System?
   a. If so, what affect does the statute, *N.J.S.A.* 18A:66-40, have in this matter?
3. What affect, if any does petitioner's employment with another board of education between the period of separation from the Board and her claim for reinstatement?
4. Whether petitioner's application and/or claim for reinstatement with the Board was timely filed?

STIPULATION OF FACTS

Petitioner, Christine Bublin, was hired by the respondent Board in September of 1968 as a teaching staff member, and, at the time of this employment became

enrolled in the TPAF. Petitioner received tenure as a teaching staff member in September of 1972. At all times while in the employ of the Board, petitioner was properly certified as a teacher of English and teacher-librarian by the State Department of Education. During the term of her employment, petitioner served first as an elementary school staff member under her teacher-librarian endorsement and thereafter, under the same endorsement in the high school, until June 30, 1981, when she was assigned to duties as an English teacher in the Board's high school.

Petitioner continued on active status until January 18, 1982, which was the last day petitioner reported for work. At that time, petitioner was acting in the capacity of an English teacher. After January 18, 1982, until she received her disability retirement, petitioner was absent from duty under Workers' Compensation.

By certification filed on September 14, 1982, the Board certified to the TPAF that petitioner was permanently and totally disabled. On September 14, 1982, petitioner certified to the TPAF that she was incapacitated for further service as a teacher. On October 21, 1982, petitioner's disability retirement was confirmed by the TPAF to be effective November 1, 1982, and, on appeal, petitioner was finally awarded an accidental disability retirement.

By letter dated March 12, 1991, the Board received notice from the State of New Jersey, Department of the Treasury, Division of Pensions, that the Board of Trustees of the Pension Fund had found that petitioner's disability had diminished to the point where she could resume her former duties as a teacher without restriction. Petitioner had also received a letter, dated March 11, 1991, advising that she was able to resume her duties as a teacher. (Exhibit B). At that time, there was no position available, either as an English teacher or as a teacher-librarian, and the Board neither contacted petitioner, nor did petitioner contact the Board of Education. Petitioner, however, accepted employment as a librarian with the South Amboy Board of Education beginning April 8, 1991, and sought reinstatement in the Teachers' Pension and Annuity Fund, which was granted. Petitioner was assigned a new TPAF number.

Since April 8, 1991, petitioner has remained in the employment of the South Amboy Board of Education, and has been offered a contract for the 1993-94 school year.

Thereafter, by letter dated April 13, 1992, petitioner applied for a position of elementary school librarian, which had become open in the Point Pleasant School system. By letter dated June 8, 1992 from the Board, petitioner was advised that she would not be hired for the position, and on August 14, 1992, petitioner filed this action, seeking the position of elementary school librarian for which she applied, together with other relief.

LEGAL ARGUMENTS OF THE PARTIES

PETITIONER'S POSITION

Introductory Statement

As set forth in the Stipulation of Facts, petitioner was employed as a teacher-librarian by the respondent Board from 1972 through June 1981. (Stipulation of Facts, p. 1-2). Effective September 1981, she was involuntarily transferred to the position of English teacher and taught in that position until January, 1982 when she retired under an ordinary disability retirement allowance. (Stipulations of Facts, p.2) On or about March, 1991, the Board of Trustees, Teachers' Pension and Annuity Fund (TPAF) certified that petitioner had recovered to the extent where she could resume her former duties without restriction. The TPAF ordered the Board to reinstate petitioner to her former duty or any comparable duty. (Stipulation of Facts, Exhibit A). In that letter, the TPAF advised the Point Pleasant Board of Education that if it disagreed with the determination, it could appeal the decision. The Board did not file an appeal of the TPAF's decision and therefore, the TPAF's determination became final. At that time, no position was available with the Board for which petitioner was qualified.

By April, 1992, the position of elementary school librarian, in which petitioner had previously served for nine years, became available in the Board's school district. Petitioner applied for this position but was denied appointment. (Stipulation of Facts, p.3). Petitioner then filed a timely petition of appeal seeking the position of elementary school librarian together with other relief.

The issue in this matter is whether petitioner is entitled to the position of elementary school librarian pursuant to *N.J.S.A.* 18A:66-40, and should have been appointed to that position when it became vacant in April, 1992.

POINT I

PETITIONER IS ENTITLED TO BE REINSTATED AS ELEMENTARY SCHOOL LIBRARIAN AS OF APRIL 13, 1992, REGARDLESS OF THE POSITION IN WHICH SHE LAST SERVED.

Pursuant to *N.J.S.A.* 18A:66-40, if a retiree under ordinary disability recovers, he must be reinstated to his former duty or other comparable duty which his employer is willing to assign him. *N.J.S.A.* 18A:66-40 (a). The plain language of the statute provides as follows:

> If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty which his former employer is willing to assign him, the beneficiary shall report for duty .... *N.J.S.A.* 18A:66-40(a).

There is nothing in the statute which limits the "former duty" to the last duty performed. Petitioner was employed as a teacher-librarian with respondent school district for over nine years. Thus, petitioner is entitled to be reinstated to the position of teacher-librarian and the court should reject any attempt by the Board to add conditions or limitations to the statute.

This conclusion is also required by the Appellate Division's decision in *Board of Police Commissioners, City of East Orange v. PFRS, DiMuzio,* (App. Div. Docket No. A-2629-87T8, unpubl. op. May 18, 1989). There, a former East Orange police officer who had been retired on an accidental disability allowance under the Police and Firemen's Retirement System (PFRS) statute, *N.J.S.A.* 43:16A-8, *et seq.*[1], recovered from his disability and sought reinstatement to his former position. The Board of Trustees of PFRS, as the TPAF in this matter, ordered the officer reinstated to his former position. The City of East Orange refused to reappoint him and claimed that it had the authority and discretion to deny reappointment, depending on its own budgetary needs.

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[1] The language of the PFRS statute, *N.J.S.A.* 43:16A-8(2), which governs an employee's return to work after recovering from a disability, is substantially similar to the TPAF statute at issue, *N.J.S.A.* 18A:66-40(a).

In affirming the pension board's decision that DiMuzio should be returned to work, the Court determined that the PFRS statute required the municipality to reinstate DiMuzio to his former position of lieutenant, if a vacancy existed. Significantly, the Court also found that if there was no vacancy at the former level, the City was required to appoint him to *any other available duty.* (emphasis added). As to the City's argument that it had the discretion to deny the officer reinstatement to another available duty, the Court concluded that the thrust of the pension statute:

> is to reemploy an able-bodied police officer, not to waste pension funds, and we, therefore, interpret this provision to mean that East Orange may not arbitrarily refuse to assign DiMuzio to the next level of available vacancy for which he is eligible, nor may it defer action until he is no longer eligible. *City of East Orange,* unpub. op. at p. 9

Recently, the Appellate Division affirmed this rule, that a public employee who has recovered from a disability is entitled to reinstatement to his former position or any available position, *In the Matter of John J. Allen,* 262 *N.J. Super.* 438 (App. Div. 1993). Allen was a police sergeant with Hazlet Township who retired under an ordinary disability allowance from the PFRS. A year later, the PFRS board determined that he was fit for reemployment. The Township returned Allen to duty as a police officer, rather than a sergeant, and refused to grant him seniority for his prior service, or any guarantee of future employment.

The Merit System Board found that the Township should have reemployed Allen when two police officer positions became vacant. 262 *N.J. Super.* at 442. Citing the PFRS statute, *N.J.S.A.* 43:16A-8(2), the Board also found that Allen should be reappointed to the position of sergeant when the next vacancy occurred. In reviewing the agency's determination, the Appellate Division found that by implication, the PFRS statute mandates that a recovered employee be returned to his former position, along with the cumulation of prior service. 262 *N.J. Super.* at 444-445.

The PFRS statute which governs restoration to active service mirrors the TPAF statute, in that it provides that a member shall return to work "if the report of the medical board shall show that such beneficiary is able to perform either his former duty or any other available duty. ... which his employer is willing to assign him" *N.J.S.A.* 43:16A-8(2). As the PFRS statute and TPAF statute serve the same purpose

and contain substantially the same language, it logically follows that the rationale of *DiMuzio* and *Allen* apply equally to this matter.

Thus, pursuant to *DiMuzio* and *Allen,* petitioner herein is entitled to reinstatement to her last position, *i.e.,* English teacher, if a vacancy exists. If no vacancy exists, then she must be appointed to the next available duty for which she is qualified, that of elementary school librarian. Accordingly, the Board's claim that petitioner's last position, English teacher, was unavailable is irrelevant, for the case law and statute require the employer to appoint her to the next available position. Here, it is undisputed that at the time petitioner was deemed able to return to her employment, there was no open English teacher position. It is likewise undisputed that the next available position for which petitioner was qualified was the elementary school librarian position, which opened in April, 1992. Accordingly, petitioner should be reinstated to the position of elementary school librarian, retroactive to the date the position became available.

Moreover, petitioner's tenure in the position of teacher-librarian further entitles her to the position. As set forth in the Stipulation of Facts, petitioner is certified as a teacher of English and a teacher-librarian. Pursuant to ***N.J.S.A.*** 18A:28-5, a teacher becomes tenured in a position after serving three years and one day. Petitioner served over nine years under the teacher-librarian endorsement, became tenured in that position and is entitled to be reinstated to the position of librarian. As the Commissioner and State Board of Education have repeatedly ruled, tenure is achieved within a position and tenure protection extends to all assignments within that tenured position. *Wallen v. Rancocas,* Com. of Ed. (Oct. 27, 1992); *Howley v. Ewing Twp.* 1982 *S.L.D.* 1328, aff'd., St. Bd. of Ed., 1983 *S.L.D.* 1554; *Kish v. Bor. of Elmwood Pk.,* St. Bd. of Ed. (May 6, 1992).

By contrast, petitioner served only six months as an English teacher, and therefore, is not tenured as an English teacher. Accordingly, petitioner is entitled to the protection of the tenure statutes ***N.J.S.A.*** 18A:6-10, *et seq.,* for her position as a teacher-librarian, but would not be able to claim tenure in the position of English teacher. Moreover, petitioner's tenure as a teacher-librarian was never revoked or lost, as the laws do not provide that a person's tenure is revoked upon retirement. See ***N.J.S.A.*** 18A:28-9. Indeed, the Appellate Division in *Allen* recognized that a public employee returning from retirement is entitled to credit for his or her prior service. Thus, petitioner's tenure and former service in the position of teacher-librarian entitle her to be appointed to that position over a nontenured employee.

For these reasons, petitioner is entitled to be restored to the position of elementary school librarian retroactive to the date the position became vacant.

POINT II

THAT THERE WAS NO POSITION VACANT AT THE TIME MS. BUBLIN WAS ABLE TO RETURN TO SERVICE DOES NOT PRECLUDE HER APPOINTMENT TO THE NEXT AVAILABLE POSITION

The respondent Board may argue that because there was no position available at the time petitioner was certified as medically fit for reemployment, the Board was not required to appoint her to the next available position. This argument is untenable, is not supported by the pension statute, and contravenes the public policy established in *DiMuzio*.

First, the TPAF statute does not prescribe any time limit for restoring a member to his duty. *N.J.S.A.* 18A:66-40. To the contrary, the statute states that "beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service." *N.J.S.A.* 18A:66-40 (a), 3d. para. Thus, the plain language of the statute clearly states that the return to service does not have to be contemporaneous with the time the member is first able to return to service.

Moreover, in *DiMuzio,* the Court implied that if no vacancy exists at the time of recovery, the public employer must return the member to the next available duty - whenever it occurs. *DiMuzio,* unpub. op. at p. 9. As the Court also emphasized, the thrust of the pension statute is to reemploy an able-bodied employee, not to waste pension funds. *DiMuzio,* unpub. op. at p. 9. If the Board's position was correct, and an employee loses her recall rights if there is no position immediately available, then public employees would be encouraged not to seek work, to remain on retirement thereby depleting the pension fund and jeopardizing the members who rightfully deserve it. The Board's argument would completely subvert the purpose underlying the pension statutes, which is to induce able person to enter and remain in public service and to render faithful and continued service. *Geller v. Dept. of Treasury,* 53 *N.J.* 597 (1969).

In addition, petitioner's claim is supported, by analogy, by the tenure statutes. Pursuant to the tenure laws, an employee who has been terminated pursuant to a reduction in force (RIF) is placed on a recall list for reemployment and is to be reemployed whenever a vacancy occurs. *N.J.S.A.* 18A:28-12. See *Mirandi v. West Orange B.O.E.*, St. Bd. of Ed., April 5, 1989. In *Mirandi,* a tenured assistant high school principal was terminated and assigned to a teaching position. When a principalship opened two years later, the petitioner applied but was rejected in favor of a person from outside the district. The State Board of Education found that when a teaching staff member is riffed, he has the right to employment in a position within the scope of his tenured position over an nontenured employee. More importantly, the State Board concluded that the teacher's recall rights prevail even if the vacancy occurred not at the time of the termination, but two years later. Thus, the State Board ruled that Mirandi's tenure status entitled him to the principal position, regardless of when the vacancy occurred.

Here, the pension statute should be liberally construed to effectuate its purpose, which is to induce able-bodied persons to remain in public service. *Geller,* 53 *N.J.* at 598. Thus, the fact that a vacancy did not exist in April, 1991, when petitioner recovered, does not mean that she loses her right to be reinstated or recalled to her former position. The timing of the vacancy is irrelevant, for the statute and case law mandate that a teacher is to be reinstated to her duty as soon as a position becomes available. *DiMuzio; Allen, supra.*

To the extent the Board may argue that her acceptance of alternate employment terminated petitioner's recall rights, the Board is incorrect. Nothing in the statute suggests that acceptance of employment in another school district while awaiting reinstatement constitutes a waiver or abandonment of the member's recall rights to her former position. On the contrary, any such rule must be rejected because nothing in the statute supports that position. *N.J.S.A.* 18A:66-40 (a). Second, any such policy would encourage employees to receive unnecessary pension benefits, which would contravene the public policy underlying pension statutes. Third, the respondent can point to no harm or prejudice by allowing petitioner to work in another school district until a position became available in the Board's school district. If anything, by accepting other employment and removing herself from the pension rolls, petitioner was mitigating her damages, and by doing so, furthering the purpose of the pension statute.

For these reasons, petitioner's motion for summary decision should be granted and she must be reinstated to the position of elementary school librarian retroactive to April 1992, together with back pay, benefits and all other emoluments of employment.

THE BOARD'S POSITION

Statement of Facts

Respondent will rely upon the Stipulation of Facts agreed to by the parties.

POINT I

THE STATE BOARD OF EDUCATION HAS CONSISTENTLY HELD THAT RETIREMENT IS TANTAMOUNT TO RESIGNATION

In a series of decisions reaching back to 1977, the State Board of Education has held that retirement, for any reason, constitutes a resignation. The first reported decision was in the matter of *Laing v. Board of Education of the Township of Edison,* 1977 *S.L.D.* 422, which was subsequently affirmed by an unreported Appellate Division opinion. In that particular case, the petitioner was a tenured teacher, who applied to the TPAF for accidental disability retirement to be effective on September 1, 1973. Subsequently, the Board of Education approved petitioner's application for a retirement. When the TPAF denied petitioner's request for an accidental disability retirement, and instead retired her on an ordinary disability retirement, petitioner sought to have the TPAF rescind the determination on her retirement, and in fact, the TPAF thereafter reinstated her. The Commissioner, in affirming the hearing examiner's report held:

> This act [the application for retirement to the TPAF] terminated her employment just as effectively as the acceptance of a letter of resignation would have done. Petitioner clearly intended to terminate her employment and she did so. 1977 *S.L.D.* at 426.

That decision was affirmed by the Appellate Division in an unreported opinion which appears at 1978, *S.L.D.* 1025. The Court there held:

> Petitioner's status as a terminated employee of the Edison Township Board of Education was not altered by the action of the Teachers' Pension and Annuity Fund in rescinding her retirement. The Fund, and the Board of Education, are separate and independent agencies. (cases cited) (at p. 1026 of the Appellate Division *Laing* decision in appendix A).

Thereafter, in the matter of the *School District of the City of Newark v. Rosalind Kopel,* 1982 *S.L.D.* 17, which was affirmed by the Commissioner, in part relying upon *Laing,* it was held that respondent's application for retirement and acceptance of the respondent's application for retirement terminated her employment as effectively as if she had submitted a letter of resignation. More importantly, in that case respondent raised the issue present here regarding the interpretation and applicability of *N.J.S.A.* 18A:66-40 (a). The Administrative Law Judge therein, the Honorable August E. Thomas, found, under the statute governing disability retirement, that it was entirely discretionary with the Board whether to rehire respondent or not.

Finally, in the last decision involving a school employee, *Young v. Board of Education of the City of West Orange,* 1987 *S.L.D.* 69, affirmed by the Commissioner and the State Board on September 4, 1987, the Administrative Law Judge, Honorable Elinor R. Reiner, addressed the issue of a retirement terminating petitioner's employment. The Court again held that retirement constitutes a resignation and relinquishment of tenure and seniority rights.

The State Board of Education has general jurisdiction of all educational matters within the State of New Jersey. The respondent Board would certainly have the right to rely upon the state of the law, as it existed in 1991, when it received notice from the Teachers' Pension and Annuity Fund that petitioner was found to be able to return to her former duties as a teacher. Instead of approving her disability retirement, the Board could have sought her dismissal for incapacity under *N.J.S.A.* 18A:6-10 or her resignation. The Board relied, however, upon petitioner's application for retirement as being effectively a resignation, and chose to approve the same on that basis. The recent Appellate Division case, *In the Matter of John J. Allen,* 62 *N.J. Super.* 438 (App. Div. 1993) is readily distinguishable. In that case, *Allen,* a police sergeant who had been retired from active duty on an accidental disability pension, upon being certified by the Policemen and Firemen Retirement

System as medically fit for reemployment, immediately sought return to the Hazlet Township Police force, at his prior position, and with his former seniority. The Court there held that, under those circumstances, *Allen* was entitled to be reinstated. In this case, petitioner never even contacted the Point Pleasant Borough Board of Education to find out if any positions were available, and, instead, accepted employment with the Board of Education of South Amboy as a teaching staff member, where she has remained employed to the present time. Petitioner was even assigned a new number in the Teachers' Pension and Annuity Fund. There is nothing to indicated that petitioner lost the benefit of her prior years of experience as a teacher by accepting employment in South Amboy.

The unreported Appellate Division decision in *Board of Police Commissioners, City of East Orange v. Board of Trustees, Police and Firemen's Retirement System and Anthony DiMuzio,* (Docket No. A-2629-87TS, decided May 18, 1989) is also distinguishable for the same reason the *Allen* decision is distinguishable. In that case, also involving a police officer, the defendant DiMuzio, upon being certified as available to return to active duty, immediately sought reinstatement with his former employer. The Court held that since DiMuzio had been a lieutenant at the time of his disability retirement, then he should be returned to a lieutenant's position if one were available, and otherwise return to active duty police work.

Such a result may be workable in a situation involving a police officer, but ignores the requirement for certification applicable to teachers. If, as petitioner now apparently contends, she is entitled to her former seniority, then that seniority would have attached upon the certification by the TPAF that she was able to return to work. Followed to its logical conclusion, if petitioner then enjoyed her former seniority with the respondent, Board of Education, she would have been entitled to assert a claim upon a position for which she was certified held by a teaching staff member with less seniority. Instead, petitioner chose her present employment in South Amboy.

In the *East Orange* case, the Court noted that the thrust of the statute, *N.J.S.A.* 43:16A-8, similar to *N.J.S.A.* 18A:66-40, was to reemploy an able-bodied police officer and not to waste pension funds. Certainly, that is not the situation that exists here. In fact, petitioner became employed less than one month after the date of her notice from the TPAF that she was physically able to return to work, remains employed, and will gain tenure in the South Amboy school system on April 9, 1994.

POINT II

BY HER APPLICATION FOR RETIREMENT, AND SUBSEQUENT ACCEPTANCE OF ANOTHER POSITION PETITIONER LOST ALL TENURE RIGHTS

Under *N.J.S.A.* 18A:66-39, before the granting of a disability retirement, either ordinary or accidental, a physician designated by the Board must certify that a teacher is physically or mentally incapacitated for the performance of duty. In fact, on September 14, 1982, petitioner certified to the TPAF that she was incapacitated for further service as a teacher. Thus, if read *in para materia,* the statutes themselves lead to the inescapable conclusion that a retirement is equivalent to a resignation and loss of tenure status. Thus, even if petitioner had sought reemployment, she would have returned as a nontenured teacher, since her admitted physical incapacity in September of 1982 constituted sufficient grounds for loss of tenure. Even if petitioner were now to return to a position with the respondent Board, she would do so as a nontenured teacher, and the Board could not be compelled to retain her in her position.

While a police officer enjoys protection under civil service in his job, after a brief probationary period, the concept of tenure is unique to the educational system. The right of tenure is earned only after three years as a teaching staff member in a particular school system. When a teacher leaves to take a position in another system, tenure does not follow that teacher. By her acceptance of other employment, petitioner lost her rights to tenure in the Point Pleasant Borough school system.

POINT III

PETITIONER'S APPEAL IS UNTIMELY AND BARRED BY *N.J.A.C.* 6:24-1.2

N.J.A.C. 6:24-1.2 requires that an appeal from a decision of a Board of Education be filed within 90 days of the date of such decision. If petitioner's logic is followed to its ultimate conclusion, she is, in effect, claiming that she was entitled to a position with the respondent Board of Education upon the TPAF certifying that she was physically capable of returning to work, and its directive to the Board as

contained in its letter of March 12, 1991. It is undisputed that the Board did not offer any position to the petitioner at that time or any other time.

If petitioner's rights came into being with the March 12, 1991, letter, then her petition should have been filed by June 11, 1991. Instead, petitioner's appeal is dated August 12, 1992, more than one year later. Her petition is substantially out of time, and she has not shown the requisite good cause for an extension of time limit on filing an appeal.

In essence, if anything, it was the Board's inaction in 1991 that gives rise to any color of rights in the petitioner, and not the subsequent vacancy and application by petitioner in 1992. Further, it can well be argued that her failure to even contact the Board about a position, and her acceptance of a position with the South Amboy Board of Education, works an estoppel against petitioner's untimely claim.

The Board, therefore, argues that petitioner's appeal be denied and that summary decision be entered on its behalf.

PETITIONER'S REPLY

First, to the extent the Board argues that a retirement terminates petitioner's rights to reemployment upon recovery from a disability, respondent is wrong. Respondent argues that pursuant to *Laing v. Board of Education of the Township of Edison,* 1977 *S.L.D.* 422, a retirement constitutes a resignation. Petitioner does not contest the general holding of *Laing; i.e.,* that a retirement constitutes a resignation. However, the analysis of *Laing* must be reviewed in the context in which the case was brought. There, the petitioner had retired on an ordinary disability retirement, changed her mind and sought to have the TPAF rescind her retirement. Once the TPAF rescinded her retirement, the teacher sought reinstatement to her former position. The Commissioner held and the Appellate Division affirmed that the TPAF's action in rescinding the petitioner's retirement had no effect on the board of education and therefore, the teacher had no right to receive her job back.

Laing had nothing to do with recall rights pursuant to *N.J.S.A.* 18A:66-40 (a). *Laing* simply involved the case of a teacher who retired, changed her mind and then sought reinstatement. There, the petitioner did not and could not have sought

reinstatement pursuant to the recall statute, *N.J.S.A.* 18A:66-40(a), because the TPAF did not certify her as able to return to work. The recall statute requires that if the medical board certifies that the employee is able to return to his duty, the member *shall* report for duty. Accordingly, for purposes of the recall statute, a retirement is not equivalent to a resignation. The petitioner in *Laing* could not rely on the recall statute in her claim for reinstatement to her former position. Here, petitioner Bublin retired on an accidental disability retirement, was certified to return to duty by the TPAF and therefore, was entitled to return to her former position pursuant to *N.J.S.A.* 18A:66-40(a).

Indeed, the Board's position, that a retirement is a resignation which means that you have absolutely no right to reemployment, is illogical and in fact, vitiates the disability recall statute, *N.J.S.A.* 18A:66-40 (a). The statute was clearly adopted to address the specific instance where a member is retired due to medical disability and later recovers to the point where she is able to return to work. As set forth in the petitioner's initial brief, the statute requires the employer to reinstate the employee to his or her former position or comparable duty.

In addition, respondent's position would reverse the Appellate Division precedent as established in *Board of Police Commissioners, City of East Orange v. PFRS, DiMuzio,* (App. Div. Docket No. A-2629-87T8), unpub. May 18, 1989 and *In the Matter of John J. Allen,* 262 *N.J. Super.* 438 (App. Div. 1993), both which held that a public employer lacks the discretion to deny reinstatement and must return a recovered employee to his former position. To the extent the respondent argues that *City of Newark v. Kopel,* 1982 *S.L.D.* 17, grants an employer the discretion to rehire and employee or not, *Kopel,* is inconsistent with both *DiMuzio* and *Allen.* In *DiMuzio* and *Allen,* the Appellate Division reviewed pension statutes identical to *N.J.S.A.* 18A:66-40(a) and found that when a public employee recovers from a disability, his employer is *required* to appoint him to his former duty or any other available duty. Thus, to the extent the Commissioner in *Kopel* found that *N.J.S.A.* 18A:66-40(a) allows a board of education the discretion to deny reappointment to a recovered employee, *Kopel* is no longer good law.

Respondent's position, that retirement is equal to a resignation, is likewise inconsistent with the pension fund's decision in *Township of Dover v. Bd. of Trustees, Public Employees' Retirement System,* (PERS), 92 *N.J.A.R.* 2*d.* 83 (1992), where PERS found that there is a difference between a voluntary resignation and a retirement and recall rights. Reviewing the PERS statute, *N.J.S.A.* 43:15A-44 (a), which is similar

to the TPAF recall statute at issue here, the agency concluded that a teacher who had retired from his employment three months before filing for a disability pension was not entitled to the protection of the recall statute. In distinguishing the facts from the situation in *DiMuzio, supra*. PERS stated "where an individual chooses to sever his employee status with an employer prior to even applying for a disability benefit" he has no "former employer" with whom he can seek reinstatement. 92 *N.J.A.R. 2d.* at 85. Accordingly, when the member recovered from his disability, the agency found that his employer had no duty to reinstate him under the disability recall statute because he had severed his employer/employee relationship prior to applying for disability. In this case, petitioner never resigned, but rather, retired on an accidental disability retirement allowance, and therefore, the rationale of *DiMuzio* applies and her employer has the duty to reinstate her.

The Board further argues that petitioner's Petitioner of Appeal was untimely. *N.J.A.C.* 6:24-1.2 (c) provides that a petition of appeal must be filed no later than the 90th day from the date of receipt of the notice of a final order ruling or other action by the district board of education ... which is the subject of the appeal. *N.J.A.C.* 6:25-1.2 (c). The Board argues that the 90 day time limit runs from the date of the TPAF's letter notifying the Board of Education that petitioner was able to return to work, that is March 12, 1991. Such an argument is ridiculous, for there was no vacancy at that time, and no decision or final order by the Board which petitioner could appeal. Petitioner's cause of action did not accrue and could not accrue *until* a position opened, and the Board notified her that she would not be appointed to the position.

In addition, as established in *DiMuzio* and *Allen, supra.,* the disability recall statutes contemplate that a vacancy may not exist at the time the member recovers from his or her disability. Accordingly, the only logical reading of the TPAF statute in conjunction with *N.J.A.C.* 6:24-1.2 (c), is that petitioner's recall rights did not arise until there was an open position and the Board refused to appoint her to that position. See *Kaprow v. Board of Ed., Berkeley Twp.,* 131 *N.J.* 572 (1003) where the Court found that the 90 day time period for filing an appeal runs from the time that the employee is denied reinstatement to a position and each vacancy is a new cause of action. It is undisputed that there was no vacancy in the Point Pleasant school district for which petitioner was qualified until April of 1992 and the Board denied her the position of elementary school librarian on June 8, 1992.

Thus, petitioner's cause of action did not accrue until June 8, 1992, the time she was notified that she would not be appointed to the teacher-librarian position. Ms. Bublin's Petition of Appeal was filed on August 13, 1992, well within the 90 day time frame and accordingly, her appeal is timely.

For these reasons, summary decision should be granted in favor of petitioner and an order should be entered reinstating her to the position of elementary school librarian retroactive to April, 1992, together with full back pay and other benefits and rights of employment.

DISCUSSION AND CONCLUSIONS

The stipulated facts in this matter demonstrate that petitioner was granted an accidental disability retirement by the TPAF. Pursuant to *N.J.S.A.* 18A:66-40, petitioner was subject to periodic medical examinations by TPAF physicians to determine whether the disability which existed at the time of retirement continued, vanished, or materially diminished. The statute *N.J.S.A.* 18A:66-40, continues to state in part, that:

> ... If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty *which his former employer is willing to assign him,* the beneficiary shall report for duty; such a beneficiary while he awaits his restoration to active service.

In the instant matter, it was petitioner who initiated the medical examinations and requested of the Board of Trustees of the TPAF that her accidental disability retirement benefits be terminated and that she be reinstated to the TPAF rolls. Following its review of medical documentation provided by petitioner, the Board of Trustees assigned an independent physician to examine petitioner and her medical documents. The independent physician submitted a report to TPAF, which was reviewed by the State Medical Panel. The Board of Trustees of TPAF then found that petitioner's disability had disappeared or substantially diminished to the point that petitioner was able to resume her former duties of a teacher without restriction. The TPAF Board of Trustees then ordered the Point Pleasant Borough Board of Education, by way of letter dated March 12, 1991, to reinstate petitioner to her former duty or any other comparable duty.

The Board did not respond to the TPAF letter dated March 12, 1991. Nor did petitioner contact the Board to express an interest in or advise the Board she was able to return to duty. Had petitioner done so, the Board would have had the opportunity of requesting its independent medical evaluation of petitioner. Rather, petitioner accepted employment with the Board of Education of the City of South Amboy commencing April 8, 1991, less than 30 days from receipt of the TPAF letter dated March 12, 1991. Petitioner remains in the employ of the South Amboy Board.

The issue presented by this matter has clearly been disposed of by the Commissioner and the Courts in the matter of *Laing, supra.* The Honorable August E. Thomas summarized the *Laing* case in *Kopel, supra.,* where he observed that:

> Her reinstatement in TPAF gave rise to the issue of whether the Board was obligated to reinstate the petitioner to a position as a teacher, or whether her retirement, which was effectuated by the TPAF, permanently terminated her employment irrespective of the later decision by TPAF to rescind its earlier determination. The Commissioner determined that the petitioner forfeited her tenure entitlement because of her retirement, and that the determination by the TPAF to reinstate her in its pension fund did not automatically compel the Board to reinstate her as a teacher. 1977 *S.L.D.* at 426. This decision was affirmed by the State Board of Education. The Commissioner found that there was no distinction between the Board's approval of the petitioner's application for retirement and a letter of resignation. 1977 *S.L.D.* at 426.
>
> Petitioner submitted her application for retirement to the TPAF and made this fact known to the Superintendent on September 4, 1973. The Board considered this a *fait accompli* and approved her retirement from the Edison school district. This act terminated her employment just as effectively as the acceptance of a letter of resignation would have done. *Ibid.*
>
> The Commissioner's decision was affirmed by the Appellate Division, 1978 *S.L.D.* 1025. (1982 *S.L.D.* 20)

Judge Thomas continued to observe that case law hold that the State Department of Education and the Board of Trustees of the TPAF are independent and separate agencies. Any determination by the TPAF that a teacher is capable of returning to duty after accepting retirement cannot affect the prior determination

by a board of education to accept the teacher's retirement and resignation. Judge Thomas cites the words of the Appellate bench in *Laing* where it said:

> Petitioner's status as a terminated employee of the Edison Board of Education was not altered by the action of the Teacher's Pension and Annuity Fund in rescinding her retirement. The Fund and the Board of Education are separate and independent agencies. *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 33 (App. Div. 1974); *Swan v. Bd. of Trustees of Teachers' Pension Fund,* 85 *N.J. Super.* 226, 232 (App. Div. 1964). They function within unrelated areas of responsibility and the determination of the Fund could not effect consequences of policy lying within the authority of the Board of Education. 1977 *S.L.D.* at 1026. (1982 *S.L.D.* 21)

The *Kopel* case further observes that *N.J.S.A.* 18A:66-40 makes it entirely discretionary for the Board to determine whether or not to rehire a retired employee. Judge Thomas properly observes:

> Policy considerations also support this determination. The Board must be able to plan and determine the size and status of its work force in order to operate effectively and efficiently. 1982 *S.L.D.* 22

Based upon the Commissioner's holding in *Laing,* and as affirmed by the Appellate Division of Superior Court, I **CONCLUDE** that petitioner herein effectively resigned her position when she accepted accidental disability retirement from the TPAF on or about January 18, 1982, and forfeited her tenure rights.

I **CONCLUDE,** therefore, that petitioner has no entitlement to any position with the Board.

I **CONCLUDE** that the Board may, in its discretion, consider petitioner for employment if and when she presents herself for a teaching position for which she is qualified and certified.

I **FIND and CONCLUDE** that pursuant to the holding in *Kaprow, supra.* petitioner's Petition of Appeal as timely filed.

Having arrived at such conclusions, it is not necessary to address the issue of the affect of petitioner's employment with another board of education subsequent to the termination of her disability retirement.

ORDER

Accordingly, it is hereby **ORDERED** that the herein Petition of Appeal be **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8 December 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/13/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 21 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 6846-92

CHRISTINE BUBLIN,	:	
		COMMISSIONER OF EDUCATION
PETITIONER,	:	
		DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4 and N.J.A.C. 1:1-18.8.

In her exceptions, petitioner references her briefs before the ALJ, which, the Commissioner notes, are well summarized in the initial decision. Petitioner further argues that Laing, supra, was wrongly relied upon by the ALJ to conclude that retirement on an accidental disability pension constituted a resignation and forfeiture of tenure rights on petitioner's part. Laing, petitioner argues, is distinguishable from the circumstances herein in that Laing was not seeking reinstatement pursuant to N.J.S.A. 18A:66-40(a) after being certified by the pension system ("TPAF") as recovered and able to return to work; this case, in contrast, turns precisely on petitioner's rights under that statute, and the ALJ ignored the Appellate Division decisions (DiMuzio, supra, and Allen, supra) specifically addressing this issue and standing for the

proposition that disability retirement cannot be viewed as a resignation so as to vitiate an able-bodied employee's statutory reinstatement rights. (Petitioner's Exceptions, at pp. 1-5)

Petitioner also argues that, to the extent that the ALJ's decision implies that petitioner had an obligation to present herself to the Board for employment in order to dispute a failure to reinstate her, nothing in statute imposes such a requirement and the Board was clearly on notice by TPAF (Stipulation of Facts, Exhibit A) that it was obliged to reemploy her or keep her on a preferred reemployment list if no position was then available. The Board neither acted on nor appealed TPAF's order, choosing instead to simply ignore it; this lack of action on the Board's part cannot now be used as a basis to deny petitioner her rights. Neither can the Board rely on claims of disruption to district staffing patterns or employees, as the position sought by petitioner was vacant. (Petitioner's Exceptions, at pp. 5-6)

Upon review of the record and consideration of the arguments raised, the Commissioner cannot concur with the ALJ that Laing, supra, and Kopel, supra, dispose of the central issue of this matter so as to end the inquiry into petitioner's claimed entitlement.

Initially, the Commissioner notes that Laing does indeed stand for the general proposition that retirement constitutes a resignation from the district of employment, and that action by

TPAF to rescind such retirement does not necessarily obligate a district to reinstate a retired employee. Following this reasoning when turning to the specific question of a disabled employee's entitlement to reemployment under N.J.S.A. 18A:66-40, the Commissioner in Kopel interpreted that statute to make reinstatement by the former employer following a determination of fitness by the TPAF medical board optional rather than mandatory. However, in the wake of subsequent Court decisions (DiMuzio, supra, and Allen, supra), this interpretation can no longer be held valid. To the contrary, in interpreting language substantially identical to that of N.J.S.A. 18A:66-40, the Court explicitly stated that

> ***Although the statute does not expressly compel the appointing authority to restore the employee to his former position, the [Police and Fireman's Retirement System] Board's construction of N.J.S.A. 43:16A-8(2) is fully consonant with the legislative purpose. It is apparent that the grant of disability retirement is conditioned on the continuation of the incapacity. If the retired employee regains the ability to perform his or her duties, the Legislature mandated that he or she be returned to the former position. The Legislature clearly recognized that individuals returning from a disability retirement are in a unique situation, plainly different from all other employees returning to active service. Their separation from employment is unlike the voluntary separation of other civil servants whose seniority is not aggregated. In our view, N.J.S.A. 43:16A-8(2) contemplates that a restoration to employment return the formerly disabled individual as nearly as possible to the status held at the time he or she was pensioned.*** (Allen, supra, at 444)

Thus, the Commissioner can reach no other conclusion but that upon TPAF's determining that a disabled retiree is able to return to work, that retiree has a right to return to his or

her former position. That right, however, is not unfettered, as noted by the Court in DiMuzio:

> We recognize that N.J.S.A. 43:16A-8 does not require that an additional slot be created if there are no existing vacancies at the former duty level, nor does it require that incumbents be "bumped" to make room. The PFRS order does not so require, nor do we. If a vacancy at the former level, i.e., lieutenant, then existed the order (and the statute) requires that DiMuzio be there placed. If not, he should be returned to "any other available duty" to which the Department "is willing to assign him."*** (DiMuzio, supra, slip opinion at p. 9)

Thus, in the case of petitioner, the threshold questions to be resolved are what constitutes petitioner's "former duty," that is, whether her statutory entitlement is limited to a vacancy in the position of Teacher of English (the position from which she retired) or extends to her prior position of Teacher-Librarian; and what is the effect, if any, of her acceptance and retention of employment in another district.

In the latter regard, given that there was no vacancy in the respondent school district in any position arguably appropriate for petitioner until the opening of the Teacher-Librarian vacancy disputed herein, the Commissioner finds that petitioner cannot be faulted, let alone found to have waived her cause of action or entitlement to reemployment, as a result of accepting a position elsewhere in the interim. To the contrary, such action served the public interest in its return of a formerly pensioned employee to productive service, and there is nothing in controlling statute that appears to contemplate termination of either employee rights or employer

obligation by virtue of alternative employment pending availability of an employee's former position. Neither does the Commissioner find this conclusion to be altered by petitioner's "failure" to contact the district, both because she did so at the first available opening and because the statutory scheme (as well as the TPAF letter orders effectuating it, Stipulation of Facts, Exhibits A and B) clearly envisions the initial impetus for reemployment to be the responsibility of the former employer.

In the former regard, the question of the duty to which petitioner is entitled, the Commissioner here interprets the controlling statute and the case law arising from analogous statutes in other public pension systems to contemplate a mandatory return to the duties and status held by a disabled retiree at the time of his or her retirement, when those duties are available, with return to other duties in the absence of a vacancy in the former position being solely at the discretion of the employing board. Where, as herein, a returning retiree whose former position is not vacant seeks appointment to duties other than those held at the time of retirement, a board "may not arbitrarily refuse" such assignment, but may do so on a reasonable basis. DiMuzio, supra, slip opinion at p. 9.

Thus, as petitioner's statutory entitlement in this matter is to the position of Teacher of English, in which there is undisputedly no vacancy at present, the instant claim must be decided based upon whether the Board's refusal to appoint petitioner to her prior position of Teacher-Librarian was

arbitrary, capricious or unreasonable. Because the present record, developed in response to other issues, will not permit such a determination, a remand is necessary for further argument and factfinding to this end.

Accordingly, for the reasons expressed herein, the initial decision of the Office of Administrative Law is reversed and remanded for finding and recommendation as to whether the Board's refusal to appoint petitioner to the position of Teacher-Librarian was arbitrary, capricious or unreasonable.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JANUARY 26, 1994

DATE OF MAILING - JANUARY 26, 1994

*The Commissioner notes that petitioner's initial employment date was September 1969, not September 1968 as stated in the initial decision at p. 2. (Stipulation of Facts, at p. 1)

12-94

EDU #6846-92
C # 12-94
EDU # 889-94
C # 221-96R
SB # 46-96

CHRISTINE BUBLIN,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY, : DECISION

RESPONDENT-CROSS/APPELLANT.:

Remanded by the Commissioner of Education, January 26, 1994

Decision on remand by the Commissioner of Education, May 29, 1996

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

For the Respondent-Cross/Appellant, Popovitch & Popovitch (Daniel S. Popovitch, Esq., of Counsel)

The decision of the Commissioner of Education dismissing the petition in this matter is affirmed substantially for the reasons expressed therein.[1]

December 4, 1996

Date of mailing DEC 06 1996

[1] We stress in so doing that we dismiss the petition for the reasons expressed by the Commissioner and not on the basis of petitioner's failure to accept the Board's offer of employment as an English teacher in June 1996, as urged by the Board in its motion to dismiss.

13-94

IN THE MATTER OF THE TENURE	:	
HEARING OF BONNIE SPEARMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF NEWARK, ESSEX COUNTY.	:	
	:	

JANUARY 26, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6099-93
AGENCY DKT. NO. 159-5/93

IN THE MATTER OF THE TENURE HEARING OF BONNIE SPEARMAN, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

Carolyn Ryan Reed, Esq., Associate Counsel, for petitioner Newark Board of Education
(Marvin L. Comick, General Counsel)

John L. Schettino, Esq., for respondent
(Giblin & Giblin, attorneys)

Record Closed: December 8, 1993 Decided: December 14, 1993

BEFORE **STEPHEN G. WEISS**, ALJ:

This teacher tenure case was transmitted to the Office of Administrative Law by the Department of Education on June 25, 1993 and involves certified charges against respondent of inefficiency and unbecoming conduct. The inefficiency charge related that respondent had demonstrated various inadequacies while a teaching staff member since 1986 and had not corrected the same despite having been afforded an opportunity to do so. The unbecoming conduct count alleged that respondent had, among other things, inappropriately disciplined her students by the use of corporal punishment on November 28, 1989 and June 15, 1990

Following transmittal of the case to the Office of Administrative Law I communicated with counsel and conducted a settlement conference. At that time, early August 1993, counsel advised that they were negotiating a settlement and hoped to reach agreement in the near future. Thereafter, in late August 1993, a second case involving the parties was transmitted by the Department of Education to the Office of Administrative Law involving an appeal by Spearman from the withholding of her 1992-93 increments. The transmittal from the Department in that case (OAL Docket No. EDU 8096-93) recommended that the case be consolidated with the pending tenure matter.

Recently, a stipulation of settlement was submitted to me for review. That document, which contains the signatures of the attorneys and the respondent, reveals that the parties have agreed to resolve the two matters in the following fashion. Spearman will immediately upon acceptance of the settlement resign her employment as a tenured teacher and will withdraw her appeals from the Board's withholding of her 1991-92 and 1992-93 increments. The Board will withdraw the tenure charges and restore to Spearman the salary which was withheld during her 120-day suspension following certification of the charges, as well as the increments she would have received for the above two school years. In reaching this agreement the settlement document recognizes with respect to the corporal punishment allegations that those three alleged incidents occurred three and one-half to four years ago. Thus, it will be difficult to substantiate the allegations because of the length of time that has elapsed since their occurrence and the problems this creates with respect to recollection of witnesses, especially students. In addition, the settlement recognizes that there would be substantial potential legal and related administrative costs to the Board if the matter were to proceed to a full hearing and decision by the Commissioner and that the respondent would be in a full pay status during this period. Accordingly, the stipulation recognized that the settlement is in the best interests of the school system and also would be in the public interest. For her part, respondent recognized that despite the withdrawal of tenure charges, as part of any settlement the Commissioner of Education remains free to refer the matter to the State Board of Examiners for possible revocation of her certification.

Finally, attached to the stipulation was an affidavit by respondent attesting to the fact that since her suspension she has not been employed nor received any wages from any other employer.

I have reviewed the entire file in this matter, including the charges and the documentary evidence in support thereof, the certificate of determination, the contents of the stipulation of settlement and my own notes of the settlement conference. In my view, the Board's determination to enter into a settlement is appropriate despite the existence of the corporal punishment allegations for the reasons set forth by the Board in the stipulation.

I am aware, of course, of the particularly close attention which is paid by the Commissioner to the settlement of tenure matters where allegations of corporal punishment are made. In this case I agree with the Board that in light of the length of time that has elapsed since the alleged corporal punishment took place, and the problems of proof attendant thereto, a settlement of this case involving the resignation of the respondent does not subvert the interests of the public. Accordingly, I have reviewed the file and the terms of the settlement, and I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures appearing on the settlement agreement; and

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

I therefore **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and order that the parties comply with its terms and that these proceedings be **CONCLUDED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 14, 1993
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

12/16/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

MARVIN L. COMICK
GENERAL COUNSEL
NEWARK BOARD OF EDUCATION
2 CEDAR STREET
NEWARK, NEW JERSEY 07102
(201) 733-7139

IN THE MATTER OF THE TENURE HEARING OF BONNIE SPEARMAN, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	: BEFORE THE COMMISSIONER OF : EDUCATION OF THE STATE : OF NEW JERSEY : OAL DOCKET NO. EDU-06099-93N :

STIPULATION OF SETTLEMENT

The parties to the above matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following:

1. The Respondent, Bonnie Spearman, was employed by the Petitioner School District of the City of Newark (hereinafter "Board") as of September 2, 1986 and in due course became tenured.

2. It is alleged by the Board of Education that on a number of occasions during her employment, the Respondent exhibited performance problems which were documented in observations conducted by four administrators employed by the Board, as well as in memoranda prepared by supervisors and administrators.

3. As a result of these problems, the Board voted in May, 1993 to certify tenure charges against the Respondent, Bonnie Spearman. The charges filed against the Respondent were charges of Inefficiency and unbecoming conduct.

4. The Board alleges that Ms. Spearman's performance problems resulted in several incidents involving inappropriate disciplinary methods.

5. While said incidents are incorporated in the second tenure charge of unbecoming conduct, it is recognized that such incidents occurred four years ago and may be difficult to substantiate because of difficulties encountered in students as witnesses and the length of time that has elapsed since the alleged incidents have occurred.

6. Respondent Bonnie Spearman fully understands that the Commissioner of Education may refer this matter to the State Board of Examiners for possible revocation of her certification.

7. In addition to the time, legal and related administrative costs regarding the continuation of the tenure charges proceeding against Ms. Spearman, in light of the passage of 120 days since her suspension without pay, the Board will have to effect salary payments to Ms. Spearman.

8. It is in the best interest of the school system to settle this matter, in that it is cost effective, within the public interest and adequately addresses the concerns of the school district.

Based upon the aforementioned, the parties hereby agree to resolve this matter on the following basis:

1. Bonnie Spearman will immediately resign her position of employment as a teacher with the Newark Board of Education. She will also withdraw her two appeals of the Board's withholding of her increment for the 1991-92 and 1992-93 school year.

2. The Board will pay Ms. Spearman for the 120 day suspension plus the two increments Ms. Spearman would have received for the 1991-92 and 1992-93 school years.

3. The Board of Education will withdraw the tenure charges in this matter.

4. This agreement represents a complete resolution of all issues outstanding between the parties. Neither party shall be entitled to any relief in this matter other than the relief set forth in this agreement.

5. The provisions of the Stipulation of Settlement are specifically conditioned on the approval by the Commissioner of Education of the acceptance of this Stipulation and the approval of any Order of Dismissal which may be recommended by the Administrative law judge. If the Commissioner shall reject the provisions of this Stipulation of Settlement and/or an Order of the Administrative Law Judge, then the parties shall revert to the position they were in, without prejudice to any and all matters then to be determined.

MARVIN L.COMICK
General Counsel
Newark Board of Education

By: Carolyn Ryan Reed
CAROLYN RYAN REED
Associate Counsel
Attorney for Petitioner

By: John J Schettino
JOHN L. SCHETTINO, ESQUIRE
Giblin & Giblin
Attorney for Respondent

Dated: November 10, 1993

By: Bonnie Spearman
BONNIE SPEARMAN
Respondent

GIBLIN & GIBLIN, ESQS.
Two Forest Avenue
Oradell, NJ 07649
(201) 262-9500

IN THE MATTER OF BONNIE SPEARMAN, A TENURED STAFF MEMBER OF THE SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	AFFIDAVIT IN RESPONSE TO TENURE CHARGES

I, Bonnie Spearman, of full age, being duly sworn according to law, upon my oath, depose and say the following:

1. Since my suspension from the Newark Board of Education, I have not been employed nor have I received wages from any other employer.

Bonnie Spearman
BONNIE SPEARMAN

Sworn to and subscribed before me on
this 30 day of December, 1993.

John J Ackerman
ATTORNEY AT LAW
STATE OF NJ

4d

OAL DKT. NO. EDU 6099-93

IN THE MATTER OF THE TENURE	:	
HEARING OF BONNIE SPEARMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF NEWARK, ESSEX COUNTY.	:	
	:	

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

For the reasons expressed by the ALJ, the Commissioner approves the settlement terms, as they comport with the Cardonick standards for review of settlements in tenure matters. In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846. However, because the allegations of corporal punishment raised in the tenure charges are sufficiently serious to warrant consideration by the State Board of Examiners, this matter shall be forwarded to that body for action regarding respondent's certificate as it deems appropriate.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement, but shall be forwarded to the State Board of Examiners as set forth above.

IT IS SO ORDERED.

JANUARY 26, 1994

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 26, 1994

14-94

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

JANUARY 26, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8096-93
AGENCY DKT. NO. 464-9/92

BONNIE SPEARMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

John L. Schettino, Esq., for petitioner
(Giblin & Giblin, attorneys)

Carolyn Ryan Reed, Esq., Associate Counsel, for respondent
(Marvin L. Comick, General Counsel)

Record Closed: December 8, 1993 Decided: December 14, 1993

BEFORE **STEPHEN G. WEISS,** ALJ:

This matter was transmitted to the Office of Administrative Law by the Department of Education on August 26, 1993 as a result of the filing of an appeal by Bonnie Spearman from the determination by the respondent to withhold her salary and adjustment increments for the 1992-93 school year. When the file was transmitted, the Department recommended that I consider consolidating this case with a pending tenure matter against petitioner entitled *In the Matter of the Tenure Hearing of Bonnie Spearman,* OAL Docket No. EDU 6099-93.

Recently, a stipulation of settlement with respect to the tenure case has been submitted to me for review and is attached hereto. In it the parties have agreed that as part of a comprehensive resolution of their disputes the instant case will be withdrawn. In the event the Commissioner rejects the tenure settlement, the petitioner has reserved the right to reinstate this action and to proceed to a hearing with respect to the increment withholdings. As part of the settlement, the Board has agreed to restore all increments withheld from petitioner.

Having reviewed the stipulation of settlement submitted in connection with the tenure matter and having recommended its approval to the Commissioner of Education, I similarly recommend its approval in this case. This initial decision-settlement has been submitted to the Commissioner simultaneous with the initial decision-settlement in the tenure case so that the Commissioner may review them together.

I have reviewed the file and the terms of the settlement, and I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures appearing on the settlement agreement; and

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

I therefore **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and order that the parties comply with its terms and that these proceedings be **CONCLUDED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 14, 1993
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

12/16/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 1993
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

MARVIN L. COMICK
GENERAL COUNSEL
NEWARK BOARD OF EDUCATION
2 CEDAR STREET
NEWARK, NEW JERSEY 07102
(201) 733-7139

IN THE MATTER OF THE TENURE HEARING OF BONNIE SPEARMAN, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	: BEFORE THE COMMISSIONER OF : EDUCATION OF THE STATE : OF NEW JERSEY : OAL DOCKET NO. EDU-06099-93N :

STIPULATION OF SETTLEMENT

The parties to the above matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following:

1. The Respondent, Bonnie Spearman, was employed by the Petitioner School District of the City of Newark (hereinafter "Board") as of September 2, 1986 and in due course became tenured.

2. It is alleged by the Board of Education that on a number of occasions during her employment, the Respondent exhibited performance problems which were documented in observations conducted by four administrators employed by the Board, as well as in memoranda prepared by supervisors and administrators.

3. As a result of these problems, the Board voted in May, 1993 to certify tenure charges against the Respondent, Bonnie Spearman. The charges filed against the Respondent were charges of Inefficiency and unbecoming conduct.

4. The Board alleges that Ms. Spearman's performance problems resulted in several incidents involving inappropriate disciplinary methods.

5. While said incidents are incorporated in the second tenure charge of unbecoming conduct, it is recognized that such incidents occurred four years ago and may be difficult to substantiate because of difficulties encountered in students as witnesses and the length of time that has elapsed since the alleged incidents have occurred.

6. Respondent Bonnie Spearman fully understands that the Commissioner of Education may refer this matter to the State Board of Examiners for possible revocation of her certification.

7. In addition to the time, legal and related administrative costs regarding the continuation of the tenure charges proceeding against Ms. Spearman, in light of the passage of 120 days since her suspension without pay, the Board will have to effect salary payments to Ms. Spearman.

8. It is in the best interest of the school system to settle this matter, in that it is cost effective, within the public interest and adequately addresses the concerns of the school district.

Based upon the aforementioned, the parties hereby agree to resolve this matter on the following basis:

1. Bonnie Spearman will immediately resign her position of employment as a teacher with the Newark Board of Education. She will also withdraw her two appeals of the Board's withholding of her increment for the 1991-92 and 1992-93 school year.

2. The Board will pay Ms. Spearman for the 120 day suspension plus the two increments Ms. Spearman would have received for the 1991-92 and 1992-93 school years.

3. The Board of Education will withdraw the tenure charges in this matter.

4. This agreement represents a complete resolution of all issues outstanding between the parties. Neither party shall be entitled to any relief in this matter other than the relief set forth in this agreement.

5. The provisions of the Stipulation of Settlement are specifically conditioned on the approval by the Commissioner of Education of the acceptance of this Stipulation and the approval of any Order of Dismissal which may be recommended by the Administrative law judge. If the Commissioner shall reject the provisions of this Stipulation of Settlement and/or an Order of the Administrative Law Judge, then the parties shall revert to the position they were in, without prejudice to any and all matters then to be determined.

MARVIN L.COMICK
General Counsel
Newark Board of Education

By: Carolyn Ryan Reed
CAROLYN RYAN REED
Associate Counsel
Attorney for Petitioner

By: John J. Schettino
JOHN L. SCHETTINO, ESQUIRE
Giblin & Giblin
Attorney for Respondent

Dated: November 10, 1993

By: Bonnie Spearman
BONNIE SPEARMAN
Respondent

GIBLIN & GIBLIN, ESQS.
Two Forest Avenue
Oradell, NJ 07649
(201) 262-9500

IN THE MATTER OF BONNIE SPEARMAN, A TENURED STAFF MEMBER OF THE SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	AFFIDAVIT IN RESPONSE TO TENURE CHARGES

I, Bonnie Spearman, of full age, being duly sworn according to law, upon my oath, depose and say the following:

1. Since my suspension from the Newark Board of Education, I have not been employed nor have I received wages from any other employer.

BONNIE SPEARMAN

Sworn to and subscribed before me on this 30 day of December, 1993.

Attorney at Law
State of NJ

OAL DKT. NO. EDU 8096-93

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

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

In view of approval of the settlement in the related tenure matter captioned In the Matter of the Tenure Hearing of Bonnie Spearman, School District of the City of Newark, Essex County, OAL DKT. No. EDU 6099-93, the Commissioner approves the settlement terms herein and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

JANUARY 26, 1994

DATE OF MAILING - JANUARY 26, 1994

15-94

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Educational Services Commission sought finding that it had no obligation to refund monies paid to it for auxiliary services by participating member school districts because it is not a school district. Department alleged result of audit was that Commission owed $1,299,100 with interest earned.

ALJ concluded that petitioner is not a school district pursuant to N.J.S.A. 18A:1-1 but that as a matter of law unused Chapter I funds ($321,487) and unused Chapters 192/193 funds ($977,613) retained by petitioner were to be returned to Department. Moreover, interest earned was also due since the law clearly does not allow any educational services commission to make a profit.

Commissioner concurred with findings and conclusions of initial decision and order with clarification that while not a profit-making entity, petitioner must reimburse $1,299,100 plus interest earned on such funds to State Department of Education. Petition was dismissed.

JANUARY 26, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 2030-92
and 1479-91
AGENCY DKT. NO. 392-12/90

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,
Petitioner,
v.
STATE DEPARTMENT OF EDUCATION,
Respondent.

Anthony B. Vignuolo, Esq., for the petitioner (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Arlene G. Lutz, Deputy Attorney General, for the respondent (Frederick P. DeVesa, Acting Attorney General of New Jersey, attorney)

Record Closed: September 8, 1993 Decided: December 13, 1993

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

This matter concerns the petition, dated November 29, 1990, filed by the Middlesex County Educational Services Commission (MCESC), the petitioner, objecting to the results of the audit of its business records by the State Department of Education (Department), the respondent (EDU 1479-91). The Department, in answer to the petition, alleges that the audit results are correct. The Department has since amended its answer to include a counterclaim which asks that the petitioner be ordered to return $1,299,100, with interest, and that the Department be afforded other appropriate relief, including but not limited to cost of suit and attorney fees.

PROCEDURAL HISTORY

In February 1989, the respondent issued a report regarding the audit of the MCESC's business records for the school year July 1, 1987, through July 30, 1988 (P-8). Contained in this report was the determination that the MCESC had a liability to the respondent in the amount of $1,372,000. This amount was composed of $1,165,320 in accrued funds for Chapters 192/193 services (N.J.S.A. 18A:46A-1 and 18A:46-19.1) and $206,680 in accrued funds for Chapter 1 services. After departmental appeals, the total amount alleged due was reduced to $1,299,100 (P-9).

The funds for Chapters 192/193 services are monies made available by the Legislature to provide auxiliary services for pupils in the non-public schools (Chapter 192), and remedial services for handicapped children in non-public schools (Chapter 193). The funds for Chapter 1 services are monies made available by the Legislature pursuant to the Federal Education Consolidation and Improvement Act for basic skills and remedial education for educationally deprived pupils.

The MCESC's petition was transmitted to the Office of Administrative Law on February 13, 1991, for a determination pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The initial prehearing conference date was adjourned at the request of the respondent and a telephone prehearing conference took place on July 10, 1991. At this prehearing conference, Anthony B. Vignuolo, Esq., on behalf of the petitioner, requested that the matter be adjourned and placed on the inactive list of cases. Mr. Vignuolo stated that the petitioner and several other educational services commissions were planning to initiate a joint action in the Superior Court regarding one of the issues in this matter and requested that the hearing before me not be scheduled until there was a determination by the Superior Court. Deputy Attorney General Arlene G. Lutz, on behalf of the respondent, concurred with this request. Thereafter, I had a telephone status conference with the parties on February 19, 1992.

A case was initiated by the MCESC in the Law Division of the Superior Court, Middlesex Cty. Educ. Serv. Comm'n v. State Dep't of Educ., Dkt. No. L-013889-91. On February 24, 1992, Superior Court Judge Steven L. Lefelt dismissed the matter, with prejudice, for lack of jurisdiction, failure to exhaust administrative remedies and

violation of the entire controversy doctrine. Further, Judge Lefelt transferred the case so that it could be consolidated with the proceeding before me.

On March 5, 1992, I again discussed the matter with the parties and it was determined that Mr. Vignuolo, on behalf of the petitioner, would submit a motion for partial summary judgment as to the threshold issues in this matter, namely, whether the MCESC is a school district, and whether it is subject to a legal obligation to return unused funds paid to it for auxiliary services by participating school districts. Briefs regarding these issues were received from the parties.

Judge Lefelt's remand was formally transmitted to the Office of Administrative Law by the Department (EDU 2030-92). During a telephone conference call on September 8, 1992, the parties agreed that the matters should be consolidated as suggested in Judge Lefelt's decision. On September 11, 1992, I ordered that the matters be consolidated.

After reviewing the briefs submitted by the parties, I denied the motion for partial summary judgment. I concluded that although the MCESC is not a school district pursuant to N.J.S.A. 18A:1-1, or as that term is used in N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq., it had not shown that it was legally entitled to retain unused Chapters 192/193 funds or unused Chapter 1 funds. A copy of this order is attached and incorporated herein.

The hearing as to the remaining issues took place on July 13 and 14, 1993, and after receipt of briefs, the record in this matter closed on September 8, 1993. I requested an extension of time for the filing of my initial decision and by order dated October 25,1993, the date for the filing of the initial decision was extended until December 13, 1993.

Since neither the testimony nor the briefs presented any additional reasons as to why the MCESC is entitled to retain either Chapters 192/193 or Chapter 1 funds, I **CONCLUDE** that the Department is entitled to the reimbursement of these monies as a matter of law.

As stated, the Department seeks the return of $1,299,100. This amount is comprised of alleged unused Chapters 192/193 funds amounting to $977,613, and unused Chapter 1 funds amounting to $321,487. It was stipulated at the hearing that the Chapter 1 unused funds are no longer an issue in the matter.

The remaining issues are:

1. Whether the $977,613 is unused Chapters 192/193 funds or money received by the MCESC pursuant to the Teacher Quality Education Act (TQEA), N.J.S.A. 18A:29-5 to -16.

2. If the $977,613 is TQEA funds, whether any or all of it must be returned to the State of New Jersey.

In its brief dated September 3, 1993, the MCESC argued that the burden of proof as to the remaining issues is on the Department. The Department disagreed and argued in its response brief dated September 9, 1993, that the burden of proof is on the MCESC since it was challenging the findings of the audit. I agree with the Department's position and **CONCLUDE** that the burden of proof is on the petitioner. In general, the party asserting a claim, such as the MCESC in this matter, has the burden to prove the claim, WCI - Westinghouse Inc. v. Edison Tp., 7 N.J. Tax 610, 630 (Tax Ct. 1985), aff'd 9 N.J. Tax 86 (App. Div. 1986).

FACTUAL DETERMINATIONS

When the TQEA passed in 1985, it established a minimum salary of $18,500 for teachers, and it did not include teachers employed by the educational services commissions. The statute was amended, effective March 28, 1986, to include full-time teachers employed by educational services commissions, L. 1986, c. 9. Initially, the MCESC was advised that hourly teachers would not be eligible to receive the minimum salary; later, however an opinion of the Attorney General advised the educational services commissions that full-time hourly teachers were entitled to the minimum salary established by the TQEA.

Jane A. Henry, the superintendent of the MCESC, testified about the efforts to get teachers employed by the educational services commissions eligible for the minimum salary established by the TQEA. It was clear from her testimony that the MCESC's teachers would not have been paid the TQEA's minimum salary unless the law was amended and construed to cover them and the MCESC was able to get the TQEA funds to pay for the increase in salaries. Once it was determined that the MCESC's teachers were eligible, the MCESC applied for TQEA funds to pay for the difference in the salaries retroactive to the 1985-86 school year. Between January

12, 1987, and February 1, 1988, the State of New Jersey sent several checks to the MCESC for TQEA funds for the 1985-86 and 1987-88 school years (P-1 through P-5). It was recognized at the hearing that $34,500, part of the money provided by one of the checks (P-2), was not TQEA funds. Therefore, the total TQEA funds received by the MCESC was $977,613.

After is was determined that the MCESC teachers were entitled to the TQEA's minimum salary, checks for the 1985-86 and 1987-88 school years were issued to the teachers in January 1988. This was before all of the TQEA funds were received by the MCESC. It is the MCESC's position that it used Chapters 192/193 funds to pay the teachers, and that it can retain and use the TQEA funds for future teacher salaries in accordance with the provisions of N.J.S.A. 18A:29-5.10 and N.J.A.C. 6:20-5.6.

Ronald E. Bolandi, the assistant superintendent and school business administrator for the Middletown School District, was hired by the MCESC to review its records (R-1). Mr. Bolandi testified that the TQEA funds received by the MCESC should have been placed in a restricted account rather than in the account containing Chapters 192/193 funds. According to Mr. Bolandi, the MCESC should have created a separate account similar to the one created by the Union County Educational Services Commission (P-10). The MCESC recognizes that it was an error not to place the TQEA funds in a separate, restricted account and it is the MCESC's position that because the TQEA funds were placed in the wrong account, its own audit (R-2) as well as the Department's audit (P-8) has incorrectly identified the $977,613 as unused Chapters 192/193 funds. Notwithstanding its failure to place the TQEA funds into a separate, restricted account, it is the MCESC's position that the $977,613 is not unused Chapters 192/193 funds, but is unused TQEA funds which can be retained by the MCESC.

Melvin Wyns, the director of the Bureau of School Finance, and Robert W. Ortley, a supervising auditor, both employed by the Department, testified that the $977,613 was correctly identified as unused Chapters 192/193 funds. Mr. Wyns stated that TQEA funds had to be used for the teacher salary differential payments, the extra salary payments made in order to reach the minimum salary of $18,500. Mr. Wyns stated that the law recognizes that a school district or an educational services commission may receive more TQEA funds than needed to make the teachers salary differential payment since in its application for the funds it may not have anticipated all future staffing and salary changes. According to Mr. Wyns, this surplus would be a small amount, and the law allows the school district or

the educational services commission to retain such surplus funds and to place the funds into a reserve account for future salary payments. Mr. Wyns stated that even if the MCESC used the Chapters 192/193 account to make the teacher salary differential payments, this account should have been reimbursed once the TQEA funds were received by the MCESC.

Mr. Ortley, who did the audit in issue, stated that based on his review of the MCESC's records, all of the TQEA funds were used to make the salary differential payments. Mr. Ortley stated that the TQEA funds had to be used for this purpose. According to Mr. Ortley, the MCESC would be double billing if it used Chapters 192/193 funds instead of the TQEA funds to make the teacher salary differential payments. Chapters 192/193 funds are provided by the State of New Jersey to school districts for certain services, and some of the school districts contract with the MCESC to provide these services. These school districts use their Chapters 192/193 funds to pay the MCESC for these services. Part of the Chapters 192/193 funds paid to the MCESC by the school districts is used by the MCESC to pay the regular salaries of the teachers employed by the MCESC. If the MCESC also used the Chapters 192/193 funds to make the salary differential payments, it would be receiving funds from two sources to make the payments.

I **FIND** the facts as stated above are not in dispute, except for the question of whether the funds used to make the teacher salary differential payments in January 1988 were Chapters 192/193 funds, TQEA funds, or a combination of Chapters 192/193 and TQEA funds. It is the position of the MCESC that it used exclusively Chapters 192/193 funds. It is the position of the Department that the MCESC used at least some TQEA funds, since two of the TQEA checks were sent to the MCESC before it paid the teachers and since Ms. Henry clearly stated that the MCESC teachers would not have received the salary differential payments if the MCESC had not been provided with TQEA funds. Based on the testimony and exhibits admitted into evidence, I **FIND** that it is impossible to determine whether the teacher salary differential payments in January 1988 were solely from Chapters 192/193 funds or from a combination of Chapters 192/193 and TQEA funds. The TQEA funds were placed by the MCESC into its Chapters 192/193 account and the teacher salary differential payments were made from that account. Two of the TQEA checks were sent to the MCESC before the teachers were paid in January 1988, and commingled with money already in the account.

FIRST ISSUE

A. Arguments of the Parties

As to the first issue, namely whether the $977,613 is TQEA funds or unused Chapters 192/193 funds, the pertinent provision of the TQEA provides:

> Any funds appropriated for salaries that will be replaced by State aid as authorized pursuant to this amendatory and supplementary act shall not be transferred to or used for any purpose other than the payment of teaching staff member salaries.
>
> [N.J.S.A. 18A:29-5.10]

In addition, the regulation that is pertinent to this issue, N.J.A.C. 6:20-5.6*, in part provides:

> (e) For the 1985-86 school year and subsequent school years a district board of education shall not transfer out of any line item account or program category any funds replaced by State aid received pursuant to the "Teacher Quality Employment Act." . . .
>
> (h) Any part of the funds replaced by State aid as determined in (f) and (g) above which remains unexpended at the completion of the 1985-86 school year or a subsequent school year shall be held as a special balance appropriated which shall only be used in subsequent school years for the payment of full-time teaching staff member salaries for duties which are part of the teaching staff member's regular contractual responsibilities.

Also pertinent to this issue is N.J.S.A. 18A:6-62.1 which was enacted at the same time that the Legislature provided that teachers employed by educational services commissions were entitled to the benefits of the TQEA. This statute provides:

> Tuition rates for the 1985-86 school year and subsequent years for educational services commissions shall be determined after excluding the applicable salaries funded by section 7 of P.L. 1985, c. 321 (C. 18A:29-5.6) and shall be certified by the Commissioner of Education.

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* The cited provisions of N.J.A.C. 6:20-5.6 (P-11) were in effect at the time of the audit and are applicable in this matter. This regulation was thereafter twice amended, R. 1990 d. 393, effective August 6, 1990 (18 N.J.R. 1199(a), and R. 1991 d. 459, effective September 3, 1991 (23 N.J.R. 2634(a)).

Although this provision was repealed by L. 1990, c. 254, §18 (effective July 1, 1990), it is applicable in this matter since the rights and obligations of parties are determined by the law in effect at the relevant time.

In summary, the MCESC stated that it used Chapters 192/193 funds for the teacher salary differential payments in January 1988 and argued that it is entitled to retain the $977,613 it received as TQEA funds in a restricted account for future salary payments. The MCESC argued that pursuant to the clear meaning of N.J.S.A. 18A:29-5.10 and N.J.A.C. 6:20-5.6, the MCESC is entitled to retain this money since it constitutes unused TQEA funds. The MCESC cited a number of cases holding that where the language of the statute is clear and unambiguous, the court's sole function is to enforce the statute in accordance with its terms and provisions, State Department of Law and Public Safety, Division of Motor Vehicles, v. Bigham, 119 N.J. 646 (1990), Dacunzo v. Edgye, 19 N.J. 443 (1955). The MCESC argued that Mr. Wyns's testimony that TQEA funds had to be used for the teacher salary differential payments is not consistent with the provisions of the TQEA. Also, the MCESC disagreed with Mr. Ortley's statement that if the MCESC did not use the TQEA funds for the teacher salary differential payments, it would be double billing for such payments. The MCESC admitted that it made a bookkeeping error by not placing the TQEA funds in a separate account, but argued that these funds can be clearly identified and can be retained by the MCESC for future salary payments pursuant to the provisions of N.J.S.A. 18A:29-5.10.

The Department argued that Mr. Wyns correctly testified that the TQEA funds were intended to be used for the teacher salary differential payments and that the law requires that the TQEA funds be used for that purpose. According to the Department, if the MCESC used any Chapters 192/193 monies to make the teacher salary differential payments it should have reimbursed the Chapters 192/193 account for such payments when the TQEA funds were received by the MCESC. The Department noted that N.J.S.A. 18A:6-62.1 clearly shows that this was the intent of the TQEA, since it requires the exclusion of TQEA monies from the tuition rates charged by the educational service commissions. The Department argued that to hold to the contrary would be to allow the educational services commissions to double bill, since the commission would be getting both funds from the participating school districts (Chapters 192/193 funds) and direct TQEA funds to make the teacher salary differential payments. The Department argued that the clear intent of the Legislature was that the TQEA funds would be used to make the teacher salary payments. Although the TQEA allows unused TQEA funds to be

retained in a reserve account, the Department argued that funds to be placed in such an account are limited to TQEA funds not needed to make the teacher salary differential payments, and that it was never intended that a school district or an educational services commission be allowed to use other funds to make the teacher salary differential payments and to put into the reserve account the full amount of the TQEA funds.

Further, the Department argued that since the MCESC never put into evidence the exact amount of money it used to make the teacher salary differential payments in January 1988, it is reasonable to conclude as determined by both the MCESC's own audit and the State audit that all of the TQEA funds were used for the teacher salary differential payments.

The Department disagreed with the MCESC's argument that if it had used a separate account for the TQEA funds initially, there would have been no question that it could retain said funds. The Department argued that the fact that the Union County Educational Services Commission used a separate account for its TQEA funds and has not been asked to reimburse said funds is immaterial since there has not yet been a Department audit of the books of the Union County Educational Services Commission.

The Department argued that the MCESC should be ordered to reimburse the $977,613, with interest.

B. - Legal Conclusions

After reviewing the arguments of the parties, I agree with the Department's arguments that the provisions of the TQEA clearly intended to request that the funds provided to the school districts and the educational services commissions be used to meet the statutory teacher minimum salary requirement. In general, the interpretation of a statute by the agency in change of its enforcement is entitled to substantial weight, Matter of Bd. of Educ. of Town of Boonton, 99 N.J. 523, 532 (1985); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 69-70 (1978); N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 575 (1978). In this matter the Department's interpretation is reasonable and clearly consistent with the legislative history of the TQEA and the amendment to add teachers employed by educational services commission to the TQEA program. Also, the provisions of N.J.A.C. 6:20-5.6 are consistent with the Department's interpretation of the provisions of the TQEA.

The court's have recognized that an agency's interpretation of its own regulation is entitled to due deference by a court which is called upon to interpret the regulation, Venuti v. Construction Bd. of Appeals, 231 N.J. Super. 546, 554 (App. Div. 1989); DiMaria v. Bd. of Tr. of P.E.R.S., 225 N.J. Super. 341, 351 (App. Div. 1988). In addition, the testimony of Ms. Henry clearly indicated that the MCESC did not intend to increase salaries to the minimum teacher salary provided by the TQEA unless it qualified for funds pursuant to the TQEA.

Also, I agree with the Department's position that the provisions of the TQEA clearly limit the amount of money placed in the reserve account to any funds left over after the teacher salary differential payments are made, and the law does not allow either a school district or an educational services commission to make the teacher salary differential payments using other available funds and to place all of the TQEA funds in the reserve account. The Legislature's intent is clear, especially when N.J.S.A. 18A:29-5.10 is read in conjunction with N.J.S.A. 18A:6-62.1. If any Chapters 192/193 funds were used by the MCESC for the January 1988 teacher salary differential payments, those funds were borrowed for this purpose and the Chapters 192/193 account had to be reimbursed once the TQEA funds were received by the MCESC. I agree with the Department's argument that to hold to the contrary would allow the MCESC to get funds from two different sources for the teacher salary differential payments. My conclusion herein is consistent with the determination in Essex Cty Educ. Serv. Comm'n v. State Dep't of Educ., 93 N.J.A.R. 2d (EDU) 522, adopted, Dep't of Educ. (June 8, 1993).

Therefore, I **CONCLUDE** that the MCESC used its TQEA funds to make the teacher salary differential payments, and that the $977,613 is unused Chapters 192/193 funds. I **CONCLUDE** that the MCESC should reimburse the amount of $977,613 to the Department.

The Department argued that in addition to this money, it is also entitled to receive any interest earned by the MCESC on its Chapters 192/193 account. Since the law clearly does not allow any educational services commission to make a profit, I **CONCLUDE** that the MCESC should also return to the Department any interest earned by retaining the $977,613.

SECOND ISSUE

It is not necessary for me to address the second issue, namely, whether the MCESC can retain all or part of the $977,613, since I have concluded that based on the evidence presented, all of this money is Chapters 192/193 funds which have to be returned to the Department. However, the Department has recognized the possibility that the MCESC received more TQEA funds than were needed to make the teacher salary differential payments in January 1988. If the MCESC had presented proof that it had received more TQEA funds than needed to make the January 1988 payments, it would be entitled to retain such excess funds in a special account for future teacher salary payments. Since no such proof was presented, I agreed with the Department's argument that it is reasonable to assume that all the TQEA funds were used for the teacher salary differential payments, as shown by the MCESC's audit and the State audit. I **CONCLUDE**, however, that my decision is not intended to foreclose the right of the MCESC to submit information to the Department detailing the exact amount of TQEA funds it used to make the teacher salary differential payments in January 1988, and if that sum is less than $977,613, to request that it be allowed to retain the difference in a special reserve account for future teacher salaries. Even though the MCESC did not present such evidence during this hearing, I **CONCLUDE** that it should not be foreclosed from doing so in the future.

CONCLUSIONS

For the reasons stated above, I **CONCLUDE** that the $977,613 is Chapters 192/193 unused funds and that the MCESC is to return to the Department the amount of $977,613, plus any interest earned on this amount. Also, I **CONCLUDE** that the MCESC has retained unused Chapter 1 funds in the amount of $321,487, and that the MCESC is to return to the Department this amount plus any interest earned on it. In addition, the Department has presented no legal arguments to support its demand for additional relief such as court costs and attorney costs, and therefore I will not order any such relief.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 13, 1993
Date

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

12/13/93
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

P-1 Copy of the check stub for a check to the Middlesex County Educational Services Commission from the State Department of Treasury, in the amount of $25,229

P-2 Copy of the check and the check stub sent to the Middlesex County Educational Services Commission from the State Department of Treasury in the amount of $256,410

P-3 Copy of the check and the check stub sent to the Middlesex County Educational Services Commission from the State Department of Treasury, in the amount of $4,979

P-4 Copy of the check and the check stub sent to the Middlesex County Educational Services Commission from the State Department of Treasury, in the amount of $577,559

P-5 Letter from Melvin L. Wyns to Jane A. Henry, dated January 11, 1988, with attachments

P-6 Part of the 1987-88 audit of the records of the Middlesex County Educational Services Commission by its accounting firm, Bernard Lipman and Associates

P-7 Part of the 1987-88 audit of the records of the Middlesex County Educational Services Commission by its accounting firm, Bernard Lipman and Associates

P-8 Letter from Richard M. Kaplan to Burton Edelchick, dated February 15, 1989, with attachments

P-9 Letter from Edward D. Kent to Jane A. Henry, dated June 15, 1990, with attachments

P-10 Letter from Vincent B. Calabrese to Edward M. Hartnett, dated October 15, 1986, with attachments

P-11 Copy of N.J.A.C. 6:20-5.6 in effect at the time of the audit of the 1987-88 financial records of the Middlesex County Educational Services Commission

For the Respondent:

R-1 Letter from Ronald Bolandi and Annette Bunting to Jane Henry, dated December 4, 1989

R-2 The complete audit report of the financial records for the fiscal year ending June 30, 1988, of the Middlesex County Educational Services Commission, prepared by Bernard Lipman and Associates

WITNESSES:

For the Petitioner:

Jane A. Henry
Ronald E. Bolandi

For the Respondent:

Melvin L. Wyns
Robert W. Ortley

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
CN 049
QUAKERBRIDGE PLAZA, BLDG. #9
TRENTON, NEW JERSEY 08625
(609) 588-6573

BEATRICE S. TYLUTKI
ADMINISTRATIVE LAW JUDGE

October 30, 1992

Anthony B. Vignuolo, Esq.
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North Brunswick, New Jersey 08902

Arlene Lutz
Deputy Attorney General
Division of Law
Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

RE: MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION v. STATEMENT DEPARTMENT O EDUCATION
OAL DKT. NOS. EDU 2030-92 and 1479-91
AGENCY DKT. NO. 392-12/90

Dear Counsel:

Enclosed please find a copy of the order issued in the above captioned matter.

This order may be reviewed by **DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Sincerely,

Beatrice S. Tylutki
Administrative Law Judge

BST:cad
Enclosure:

cc: Joanne Restivo - OAL

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
OAL DKT. NOS. EDU 2030-92 and 1479-91
AGENCY DKT. NO. 392-12/90

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,
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STATE DEPARTMENT OF EDUCATION,
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Arlene G. Lutz, Deputy Attorney General for the respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

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

This matter concerns the petition filed by the Middlesex County Educational Services Commission (MCESC), the petitioner, regarding its objections to an audit of its business records by the State Department of Education (Department), the respondent (EDU 1479-91).

On or about February 1989, the respondent issued a report of an audit of the MCESC's business records for the period July 1, 1987, through July 30, 1988. In this report, it was determined that the MCESC had an alleged liability to the respondent in the amount of $1,372,000.

This amount is composed of $1,165,320 in accrued funds for Chapters 192/193 services (N.J.S.A. 18A:46A-1 and 18A:46-19.1) and $206,680 in accrued funds for Chapter 1 services. After departmental appeals, the total amount alleged due was

reduced to $1,299,100. The funds for Chapters 192/193 services refer to monies made available by the Legislature to provide auxiliary services for pupils in the non-public schools (Chapter 192), and remedial services for handicapped children in non-public schools (Chapter 193). The funds for Chapter 1 services refer to monies made available by the Legislature pursuant to the Federal Education Consolidation and Improvement Act for basic skills and remedial education for educationally deprived pupils.

The MCESC's petition was transmitted to the Office of Administrative Law on February 13, 1991, for a determination pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The initial prehearing conference date was adjourned at the request of the respondent and a telephone prehearing conference took place on July 10, 1991. At this prehearing conference, Anthony B. Vignuolo, Esq., on behalf of the petitioner, requested that the matter be adjourned and placed on the inactive list of cases. Mr. Vignuolo stated that the petitioner and several other educational services commissions were planning to initiate a joint action in the Superior Court regarding one of the issues in this matter and requested that the hearing before me not be scheduled until there was a determination by the Superior Court. Deputy Attorney General Arlene G. Lutz, on behalf of the respondent, concurred with this request. Thereafter, I had a telephone status conference with the parties on February 19, 1992.

A case was initiated by the MCESC in the Law Division of the Superior Court, Middlesex Cty. Educ. Services Comm'n. v. State Dept. of Educ., Dkt. No. L-013889-91. On February 24, 1992, Superior Court Judge Steven L. Lefelt dismissed the matter with prejudice for lack of jurisdiction, failure to exhaust administrative remedies and violation of the entire controversy doctrine. Further, Judge Lefelt transferred the case so that it could be consolidated with the proceeding before me.

On March 5, 1992, I again discussed the matter with the parties and it was determined that Mr. Vignuolo, on behalf of the petitioner, would submit a motion for partial summary judgment as to the threshold issues in this matter; namely, whether the MCESC is a school district, and whether it is subject to a legal obligation to return unused funds paid to it for auxiliary services by participating school districts. Briefs regarding these issues were received from the parties.

Judge Lefelt's remand was formerly transmitted to the Office of Administrative Law by the State Department of Education (EDU 2030-92). During a telephone conference call on September 8, 1992, the parties agreed that the matters should be consolidated as suggested in Judge Lefelt's decision. I ordered that the matters be consolidated on September 11, 1992.

As to the petitioner's motion, the parties did not enter into a stipulation of facts and the pertinent facts are set forth in the briefs. These facts are not in dispute except for the information contained in the certification in lieu of affidavit of William Searle, which is attached to the respondent's brief. Mr. Vignuolo objected to the certification. According to Mr. Vignuolo, the petitioner has not yet conducted discovery and may contest some of the factual statements in the certification, specifically Sections 8 - 16. Ms. Lutz stated that the respondent had done nothing improper by including the certification.

As stated by Mr. Vignuolo, the issues involved in the motion deal with statutory construction; however, certain basic facts must be presented to set forth the circumstances which give rise to the issues. For this purpose, I will consider only Sections 1 - 7 of Mr. Searle's certification and the rest of the certification is deleted from the record as to this motion. I am taking this action since I recognize Mr. Vignuolo's right to discovery and cross-examination as to facts which may be disputed.

I **FIND** the following facts are not disputed.

The MCESC was organized under the school laws of the State. It was formed in 1979 for the purpose of rendering specialized educational services to the students of its participating school districts and for participating non-public schools. The MCESC employs teachers, principals and other personnel subject to the same employment rules as school districts. The pertinent statute relating to the arrangement with participating school districts provides:

> Any board of education may contract with an educational improvement center, an educational services commission or other public or private agency, other than a church or sectarian school, approved by the commissioner for the provision of auxiliary services. [N.J.S.A. 18A:46A-7]

By statute, the participating school districts apply for state funds to cover the cost of MCESC's services and receive a fixed sum per pupil. Each of the school districts then agrees with the MCESC to pay such sums as were appropriated by the State for the MCESC's services.

As to Chapters 192/193 service funds, the school districts are required to return unused monies to the respondent and these monies go into a pool to be used by other school districts whose actual expenditures exceeded the amount of their state aid, N.J.S.A. 18A:46-14, 18A:46-19.8. No school district is required to make expenditures pursuant to Chapter 192 in excess of the amount of state aid, N.J.S.A. 18A:46A-15; however, the school districts must provide the services for the handicapped children even if the cost exceeds the amount of state aid pursuant to N.J.S.A. 18A:46-19.1 et seq.

Since its creation, the MCESC has had contracts with an average of eighteen school districts to provide auxiliary services. The participating school districts enter into contracts with the MCESC and the consideration for the services comes from the state aid appropriated to the school district. The number of students serviced by the MCESC fluctuates during the course of any school year and on occasion the number of students actually serviced exceeds that provided for in the contractual arrangements. No additional costs are paid by the participating school districts in such cases. The MCESC has retained all unused funds generated as a result of its contractual arrangements with the participating school districts. These funds have now accumulated over an approximate thirteen-year period and it is these monies that the respondent requests be returned to the State.

The first issue as to this motion is whether the MCESC is a school district. On behalf of the petitioner, Mr. Vignuolo argued that the MCESC is a separate and distinct legal entity. N.J.S.A. 18A:6-51(a) defines an educational services commission as follows:

> "Educational Services Commission" means an agency established or to be established in one or more counties for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education.

Based on this definition, Mr. Vignuolo argued that the MCESC is not a school district since it does not meet the statutory definition of a school district, N.J.S.A.

18A:1-1. Mr. Vignuolo argued that the plain meaning of these statutes bars the respondent from considering the MCESC to be a school district, State Dep't of Law and Public Safety, Div. of Motor Vehicles v. Bigham, 119 N.J. 646 (1990); Rosenberg v. North Bergen Tp., 115 N.J. Super. 322 (App. Div. 1971), rev'd, 61 N.J. 190 (1972); Dacunzo v. Edgye, 19 N.J. 443 (1955); Graham v. City of Asbury Park, 64 N.J. Super. 385 (Law Div. 1960), rev'd, 69 N.J. Super. 256 (App. Div. 1961), aff'd, 37 N.J. 166 (1962).

Ms. Lutz argued that the MCESC is a school district or, in the alternative, is a quasi school district since its organization and structure is like that of a school district.

After reviewing the arguments of the parties, I agree with the MCESC's argument that it is not a school district. The definition of an educational services commission clearly distinguishes it from a school district. See, N.J.E.A. v. Essex Cty. Educ. Services Comm'n, OAL DKT. NO. EDU 1666-82 (June 23, 1982) and (Jan. 26, 1984), rev'd and remanded, Comm'r of Educ. (March 22, 1984). In that case, the Commissioner of Education refers to an Attorney General's formal opinion which states:

> [I]t is clear that the Legislature, which has already created local districts to discharge its responsibility under the Education Clause, has further authorized the creation of regional public agencies to assist districts in the performance of their educational functions. [Att'y Gen. Form. Op. 1981 - No. 1, p.8]

In Remedial Educ. & Diag. v. Essex Cty. Educ. Serv. Comm'n, 191 N.J. Super. 524, 527 (App. Div. 1983), the court recognized that the only reason for an educational services commission is "for the purpose of 'providing' the educational services to the public school districts" and the court did not define the educational service commission as a school district. Therefore, I **CONCLUDE** that an educational services commission is a unique and separate entity which is established to assist school districts by providing educational services. Further, I **CONCLUDE** that although there are some similarities between a school district and an educational services commission, there is no authority to conclude that such a commission is a quasi school district.

The second issue is whether the MCESC is subject to a legal obligation to return unused funds paid to it for auxiliary services by participating school districts. As to this issue, I agree with Ms. Lutz's argument that the petitioner did not present a

persuasive argument that it can retain the Chapter 1 service funds. Other than its argument that the MCESC is not a school district, the respondent presented no argument to justify its position as to the Chapter 1 service funds.

As to the unused Chapters 192/193 service funds, Mr. Vignuolo argued that the law clearly requires only school districts to return unexpended funds. The pertinent portions of the applicable statutes provide:

> In the event the expenditure incurred by any district is less than the amount of State aid received, the district shall refund the unexpended State aid. . . . In any year, a district may submit a request for additional aid. . . . If the request is approved and funds are available from refunds received from school districts from the prior year, payments for the additional aid shall be made immediately from those funds. [N.J.S.A. 18A:46A-14]
>
> In the event the expenditures incurred by any district are less than the amount of State aid received, the district shall refund the unexpended State aid. . . . In any year, a district may submit a request for additional aid. . . If the request is approved and funds are available from refunds of the prior year, payment shall be made in the current school year. [N.J.S.A. 18A:46-19.8]

As to these funds, Mr. Vignuolo argued that there is no legal authority to require the MCESC as the provider of the services to return unexpended Chapters 192/193 monies. Mr. Vignuolo argued that the only way the respondent can justify its demand is by considering the MCESC to be a school district. Since there is no legal justification for considering the MCESC to be a school district, Mr. Vignuolo argued that the respondent is not entitled to any reimbursement of monies.

Further, Mr. Vignuolo stated that by statute the school districts can enter into agreements for the auxiliary services with private agencies, and if the school district contracts with such a private agency, the respondent cannot get a return of funds. See, N.J.E.A. v. Essex Cty. Educ. Services Comm'n., 5 N.J.A.R. 29 (Dep't of Education 1981). In addition, Mr. Vignuolo argued that the school district can contract with another school district to provide such services and he represented that the respondent has never requested or investigated to find out whether all the monies were used by that school district.

Ms. Lutz argued that the MCESC as a school district or a quasi school district is subject to the same requirements as a local school district and therefore it is required to return the excess Chapters 192/193 funds.

More specifically, Ms. Lutz argued that the MCESC cannot retain these funds since it is not permitted by law to make and retain a profit. Ms. Lutz argued that the MCESC can exercise only those powers which are given by the Legislature expressly or by necessity or fair implication. See, Bd. of Educ. of Belvidere v. Bosco, 138 N.J. Super. 368 (Law Div. 1975); Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 161 N.J. Super. 67 (App. Div. 1978), aff'd, 79 N.J. 574 (1979); Resnick v. East Brunswick Bd. of Educ., 135 N.J. Super. 257 (Ch. Div. 1975), aff'd, 144 N.J. Super. 474 (App. Div. 1976), rev'd on other grounds, 77 N.J. 88 (1978). Ms. Lutz noted that there is no statutory provision allowing the MCESC to earn a profit.

Ms. Lutz argued that the Chapters 192/193 service funds are dedicated funds and that they cannot be used for other purposes. Further, she noted that it is the legislative intent that the unused monies be returned and placed into a fund to be used by other local school districts. After reviewing the arguments of the parties, I **CONCLUDE** that although the statutory provisions, N.J.S.A. 18A:46A-14 and N.J.S.A. 18A:46-19.8, do not specifically require the MCESC as the provider of the services to refund unused monies, based on the legislative intent, the MCESC comes under the purview of the statutes and is required to make such refunds of unexpended Chapters 192/193 funds.

The legislative intent as to both statutes, N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq., is set forth in the legislative findings which provide:

> The Legislature hereby finds and determines that the welfare of the State requires that present and future generations of school age children be assured opportunity to develop to the fullest their intellectual capacities. It is the intent of this Legislature to insure that the State shall furnish on an equal basis auxiliary services to all pupils in the State in both public and nonpublic schools. [N.J.S.A. 18A:46A-1]
>
> The Legislature hereby finds and determines that the security and welfare of the State require that all school-age children be assured the fullest possible opportunity to develop their intellectual capacities. In order to achieve this objective it is the intent of this Legislature to require that the State and local communities identify and provide remedial services for handicapped children in both public and nonpublic schools. [N.J.S.A. 18A:46-19.1]

The obvious intent of both statutes is to insure that the identified children receive the needed services. Since funds are limited, it is obvious that refunds can play a critical role in achieving the Legislature's objective. The MCESC's position that it can retain unused monies is clearly inconsistent with this legislative intent. The courts have clearly recognized that if the literal reading of a statute will lead to a result not in accordance with the essential purpose of the act, the spirit of the act will control. See, M.P. by D.P. v. Wee Care Day Nursery, 250 N.J. Super. 119 (App. Div. 1991); N.J. Turnpike Employees v. N.J. Turnpike Auth., 200 N.J. Super 48 (App. Div. 1985), certif. den., 101 N.J. 294 (1985); Cty. of Essex v. Waldman, 244 N.J. Super. 647 (App. Div. 1990). It is clearly evident that the policy and purpose underlying the Chapters 192/193 statutes would be hindered if the MCESC is allowed to retain unexpended state aid and to use the monies at its discretion for other purposes.

Although it may be true as argued by the MCESC that a private agency would not be required to refund any unused money, the MCESC is a public entity and as such has a "responsibility [that is] owed to the public which places governmental functions, relationships and practices at a higher level than those of the marketplace." N.J.E.A. v. Essex Cty. Educ. Services Comm'n., supra., 5 N.J.A.R. at 63. Also, as a public entity the MCESC has a unique relationship with the school districts it services. It is doubtful that these school districts would enter into the same type of contractual relationships with a public entity as they have with the MCESC, namely, giving their entire appropriations of Chapters 192/193 service funds to the MCESC.

In addition, it should be noted that N.J.S.A. 18A:6-67 provides:

> **With the approval of the State Board of Education,** the board of directors may enter into a contract with and receive and administer funds and grants from any individual or agency including but not limited to, agencies of the Federal Government of the United states, provided that the funds or grants are for programs or services for which the commission has received approval from the State board pursuant to sections 2 and 19 of P.L. 1968, c. 243 (C. 18A:6-52 and C. 18A:6-69). [emphasized language deleted and underlined language added, L. 1989, c.254].

The key word in this statute is "administer." The word "administer" does not convey ownership. It means to "manage or conduct" and "to serve in the conduct of affairs, in the application of things to their uses." Black's Law Dictionary 41 (5th ed. 1979). The MCESC therefore administrates the Chapters 192/193 service funds for the school districts and it has to comply with the refund statutes since it is acting on behalf of

each participating school district. Further, I agree with Ms. Lutz's argument that by statutes these funds are dedicated for the purposes set forth in N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq.

Lastly, it is questionable whether if the MCESC is allowed to retain the unused Chapters 192/193 service funds, these monies can be used for a capital construction program as planned by MCESC.

As an educational services commission, the MCESC is required to prepare and submit an annual budget, and to notify its participating school districts of their proportionate portion of the expenses, N.J.S.A. 18A:6-62. Although I disagree with the respondent's argument that the retention of the unused Chapters 192/193 service funds would constitute a profit, I find no legal authority to allow the MCESC, at its discretion, to use these monies for unplanned and non-budgeted expenditures. See, N.J.S.A. 18A:6-62, amended by L. 1989, c.254 and L. 1990, c.52.

Based on the above, I **CONCLUDE** that the MCESC's motion for partial summary judgment is hereby denied. Although the MCESC has presented persuasive proof that it is not a school district pursuant to N.J.S.A. 18A:1-1 or as that term is used in N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq., it has not shown at this juncture that it is entitled to retain unused Chapters 192/193 service funds or unused Chapter 1 service funds.

This order may be reviewed by **COMMISSIONER OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

October 30, 1992
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

cad

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4. Respondent, however, filed a timely statement in support of the initial decision.

Upon careful and independent review of the record of this matter, the Commissioner concurs with the findings and conclusions of the Office of Administrative Law as embodied in the initial decision rendered on December 13, 1993, as well as the order dated October 30, 1992. Said determinations hold that while not a school district per se, petitioner herein, as an educational services commission, is under a legal obligation to refund unused Chapter I and Chapters 192/193 services funds and that, consequently, petitioner must refund to the Department of Education $1,299,100 in excess funds, composed of $321,487 in accrued Chapter I services funds, which, by the time of the December 13, 1992 hearing petitioner no longer contested, and $977,613 in accrued Chapters 192/193 services funds.

One last point of the initial decision requires clarification. Interest on the monies due and owing in this matter

cannot be described as a request for prehearing judgment. Pursuant to N.J.A.C. 6:24-1.16(c)1, pre-judgment interest is warranted when it is concluded that "the denial of the monetary claim was an action taken in bad faith and/or has been determined, to have been taken in deliberate violation of statute or rule." No such contention has been advanced or demonstrated in the record of this matter. Rather, the question of interest arises from a determination of whether petitioner's retention of the monies at issue herein resulted in the accumulation of additional interest on such funds. The initial decision correctly observes at page 10 that the law does not allow any educational services commission to be a profit-making entity. However, it bears mentioning that merely because the monies retained by petitioner may have accumulated interest does not necessarily mean that petitioner is thereby a profit-making entity. Nevertheless, if petitioner acquired additional revenues as a result of retaining the sums in question, such interest must also be returned to the Department of Education.

Accordingly, for the reasons expressed in the initial decision and order of the Office of Administrative Law, petitioner is directed to reimburse the amount of $1,299,100 and also to return any interest earned on such monies to the State Department of Education. The Petition of Appeal is therefore dismissed, with prejudice.

IT IS SO ORDERED.

JANUARY 26, 1994

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 26, 1994

15-94

EDU #1479-91 and #2030-92 (consolidated)
C # 15-94
SB # 9-94

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 26, 1994

For the Petitioner-Appellant, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl (Anthony B. Vignuolo, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

We recognize, as did the Administrative Law Judge (ALJ), that there are differences between a district board of education and an educational services commission. Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, decided by the State Board, January 7, 1987, slip op. at 6. See Remedial Educ. & Diag. v. Essex Cty. Educ. Ser., 191 N.J. Super. 524 (App. Div. 1983), certif. denied, 97 N.J. 601 (1984). However, as the ALJ properly concluded, those differences did not entitle Middlesex County Educational Services Commission (MCESC) to retain Chapter 1 service funds in excess of the cost of the services. We further

June 1, 1994

agree that the moneys at issue in this case are unused Chapter 192/193 funds and must be returned to the State. We concur with the ALJ that because New Jersey law does not permit an educational services commission to make a profit, to the extent that these funds can be isolated, MCESC must return any interest it earned on them.

Therefore, as modified herein, we affirm the Commissioner's decision in this case.

June 1, 1994

Date of mailing JUN 03 1994

16-94

G.M., on behalf of his minor child, T.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parent, on behalf of his kindergarten child, sought transfer of child to different school building, alleging arbitrary action by Board.

Initial decision determined Board's action to change geographic designations for attendance at its various kindergarten classes was neither arbitrary nor unreasonable, nor did it result in petitioner's child being treated differently from other similarly situated children. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JANUARY 26, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8098-93
AGENCY REF. NO. 262-7/93

G.M. on Behalf of Minor Child, T.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,
Respondent.

Robert P. Glickman, Esq., for petitioner

Steven S. Glickman, Esq., for respondent
(Ruderman & Glickman, attorneys)

Record Closed: November 15, 1993 Decided: December 15, 1993

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

PROCEDURAL HISTORY

This matter was brought by way of verified petition dated September 9, 1993 to set aside the Board's decision of June 10, 1993 transferring T.M. from the Robert Gordon School to Sherman Elementary School in Roselle Park. Further relief was sought permanently restraining the Board of Education from reassigning and transferring T.M. to the Sherman Elementary School. This petition was filed with the Department of Education on July 12, 1993. An answer was filed on behalf of respondent on August 16, 1993 and the matter was transmitted to the Office of Administrative Law (OAL) on August 26, 1993 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On September 8, 1993 this case was assigned to the undersigned ALJ for hearings. It was scheduled for a in-person prehearing on September 21, 1993. That date was adjourned at the request of petitioner's attorney due to his unavailability. The matter was then scheduled for a telephone prehearing on September 28, 1993. Because of an expedited hearing request due to the nature of the case the matter was also scheduled for a hearing on October 1, 1993. At the time of the hearing petitioner moved to amend the complaint changing the requested relief. Petitioner requested that the relief be changed to delete a request barring T.M.'s transfer and instead, since the transfer had already occurred, to have her moved from the Sherman School back to the Robert Gordon School at the end of the 1993-94 school year. No objection was made to the request to amend the complaint and leave to amend was granted.

On October 1, 1993 testimony was taken and the parties entered into a stipulation of facts. At the close of testimony both sides agreed that the expedited nature of the case no longer existed due to the change in requested relief. The parties were given until November 15, 1993 at their request to submit posthearing memoranda. On that date the record closed.

STIPULATION OF FACTS

Prior to the beginning of the hearing both sides entered into a stipulation of facts as follows:

1. Petitioner resides at 127 W. Street, Roselle Park, New Jersey, and is the parent and guardian of T.M., age five, who began kindergarten in the Roselle Park school system commencing September 1993.

2. Respondent, Roselle Park Board of Education, owns, operates, maintains, sets policy and administers all of the schools in Roselle Park.

3. Respondent, Roselle Park Board of Education, operates, controls, maintains, supervises, sets policy for and administers three elementary schools in the municipality of Roselle Park, namely Sherman Elementary School, Robert Gordon Elementary School and Aldene Elementary School.

4. By letter dated April 19, 1993 from James Banyas, principal at the Robert Gordon Elementary School, petitioner was notified that his daughter, T.M., would be attending Robert Gordon Elementary School commencing September 1993.

5. On or about May 11, 1993 T.M. attended an orientation session at the Robert Gordon Elementary School.

6. By letter dated June 10, 1993 from William Clarke, superintendent of schools for respondent and James Banyas, petitioner was notified that T.M. would be attending the Sherman Elementary School.

7. By letter dated June 11, 1993 from Thomas Faria, prinicipal at the Sherman Elementary School, petitioner was notified again that T.M. would be attending the Sherman Elementary School and that an orientation session was being held on June 17, 1993.

8. By correspondence dated September 1, 1993 from Mr. Faria, petitioner was notified of T.M.'s classroom assignment at the Sherman Elementary School.

9. Beginning September 8, 1993, T.M. began attending the Sherman Elementary School.

10. At its March 8, 1983 open session, the Roselle Park Board of Education passed a resolution memorializing the Board's policy for assigning elementary school students to the various elementary schools owned and operated by the Roselle Park Board of Education.

11. At its May 4, 1993 open session, the Roselle Park Board of Education discussed kindergarten registration and enrollment for the 1993-94 school year.

12. At its June 8, 1993 open session, the Roselle Park Board of Education discussed the assignment of students to the elementary schools for the 1993-94 school year.

13. At its July 27, 1993 regular session, the Roselle Park Board of Education approved the establishment of a new kindergarten section at Sherman Elementary School due to increased enrollment and approved the assignment of students to that section.

As these facts are stipulated to by the parties I **FIND** them to be operational facts in this case.

TESTIMONY

At the time of the hearing G.M., who is the father of the five year old T.M., testified. G.M. is married and in addition to T.M. has a two and one-half year old daughter and his wife is seven and one-half months pregnant.

G.M. and his wife were born and raised in Roselle Park and both of them went to the Robert Gordon School. They have owned their home for nine years and G.M. stated that he thought his child would be able to go to the Robert Gordon School. He himself was raised very close to the Robert Gordon School and his parents, as well as his sister and niece, live in the family which is nearby that school.

G.M. stated that his experience is that the children in the neighborhood had been going to the Robert Gordon School. He also felt that the child would be able to go to her grandparents' house only doors away from the school either at lunchtime or after school. Should T.M. become ill and need attention her grandparents would be the closest to that school. G.M. lives approximately two blocks away from the Robert Gordon School however lives between seven and nine blocks from the Sherman School.

With respect to the Sherman School, G.M. has both walked and driven the route which T.M. must walk. He stated that there are only crossing guards on one block near the school at two different intersections. He stated that he has a safety concern for his child walking to and from the Sherman School. G.M. also produced a

letter from Ronald R. Scull of the Roselle Park police department indicating the lack of crossing guards.

G.M. stated that there would be crossing guards at each intersection for T.M. to travel between their door and the Robert Gordon School. According to G.M. all the other children on his block which is W. Street go to the Robert Gordon School. T.M. has friends in the two-block area with whom she plays. These include twins across the street as well as three children from the nearby families. He stated that T.M. wanted to know why she could not "go to kindergarten" rather than Sherman. This is because she perceived Robert Gordon as being kindergarten and Sherman as being something different. She has expressed a desire to go to the Robert Gordon School. G.M. confirmed that he does not know of any kindergarten children in his area going to the Robert Gordon School this school year. He also indicated that he was unaware of any children in the area attending kindergarten at the Sherman School other than T.M.

G.M. confirmed that the distance between the Sherman and the Robert Gordon Schools may be approximately one-half mile. He also stated that with respect to crossing guards he believed it was the Township rather than the Board of Education that had the ultimate responsibility of placing crossing guards. He stated that Sgt. Scull told him that crossing guards were placed based upon traffic patterns and school zones.

G.M. then traced the route that T.M would have to walk from their home on W. Street in order to get to the Robert Gordon School. She would have to walk up W. Street and turn left onto Grant. She would then have to continue on Grant until arriving at the Robert Gordon School. This would require her crossing at Charles where there is no crossing guard. There would however be a crossing guard available at the corner of Chestnut and Grant.

The respondent produced the testimony of William T. Clarke who is the superintendent of schools in Roselle Park. He has held this position since July 1, 1993. Prior to this he was the business administrator since January 1982.

Mr. Clarke testified that two different members of the school board staff measured the distance between petitioner's home and Robert Gordon School. This

distance is 3 tenths of a mile. The same was done with respect to the distance from petitioner's house to the Sherman School. This distance was 4.5 tenths of a mile. He stated that the total distance between the Robert Gordon School and the Sherman School is approximately one-half mile.

Mr. Clarke stated that it is the Borough of Roselle Park that has jurisdiction over crossing guards rather than the board of education. The police determine the appropriate locations for crossing guards based upon considerations of safety and traffic flow. He was aware that the prior superintendent had contact with the chief of police regarding placement of crossing guards.

The witness described what lead up to the changing of the geographic designation determining which students in town went to the Robert Gordon School and which went to Sherman. He stated that in February 1993 the school principals advertised for "kindergarten roundup." This was a manner of seeking parents with children who were going to be attending kindergarten to come in and register. In March the actual registration took place. In April an orientation was held for the parents and the children. After the April 1993 orientation the board of education got more registrations. That number would have made the classes too large in his estimation. The three elementary principals approached him and discussed the question of class size. As a result of their input he went to the board of education and requested that a third section of kindergarten be put in place. At that time the only available classroom was at the Sherman School. Each class was then determined to be approximately 20 children.

The witness described while using a map (R-1), that previously all students living on Spruce Street went to the Sherman School and those west of Spruce went to the Robert Gordon School. Upon inspection and consideration after listening to the elementary school principals he made the recommendation to the board of education that the designation be moved to Walnut Street. That would cause those students living on Walnut Street to go to kindergarten at the Sherman School. Those living west of that location but east of the Aldene grade school would go to the Robert Gordon grade school. He stated that it was necessary to move the line west and that the line is considered a "floating line" in order to adjust for population. After the change in line to Walnut Street the result was that 11 students were changed from the Sherman School to the Robert Gordon School. This meant

that all kindergarten aged students living on Walnut were reassigned to the Sherman School. Of those 11 students the witness pointed to five other children who live closer to the Robert Gordon School than T.M.

The witness explained that if there are more than 25 students in a class it is necessary to have a teacher's aide present. Although they may have as many as 25 students without an aide, the district policy is to keep the class size to approximately 20 students. At the time the decision was made Robert Gordon had 49 registrations as well as three retentions which would have meant a total of 52 students in two classes. The Board was presented with the option of an increased class size with an aide present. It was not however recommended and the Board did not opt to use this solution. Instead, the Board decided to make a third class at the Sherman School and adjust the geographic line which indicated which student went where.

The witness confirmed that the school has a policy that once a student is reassigned the intent is that they remain at that school. Additionally, under their policy any siblings would not be split up.

Mr. Clarke stated that he did not personally know at the time the decision was made where crossing guards were located.

The witness also stated that the Board took into account that all grades from first and above would continue to go to the Robert Gordon School where they had been previously been placed. This change in demarcation affected only this years' kindergarten class.

As the facts testified to by these two witnesses are not in dispute, I **FIND** these, in conjunction with the stipulated facts, to be the operational facts in this case.

LEGAL DISCUSSION

The only issue in this case is whether the action of the Roselle Park Board of Education changing the geographic designation for attendance in kindergarten was arbitrary, capricious and unreasonable. It was this change in the geographic designation which resulted in T.M. attending the Sherman Elementary School rather than the Robert Gordon Elementary School which she and her family had originally

believed she was to attend. It is well established that actions of local boards that lie within their discretionary powers may not be upset unless they are arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288 (App. Div. 1960). The standard for review at a hearing such as this requires a determination of whether the underlying facts were as those who made the evaluation claimed and also whether it was unreasonable for them to conclude as they did upon those facts bearing in mind that they were experts. The burden of proving unreasonableness is on the appellant. This is not a situation in which the Commissioner of Education will substitute his or her judgment for that of the board of education. *Massaro v. Board of Education of the Borough of Bergenfield*, 165 S.L.D. 84. It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis. *Paddock v. Board of Education of the Borough of Demarest*, 1974 S.L.D. 435.

In this case those facts that were known to the Board of Education at the time they made the decision to move the geographic designation were that the student enrollment was of sufficient size to cause the two classes that were available at the Robert Gordon School to exceed the amount of students they believed appropriate for maximized learning. The number that the Board of Education aims for in classes is 20 students. Up to 25 students in a class may be accommodated by one teacher but any number in excess of that would require the presence of an aide in addition to the classroom teacher. The enrollment, when taking into account new students as well as retentions, would have meant that the classes would also have required an instructional aide. The school board determined that an additional kindergarten class could be set up at the Sherman School and by doing so the Board of Education would be able to keep the number around 20 students for each available kindergarten class. In order to distribute the students evenly it was necessary to change the manner in which they were assigned to the two schools. In changing the geographic designation from Spruce Street to Walnut the Board of Education did not affect only T.M. it also affected ten other kindergarten students living on Walnut Street or in that immediate area. This geographical change was applied uniformly to all kindergarten students who would be attending the Roselle Park schools in that particular year. The Board of Education did not single out T.M. or any

other student and move them based upon considerations other than geography and available classrooms that met the desired size.

It is certainly understandable that G.M. would prefer his child go the Robert Gordon School based upon the easy access to the child's grandparents and other family members from that location. While this is understandable the school board may not look at each individual child and decide whose personal reasons are more compelling for attendance at one school than another. Absent some form of actual impediment to attendance or extraordinary circumstance boards must act in a manner that treats all students equally. While T.M. will have more actual intersections to cross on her way to kindergarten the actual distance from her home to the two schools is not signficantly different. T.M. lives 4.5 tenths of a mile from the Sherman School and 3.0 tenths of a mile from the Robert Gordon School. The question of placement and location of crossing guards is not within the direct control of the Board of Education. It is however a matter of concern both to the Board of Education and to all parents. The police department makes determinations as to the location of school crossing guards based upon their evaluation of traffic flow and school zones. It is within their area of expertise to determine if a crossing guard is necessary or advisable at any particular location. Should parents have a concern with respect to specific intersections they must turn those concerns over to the police department in order that they might reevaluate the appropriate locations for crossing guards.

While the petitioner has expressed very articulately his concerns and reasons for dissatisfaction with the action of the board he has not shown by a preponderance of the evidence that the action of the Board of Education at the time the decision was made to change the geographic designation for attendance at the two schools, was arbitrary, capricious and unreasonable.

CONCLUSION

Based upon the foregoing I **CONCLUDE** that the actions of the Roselle Park Board of Education in changing the geographic designation for students to attend kindergarten in the 1993-94 school year was reasonable.

ORDER

It is hereby **ORDERED** that the petition be and hereby is **DISMISSED.**

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/15/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

12/17/93
Date

DEPARTMENT OF EDUCATION

DEC 23 1993
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witnesses

For petitioner:

G.M.

For respondent:

William T. Clarke

Evidence

J-1	Minutes of Board meeting, open session, March 8, 1983
J-2	Minutes of Board meeting, open session, May 4, 1993
J-3	Agenda for Board meeding, June 8, 1993
J-4	Minutes of Board meeting, open session, June 8, 1993
J-5	Minutes of Board meeting, regular session, June 27, 1993
J-6	Board resolution entitled "Central Assignment of Elementary Students"
J-7	Board policy entitled "School Attendance Areas"
J-8	Correspondence dated June 10, 1993 from William Clarke and James Banyas to parents or guardians
J-10	Correspondence dated June 11, 1993 from Thomas Faria to parents
J-11	Correspondent dated September 1, 1993 from Thomas Faria to parents
P-1	Letter dated September 20, 1993 from Ronald Scull to G.M.
R-1	Map of Roselle Park (not to scale)

OAL DKT. NO. EDU 8098-93

G.M., on behalf of his minor child, T.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that the Board's decision to change the geographic designations for attendance at its various kindergarten classes was neither arbitrary and capricious nor unreasonable, nor did it result in petitioner's child being treated differently from other similarly situated children.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal and upholding the actions of the Board of Education is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

JANUARY 26, 1994 ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 26, 1994

18-94

IN THE MATTER OF THE APPLICATION	:	
OF THE BOARD OF EDUCATION OF WEST	:	COMMISSIONER OF EDUCATION
WINDSOR-PLAINSBORO REGIONAL	:	ORDER
SCHOOL DISTRICT, MERCER COUNTY.	:	
	:	

JANUARY 26, 1994

IN THE MATTER OF THE APPLICATION :
OF THE BOARD OF EDUCATION OF WEST : COMMISSIONER OF EDUCATION
WINDSOR-PLAINSBORO REGIONAL : ORDER
SCHOOL DISTRICT, MERCER COUNTY. :
:

For the Board of Education, William C. Baggitt, Esq.

This matter comes before the Commissioner of Education by way of a Petition for Declaratory Judgment seeking approval for altering the terms of Board members pursuant to the provisions of N.J.S.A. 18A:13-9. The provisions of the aforesaid statute are set forth in their entirety below

N.J.S.A. 18A:13-9. Reapportionment of membership

> Each apportionment shall continue in effect unless and until a reapportionment shall become necessary by reason of the official promulgation of the next Federal census or the enlargement of the regional district by the admission of one or more local districts. In any such case, immediately after the official promulgation of said census or the certification of a favorable result of the election for enlargement of the regional district the county superintendent or county superintendents of the county or counties in which the constituent districts are situate shall reapportion the members accordingly but all members shall continue in office for the terms for which they were elected or appointed notwithstanding any reapportionment. If any constituent district shall become entitled to increased representation on the board the additional members shall be elected at the next annual school election of the regional district. If, as a result of such reapportionment, a disproportionate number of the total representatives of any one constituent district to a regional board are to be elected at a single annual school election, the commissioner shall have the power, on petition of a constituent

district board of education, to alter the term of any member representing such constituent district by not more than 1 year, so as to temporarily apportion, as equally as possible over any given 3-year period, the election of the members representing such constituent district.

It appearing that the West Windsor-Plainsboro Regional School District is an all purpose regional school district as defined in N.J.S.A. 18A:13-2 which is comprised of the constituent municipalities of the Township of West Windsor and the Township of Plainsboro; and

It appearing that as a result of the 1980 census, the County Superintendent of Schools notified the Board of Education of the West Windsor-Plainsboro Regional School District of a reapportionment of Board representatives, five for the Township of West Windsor and four for the Township of Plainsboro; and

It appearing that as a result of said reapportionment, all of the School Board members are elected for three-year terms; however, elections are not held in each district every year. A ten-year projection of the effect of this is shown below:

TEN YEAR PROJECTION OF PRESENT BOARD
5 MEMBERS FROM WEST WINDSOR; 4 MEMBERS FROM PLAINSBORO

ELECTION YEAR	NO. OF SEATS UP FOR REELECTION
1994	3 Plainsboro seats 0 West Windsor seats
1995	1 Plainsboro seat 2 West Windsor seats
1996	0 Plainsboro seats 3 West Windsor seats
1997	3 Plainsboro seats 0 West Windsor seats
1998	1 Plainsboro seat 2 West Windsor seats
1999	0 Plainsboro seats 3 West Windsor seats

ELECTION YEAR	NO. OF SEATS UP FOR REELECTION	
2000	3	Plainsboro seats
	0	West Windsor seats
2001	1	Plainsboro seat
	2	West Windsor seats
2002	0	Plainsboro seats
	3	West Windsor seats
2003	3	Plainsboro seats
	0	West Windsor seats

It appearing that the School Board deems it to be in the best interest of the School District and of the public to temporarily reschedule terms as set forth in N.J.S.A. 18A:13-9 so as to achieve the result of holding an election in each district every year; and

It appearing that each member of the Board of Education of the West Windsor-Plainsboro Regional School District signed a Resolution, which was adopted on December 14, 1993, requesting the Board Secretary and Board Attorney to submit a proposed plan for the reapportionment of the terms of Board members for review and approval by the Commissioner; and

It appearing that on December 27, 1993, the Board of Education of the West Windsor-Plainsboro Regional School District petitioned the Commissioner to alter the terms of the Board members to be elected in the April 1994 and April 1996 elections pursuant to N.J.S.A. 18A:13-9, such proposed alteration not affecting the term of any existing Board member, and the Commissioner noting that the full Board membership and the Mercer County Superintendent of Schools support the relief sought by the two petitioning municipalities; now therefore

The Commissioner accepts and makes a part of this order the following proposed method of reapportioning the terms of Board members for the Board of Education of the West Windsor-Plainsboro Regional School District as approved by the parties herein:

Proposed Realignment

ELECTION YEAR	NO. OF SEATS UP FOR REELECTION
1994	2 3-year Plainsboro seats 1 2-year Plainsboro seat (converts to 3-year in 1996) 0 West Windsor seats
1995	1 3-year Plainsboro seat 2 3-year West Windsor seats
1996	1 3-year Plainsboro seat 2 3-year West Windsor seats 1 1-year West Windsor seat (coverts to 3-year in 1997)
1997	2 3-year Plainsboro seats 1 3-year West Windsor seat
1998	1 3-year Plainsboro seat 2 3-year West Windsor seats
1999	1 3-year Plainsboro seat 2 3-year West Windsor seats
2000	2 3-year Plainsboro seats 1 3-year West Windsor seat
2001	1 3-year Plainsboro seat 2 3-year West Windsor seats
2002	1 3-year Plainsboro seat 2 3-year West Windsor seats
2003	2 3-year Plainsboro seats 1 3-year West Windsor seat

Accordingly, the Board of Education of the West Windsor-Plainsboro Regional School District is hereby directed to make the necessary realignment as set forth above.

IT IS SO ORDERED this 26TH day of January 1994

JANUARY 26, 1994

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 26, 1994

19-94

LOUISE COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member, alleged Board reduced her salary for 1991-92 school year in violation of her tenure rights (N.J.S.A. 18A:6-10 and 28-5).

Citing Galloway Township, ALJ found Board complied with law by paying petitioner according to 1988-91 salary schedule and that such payment did not vest in petitioner the right to a salary inconsistent with new collective bargaining agreement. Thus, ALJ concluded petitioner was unable to establish that her salary was unlawfully reduced since her salary was adjusted to reflect the salary to which she was contractually entitled under 1991-94 Agreement between employees' union and the Board. Board's motion for summary judgment was granted.

Commissioner affirmed in part/reversed in part the initial decision. Commissioner concurred with ALJ that matter was amenable to summary judgment. However, citing Stockton, Commissioner found that tenured teaching staff member's salary cannot be reduced absent certification of tenure charges to Commissioner or the withholding of an increment pursuant to N.J.S.A. 18A:29-14. Commissioner denied Board's motion for summary judgment and directed petitioner's salary be held in place until salary guide catches up to salary paid her in 1991.

JANUARY 28, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION AND SUMMARY DECISION
OAL DKT. NO. EDU 2028-92
AGENCY DKT. NO. 46-2/92S

LOUISE COHEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent.

Arnold S. Cohen, Esq., on behalf of petitioner (Balk, Oxfeld, Mandell and Cohen, attorneys)

Gordon J. Golum, Esq., on behalf of respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: November 12, 1993 Decided: December 10, 1993

BEFORE **STEVEN C. REBACK**, ALJ:

This appeal was instituted by the petitioner, Louise Cohen, by a petition filed with the Commissioner of Education on February 25, 1992. Essentially Ms. Cohen alleges that the action of respondent in determining to reduce her salary for the 1991-1992 school year violated her rights and was in contravention of N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5. An answer to the petition was filed by the respondent (South River) on March 16, 1992, in which it essentially argues that the salary paid to the petitioner for the period in question was consistent with law, appropriately negotiated by her representative, the South River Education Association, fully and

completely memorialized and embodied in a labor agreement to which the parties agreed.

On March 18, 1992, following the filing of the pleadings in the matter, the Commissioner of Education transmitted the appeal to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Thereafter cross-motions were filed by the parties for summary decision in the matter. On September 8, 1992, I issued a letter-ruling indicating that a genuine issue of fact and law existed in respect to an argument raised by Mr. Cohen, counsel for the petitioner, at point two of his brief. In his brief counsel argued that a negotiator for the petitioner's bargaining unit and the chief negotiator for the respondent orally agreed that certain salaries, including the petitioner's, would be held at their current level until the new guide "caught up" with them. This process, referred to as "redlining," was alleged by Mr. Cohen to justify entry of summary judgment on his client's behalf if not rebutted; if the assertion was contradicted by the Board, he argued that a hearing would be required to arrive at factual findings concerning the "redlining" question.

In my September 8, 1992 letter ruling denying summary decision, I concluded that, at least in respect to the issue which I have just described above, a hearing would be required. As a further incident of my letter ruling, I indicated to the parties that I thought it best that a status conference be conducted to discuss the parameters of the hearing and to set forth a schedule. That conference was conducted by telephone on November 19, 1992 and its subject matter was memorialized by me in a letter of November 23, 1992. During the course of these conversations, Mr. Golum, on behalf of South River, discussed various issues which touched upon the possibility of further argument being brought to my attention in respect to the ruling denying the motion for summary decision and directing a hearing on the issue of "red lining." Based upon those discussions I noted in my letter of November 23 that a motion for reconsideration of my decision would be contemplated. *

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* While insignificant, it was Mr. Golum's recollection in a later telephone conversation that I suggested instituting a motion for reconsideration. That, based upon my recollection, is not entirely accurate. While I did suggest that he institute a motion for reconsideration if he chose to, that suggestion was not prompted by any substantive view that I had held; rather it was based upon the procedure that I suggested that he employ based upon the arguments which he indicated he wished to offer.

Thereafter, by moving papers dated March 5, 1993, South River submitted its motion for reconsideration of my earlier ruling as well as summary decision. Mr. Cohen, on July 30, 1993 submitted his brief in opposition to reconsideration. On August 30, 1993, my office received Mr. Golum's reply brief in the matter. Following a review of the documentary submissions, I attempted to schedule a telephone conference with the parties as soon as it was reasonably possible; as a consequence of an illness from which Mr. Cohen was suffering and from which he has since recovered, that conference could not be conducted until November 12, 1993. Essentially, my concerns in respect to the motion were directed to whether the parties were inclined to receive a ruling exclusively on the motion for consideration, which would then be followed if the motion were granted, by an initial decision fully depositive of all of the issues in the case, or whether they wanted the matter to be decided in its entirety. It was agreed that the case be decided in its entirety (assuming that the motion for reconsideration were granted). Accordingly, I also advised them, based upon their request that I would inform them by telephone by no later than November 29, 1993 in respect to whether plenary proceeding would be required. This was designed to avoid the unnecessary expense and time that the parties might utilize in deposing witnesses and preparing for what would otherwise be unnecessary litigation. They were so advised. Accordingly, the record in the matter closed on the date of the final telephone conference in this matter, November 12, 1993.

A.

PETITIONER'S MOTION FOR RECONSIDERATION

As will be recalled in my earlier ruling of September 8, 1992, I concluded that a plenary hearing would be required in respect to the argument raised by Mr. Cohen at point two of his brief wherein he describes a purported oral agreement to redline the petitioner's salary. Upon further review and examination of the arguments presented, I have concluded that the existence or nonexistence of that purported oral agreement does not present any genuine issue of fact or law which would require a plenary proceeding and accordingly I hereby **GRANT** the respondent's motion for reconsideration and **CONCLUDE** that there are no genuine fact issues which are required to be addressed at a plenary proceeding in respect to any aspect of this case.

For purposes of South River's motion for reconsideration and insofar as it also impacts upon summary decision, the petitioner's representation of the facts and any

reasonable inferences drawn from those facts must be accepted as provided for by affidavits and/or certifications. For purposes of the motion for reconsideration and as it relates to the purported conversations at issue addressed to "redlining," the following factual scenario has been adopted.

When the salary guide for the Agreement between the Board of Education of South River, New Jersey and the South River Education Association 1991-94 (hereinafter, 1991-94 Agreement) was proposed, James Sanderson, member of the SREA negotiating team inquired about the status of 12-month employees. Fred Baron, negotiator for the Board, stated that these salaries, including petitioner's, would be redlined. (Sanderson certification, 7/20/92, para. 4). When Mr. Sanderson asked what redlined meant, Mr. Baron explained that these particular employees, including petitioner, would continue at their present salary until the new salary guide caught up with them. This was presented as an uncontroverted contractual interpretation. (Sanderson certification, para. 5). Mr. Sanderson checked several times with Mr. Baron and other members of the SREA negotiating committee to make sure there were no misunderstandings regarding this concept of redlining. All parties were in agreement and at no point did Mr. Baron alter his position. (Sanderson certification, para. 6). It was the understanding of Michael Parise, Uniserve representative of the New Jersey Education Association, Stephanie Scrime, another member of the SREA negotiating committee, and Mr. Sanderson, that redlining was the only manner in which the salary guide would be interpreted. (Sanderson certification, para. 7).

Similarly, Mr. Parise, chief negotiator for the SREA, had a number of conversations with Mr. Baron regarding petitioner and redlining of her salary. Mr. Parise initially spoke with Mr. Baron about petitioner and redlining in the summer of 1991, at which time Mr. Parise and Mr. Baron agreed that any salary schedule agreed upon would include redlining of petitioner's salary. (Parise certification, 7/22/93, para. 7). Mr. Parise and Mr. Baron again discussed petitioner's salary with regard to the October 22, 1991 Memorandum of Understanding (Exhibit A to Parise certification) which did not include petitioner's redlined salary. Mr. Parise asked Mr. Baron if their agreement to redline petitioner's salary needed to be committed to writing. Mr. Baron responded, "no, the law protects Louise Cohen, she has tenure, we cannot reduce her salary." (Parise certification, para. 8). After Mr. Parise learned that petitioner's salary had been reduced, shortly after December 15, 1992, he called Mr. Baron requesting an explanation. Mr. Baron admitted that this reduction was contrary to the understanding reached on October 22, 1991. Mr. Baron said he

would talk to Ernest Barberio, Superintendent of South River School District. Thereafter, Mr. Baron contacted Mr. Parise and said the redlining of petitioner's salary was not agreed to by him or the Board.

The factual issue I found to be in dispute in my initial ruling was whether there was an oral agreement between the Board and the SREA that petitioner's salary would be redlined, that is, kept at the level it would have been under the 1988-91 Agreement until her salary under the 1991-1994 Agreement, or some future agreement, reached the 1988-91 Agreement level. Certifications have been submitted from two Board negotiators (Baron Cert. I and II and Hoskins Cert.) and the School Superintendent, who attended every negotiations session, (Barberio Cert. I, II and III) that no such agreement was made. Certifications have been submitted from two SREA negotiators that such agreement was reached.

Petitioner asserts that respondent has offered no new facts or legal arguments that require reconsideration. This is not the case. The argument that the parol evidence rule bars consideration of evidence regarding alleged discussions or oral agreements offered to contradict the written collective bargaining agreement is first raised in Respondent's Brief in Support of Motion for Reconsideration. The parol evidence rule is part of the substantive law of contracts. Additionally, new factual details surrounding the discussions regarding redlining of petitioner's salary have been alleged.

The contract which governs this case is the 1991-1994 Agreement between the Board and the SREA. Petitioner persists in attempting to argue that the individual contract she entered with the board for a 1991-92 salary of "$36,685 plus any negotiated adjustment" plus the fact of payment between July 1, 1991 and November 29, 1991 at an annual rate of $47,035, vested her salary at that latter level. See, Petitioner's Brief in Opposition to Motion for Reconsideration, Statement of Facts, page 3, para. 2 and Legal Argument, page 10. However, the 1991-1994 Agreement at page 9 contains the following paragraph:

> Any individual contract between the board and an individual employee, heretofore, or hereafter executed, shall be consistent with the terms of the Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement during its duration, shall be controlling.

Additionally, one of the cardinal principles of American labor law is that of exclusive representation by the majority union. Lullo v. International Assoc. of Firefighters Local 1066, 55 N.J. 409 (1970) (Individuals who voted against union representation are nonetheless bound by the majority vote of their colleagues.) Multiple representation of employees encourages rivalries among employee groups and severely handicaps the development of effective negotiations and stable relationships. Lullo v. Local 1066, 55 N.J. at 421. The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3 provides that

> [P]ublic employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization. . .A majority representative of public employees. . .shall be entitled to act for and to negotiate agreements covering all employees. . . (emphasis added)

It is illegal for an employer to by-pass the bargaining agent and engage in negotiations about wages and other working conditions with individual employees. See, Robert Gorman, Basic Text on Labor Law, 1976, page 375, discussing a provision similar to N.J.S.A. 34:13A-5.3 contained in the the National Labor Relations Act which provides "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representative of all employees . . . for the purposes of collective bargaining in respect to rates of pay, wages . . ." (emphasis added), citing, inter alia, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) and J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (individual advantages are a fruitful way of interfering with organization).

"The law of contracts is well settled that a party to a contract cannot rely on extrinsic parol evidence to circumvent the clear and unambiguous terms of the contract." Henry v. Black & Decker, Inc., 779 F.Supp. 778, 785 (D.N.J. 1991) (Former employee cannot rely on oral discussions with employer to contradict the terms of written agreement). "On the theory that all language will bear some different meanings, evidence of the circumstances is always admissible in the construction of integrated agreements, but not for the purpose of giving effect to an intent at variance with any meaning that can be attached to the words. . .Extrinsic. . .evidence is adducible only for the purpose of interpreting the writing- - not for the purpose of modifying or enlarging or curtailing its terms. . .So far as evidence tends to show not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant." Casriel v. King, 2 N.J. 45, 50-51 (1949).

"The touchstone of the [parol evidence] rule's application is the fact of an 'integrated' written contract, and 'integrated' is a word of art. An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings adopted." U.S. v. Clementon Sewerage Authority, 365 F.2d 609, 613 (3d Cir. 1966). "If the writing contains a statement to the effect that it is the complete and final statement of the agreement, the courts may give the statement conclusive effect in determining integration." U.S. v. Clementon Sewerage Auth., 365 F.2d at 614. (citing Zone Co. v. Service Transportation Co., Inc., 137 N.J.L. 112 (1948) ("Where there is a clear implication of fact from the writing itself that it fully expresses the whole bargain between the parties (here it is explicit), contradiction of the implication by parol evidence is no more permissible than the contradiction of the express terms of the writing." Zone Co. v. Service Transportation Co., Inc., 137 N.J.L. at 117.))

There can be little doubt that the 1991-1994 Agreement constitutes an integrated written contract. The Agreement provides:

> This Agreement represents and incorporates the complete and final understanding and settlement of the parties of all bargainable issues which were or could have been the subject of negotiations. During the term of the Agreement, neither party will be required to negotiate with respect to any matter that was within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

1991-1994 Agreement, page 10.

Petitioner points to no terms of the 1991-1994 Agreement which are vague or ambiguous, the interpretation of which would be aided by the parol evidence. Instead, it is clear that the parol evidence is being offered to vary the written salary schedule contained in the Agreement or to add a material term, that if indeed intended, should reasonably have been expressly included in the writing.

Additionally, "[t]he [parol evidence] rule operates in favor of or against a third party who was not a party to the written integration. If there [is] a complete integration, the rule is the same no matter who asserts or denies [the terms of the agreement]; the intention of the parties is equally binding upon strangers to the instrument." Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953) (citations omitted)

Invocation of the parol evidence rule to collective bargaining agreements is particularly appropriate. See, Adams v. Jersey Central Power & Light Co., 21 N.J. 8 (1956):

> We find no error in the rejection of parol testimony with respect to discussions that took place prior to the final drafting of the collective bargaining contract, since this proof consists merely of views expressed by those who were participating in the discussions and offers no help in determining what was subsequently agreed on. The proof was clearly inadmissible under Casriel v. King, 2 N.J. 45 (1949).

Adams v. Jersey Central Power & Light Co., 21 N.J. at 16.

None of the negotiators involved has the authority to bind the entities he or she represents. The negotiators for the SREA must present the written contract to the SREA membership which holds power to ratify it. Similarly, the labor consultant who negotiated for the Board merely recommends the contract to the Board which, again, holds the power to accept or reject it. Neither the SREA membership nor the School Board partook in any discussions of proposed redlining of salaries. Nor is there any language in the Agreement which reasonably supports an interpretation that redlining was intended.

It is of course true that parol evidence is sometimes admitted to contradict apparently unambiguous contractual language. "Even when the contract on its face is free from ambiguity, evidence of the situation of the parties and the surrounding circumstances and conditions is admissible in aid of interpretation. The inquiry is the meaning of the words when assayed by the standard adopted by the law." Casriel v. King, 2 N.J. at 50-51. For example, "[i]n evaluating claims of mutual mistake and fraud, a court necessarily must look beyond the four corners of the contract." Conforti v. Guliadis, 128 N.J. 318, 327 (1992) (The Court's well established equitable power to modify property distributions can be used to examine the intent of the parties (former spouses) in entering a lease which allows one spouse to sell the property at any time and terminate the lease.) Ace Stone, Inc. v. Wayne Township, 47 N.J. 431 (1966) provides another example of the acceptance of parol evidence despite apparently unambiguous contractual language. In Ace Stone, Inc. The Court allowed parol evidence of the circumstances attending the contract including trade practices and customs to determine whether a "no damage" clause ("No claim for damages or any claim other than for an extension of time as herein provided shall be

made or asserted against the [Township] by reason of the delays hereinbefore mentioned.") contemplated barring contractor's claim based on Township's failure to have acquired the easements necessary for the construction of sewer lines. Petitioner sets forth a passage from Kearny, P.B.A. Local 21 v. Town of Kearny, 81 N.J. 208, 221 (1979) (Petitioner's Brief in Opposition to Motion for Reconsideration, p. 13). The question in this case was whether "standby" time was includable in computing hours worked and therefore, whether or not officers were entitled to overtime compensation. The Court acknowledged that "[w]hat occurred during negotiations frequently will throw light upon the parties intent as expressed in the written contract." Kearny P.B.A. Local 21, 81 N.J. at 222. The difference between Kearny P.B.A. Local 21 and the case at hand is that Kearny P.B.A. Local 21 clearly involved interpretation of contractual language not supplantation.

Damaging to Respondents motion for summary decision is the alleged statement by Mr. Baron, Board negotiator, in response to an inquiry by Mr. Parise as to whether the agreement to redline petitioner's salary needed to be committed to writing, that "No, the law protects Louise Cohen, she has tenure. We cannot reduce her salary." Also damaging is the alleged acknowledgement by Mr. Baron, after learning of the reduction in petitioner's salary, that such reduction was contrary to the understanding reached. The first statement is denied by Mr. Baron and no response was made regarding the latter assertion. Though perhaps making the determination as to whether summary judgment should be granted to the Respondent more difficult, these statements are not fatal to Respondent's Motion. The problems raised by these statements illustrate the policy behind the parol evidence rule. With regard to the first statement, assuming in fact it was made, as we must in a motion for summary decision, the meaning is far from unambivalent. Did Mr. Cohen mean that petitioner's salary could not be reduced below the $36,685 she received for the 1990-91 school year or the $47,035 she received after July 1, 1991? Alternatively, did Mr. Baron misunderstand the law? Could it have been intended as negotiating "puffing"?

If in fact the statement was made and the meaning intended was as now asserted by petitioner, the question arises whether the SREA negotiators were reasonable in relying on such statement in the face of clear and contrary contractual language. Petitioner has not alleged deliberate misrepresentation by the Board negotiator nor do the defenses to contract formation of mutual mistake or unilateral mistake appear to be applicable. They have not been alleged by Petitioner.

The clear statement in the 1991-1994 Agreement that it constituted an integrated, written agreement, the absence of ambiguous or uncertain contractual language the interpretation of which would be aided by the parol evidence, the presumed equal sophistication of the bargaining parties, and the lack of any allegations of fraud in the inducement to approve the contract or mistake, lead to the conclusion that the parol evidence rule bars consideration of the alleged oral agreement to redline petitioner's salary.

Absent the effect of the parol evidence rule whether there had been oral agreement to redline petitioner's salary would be a genuine issue of material fact. The workings of the parol evidence rule, however, render these alleged discussions and agreement irrelevant. It doesn't matter whether they took place or not. The petitioner's salary pursuant to the unambiguous 1991-1994 Agreement is uncontested.

The alleged discussions and oral agreement is also rendered irrelevant by the fact that they took place between SREA and Board negotiators which lack the authority to contractually bind their respective organizations and there is no contractual language which can reasonably support the assertion that redlining was intended.

Accordingly, and based upon the foregoing, I **CONCLUDE** that there is no genuine issue as to any material fact in respect to the purported redlining of the petitioner's salary and accordingly the motion for reconsideration is **GRANTED**.

B.

THE CROSS-MOTIONS FOR SUMMARY DECISION

Having concluded that there are no genuine fact issues and having adopted the facts as set forth above, the only substantive argument to be addressed at this time is whether, as the petitioner asserts, South River unlawfully reduced her salary in contravention of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10.

N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 each provide that a tenured school teacher may not receive a reduction in compensation except for just cause. N.J.S.A. 18A:6-10 provides that:

> No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure of office, position or employment . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing. . .

N.J.S.A. 18A:28-5 reiterates this protection against dismissal or reduced compensation except for good cause and specifies that a teaching staff member shall be tenured after employment in the district for three consecutive years.

Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn., 78 N.J. 25 (1978), is dispositive of the case at hand. In Galloway, the court held that the unilateral decision of the school board to withhold increments at the beginning of a new school year, that would have been due under the salary schedule provided in the then expired collective bargaining agreement, constituted an unlawful failure to bargain in good faith and an unlawful interference with the employees' right to form and join labor unions for collective bargaining purposes, in violation of N.J.S.A. 34:13A5-3.[1] Under Galloway, if the South River Board of Education unilaterally failed to pay petitioner the salary to which she was entitled under the previous collective bargaining agreement during the period of time from expiration of the previous agreement to the adoption of the new agreement, the Board would have committed an unfair labor practice. The Respondent was statutorily required to abide by the salary schedules established by the expired collective bargaining agreement until a new agreement was negotiated and adopted.

In Galloway, the 1974-75 collective bargaining agreement expired on June 30, 1975. When school resumed in September of 1975, a new collective bargaining agreement between the board and the employees had not yet been adopted. In the face of no new collective bargaining agreement, the school board unilaterally determined to pay employees the same salary they had

[1] N.J.S.A. 34:13A-5.3 provides that the representatives selected by the majority of public employees, of an appropriate unit, shall be the exclusive representative for collective negotiation for all employees of that unit. Furthermore, all "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative," and "the majority representative and designated representatives of the public employer shall . . . negotiate in good faith with respect to . . . terms and conditions of employment."

earned the previous year, and to not pay any salary increment to which the employees would automatically be entitled, based on years of service, if the 1974-75 agreement were still in effect.

In the Galloway case, the Public Employment Relations Commission (PERC) took the position that the automatic payment of the scheduled annual salary increment was one of the existing terms and conditions of employment despite expiration of the agreement. The 1974-75 agreement contained a salary schedule specifying annual increments for each additional year of service. Therefore, the Board's failure to pay the increment upon start of the new school year constituted a unilateral alteration of the status quo. The school board argued that it was maintaining the status quo by not paying the increments. The Supreme Court found that N.J.S.A. 18A:29-4.1[2] commands the conclusion that in the absence of a new salary schedule, the 1974-75 salary schedule, with its annual increments for each additional year of service, remained operative and obligated the board to pay according to it. Galloway Twp. Bd. of Ed., 78 N.J. at 51.

The factual distinction between Galloway and the case at bar appears to be one source of the confusion and disagreement between petitioner and respondent as to what was agreed between them. In the current matter, twelve-month employees of the South River board of education, including petitioner, were paid, beginning July 1, 1991, the salary increase to which they were entitled under the expired 1988-91 Agreement. Certification of Fred Baron, August 13, 1993, para. 5. Upon agreement of the South River board and employees' union, nine-month employees were paid, beginning in September of 1991, the same salary they earned the previous year. Nine-month employees were not paid the salary increment for years of service which they would have earned under the 1988-91 Agreement. Id. Therefore, during September and October, 1991, some South River employees were being paid what they earned the prior year and some employees were paid an increment consistent with the expired agreement. The

2. N.J.S.A. 18A:29-4.1 provides that one, two, or three year salary schedules adopted by a board of education shall be binding upon the adopting board and upon all future boards in the same district for a period of one, two, or three three years from the effective date of such schedule. Cases citing to this provision do not aid the analysis in the case at hand.

Galloway Board acted unilaterally to withhold salary increments from all employees. However, as far as application of the Galloway rule to this case, and the conclusive effect of the salary schedules contained in the 1991-94 Agreement, this is a distinction without a difference.

Petitioner asserts that Galloway has no bearing on this case because Galloway "only applies to cases in which employees are denied an advancement or raise merely because a new collective negotiations agreement is not ready." Petitioner's Brief in Opposition to Motion for Summary Decision, pg. 8. Petitioner's attempt to limit Galloway is in effect a concession that, under Galloway, if petitioner had been denied the salary increment called for by the 1988-91 agreement, respondent would have been vulnerable to an unfair labor practices charge. Petitioner concedes that Galloway stands for the proposition that "in the absence of any agreement at all, the salary guide of the old collective negotiations agreement will apply until a new collective negotiations agreement is adopted."

It was earlier concluded that the parol evidence rule barred consideration of petitioner's evidence of alleged oral agreement between board and union negotiators to "redline" or "red circle" petitioner's salary at $47,035. Therefore, petitioner must rely on the proposition that the individual contract between the board and petitioner for a 1991-92 salary of "$36,685 plus any negotiated adjustment," plus the fact of payment between July 1, 1991 and November 29, 1991 at an annual rate of $47,035, created in her a contractual right, and in the board a contractual obligation, to this latter amount. See, Petitioner of Appeal, February 24, 1992, Motion for Summary Decision, July 21, 1992, pages 6-7. Petitioner must also assert the ascendancy of this individual contract over the 1991-94 collective bargaining agreement. In this, petitioner must fail.

For the reasons already set forth, petitioner's reliance on the individual contract is misplaced. The union is the employees' exclusive representative and the collective bargaining agreement explicitly provides that any conflicting provision in any contract with an individual employee is preempted. The New Jersey Legislature has "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and. . .agreement between the public employer and the majority representative of its employees." Galloway, 78 N.J. at 48. It is illegal for the school board to offer salary or other

benefits to individual employees which are inconsistent with the collective bargaining agreement. Cf., D'Arrigo v. New Jersey Board of Mediation, 119 N.J. 74, 78 (1990) (Exclusive representation by the representative chosen by a majority of the employees is now at the core of our national labor policy.)

The cases citing to Galloway offer no reason to question the applicability of the rule established by Galloway to this case. The question in Board of Ed. of Bernards Twp. v. Bernards Twp. Ed. Assn., 79 N.J. 311 (1979) concerned the validity of a clause of the collective bargaining agreement which provided that disputes concerning the withholding of a teacher's salary increment for inefficiency or other good cause, shall be subject to advisory, as opposed to binding, arbitration. Stating that the "decision to withhold an increment is therefore an essential managerial prerogative delegated by the Legislature to the Board [that] cannot be bargained away," Board of Ed. of Bernards Twp., 79 N.J. at 321, the Court distinguished the holding in Galloway. "In Galloway, we held that a board's unilateral alteration of an automatic right to an annual salary increment, during the course of collective negotiations, constituted an unfair labor practice." Board of Ed. of Bernards Twp., 79 N.J. at 321-322, n. 2. In Galloway there was no claim that the teachers' salary increments were withheld for inefficiency , incapacity, or other just cause. Id.

See, also, In re Piscataway Twp. Board of Education, 164 N.J.Super. 98 (App. Div. 1978) (Unilateral reduction of the yearly term of employment from 12 months to 10 months and proportionate reduction in salary violated the spirit and the text of the Employer-Employee Relations Act and was an unfair labor practice.); In the Matter of Maywood Bd. of Education, 168 N.J. Super. 45 (App. Div.), cert. denied, 81 N.J. 292 (1979) (A change in the length of the teachers' work day is mandatorily negotiated.); Ramapo-Indian Hills Education Assn. v. Ramapo-Indian Hills Regional High School Board of Ed., 176 N.J. Super. 35 (App. Div. 1980) (Compensation for a newly created post must be established through bilateral negotiations.)

Galloway Twp. Board of Ed. v. Galloway Twp. Ed. Assn. strongly supports respondent's position that it was merely complying with the law by paying petitioner according to the 1988-91 salary schedule and that such payment did not vest in petitioner the right to a salary inconsistent with the new collective bargaining agreement. Accordingly, I **CONCLUDE** that the petitioner has been unable to establish that her salary was unlawfully reduced in contravention of

N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10. I further **CONCLUDE** that her salary was adjusted to reflect the salary to which she was contractually entitled under 1991-94 Agreement between the employees' union and the South River Board of Education. It is therefore **ORDERED** that the respondent's motion for summary decision be and is hereby **GRANTED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec 10, 1993
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

12/14/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1993
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

LOUISE COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record of this matter, the Commissioner reverses in part and accepts in part the initial decision rendered by the Office of Administrative Law. The Commissioner concurs with the ALJ that this matter is amenable to summary judgment for the reasons suggested in the initial decision. Specifically, the Commissioner concurs that parol evidence as to what unwritten agreements may have been struck between the negotiators for the South River Education Association (SREA) and the Board is not relevant to a determination as to whether petitioner's rights under the Tenure Employees Hearing Law were abridged by the Board's 1991-94 collective bargaining agreement's salary provisions. He so finds for the reasons expressed in the Reconsidered Initial Decision.

However, N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 mandate that a tenured teaching staff member's salary cannot be reduced

absent certification of tenure charges to the Commissioner or the withholding of an increment pursuant to N.J.S.A. 18A:29-14. In the instant matter, it is uncontested that in conformity with Galloway Township, supra, and pursuant to the terms of the expired 1988-91 collective bargaining agreement between SREA and the Board, respondent raised petitioner's salary to $47,035 from a yearly salary of $36,685. It is also uncontested that petitioner received payments corresponding with this arrangement from July 1, 1991 to November 29, 1991. Further, it is undisputed that on November 29, 1991 the Board placed petitioner on Step "G" of the newly ratified collective bargaining agreement, which agreement would result in petitioner's salary being set at $41,101, an amount approximately $6,000 less than she had been paid from July 1, 1991 to November 29, 1991.

While it is not within the Commissioner's purview to consider the proper application of the Galloway Township holding, see Board of Education of Neptune Township, Monmouth County v. Neptune Township Education Association et. al., decided by the Commissioner February 16, 1993, this matter turns on the statute prohibiting the reduction of salary of a tenured employee and the case law interpreting it. Hence, the Commissioner finds and determines that the Board is prohibited pursuant to N.J.S.A 18A:6-10 and N.J.S.A. 18A:28-5 from placing her at a step on the new guide which would effectively reduce her salary from its previous level. See, e.g., Charles Stockton v. Board of Education of the City of Trenton, Mercer County, 1987 S.L.D 512 and 210 N.J. Super. 150 (App. Div. 1986).

Accordingly, the Commissioner reverses that part of the initial decision finding that petitioner failed to demonstrate that her salary was unlawfully reduced in contravention of N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5. Instead, the Commissioner denies the Board's Motion for Summary Judgment and further directs that petitioner's salary be held in place at the salary she was paid from July 1, 1991 to November 29, 1991 until the salary guide catches up to the salary she was paid during that period.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JANUARY 28, 1994

DATE OF MAILING - JANUARY 28, 1994

20-94

JAMES E. BRADSHAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 1, 1994

OAL DKT. NO. EDU 8915-92

JAMES E. BRADSHAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1994

DATE OF MAILING - FEBRUARY 1, 1994

21-94

ELLEN DEUTSCH,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

FEBRUARY 1, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5275-92
AGENCY DKT. NO. 283-8/92

ELLEN DEUTSCH,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,
Respondent.

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

James S. Rothschild, Jr., Esq., for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: November 17, 1993 Decided: December 23, 1993

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

On June 22, 1992, petitioner, Ellen Deutsch, a nontenured teacher, filed a petition of appeal against respondent, Livingston Board of Education, essentially alleging that she had been improperly terminated. On July 1, 1992, respondent filed an answer denying the allegations. On July 14, 1992, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of

Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On August 6, 1992, petitioner filed an amended petition of appeal alleging that respondent failed pursuant to *N.J.S.A.* 18A:27-10 to act on petitioner's employment by April 30, 1992, that the superintendent had impermissibly usurped the power of the Board of Education and his actions were without authority or approval of respondent, that petitioner had been deprived of her due process rights, and that petitioner was terminated for proscribed reasons in violation of her constitutional rights against discrimination. On or about August 19, 1992, respondent filed its answer to the amended petition of appeal denying the allegations contained therein.

A telephone prehearing conference was held on October 1, 1992, at which time the issues were isolated, and a hearing scheduled for April 12, 13, and 14, 1993 at the Office of Administrative Law.

By letter dated March 29, 1993, petitioner requested an adjournment of the scheduled hearing. A conference was held with counsel on April 2, 1993, during which respondent indicated that it would be moving for summary decision. Dates were established for the filing of the motion, and the hearing rescheduled to October 6, 7 and 8, 1993. Respondent filed its motion for summary decision on May 4, 1993. Petitioner filed its brief in opposition to the motion on June 9, 1993. On June 16, 1993, respondent filed a reply, which was supplemented on July 19, 1993. Oral argument was held on July 22, 1993, at which time the undersigned judge granted respondent's motion for summary decision on the issue of procedural due process and violation of contractual rights, dismissing the portion of the petition in regard to those issues. On August 2, 1993, the undersigned judge signed a decision setting forth with particularity the reasons for partially granting respondent's motion for summary decision in this matter. The remaining issue was scheduled for hearing on October 6, 7 and 8, 1993. A settlement conference was scheduled for August 31, 1993 at the Office of Administrative Law and adjourned at the request of petitioner's attorney. As a result of settlement conferences held between the parties, a settlement was reached on October 1, 1993, and the hearing was adjourned.

The parties have agreed to settle this matter and have prepared a Stipulation of Settlement indicating the terms of settlement which is attached and fully incorporated herein.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 23, 1993
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

12/27/93
Date

Maureen R. Miller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1993
Date

Ingrid L. Vecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

Nov 17

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Attorneys for Defendant
Livingston Board of Education

ELLEN DEUTSCH, Plaintiff, vs. LIVINGSTON BOARD OF EDUCATION, Defendant.	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 05275-92 AGENCY REF. NO. 283-8/92 **STIPULATION OF SETTLEMENT**

This matter being opened to the Court by Richard Kaplow, Esquire, of Weinberg and Kaplow, P.A., attorney for Plaintiff, and James S. Rothschild, Esquire, of the firm of Riker, Danzig, Scherer, Hyland & Perretti, Esquires, appearing as attorney for Defendant, and it appearing the parties have entered into a settlement of the above matter reflecting settlement of the issues set forth in the Complaint, hereby agree as follows:

1. Defendant will pay to Plaintiff the sum of $5,000. In return, Plaintiff will file a Stipulation of Dismissal with Prejudice with the Office of Administrative Law.

2. Plaintiff hereby waives any and all claims which she may have against Defendant and its agents, employees or

officers relative to the suit captioned Ellen Deutsch v. Livingston Board of Education, OAL Docket No. EDU 05275-92, Agency Ref. No. 283-8/92, including, but not limited to, any right to relief which plaintiff may have under Federal, State or common law.

Date: Oct. 20, 1993

RICHARD S. KAPLOW
Attorney for Plaintiff
Ellen Deutsch

Date: _____

JAMES S. ROTHSCHILD
Attorney for Defendant,
Livingston Board of Education

OAL DKT. NO. EDU 5275-92

ELLEN DEUTSCH,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1994

DATE OF MAILING - FEBRUARY 1, 1994

22-94

JENNIFER PARIENTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 1, 1994

OAL DKT. NO. EDU 6375-93

JENNIFER PARIENTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1994

DATE OF MAILING - FEBRUARY 1, 1994

School Ethics Commn. (SB)22-94

SEC #C14-93
SEC # 1-94
SB # 22-94

MARIA SCANNELLA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
CAROL SCUDILLO, BOARD MEMBER, BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the School Ethics Commission, February 3, 1994

Decided by the Commissioner of Education, March 30, 1994

Decision on motion by the State Board of Education, December 7, 1994

For the Petitioner-Respondent, Morrissey, Rotolo & DiDonato (Joseph J. Rotolo, Esq., of Counsel)

For the Respondent-Appellant, Purcell, Ries, Shannon, Mulcahy & O'Neill (Joseph F. Skinner, Esq., of Counsel)

This matter was initiated on October 5, 1993, when Maria Scannella (hereinafter "complainant") filed a certified complaint with the New Jersey School Ethics Commission, alleging violations of the School Ethics Act, N.J.S.A. 18A:12-2 et seq.[1] Complainant alleged that Carol Scudillo (hereinafter "respondent"), a member of the Board of Education of the City of Garfield, had violated

[1] The School Ethics Act was adopted by the Legislature in 1991 and was predicated on its findings that school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them so as to ensure and preserve public confidence. N.J.S.A. 18A:12-22.

Jan. 5, 1995

N.J.S.A. 18A:12-24, N.J.S.A. 18A:12-31, and N.J.S.A. 18A:12-22 of the School Ethics Act ("Act").[2]

Complainant asserted that respondent had violated the School Ethics Act when she cast the fifth and deciding vote to appoint her son-in-law as district superintendent of schools and that she had been on the personnel committee which had recommended the appointment. Complainant also alleged that she had witnessed respondent violating the Act by "soliciting" goods to the principal of one of the district's schools. Complainant attested that she "knew by speaking to several teachers" that this practice had been going on for "a long time."

Complainant urged an example should be made of respondent, not only because of her "outrageous" conduct at that time, "but for the constant and blatant arrogance and disrespect to her elected position, and, in the past, with the constant promotion of her daughter and her husband in the District."

On November 20, 1993, respondent filed a certification with the New Jersey School Ethics Commission (hereinafter "Ethics Commission" or "Commission") in response to the complaint. Therein, she denied all allegations of unethical conduct represented in the complaint and requested dismissal thereof.

By letter of November 30, 1993, the Deputy Director of the Ethics Commission notified respondent that the matter had been placed on the Commission's agenda for its meeting of December 8. She further advised respondent that:

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[2] Ms. Scannella also complained of violations of the School Ethics Act by another Board member, the Board president, and the Board's Personnel Committee. These allegations were dismissed by the Ethics Commission for lack of probable cause on December 8, 1993, and, hence, are not involved in this appeal.

> At the meeting, the School Ethics Commission may take one of several actions. The Commission may table the matter and ask for additional information and/or legal advice, the Commission may dismiss that matter, or the Commission may determine that probable cause exists for a hearing at the Office of Administrative Law, or the Commission may ask you to enter into a Consent Order if the facts are not in dispute, in lieu of a hearing at the Office of Administrative Law. The language of the Consent Order may indicate the belief of the Commission that a violation has occurred and may include a mutually agreed upon settlement. Possible sanctions include reprimand, censure, suspension, or removal.

The course which the Ethics Commission embarked upon on December 8 was not one of those enumerated in the November 30 letter. The Commission determined that there was probable cause to credit complainant's allegations concerning both respondent's vote to hire her son-in-law and the sale of gloves to school employees. However, as the Ethics Commission's Acting Executive Director advised respondent in a letter dated December 10:

> ...As the material facts regarding these allegations are undisputed, both the complainant and respondent will be given the opportunity to submit to the Commission written arguments as to whether the undisputed facts demonstrate any violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq.

Respondent did not concur with this view. To the contrary, in her brief dated January 3, 1994, she continued to contest the factual basis of the allegations, again denying the charges and contending that the complaint against her should be dismissed with prejudice. Although she had not specifically addressed complainant's charge of solicitation in her certification of November 20, respondent set forth her version of the circumstances surrounding this allegation in detail in her brief, denying that she

had ever solicited the sale of any products at any school function or Board meeting. In contrast to the circumstances alleged in the complaint, respondent's brief recounted that

> At the conclusion of the [P.T.A.] meeting, the School Principal, Peter DeFranco, asked Carol Scudillo to come into his office. Some time prior to the evening, Mr. DeFranco had purchased two pairs of gloves from Carol for his wife. On the night in question, Mr. DeFranco was returning a pair of gloves that his wife did not want to purchase. As Carol was talking to Mr. DeFranco, Maria Scannella entered the office. Maria Scannella did not say anything to either Carol Scudillo or Mr. DeFranco. She was present only for a brief moment and then left Mr. DeFranco's office to enter an adjoining office. There was never any listing on Mr. DeFranco's desk concerning school personnel to whom Carol Scudillo intended to distribute gloves. This statement in the Complaint is completely false.

Respondent's brief, at 10.

In contradiction, complainant's brief, dated January 6, asserted that

> Board member Carol Scudillo has engaged in business transactions with Board of Education employees for the purpose of financial gain. Mrs. Scudillo was witnessed soliciting for the sale of gloves from her place of regular employment to the principal of one the Garfield's schools. In addition, Mrs. Scudillo has solicited for the sale of these gloves to several teachers within the district as well as soliciting to the Superintendent of Schools and members of his staff.
>
> Once again, these allegations have been admitted, in their entirety, by Mrs. Scudillo.

Complainant's Brief, at 3.

On January 13, 1994, counsel for complainant filed a reply submission in response to respondent's submission of January 3, 1994. He stated that he had reviewed the statement of facts contained therein, but had found it unnecessary to comment on them

because those pages were "without substance or import" "in view of the fact that the facts are not in dispute...". He however reiterated in this submission that the facts regarding the sale of gloves to school employees "have been admitted...."

In her memorandum of January 19, respondent once again took issue with the factual assertions material to complainant's allegations, including both those relating to her vote for her son-in-law for superintendent and those relating to the charge of solicitation.

By a decision adopted on February 3, 1994, the School Ethics Commission found that respondent had violated N.J.S.A. 18A:12-24(c)[3] when she cast a vote in favor of her son-in-law to become superintendent of schools for the Garfield Public Schools. It further concluded that Respondent had violated N.J.S.A. 18A:12-24(b)[4] and (d)[5] when she sold gloves to school

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3 N.J.S.A. 18A:12-24(c) provides that:

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

4 N.J.S.A. 18A:12-24(b) provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or other;

5 N.J.S.A. 18A:12-24(d) provides:

> No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

employees. Both of these determinations rested on factual findings derived from the written submissions of the parties.

The Commission then determined that respondent's violation of N.J.S.A. 18A:12-24(c) was "deliberate and serious." Nevertheless, the Commission concurred with respondent's view that

> ...since the School Ethics Act is new and has never addressed a situation where a board member was penalized for voting for a relative through marriage, removal would be too severe a penalty.

The Commission concluded that, therefore, a three month suspension from membership on the district Board would be the appropriate sanction for respondent's conduct, and it recommended to the Commissioner of Education that he impose this as the penalty.[6]

The Ethics Commission further determined that respondent had derived little or no profit from the sale of gloves and that there was no evidence that her activity was "abusive." It therefore recommended that the Commissioner issue a letter of reprimand for respondent's violations of N.J.S.A. 18A:12-24(b) and (d), admonishing respondent for her actions and advising her not to

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6 The School Ethics Act provides that if the Ethics Commission finds a violation of the Act it

> ...shall by majority vote, recommend to the commissioner the reprimand, censure, suspension, or removal of the school official found to have violated this act. The commission shall state in writing its findings of fact and conclusions of law. The commissioner shall then act on the commission's recommendation regarding the sanction.

N.J.S.A. 18A:12-29(c).

We also note that, in contrast to the appeals procedure provided for under N.J.S.A. 18A:6-9 et seq., any appeal from the Ethics Commission's determination of a violation of the School Ethics Act, as well as of the Commissioner's decision as to the sanction, is to the State Board of Education. N.J.S.A. 18A:12-29(d).

sell items from her workplace to district employees in the future.

On February 7, 1994, the Ethics Commission transmitted its decision to the Commissioner of Education for his determination of the sanction to be imposed.[7]

On March 30, 1994, based on his review of the "asserted allegations" and "upon review of the Commission's findings of fact and conclusions of law," the Commissioner of Education concluded that he could not accept the Ethics Commission's recommendation as to the sanction to be imposed on respondent. The Commissioner rejected the Ethics Commission's view that although the statute was "seriously and deliberately" violated, the most severe penalty should not be imposed because the law was "new." The Commissioner instead reasoned as follows:

> [T]he statute specifically prohibits a board member from acting in any matter where the board member has a direct or indirect financial or personal involvement. The respondent refrained from acting against the public trust when she first abstained from voting when her son-in-law was appointed as acting superintendent. Subsequently, respondent's actions violated that trust and the dictates of the statute when voting to appoint him superintendent.
>
> Moreover, her act of soliciting the sale of gloves was also found to have created the justifiable impression that the public trust was violated in contravention of N.J.S.A. 18A:12-24(b) and (d).

Therefore, the Commissioner concluded, respondent should be removed from her position as a member of the district Board.

Our Legal Committee issued its Report in this matter on September 21, 1994, recommending that the State Board of Education

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[7] See supra note 6.

set aside both the Ethics Commission's determination as to the alleged violations of the School Ethics Act and the Commissioner's decision as to the sanction. This recommendation was grounded in the conclusion that, although respondent had repeatedly contested the material facts underlying the allegations against her, the School Ethics Commission had failed to follow the statutory and regulatory prescription that she be provided a hearing in these circumstances.

Complainant filed exceptions to the Report on October 4, 1994, contending that respondent had never disputed the facts salient to the vote she cast for her son-in-law. Complainant further contented that it was proper for the Ethics Commission to have acted expeditiously in penalizing respondent because public confidence in the Garfield School District had been seriously undermined of late by the Superintendent and another board member.

Subsequently, a memorandum sent in December 1993 to the Chairman of the School Ethics Commission by a Deputy Attorney General was brought to our attention. See 93-0122: Whether the School Ethics Commission Must Refer a Matter to the Office of Administrative Law for a Hearing as a Contested Case Upon a Finding of Probable Cause (December 1, 1993). In that it appeared that the contents of the memorandum might be relevant to the issues involved in this appeal, the State Board provided the parties with the opportunity to respond to it. We then directed that the memorandum be included in the record.

We have reviewed complainant's exceptions to the Legal Committee's report of September 21, and find them to be without merit. We stress that even if public confidence in the Garfield

Board has been undermined by the conduct of the Superintendent and a board member, this can not justify denying due process to respondent.

We have also considered the memorandum that was provided to us after our Legal Committee's initial report was issued. This reinforces our conclusions that the decisions below can not be sustained on the basis of the agency record that has been developed thus far and that we must remand this matter to the Ethics Commission.

The procedures which the Ethics Commission must follow in making its determinations with respect to complaints of alleged violations of the School Ethics Act are specified by N.J.S.A. 18A:12-29. The terms of this statutory provision are clear and unambiguous. After receipt and service of a complaint, the named school official must be provided the opportunity to submit a written statement under oath. The statute then provides that:

> b.... The commission shall thereafter decide by majority vote whether probable cause exists to credit the allegations in the complaint. If the commission decides that probable cause does not exist, it shall dismiss the complaint and shall so notify the complainant and any school official named in the complaint. The dismissal shall constitute final agency action. If the commission determines that probable cause exists, it shall refer the matter to the Office of Administrative Law for a hearing to be conducted in accordance with the "Administrative Procedures Act, " P.L. 1968, c 410 (C.52:14B-1 et seq.), and shall so notify the complainant and each school official named in the complaint.
>
> c. Upon completion of the hearing, the commission, by majority vote, shall determine whether the conduct complained of constitutes a violation of this act or whether the complaint should be dismissed. If a violation is found, the commission shall, by majority vote, recommend to the commissioner the reprimand, censure, suspension, or removal of the school official found to have violated this act. The commission

> shall state in writing its findings of fact and conclusions of law. The commissioner shall then act on the Commission's recommendation regarding the sanction.

(Emphasis added).

The Commission's obligations are also specified in the regulations adopted by the State Board of Education. Like the statute it implements, the pertinent regulatory provision provides that when the Ethics Commission determines that probable cause exists to credit allegations in a complaint, it shall refer the matter to the Office of Administrative Law for a hearing to be conducted in accordance with the Administrative Procedure Act. N.J.A.C. 6:3-9.18(f).

We recognize that the Administrative Procedure Act does not require that an Administrative Law Judge conduct a full evidentiary hearing in every case. Cunningham v. Department of Civil Service, 69 N.J. 13 (1975); N.J.A.C. 1:1-1 et seq. Hence, if there are no disputed facts in a given matter and resolution of a complaint under N.J.S.A. 18A:12-29 requires only the application of the law to the undisputed facts, a given matter might properly be resolved by the Ethics Commission after giving the parties the opportunity to be heard. See memorandum 93-0122, supra. at 2. However, if there are disputed facts, an evidentiary hearing must be conducted. See id.

There is no question that this case was a contested case requiring an adjudicatory hearing before a penalty could be imposed on respondent. Hills Development v. Bernards Tp., 229 N.J. Super. 318, 340-341 (App. Div. 1988). Respondent answered the complaint and repeatedly contested the facts material to the allegations against her with respect to both the charge of nepotism and that of

"solicitation." Despite this, the Commission did not alter the view embodied in its letter of December 10 that the material facts were not disputed. It therefore decided this matter solely on the basis of the written submissions. Based upon these submissions, the Commission concluded that respondent had solicited the sale of gloves and that her conduct in casting a vote for her son-in-law was a "serious and deliberate violation" of the School Ethics Act. Judgments such as these could not properly be made without an adjudicatory hearing conforming with the requirements of the Administrative Procedure Act. In re Uniform Adm'v Procedure Rules, 90 N.J. 85 (1982). See In re Township of Warren, 247 N.J. Super. 146 (App. Div. 1991); Hills Development v. Bernards Tp. 229 N.J. Super. 318, 340-341 (App. Div. 1988).

In contrast to the opportunity that was afforded respondent in this case, the Administrative Procedure Act provides that "opportunity shall be afforded all parties [in contested cases] to respond, appear and present evidence and argument on all issues involved." N.J.S.A. 52:14B-9(c). "Any party in a contested case may present his case or defense by oral and documentary evidence, submit rebuttal evidence and conduct such cross-examination as may be required, in the discretion of the administrative law judge, for a full and true disclosure of the facts." N.J.S.A. 52:14B-10(a).

Consequently, the proper course at this point is to reverse the Ethics Commission's determinations with respect to the alleged violations of the School Ethics Act and to remand the matter to the Ethics Commission with the direction that it transmit the case to OAL for hearing. Similarly, because the Commissioner's decision as to the appropriate sanction in this case was grounded in the Ethics

Commission's factual findings and determinations with respect to the violations, we must set that judgment aside and direct that the Commissioner consider the case anew once the Ethics Commission issues its decision on remand.

We express no opinion as to the merits of the allegations against respondent. Our decision rests solely on the fact that no penalty should be imposed upon an individual unless he or she has been afforded due process. This is an essential element of justice, and its importance is heightened where, as here, the Commissioner of Education has relied upon Ethics Commission findings as to the respondent's state of mind in determining what penalty should be imposed. We stress that our primary duty in this context is, as is that of the Ethics Commission and the Commissioner, to insure that justice is done.

In that there has not yet been any determination as to the merits, the effect of our decision is to return the situation to the status that existed before the Commissioner directed respondent's removal from the Board. We do not retain jurisdiction.

January 4, 1995

Date of mailing JAN 06 1995

School Ethics Commn.

(SB) 22-94

SEC #C14-93
SEC # 1-94
SB # 22-94

MARIA SCANNELLA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
CAROL SCUDILLO, BOARD MEMBER, BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	

Decided by the School Ethics Commission, February 3, 1994

Decided by the Commissioner of Education, March 30, 1994

For the Petitioner-Respondent, Morrissey, Rotolo & DiDonato (Joseph J. Rotolo, Esq., of Counsel)

For the Respondent-Appellant, Purcell, Ries, Shannon, Mulcahy & O'Neill (Joseph F. Skinner, Esq., of Counsel)

This case involves a complaint filed on October 5, 1993, by Maria Scannella (complainant) with the New Jersey School Ethics Commission, alleging that Carol Scudillo (respondent), a member of the Board of Education of the City of Garfield, had violated various provisions of the School Ethics Act, N.J.S.A. 18A:12-2 et seq. The Ethics Commission resolved the case without referring the matter to the Office of Administrative Law, finding that respondent had violated the School Ethics Act and recommending to the Commissioner of Education that he impose a sanction of three months' suspension on respondent. The Commissioner rejected the sanction recommended by the Ethics Commission and instead directed respondent's removal from the Board.

Our Legal Committee issued its Report in this matter on

December 7, 1994

September 21, 1994, and, as provided by our regulations, mailed it to both parties. N.J.A.C. 6:2-3.1(d)

Subsequently, a memorandum sent in December 1993 to the Chairman of the School Ethics Commission by a Deputy Attorney General was brought to our attention. Memorandum 93-0122: Whether the School Ethics Commission Must Refer a Matter to the Office of Administrative Law for a Hearing as a Contested Case Upon a Finding of Probable Cause (December 1, 1993). In that it appeared that the contents of the memorandum might be relevant to the issues involved in this appeal, we advised the parties that it was our intention to direct its inclusion in the record. Although we provided them with the opportunity to respond, neither party has objected to the inclusion of this document.

Therefore, as provided for by N.J.A.C. 6:2-1.9, on our own motion, the State Board of Education directs that the record on appeal in this case be supplemented by the inclusion of memorandum 93-0122, dated December 1, 1993, by Deputy Attorney General Geraldine Callahan to the Chairman of the School Ethics Commission.

Daniel J.P. Moroney abstained.

December 7, 1994

Date of mailing DEC 09 1994

23-94

REBA LIPPINCOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, Educational Media Specialist, sought order directing the Board to grant authority to the Educational Media Specialist to supervise the noncertified support members of the Library/Media Center staff and to grant authority to develop and coordinate the total Educational Media Services program within the district. Petitioner alleged her supervisor (vice principal) to whom she reported was performing out-of-title duties.

Initial decision found person holding a principal endorsement on an administrative certificate is authorized, among other things, to perform the duties involved in supervising a media center and the persons attached to a media center. Certification and endorsement required for a position are determined by duties performed; job title is irrelevant. (Teaneck Education Association) Board's Motion for Summary Judgment was granted. Petitioner's Motion for Summary Judgment was dismissed.

Commissioner adopted findings and determination in initial decision. Petition was dismissed.

FEBRUARY 1, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5339-92
AGENCY DKT. NO. 248-6/92

REBA LIPPINCOTT,
Petitioner,
v.
BOARD OF EDUCATION OF WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Reba Lippincott, petitioner, pro se

Thomas J. Savage, Esq., for respondent (Savage and Serio, attorneys)

Record Closed: November 9, 1993 Decided: December 21, 1993

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

Reba Lippincott, petitioner, seeks an order directing the Watchung Hills Regional High School Board of Education, respondent, to grant authority to the Educational Media Specialist to supervise the noncertified support members of the Library/Media Center staff and to grant authority to the Educational Media Specialist to develop and coordinate the total Educational Media Services program within the district. The Board asserts the petitioner has failed to state a claim upon which the Commissioner can grant relief and, in the alternative, that the petitioner has failed to exhaust administrative remedies.

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The matter was opened on June 2, 1992, when the petitioner, then represented by counsel, filed a petition of appeal with the Commissioner of Education alleging the supervisor to whom she reports is performing out-of-title duties. The Board filed its answer on July 8, 1992.

The Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. After notice, a prehearing conference was held by telephone on October 2, 1992. It was settled that the petitioner sought an order of the Commissioner directing that the Board's Supervisor of Communications cease performing certain responsibilities and that the petitioner be permitted to perform those responsibilities. Counsel were directed to complete discovery. The matter was set down for hearing on February 10, 1993 and counsel were directed to file a joint stipulation of facts not later than January 15, 1993.

On February 8, 1993, counsel represented that the matter could proceed on stipulations of fact and cross-motions for summary judgment. Accordingly, I adjourned the February 10 hearing date and scheduled the appropriate submissions. On March 8, 1993 I wrote to counsel stating that the parties' papers were long overdue and that the matter was set down for hearing on May 4, 1993. On April 22, 1993, I received a letter from the petitioner's counsel announcing that the petitioner had decided to represent herself. A Substitution of Attorney was submitted also.

On April 27, 1993 I received from the petitioner a motion to amend the pleadings along with a request for an adjournment of the May 4 hearing date. I converted the May 4 hearing to a telephone conference. The Board indicated it needed additional information and asked permission to use short interrogatories. I granted the request and set the matter down for hearing on October 20, 1993. The petitioner also indicated she wanted more discovery. Both parties agreed to the October 20, 1993 hearing date.

The Board timely filed its answer to the amended petition. Thereafter, certain discovery problems were addressed. On October 15, 1993, the petitioner moved for summary judgment. The Board cross moved for summary judgment on October 25. The petitioner filed a reply on October 29, 1993. I held the record open

for ten days, but received no reply brief from the Board. Accordingly, I closed the record on November 9, 1993.

PARTIES' ARGUMENTS

Petitioner's arguments

The petitioner asserts that the Board has assigned all responsibility to develop, coordinate and implement the services of its media center to Frances Sills. Sills does not hold an educational media specialist endorsement or an associate educational media specialist endorsement. Sills assigns work to the media center personnel. Sills' title is vice principal. The Board adopted this arrangement on September 8, 1992. The educational media specialist, Collier, and the petitioner are not responsible to develop and coordinate media center services. They merely perform services provided by the media center. Neither Collier nor the petitioner has authority over any other staff. There is an audiovisual technician and a secretary. The technician develops and/or coordinates audiovisual equipment services. He supervises the distribution and use of all audiovisual materials under Sills' direction. The technician has exclusive access to the school video collection. He is responsible for cataloging all video materials, the production of instructional materials and the selection and/or ordering of video materials.

Sills directly supervises the secretary. The secretary is not exclusively assigned to the educational media specialist.

Sills supervises the development and implementation of media center services. She is responsible for providing leadership and direction so that the media center goals are fulfilled. She is in charge of developing and coordinating educational video services and coordinating film and video previews to school faculty. She is also in charge of educational television services and processing of interlibrary loan services provided by the media center. Sills develops policies for the selection and ordering of educational media including films and video. Sills provides the same level of supervision to all media center personnel. She visits the media center daily. Sills is not responsible for attending professional media meetings, media workshops or recruiting volunteers to perform clerical duties in the media center. She is in no way responsible for reporting to the certified educational media specialist regarding the institutional plans, anticipating curriculum changes and other matters that affect the internal effectiveness of the center.

The media center has its own educational materials budget. The budget does not include monies for audiovisual materials ordered by the technician, Tuttle. There is a separate budget for his requests. The media center budget does not include monies for educational media materials and computer software ordered by department supervisors. These are also separate budget items.

Sills holds an administrator certificate with principal endorsement. She does not hold a special services certificate. Tuttle holds an instructional certificate with an English teacher endorsement. He does not hold a special services certificate or an educational media specialist endorsement.

The high school budget is administered by the chief school administrator and the Board. Sills administers the media center budget. The educational media specialists participate in acquiring educational media by submitting requests for acquisitions through the secretary. The secretary types the requests and forwards them to Sills. Sills either approves or rejects the requests. Approved requests are submitted to the chief school administrator either for final approval or rejection.

The technician participates in acquiring educational media in the same manner. Department supervisors and faculty participate in educational media acquisition in precisely the same way. The secretary catalogs all educational software under the computer technician's direction. The computer technician maintains the catalogs for all educational software.

The petitioner asserts several arguments. Sills lacks the legal right to do more than evaluate educational media specialists pursuant to N.J.A.C. 6:3-4.3(h). Sills violates school law when she does more than evaluate the educational media specialist. N.J.A.C. 6:3-4.3(h)(1) provides that vice principals are appropriately certified to perform tenured teaching staff member evaluations.

Clearly, Sills can be the petitioner's supervisor for annual evaluation purposes. But the same rule that provides the authority to evaluate does not give Sills the authority to develop, coordinate or implement the services of a media center. Therefore, in the petitioner's view, Sills is illegally developing, coordinating and implementing the services of the media center.

Sills lacks the right to develop, coordinate or implement media center services because she does not have an educational services certificate. The petitioner discusses the rights and responsibilities of the Division of Teacher Preparation and Certification in the New Jersey Department of Education. See, generally, N.J.A.C. 6:11-1.1 through -3.5.

The petitioner insists that N.J.A.C. 6:11-11.17(a) requires the educational media specialist endorsement for any person who is assigned to develop and coordinate educational media services in the public schools. Educational media are defined as all print and nonprint resources and the equipment needed for their use.

Because Sills has been assigned to develop and coordinate educational media services, and because she is in charge of the four people who work in the media center, she should hold an educational services certificate, but does not. The law does not allow for exceptions.

If Sills were allowed to continue to develop and coordinate the educational media services, N.J.A.C. 6:11-11.17(a) would be meaningless. Vice principals could run libraries without media specialists.

The chief school administrator has violated N.J.A.C. 6:11-3.1(b) by assigning Sills to be in charge of the media center and by failing to require her to exhibit the educational services certificate and educational media specialist endorsement before she assumed the responsibilities. Being in charge of the media center is a regulated duty. Running a media center requires the proper certificate. Sills has neither the proper certificate nor the proper endorsement.

The petitioner also urges that N.J.A.C. 6:11-9.3(b) does not give authority to develop and coordinate educational media services. The rule provides

> Principal: This endorsement is required for any position that involves service as an administrative officer of a school or other comparable unit within a school district. Such positions shall include assistant superintendent for curriculum instruction, principal, assistant principal, vice principal and director. Holders of this endorsement are authorized to direct the formulation of goals, plans, policies, budgets and personnel actions of the school or other comparable unit, to recommend them to the chief district administrator, and to direct their implementation in the school or other comparable unit. Holders of this endorsement also are authorized to direct and supervise all school operations and programs, to evaluate school staff, including teaching staff members pursuant to

N.J.A.C. 6:3-1.19 and 1.21 and to direct the activities of school-level supervisors.

The petitioner assumes the high school administration believes Sills has legal authority to develop and coordinate educational media services because she has the right to direct and supervise all school operations and programs. However, if she has this right, derived from N.J.A.C. 6:11-9.3(b), then why does that same regulation also specifically allow her to direct the activities of school-level supervisors? Logically, the right to direct and supervise all school operations and programs would include directing the activities of school-level supervisors. New Jersey school law requires certification of any person employed to do a job regulated by certification rules. There are only three basic certificates, instructional, administrative and educational services. A person is required to have the proper certification in order to perform a job. Although Sills' administrative certificate gives her the right to direct and supervise all school operations and programs, the law still requires her to have the educational services certificate and the corresponding educational media specialist endorsement to be allowed to develop and coordinate educational media services per N.J.A.C. 6:11-11.17(a). The chief school administrator may not assign Sills to be in charge of the media center until she can show that she in fact has an educational media specialist endorsement.

Any work done by the technician that relates to educational media services is being done illegally because his supervisor has no authority to develop and coordinate educational media services. The arguments here are identical to those immediately above. Any work done by the educational media services secretary is done illegally for the same reasons. As long as the technician and secretary are not working in the media center, their salaries and other expenses should be stricken from the media center budget.

Educational media services at Watchung Hills Regional High School are not centralized. Even if Sills were properly certified to be in charge of the media center, there are others at the school developing and coordinating educational media services within their own departments without the proper certification and endorsement. Educational media are defined as all print and nonprint resources and the equipment needed for their use. At the high school, department heads are allowed to order books and other materials that clearly are within the definition of educational media. Therefore, they are coordinating and developing educational media services illegally when they fail to hold an educational media specialist endorsement. The computer technician is responsible for ordering computer parts,

equipment and software which certainly qualify as educational media. He does not have an educational media specialist endorsement and he is coordinating and developing things related to computers at the school.

No genuine issues of material fact exist in this matter and, therefore, the petitioner is entitled to summary judgment in her favor.

Board's arguments

The Board agrees that summary judgment is appropriate because there are no material issues of fact and the moving party, the Board, is entitled to judgment as a matter of law.

The petitioner's request for an order directing the Board to grant authority to the educational media specialist to supervise the noncertified members of the media center staff must be denied. The petitioner does not hold a supervisor's certificate nor has she ever served as a department chairperson or supervisor.

N.J.A.C. 6:11-9.3 is dispositive. Persons holding the principal endorsement may serve as set forth, above. At N.J.A.C. 6:11-9.3(c), the rule provides

> Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as assistant superintendent in charge of curriculum and/or instruction.

This is not a tenure case. The petitioner does not argue, nor can she, that she has tenure in the position as supervisor and is entitled to assume the media center supervisor position. She does not hold a supervisor's certificate. Her position is that the educational media center must be supervised by a certified educational media specialist.

N.J.A.C. 6:11-9.3 is clear. It expressly provides that holders of principal endorsement are authorized to direct and supervise all school operations and programs. Likewise, holders of a supervisor endorsement are also charged with the responsibility of supervising and overseeing personnel.

The Board also discusses tenure and seniority. The Board asserts that the petitioner's question has been considered and decided in a number of cases. In Herbert v. Board of Education of the Township of Middletown, OAL DKT. EDU 9107-88 (June 123, 1989) adopted Comm'r of Ed (July 25, 1989), aff'd St. Bd. of Ed. (Aug. 3, 1990), aff'd N.J. App. Div. (May 22, 1991, A-318-90T 1) (unreported), the petitioner held an administrative certificate with supervisor endorsement. The endorsement qualified him to supervise special services. No other specific endorsement covered the position of Supervisor of Special Services. Although the petitioner had never served as a supervisor of special services, he was held to have rights to that position because he had a valid tenure claim and administrative and supervisory certificates.

In the present case, the Board concedes that Lippincott does not supervise media center personnel. The Board disputes that the computer technician is an audiovisual technician and part of the educational media center.

The petitioner argues that N.J.A.C.6:11-9.3 does not clothe the vice principal with the authority to supervise the media center personnel. N.J.A.C. 6:11-9.3 is clear, however. And where the language of a statute or regulation is clear, the words must be given their generally accorded meaning State v. Maunder, 195 N.J. Super. 317 (Law Div. 1984). The regulation gives the holder of a principal's endorsement the right to direct and supervise all school operation and programs. There is no dispute that Sills holds a certificate with a principal endorsement. Therefore, she is given the express authority to supervise all media center personnel.

The petitioner seems to hold that N.J.A.C. 6:11-11.17(a) somehow changes the supervisory hierarchy permitted by regulation and case law. That rule provides

> This endorsement is required for any person who is assigned to develop an coordinate educational media services in the public schools. Educational media are defined as all print and nonprint resources and the equipment needed for their use.

The regulation is clear. An educational media specialist is permitted to develop and coordinate educational media services. The regulation does not confer upon an educational media specialist any authority to supervise personnel. The petitioner's reliance on this regulation as somehow conferring the ability to supervise personnel and as denying that right to the vice principal is misplaced.

The petitioner argues that because she is not permitted to supervise personnel and make final determinations concerning the media budget, she has been deprived of the ability to develop and coordinate educational media services. The Board does not have a problem with educational media specialists developing and coordinating educational media services. However, the Board does not agree with the petitioner's definition of developing and coordinating. Throughout her pleadings and her interrogatories and many discussions with the superintendent and staff, it has become clear that her interpretation of developing and coordinating means more than overseeing the developing of educational media services. Her interpretation is expansive and includes personnel as well as services. To the extent her interpretation exceeds the authority provided by regulation, it must be rejected. The chief school administrator, answering interrogatories propounded by the petitioner, responded in the negative when asked whether the petitioner develops and coordinates educational media services because he was aware that in her opinion, such a function includes the supervision of personnel.

The petitioner has presented no facts other than the undisputed facts that she does not supervise personnel or have final decision making authority with regard to the budget.

The petitioner also argues that departments order books and video materials or computer software. Provided they are doing so for their departments or for the computer program, there can be no violation of N.J.A.C. 6:11-11.17(a). The regulation does not confer upon the educational media specialist the sole authority to request purchase of materials either for the educational media center or for other departments. Materials purchased for schoolwide computer programs for any of the departments are properly ordered or requested by persons having responsibility for those operations. The cited regulation only gives authority to develop and coordinate educational media services. The petitioner has failed to show how she has been denied that right.

An individual who is represented by an authorized bargaining agent has no standing to maintain her cause of action about a negotiable term or condition of employment. The Board asserts that once there is an authorized bargaining agent, the individual cannot contest a contractual term or condition of employment. County of Essex, 17 N.J.P.E.R. 173 (1991).

To the extent that the petitioner's claims arise out of an allegation that she is not permitted to perform her job functions or that other personnel are performing out-of-title duties, the allegation is not cognizable in this forum. The collective bargaining agreement controls. It sets out a specific procedure for processing grievances. The labor contract in this case defines a grievance as a claim by a teacher or the Association based upon the interpretation, application or violation of this Agreement, administrative decision, or Board policies affecting a teacher or a group of teachers. The agreement then sets out a five-level grievance procedure.

The petitioner claims the Board's policy with regard to materials purchased encroaches upon her right to develop and coordinate media services. As such, this claim should go through the grievance procedure because it involves a Board policy. It is undisputed that there have been no grievances filed with regard to this matter. To the extent the petitioner's claims relate to Board policies concerning implementation of the budget and any allegations as to employees performing out-of-title work, her claims are subject to the grievance procedure.

Where the controversy does not arise under the school laws, it is outside of the Commissioner's jurisdiction even though it may pertain to school personnel.

The petitioner's claims concern the right of the educational media specialist to supervise media center employees. This arises under the school laws and regulations and is cognizable by the Commissioner. Her claims as to budget requests pursuant to Board policy are not.

DETERMINATION

Among her arguments, the petitioner asserts that it is assumed the administration of the school believes Sills has legal authority to develop and coordinate educational media services because she has the right to direct and supervise all school operations and programs. The petitioner's assumption is correct, as is the Board's similar assumption. Under the principal endorsement, Sills has the right to direct and supervise all school operations and programs.

The petitioner would distinguish this. She asks, if the vice principal has the right to direct and supervise all school operations and programs, why does the regulation also allow the principal to direct the activities of school-level supervisors? In the petitioner's view, the right to direct and supervise all school operations and

programs logically would include directing the activities of school-level supervisors. Somehow, the petitioner fails to perceive that educational media services are subsumed by the authority to direct and supervise all school operations and programs. Nothing in any of the rules cited by petitioner forecloses supervision from a higher level. Simply, the Board could chose to vest supervisory duties for the media center in a person holding an educational services certificate and educational media specialist endorsement. The Board has chosen not to add that layer of supervision. N.J.S.A. 18A:11-1 gives to every local board of education the authority to make, amend and repeal rules for its own government . . . the government and management of the public schools and the public property in the district, and for the employment, regulation of conduct and discharge of employees. The same statute authorizes local boards to perform all acts and do all things, consistent with law and state board rules, necessary for the proper conduct, equipment and maintenance of the public schools.

The Board's choice of administrative structure lies within its compass of legislatively invested authority. It is subject to challenge only when it is applied arbitrarily, capriciously, or for proscribed reasons.

The petitioner's assertion that there is no merit to the argument that N.J.A.C. 6:11-9.3(b) gives authority to the vice principal to develop and coordinate educational media services is itself without merit. The petitioner has fastened upon an isolated bit of language. One of the basic rules of statutory and regulatory interpretation is that statutes and rules upon the same matter are to be read together and harmonized. A tribunal cannot ignore the plain meaning of language employed by a legislature or an administrative body. Singleton v. Consol. Freightways Corp., 64 N.J. 357 (1974).

The statement at N.J.A.C. 6:11-9.3(b) concerning the principal is unequivocal. Fundamental principles of statutory and regulatory construction require that if the language is plain, unambiguous and uncontrolled by other parts of the matter upon the same subject the court cannot give it a different meaning. This standard of interpretation has been employed consistently by the courts of New Jersey. See, Imbriacco v. State Civil Service Comm'n, 150 N.J. Super. 105 (App. Div. 1977); Fahey v. Jersey City 52 N.J. 103 (1968); Duke Power Co. v. Patten, 20 N.J. 42 (1955). It applies with equal force to resolve the question of construction presented in this case.

Despite the other well-crafted arguments of the Board, the matter turns entirely on interpretation. What has happened is that the petitioner has seized upon one phrase in a large chapter of regulations concerning teacher preparation and certification. By failing to read the language concerning school media personnel in the larger context, she has lost sight of the fact that certain certificates subsume the powers, duties and authorities of other certificates. Reading the certification rules in their entirety, I **FIND** that a person holding a principal endorsement on an administrative certificate is authorized, among other things, to perform the duties involved in supervising a media center and the persons attached to a media center. The certification and endorsement required for a position are determined by the duties performed; the job title is irrelevant. Teaneck Education Ass'n v. Teaneck Board of Education, 1983 S.L.D. 1039.

In summary, this decision **FINDS** the Watchung Hills Regional High School District Board of Education has properly determined the administrative and supervisory arrangement of personnel in its school; the vice principal properly is assigned, among other things, to supervise the school's media center and the personnel attached to the media center; only a strained reading of the appropriate regulations could lead to the result the petitioner wants, and the clear meaning of the principal endorsement authorization and many years of common practice require that the petitioner's interpretation be rejected.

I **CONCLUDE** that the Board's motion for summary judgment must be **GRANTED**.

Accordingly, I enter judgment for the Board and **DISMISS** the petitioner's motion for summary judgment. It is so **ORDERED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

21 DECEMBER 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/27/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 29 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

REBA LIPPINCOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record, including the exceptions advanced by petitioner, the Commissioner determines that such exceptions essentially recast and reargue issues which were fully and fairly considered and addressed by the Administrative Law Judge in his initial decision and need not be herein reiterated. The Commissioner is in full agreement with the findings and conclusions of the ALJ for the reasons clearly articulated by him in the initial decision.

Accordingly, the Board's motion for summary decision is hereby granted and the instant Petition of Appeal and petitioner's Motion for Summary Decision are dismissed.

FEBRUARY 1, 1994

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 1, 1994

23-94

EDU #5339-92
C # 23-94
SB # 14-94

REBA LIPPINCOTT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 1, 1994

For the Petitioner-Appellant, Reba Lippincott, pro se

For the Respondent-Respondent, Savage & Serio
(Thomas J. Savage, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education substantially for the reasons expressed by the Administrative Law Judge ("ALJ"). In so doing, however, we clarify the ALJ's comment that the certification required for service in a particular position is "determined by the duties performed; the job title is irrelevant." Initial Decision, slip op. at 12. When a staff member demonstrates that the title established for his or her position is inappropriate in view of the duties attending such position, the certification required and the staff member's resultant tenure entitlements will then be determined by the Commissioner on the basis of the specific duties and functions required to be performed. Boeshore v. Board of Education of the Township of North Bergen, decided by the Commissioner of Education,

June 1, 1994

1974 S.L.D. 805. Consequently, position title is necessarily the starting point for such an analysis.

June 1, 1994

Date of mailing JUN 03 1994

24-94

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF SPECIAL EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 1, 1994

OAL DKT. NO. EDU 6147-93

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF SPECIAL EDUCATION, RESPONDENT.	:	DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1994

DATE OF MAILING - FEBRUARY 1, 1994

25-94

LINDA SISTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 1, 1994

OAL DKT. NO. EDU 9816-93

LINDA SISTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1994

DATE OF MAILING - FEBRUARY 1, 1994

(SB) 25-94

SB #25-94

IN THE MATTER OF THE BRANCHBURG TOWNSHIP BOARD OF EDUCATION APPLICATION FOR APPROVAL OF LEASE PURCHASE AGREEMENT, SOMERSET COUNTY.	:	STATE BOARD OF EDUCATION DECISION ON MOTIONS

Decided by the Commissioner of Education, April 20, 1994

Decision on motion by the Deputy Commissioner of Education, May 27, 1994

For the Appellant Thomas Christensen, Mark G. Yates, Esq.

For the Appellant Township Committee of Branchburg, Woolson, Sutphen, Anderson & Nergaard (Mark S. Anderson, Esq., of Counsel)

For the Respondent, Carroll & Weiss (David W. Carroll, Esq., of Counsel)

This matter is before us on application by the Township Committee of Branchburg (hereinafter "Township") and an individual Branchburg Township taxpayer (hereinafter "petitioner"). Both are seeking to stay an approval given by the Commissioner of Education on April 20, 1994 to a lease with option to purchase and ground lease agreement for the construction of a primary school and additions and/or renovations to three other schools in the school district of Branchburg.

The Township's involvement in this matter began when, on March 8, 1994, it requested the opportunity to attend the conference scheduled for March 31 pursuant to N.J.A.C. 6:22A-1.2(h) to review the proposed agreement. By letter of March 23, the Commissioner denied this request, advising the Township that it had no standing

June 1, 1994

to be represented in that phase of the application process.

Petitioner's involvement began on April 8, 1994, when he filed a petition with the Commissioner seeking to oppose the Board's application for approval of the agreement. By letter dated April 20, 1994, the Department of Education disposed of this petition by returning it to petitioner, stating that there was no mechanism in the law for the Commissioner to entertain such a filing.

On April 20, 1994, the Commissioner approved the proposed agreement pursuant to N.J.S.A. 18A:20-4.2, N.J.S.A. 18A:20-8.2(b) and N.J.A.C. 6:22A-1.1 et seq. as to the District's need for the construction. This approval was contingent on favorable review by the Local Finance Board in the Department of Community Affairs.

On May 5, 1994, the petitioner appealed to the State Board of Education, challenging both the "dismissal" of the petition he had filed with the Commissioner on April 8 and the Commissioner's approval of the lease purchase agreement.

On May 17, 1994, the Township appealed to the State Board from the approval issued by the Commissioner. On that date, the Township also sought a stay from the Commissioner.

On May 23, 1994, the petitioner filed a motion with the Commissioner seeking a stay of his approval.

By letter decision of May 27, 1994, the Deputy Commissioner, acting under authority delegated to him by the Commissioner pursuant to N.J.S.A. 18A:4-33,[1] determined that the

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[1] This statutory provision authorizes the Commissioner to designate an assistant commissioner as a deputy commissioner with full power to act in his place. See also N.J.S.A. 18A:4-34(c) (The Commissioner may delegate to an assistant commissioner the hearing and determination of controversies arising under the school laws).

Township had failed to establish standing either to seek a stay or to bring an appeal.

The Deputy Commissioner also determined that petitioner had failed to establish a likelihood of success on the merits of his appeal and that neither movant had shown that it would suffer irreparable harm were a stay denied.

The Deputy Commissioner therefore declined to stay the Commissioner's approval issued on April 20, 1994.

Both the Township and the petitioner applied to the State Board for a stay of the approval.[2] At the request of all three parties, we are considering both applications for a stay on an expedited basis.

In these proceedings, each party seeking a stay bears the burden of establishing that: 1) there is a clear likelihood that it will prevail on the merits of its appeal, 2) irreparable injury will result if the stay is not granted, 3) upon balancing the hardships, the harm to the moving party from denial of a stay outweighs the damage to the Board if a stay is granted and 4) that the public interest requires that we issue a stay. Crowe v. De Gioia, 90 N.J. 126 (1982); Zanin v. Iacono, 198 N.J. Super. 490, 498-99 (Law Div. 1984). In this respect, it is our task to engage in a delicate balancing of the interests of the parties and the public as they may be affected by the granting or denying of a stay in this case. Cf. Yakus v. United States, 321 U.S. 414, 440 (1944).

Petitioner's central claim is that the form of the transaction involved in this case is not authorized by law. He

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2 Thus, the Commissioner's "dismissal" of petitioner's petition of April 8 is not at issue in these proceedings.

argues that interest-bearing obligations will be used to finance the project and maintains that the transaction is in fact a borrowing transaction. Petitioner asserts that this requires that the Board exercise its borrowing authority and, consequently, that voter approval must be sought.

Petitioner urges that the Board will suffer little or no harm if a stay is granted, and that the Board might benefit by lower interest rates once the underlying matter is resolved.

The Township challenges the validity of the Board's population projections and asserts that the projects approved by the Commissioner are not needed. In support of this contention, it points to the fact that three bond referenda have been defeated by the voters in the last four years. It also argues that the Commissioner's approval of the lease purchase proposal was procedurally defective, asserting that an evidentiary hearing was required before the Commissioner could properly approve it. The Township also contends that N.J.S.A. 18A:20-4.2 does not authorize construction at multiple sites under the rhubric of a single lease purchase arrangement.

The Township argues that a stay is necessary to protect its taxpayers from the fiscal impact of the project.

We find that neither the Township[3] nor petitioner has demonstrated a clear likelihood that it will prevail on the merits of its appeal. The materials presented in these proceedings do not

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3 On May 27, 1994, the district Board filed a motion to dismiss the Township's appeal to the State Board for lack of standing. That motion is pending before the State Board. However, in that petitioner has adopted the Township's argument, we need not decide that issue in these proceedings.

demonstrate that the transaction at issue is outside the legal framework provided by statute and implementing regulations. Not only do the terms of the statute authorize lease purchase agreements that conform to certain conditions specified in the statute, but the terms of the implementing regulations make express provision for financing arrangements such as that here. See, e.g., N.J.A.C. 6:22A-1.2(g) and (n). Petitioner has not shown that the regulations are not valid. Nor has he demonstrated that the arrangement here is on its face contrary to statutory and regulatory authorization or that there are any specific defects in any aspect of the transaction that would invalidate the transaction.

Nor has petitioner shown in these proceedings that the payments involved in this transaction constitute debt so as to invalidate the Commissioner's approval either on statutory or constitutional grounds.

We reject the Township's contention that a stay must be issued because its enrollment projections differ from the Board's. The fact that projections may differ does not demonstrate that those upon which the Commissioner relied were erroneous. Moreover, the Township has failed to demonstrate that it was legally entitled to an evidentiary hearing so as to contest those projections prior to the Commissioner's approval of the proposal. Nor does the fact that the District's voters have defeated referendum in the past show that the District's students do not need the facilities at issue. Cf. In re Upper Freehold Reg'l School Dist., 86 N.J. 265 (1981).

Similarly, neither petitioner nor the Township has shown that it will suffer irreparable harm if we do not stay the

approval. To the contrary, to preclude the Board from proceeding at this point would make its task more difficult and would almost certainly increase the cost of this transaction. Given that the Commissioner has approved the District's need for the additional facilities, the public interest is best served by permitting the Board to begin the process of providing those facilities to its students.

June 1, 1994

Date of mailing JUN 03 1994

(SB) 25-94

SB #25-94

IN THE MATTER OF THE BRANCHBURG TOWNSHIP BOARD OF EDUCATION APPLICATION FOR APPROVAL OF LEASE PURCHASE AGREEMENT, SOMERSET COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, April 20, 1994

Decision on motion by the Deputy Commissioner of Education, May 27, 1994

Decision on motion by the State Board of Education, June 1, 1994

Order by the Appellate Division, June 6, 1994

For the Appellant Thomas Christensen, Mark G. Yates, Esq.

For the Appellant Township Committee of Branchburg, Woolson, Sutphen, Anderson & Nergaard (Mark S. Anderson, Esq., of Counsel)

For the Respondent, Carroll & Weiss (David W. Carroll, Esq., of Counsel)

This matter arises from an application by the Board of Education of the Township of Branchburg (hereinafter "Board") for approval from the Commissioner of Education as required by N.J.S.A. 18A:20-4.2(f) for a transaction for a lease with option to purchase and ground lease agreement in excess of five years for the construction of a primary school and additions and/or renovations to three other schools.[1]

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[1] N.J.S.A. 18A:20-4.2(f) provides district boards of education with the authority to:

> Acquire by lease purchase agreement a site and school building; provided that the site and building meet

Oct 5 1994

The Township Committee of the Township of Branchburg (hereinafter "Township") first became involved in the matter when, on March 8, 1994, it requested the opportunity to attend a conference that had been scheduled for March 8, 1994, to review the proposed agreement on behalf of the Commissioner.[2] By letter of March 23, the Commissioner denied this request, advising the Township that it had no standing to be represented in that phase of the application process.

Thereafter on April 8, 1994, Thomas Christensen (hereinafter "Christensen"), a taxpayer who is a resident of Branchburg, filed a Petition of Appeal to the

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guidelines and regulations of the Department of Education and that any lease purchase agreement in excess of five years shall be aproved by the Commissioner of Education as in the best interest of the school district after determining that the relationship of the proposed lease purchase project to the districts' goals and objectives established pursuant to P.L. 1975, c. 212 (C. 18A:7A-1 et seq.) has clearly been established; and provided that for any lease purchase agreement in excess of five years the Local Finance Board in the Department of Community Affairs shall determine within 30 days that the cost and the financial terms and conditions of the agreement are reasonable....

2 N.J.A.C. 6:22A-1.2(h) provides that:
The Commissioner or a designee shall hold a conference prior to the Commissioner approving any request for approval of a lease purchase agreement in excess of five years. All documents required and the application must be submitted in duplicate and in final form and received at least 15 days prior to the scheduled conference. At the conference the district board of education shall be required to document and discuss at a minimum the following:
1. The newspaper advertisement for the request for proposals;
2. The list of persons and/or firms to which the request for proposals was sent;
3. The responses to the request for proposals; and
4. The comparative analysis of proposals.

Commissioner seeking to oppose the Board's application for approval of the agreement. By letter dated April 20, 1994, the Acting Director of the Bureau of Controversies and Disputes disposed of this petition by "returning" it to Christensen. In so doing, she advised Christensen that there was no mechanism in the law for the Commissioner to entertain such a filing.

On April 20, 1994, the Commissioner acted under authority of N.J.S.A. 18A:20-4.2 to approve the proposed agreement pursuant to N.J.S.A. 18A:20-4.2, N.J.S.A. 18A:20-8.2(b) and N.J.A.C. 6:22A-1.1 et seq. as to the District's need for the construction. As required by the statute, this approval was contingent on favorable review by the Local Finance Board in the Department of Community Affairs.[3]

On May 5, 1994, Christensen filed an appeal to the State Board of Education, challenging both the "dismissal" of the petition he had filed with the Commissioner on April 8 and the Commissioner's approval of the lease purchase agreement, which had been granted by that time.

On May 17, 1994, the Township appealed to the State Board from the approval issued by the Commissioner. On that date, the Township also sought a stay from the Commissioner.

On May 23, 1994, Christensen filed a motion with the Commissioner seeking a stay of the approval.

By letter decision of May 27, 1994, the Deputy Commissioner, acting under authority delegated to him by the

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3 We have been advised that the Local Finance Board approved the transaction and that its approval has been appealed to the Appellate Division.

Commissioner pursuant to N.J.S.A. 18A:4-33,[4] determined that the Township had failed to establish standing either to seek a stay or to bring an appeal.

The Deputy Commissioner also determined that Christensen had failed to establish a likelihood of success on the merits of his appeal and that neither movant had shown that it would suffer irreparable harm were a stay denied.

The Deputy Commissioner therefore declined to stay the Commissioner's approval issued on April 20, 1994.

Both the Township and Christensen applied to the State Board for a stay of the approval. At the request of all three parties, we considered both applications for a stay on an expedited basis. On June 1, 1994, we denied them.

On June 6, 1994, the Appellate Division acted on an emergent basis to stay the Commissioner's approval and temporarily restrained the Branchburg Board from proceeding to close the lease purchase transaction.

With the agreement of the parties, briefing on the merits of this matter proceeded on an expedited basis. As part of this briefing, the Board renewed its earlier motion to dismiss the Township Committee's appeal on the grounds that the Township lacked the standing to challenge the approval.

Consequently, before we may consider the merits of these appeals, it is necessary to resolve whether the Township has the

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[4] This statutory provision authorizes the Commissioner to designate an assistant commissioner as a deputy commissioner with full power to act in his place. See also N.J.S.A. 18A:4-34(c) (The Commissioner may delegate to an assistant commissioner the hearing and determination of controversies arising under the school laws).

standing to pursue its challenge to the Commissioner's approval. We have considered the arguments of counsel on this question, including those set forth in the exceptions which the parties filed to our Legal Committee's Report. We concur with the Commissioner that the Township does not have the standing in this matter to entitle it to challenge the Commissioner's approval.

The State Board is not unaware of New Jersey's liberal standing policy in cases of public interest to which the Township has pointed in support of its right to sustain the action involved here. E.g., New Jersey State Chamber of Commerce et al. v. New Jersey Election Law Enforcement Commission, 82 N.J. 57 (1980); Crescent Park Tenants Association v. Realty Equities Corp. of New York, 58 N.J. 98 (1971). We do not view that policy, however, as conferring standing on a municipal governing body to challenge a transaction which, as here, the Legislature has expressly placed in the control of another governmental body, in this case the district board of education, contingent on approval by the State. Kaveny v. Montclair Bd. of Com'rs., 71 N.J. Super. 244, 246 (App. Div. 1962); Gualano v. Bd. of Estimate of Elizabeth School District, 39 N.J. 300, 303 (1963); Botkin v. Westwood, 52 N.J. Super. 416, 425 (App. Div. 1958).

To restate the analysis we applied in Bedminster Township Committee v. Board of Education of the Township of Bedminster, decided by the State Board, July 3, 1991:

> ...the terms of the applicable statutes do not confer standing on a governing body so as to entitle such body to participate in the approval process before the Commissioner of Education. To the contrary, pursuant to N.J.S.A. 18A:20-4.2, it is the district board of education alone which is authorized to acquire a site and school building by lease purchase agreement, and the statute

> specifically allocates jurisdictional responsibility for approval of agreements by a district board in excess of five years between the Commissioner of Education and the Local Finance Board.
>
> In short, the terms of N.J.S.A. 18A:20-4.2 do not assign any role to municipal governing bodies with respect to either the decision to seek approval of a lease purchase agreement from the Commissioner or the process by which the Commissioner approves such agreements. This is consistent with the allocation of responsibility and authority under the education statutes generally. Under those statutes, aside from specific statutory provisions such as N.J.S.A. 18A:22-37, which expressly authorizes a governing body to determine for each item appearing in the budget the amount necessary to be appropriated to provide a thorough and efficient system of schools in a district where voters defeat the budget placed before them, the statutes do not confer on governing bodies any role of a general nature with respect to the education system. This reflects that, as embodied in the education statutes, responsibility for the provision of a thorough and efficient education and the authority to meet that responsibility at the local level is vested in the district board of education. E.g., N.J.S.A. 18A:7A-1 et seq.

On these grounds, we grant the district Board's motion to dismiss the Township as a party to this appeal. Contrary to the Township's contention, this result does not permit the underlying transaction to escape either administrative or judicial review. As the Board correctly concedes, Board's brief at 18, there is no question that petitioner Christensen has the standing to seek review of the project proposed to the Commissioner by the district Board.

In his petition to the Commissioner of April 8, 1994, Christensen sought to challenge the Board's determination to seek approval for the transaction, as well as the validity of the proposed transaction, by invoking the Commissioner's authority "to hear and determine this matter as a 'controversy' under the school law (N.J.S.A. 18A:6-9)..." In the alternative, Christensen sought

review of the transaction pursuant to the Commissioner's authority to approve lease purchase agreements under N.J.S.A. 18A:20-4.2(f).

In her letter of April 20 "returning" the petition, the Acting Director of the Bureau of Controversies and Disputes expressly rejected Christensen's assertion that the matter was subject to review by the Commissioner pursuant to N.J.S.A. 18A:6-9.[5]

The Acting Director erred both in "returning" the petition and in her conclusion as to the scope of the Commissioner's jurisdiction. The substantive determination to refuse to entertain a petition made to the Commissioner of Education pursuant to his authority under N.J.S.A. 18A:6-9 is such that the responsibility entrusted to him requires that he render a final decision in the matter. In re Masiello, 25 N.J. 590 (1958); Laba v. Newark Board of Education, 23 N.J. 364 (1957). Hence, the Commissioner was required to render a decision with respect to the petition at issue here even if he had agreed that the petition should be dismissed. N.J.S.A. 6:24-1.9.

In similar situations, the State Board of Education has remanded the matter involved in order to afford the Commissioner the opportunity to fulfill the legislative mandate to render his final decision. E.g., Capra v. Board of Education of the Borough of Eatontown, remanded by the State Board, February 4, 1987, decided by the Commissioner, February 26, 1987, aff'd with modification by the State Board, November 4, 1987.

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5 N.J.S.A. 18A:6-9 provides that:
> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws....

In this case, Christensen challenged the district Board's action in seeking approval of the proposed lease purchase transaction, as well as to the validity of the transaction. In doing so, he presented a controversy under the education laws, which must now be heard and decided. Compare with Citizens Advocating Referendum for Education ("CARE") v. Board of Education of the Township of Passaic, decided by the Commissioner, March 2, 1989, appeal dismissed by the State Board, July 5, 1990 (Commissioner adopted the Administrative Law Judge's determination in contested case initiated by petition of taxpayers' group challenging validity of proposed lease purchase agreement and district board's actions in seeking approval thereof).

We reiterate that the approval process before the Commissioner of Education is specifically designed to focus on the educational necessity of a proposed lease purchase transaction. Consequently, the current process does not guarantee that there is no legal impediment to the transaction.

We have no doubt that our adjudicative responsibility requires that we resolve any questions as to whether the transaction proposed by a district board conforms with the requirements of the education laws.[6] Christensen attempted to invoke the Commissioner's jurisdiction under N.J.S.A. 18A:6-9 to hear such questions before the Commissioner approved the project pursuant N.J.S.A. 18A:20-4.2(f). Given that those questions have not yet been heard, the proper recourse is to remand the matter.

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6 We note that under N.J.S.A. 18A:20-4.2(f), questions concerning the fiscal reasonableness of the project are within the purview of the Local Finance Board. See, supra, note 3 and accompanying text.

When Christensen filed his exceptions to our Legal Committee's Report, he also filed a motion seeking an order from the State Board recusing the Commissioner from this matter and directing that the matter proceed directly to the Office of Administrative Law for hearing.

In asserting the necessity for the Commissioner's recusal, Christensen contended that remarks made by the Commissioner with respect to this litigation and reported in a newspaper article indicate that the Commissioner is biased and prejudiced in favor of the Board.

N.J.S.A. 2A:15-49 requires that a judge recuse himself from any matter on which he has given his opinion. There is no question that the Commissioner of Education must be guided by these principles. However, these same principles dictate that we afford the Commissioner the opportunity to decide in the first instance whether he should recuse himself. We therefore remand this matter to the Commissioner and transmit to him the record developed thus far[7] with the direction that, should he determine to recuse himself, he assign the matter to an assistant commissioner who has had no previous involvement with this matter. See, supra note 4.

Finally, we reiterate that we are remanding this matter for resolution of Christensen's claims that the proposed project would contravene the education laws. This requires examination of the terms of the agreement, including those providing for remedy in case

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[7] We note that, as part of the proceedings before the State Board, the parties have stipulated as to those items that constitute the record.

of default by the school district, in order to assure that the District's ability to provide a thorough and efficient education to its students is not placed in jeopardy. CARE, supra, 1157-58.

Attorney exceptions are noted.

October 5, 1994

Date of mailing OCT 05 1994

26-94

EDWARD CERATO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured teaching staff member, challenged the withholding of his 1991-92 employment and adjustment increments in 1992-93 school year. Board contended that due to clerical errors withholding was effected retroactively.

ALJ found that Board's holding of petitioner's salary for 1992-93 in place at level he received in 1991-92 was proper and was to continue until overpayment was recouped at end of 1993-94 school year. (Trenton Education Association) ALJ determined petitioner had no demonstrated right to salary monies mistakenly paid him. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

FEBRUARY 1, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9658-92
AGENCY DKT. NO. 489-11/92

EDWARD CERATO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Anthony P. Sciarrillo, Esq., for petitioner

Robin T. McMahon, Esq., Associate Counsel, for respondent
(Marvin L. Comick, General Counsel, attorney)

Record Closed: December 15, 1993 Decided: December 17, 1993

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

Edward Cerato, a tenured teaching staff member employed by the Board of Education of the City of Newark, Essex County, was advised that the Board acted on May 21, 1991 to withhold his salary and/or adjustment increments for the 1991-92 school year, in accordance with *N.J.S.A.* 18A:29-14, by reason of unbecoming conduct during the 1990-91 school year. He did not appeal the action. See, Exhibit 1 (attached to answer). Allegedly because of a computer problem with the 1991-92 salary guide, he received salary for 1991-92 at unreduced and incrementalized level. He was advised the following year in August and September 1992 that his salary was to be frozen at the level of that received at end of 1991-92 school year until, presumably, the scheduled but theretofore uneffected increment withholding amount for the previous year was recouped. Freezing was begun. Alleging Board

action contravened his tenure and/or seniority rights, he filed a petition of appeal with the Bureau of Controversies and Disputes of the Department of Education on November 6, 1992 seeking judgment against the Board for reimbursement of all monies deducted from 1992-93 salary, for invalidation of Board action purporting to withhold increments for 1991-92 retroactively and during the succeeding year of 1992-93 as unlawful, null and void, for assessment of interest and for such other relief as is proper. The Board admitted the sequence of events generally. It alleged that petitioner's employment and adjustment increments were properly determined to be withheld on May 21, 1991, but that through "clerical errors" withholding action was not effected during the succeeding school year. Petitioner's salary was held in 1992-93 at previous year's level to effect projected recoupment, which the Board said amounted to some $5,044.09. Recoupment of overpayment in that manner, said the Board, was lawful and proper. The Commissioner transmitted the matter to the Office of Administrative Law on December 10, 1992 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law and an order was entered on March 25, 1993. At issue in the matter, it was provided, are:

1. Whether Board action purporting to withhold petitioner's salary and adjustment increments in 1992-93 at 1991-92 levels was effectual as a proper retroactive increment withholding action under *N.J.S.A.* 18A:29-14; and

2. Assuming such retroactive increment withholding action to be proper, whether nevertheless the employment action was an improper reduction of compensation under *N.J.S.A.* 18A:28-5 and 6, 10, under *Trenton Education Association v. Board of Ed., City of Trenton, Mercer County,* 1986 *S.L.D.* 2415.

The parties were directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, together with documentation as necessary, indexed and premarked, which thereafter were to be filed in the cause. The matters would then be addressed and resolved as if on cross-motions for summary decision based on pleadings, admissions,

stipulations, documentation and memoranda of law, in accordance with *N.J.A.C.* 1:1-12.5 *et seq*. Stipulations and memoranda by the parties having been filed by December 15, 1993, the record closed then.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. Petitioner is a tenured teaching staff member employed by the Board of Education of the City of Newark for 32 years.

2. On May 21, 1991, the Board voted to withhold his employment and adjustment increments for the 1991-92 school year. He informed the Board he declined to appeal the action.

3. On August 28, 1992 and September 24, 1992, petitioner received letters from Board administrators saying that because of a computer problem with the 1991-92 salary guide, he had received salary monies (unreduced and incrementalized) to which he was not entitled and that in order to fulfill withholding of increments as ordained by the Board, salary for 1992-93 was to be frozen at the salary he received at the end of the 1991-92 school year.

4. Petitioner is currently being paid the same salary he received for 1991-92, that is, $65,335.

5. A summary (revised Exhibit 3 and Exhibit 4) is an accurate mathematical calculation of the effect of Board action of May 21, 1991 on petitioner's salary. It shows petitioner's corrected total earnings for 1991-92 at step 5 on the salary guide and with two longevity increments, 20 years and 25 years. His total annual salary for 1990-91 was $65,335. Continuation of compensation for intervening years at 1991-92 level until end of 1993-94 will accomplish recoupment of total overpayment of $5,044. Revised Exhibit 3 and Exhibit 4 of J-1.

6. The Board has taken no action since May 21, 1991 with respect to petitioner's salary except as above.

7. Petitioner's 1994-95 will be $69,636, plus any longevity payments and employment and adjustment increments agreed to by the Board and the City Association of Supervisors and Administrators in negotiating a successor agreement for supervisors and administrators.

DISCUSSION

Petitioner argued generally that Board action was reduction of compensation of a tenured teaching staff member forbidden by *N.J.S.A.* 18:28-5, that Board action was distinguishable from facts made plain in *Trenton Education Association v. Board of Ed., City of Trenton, supra*, in that over 15 months passed between notice of withholding and withholding, that announcement of belated withholding by administrators 15 months later was null and void since without Board approval, and that petitioner's right to salary and adjustment increments for 1992-93 had become vested by passage of time.

The Board denied petitioner's assertions. It urged that where the Board properly acts to withhold a tenured teaching staff member's salary and adjustment increments but its administration inadvertently fails to freeze salary at that level at the time, it may nonetheless properly act to do so in the succeeding school year.

My view is that Board action here is not defective for lapse of time or for the circumstance delay in retention was by computer glitch. Though not to be condoned, such mistakes are occasional perhaps in any large business organization. Petitioner cannot with reason complain he was not given notice of withholding or that he suffered loss of any property vested in him by mere passage of time. While silently and unprotestingly receiving unreduced 1991-92 salary, reason suggests, petitioner was nonetheless put on notice to inquire about the anomaly. Since he did not, he can claim no windfall at public expense. The act of withholding is not, in my view, a reduction in salary since salary at the level maintained during recoupment was all to which he was lawfully entitled. Future restoration of withheld increments is within discretion of the Board when it becomes satisfied petitioner has come to

perform his job satisfactorily. *See, Probst v. Board of Ed., Borough of Haddonfield*, 127 *N.J.* 518 (1992). That the mechanics of enforcing Board-ordered salary withholding was announced to petitioner by Board administrators, and not by additional formal Board resolution, is in my mind of no moment. It is enough to note the Board in the interim has ratified and approved measures taken by administration, no plainer evidence of which being its defense of the petition of appeal.

It is my view generally that it is wrong to permit people to retain public monies they have not earned, a sentiment I believe shared by the line of cases on salary recoupment issues. It is clear, in any event, a Board's determination to freeze a teacher's salary until it recoups an overpayment does not constitute an unlawful "reduction in compensation" under *N.J.S.A.* 18A:28-5. *Markot v. Bd.of Ed., Twp. of East Brunswick*, 1989 *S.L.D.* 3043 (State Bd. Aug. 4, 1989) (slip opinion at 6-7); and see, *Trenton Education Association v. Bd. of Ed., City of Trenton*, 1986 *S.L.D.* 2415, 2432 (. . . it must be emphasized the appropriate step for a Board to take when the issue of erroneous salary level arises is to hold the salary level in place, not to reduce it through deductions. . .).

CONCLUSION

Based on the foregoing, having considered stipulated facts and argument of counsel, I **CONCLUDE**:

1. Board action in holding petitioner's salary for 1992-93 in place at level of that paid him in 1991-92 was in discharge of a prior validly adopted action, not appealed, in withholding salary and increment adjustments for cause and was, though belated, but corrective of an excusable unilateral mistake of fact;

2. The action was proper and may continue until overpayment has been recouped at end of 1993-94 school year;

3. The action taken was not violative of *N.J.S.A.* 18A:28-5 as an impermissible reduction in compensation; nor did it contravene *N.J.S.A.* 18A:29-14.

4. Administrative action in 1992 to hold salary in place during 1992-93 and until recoupment is complete was adopted, ratified and approved by the Board;

5. Passage of some 15 months after Board resolution to withhold and before administrative action to recoup overpayment for salary paid in 1991-92 did not occasion unlawful divestiture of any property rights vested in petitioner;

6. Petitioner has demonstrated no right, vested or equitable, to salary monies mistakenly paid him;

7. Board measures to recoup are but proper discharge of obligation to guard the public fisc; and, finally,

8. The Board is entitled to judgment on its motion.

The petition of appeal is **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 17, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

12/21/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 28 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

LIST OF EXHIBITS

Exhibit 1 - (Attached to petition) Board letter to petitioner, dated May 23, 1991

Exhibit 2 - (Attached to petition) Board letter to petitioner, dated August 28, 1992

Exhibit 3 - (Attached to petition) Board letter to petitioner, dated September 24, 1992

Exhibit 4 - (Attached to petition) Evaluation of petitioner as supervisor, dated June 1992

Revised Exhibit 3 and Exhibit 4 - (Attached to joint stipulation of facts in J-1) Recapitulation of projected withholding of salary and calculation of amounts withheld and to be withheld until completion of recoupment

Exhibit J-1 - Joint stipulation of facts with attachments

Exhibit 1- (Attached to answer) Letter of petitioner's attorney to Board, dated May 20, 1991 announcing declination to appeal withholding of increment for 1991-92

Exhibit 2- (Attached to answer) Statement showing petitioner's actual earnings for 1991-92 at $65,335.09

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

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions as well.

Petitioner excepts to the ALJ conclusions that his salary may be held in place until the increment that erroneously had been paid to him following a withholding pursuant to N.J.S.A. 18A:29-14 was effectuated. Citing Deborah Kalapos v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner June 3, 1993, 93 N.J.A.R. 2d (EDU) 430, among other cases, petitioner submits, as she did at hearing below, that a board cannot require the reimbursement of monies paid in error through no fault of the employee because such action constitutes an impermissible reduction of his salary under the Tenure Employees Hearing Act, N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10. He further argues that notification of the administrative action to freeze his salary for the 1992-93 school year took place eight days after the commencement of his actual work year, without Board approval, and persisted through a third consecutive year, 1993-94. Thus, he claims, his

salary has been illegally held at the same rate since the 1991-92 school year.

Upon careful and independent review of the record of this matter, the Commissioner adopts the findings and conclusions of the Office of Administrative Law for the reasons expressed therein. The exceptions raised by petitioner offer no new arguments that would alter the conclusion drawn by the ALJ that a board's determination to freeze a teacher's salary until it recoups an inadvertent ministerial overpayment does not constitute an unlawful reduction in compensation as envisioned by N.J.S.A. 18A:28-5. See Markot, supra, and Trenton Education Association, supra. The latter case makes plain that "***the appropriate step for a board to take when the issue of erroneous salary level arises is to hold the salary level in place, not to reduce it through deductions." (Id., at 2436)

Petitioner's reliance on Kalapos, supra, is inapposite to the facts of this matter because no deductions of the overpayment to petitioner were ever undertaken. Rather, the Board herein froze petitioner's salary so that he would not receive the increments that the Board sought to withhold.

As to petitioner's contention that the Board's original action to withhold his increment was accomplished without a majority vote of the full membership of the Board, the Commissioner agrees that the defect in the action to withhold was cured by the Board's subsequent ratifications.

Accordingly, for the reasons expressed in the initial decision as amplified herein, the instant Petition of Appeal is dismissed.

FEBRUARY 1, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 1, 1994

26-94

EDU #9658-92
C # 26-94
SB # 12-94

EDWARD CERATO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 1, 1994

For the Petitioner-Appellant, Anthony P. Sciarrillo, Esq.

For the Respondent-Respondent, Robin T. McMahon, Esq.

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

June 1, 1994

Date of mailing JUN 03 1994

27-94

IN THE MATTER OF THE TENURE :
HEARING OF JACQUELINE CARSON, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF CHERRY HILL, CAMDEN COUNTY. :
:

SYNOPSIS

Board certified tenure charges of inefficiency against tenured clerk. Respondent was afforded 90-day period to correct inefficiencies.

In light of the record and testimony of witnesses, ALJ concluded Board proved its charges of inefficiency. Although some improvement was noted in 90-day period of remediation, majority of inefficiencies showed no improvement and taken together they formed the basis for respondent's removal. (Redcay) ALJ ordered respondent removed from her clerical position.

Commissioner found that in light of all relevant, credible evidence, Board had proven an overall pattern of poor performance by respondent which warranted her dismissal. Commissioner ordered respondent terminated from her tenured clerk position as of date of the Commissioner's decision.

FEBRUARY 1, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9754-92
AGENCY DKT. NO. 482-10/92

IN THE MATTER OF THE TENURE HEARING OF JACQUELINE CARSON, SCHOOL DISTRICT OF THE TOWNSHIP OF CHERRY HILL.

William C. Davis, Esq., and **Terri Jane Freedman,** Esq., for petitioner (Davis, Reberkenny & Abramowitz, attorneys)

Kenneth A. Sandler, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: October 6, 1993 Decided: November 17, 1993

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

The Cherry Hill Township Board of Education (petitioner or Board) filed tenure charges of inefficiency against a tenured clerk (respondent or Carson) with the Commissioner of Education pursuant to N.J.S.A. 18A:6-10 through -18.1. The respondent timely filed an answer and the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13.

After notice, a prehearing conference was held on April 26, 1993. Among other things, it was determined that the sole issue in this matter is whether the charges against the respondent are true in fact and, if true in fact sufficient to warrant removal or reduction in salary. The matter was heard on September 13, 14, 15 and 22, 1993 at the Merchantville Municipal Court.

There is no procedural infirmity alleged. The charges, the substantiation and a 90-day supervisory plan to correct inefficiencies were timely afforded the respondent. At the conclusion of the 90-day period, the experience was reviewed and the Board resolved to certify charges to the Commissioner of Education. All statutory and regulatory times were observed.[1]

The respondent interposes separate defenses of insufficiency of charges and, alternatively, that any alleged inefficiencies have been substantially corrected or overcome.

PAROL AND DOCUMENTARY EVIDENCE

The Board presented four witnesses. The testimony adduced tended to show that the assistant superintendent for business, who was also the Board secretary, prepared most of the paperwork required by the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 through -18.1 (P-1). The secretary met several times with the director of purchasing and the office supervisor who had daily contact with the respondent. He also made a presentation to the Board and asked that charges be filed. The Board agreed and a 90-day correction period began. The respondent was provided a supervisory plan dated June 12, 1992. On the same day, the secretary met with the respondent and her union representative to discuss the plan. The plan provides for review each two weeks of 19 items. The plan provides for follow up and additional resources, for example, additional word processing training for the respondent.

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1 5/28/92 - Statement of Charges Filed by Administration
6/8/92 - Resolution Adopted by Board of Education
6/9/92 - Letter to Mrs. Carson notifying of Board of Education action and implementation of ninety (90) day supervisory plan to correct and overcome inefficiencies
9/14/92 - Progress Report, 90 Day Supervisory Plan
9/21/92 - Resolution Adopted by Board of Education
9/22/92 - Letter to Mrs. Carson notifying of Board of Education action and advising of fifteen (15) day response period
10/7/92 - Response received from Mrs. Carson's representative
10/13/92 - Resolution Adopted by Board of Education
10/14/92 - Letter to Mrs. Carson notifying of Board of Education resolution and suspension from duties.

There were six review sessions: June 30, July 14, 29, August 17, 28, and September 9, 1992. On July 21, the respondent was provided additional suggestions for improvement.

After the 90-day period, the secretary reviewed all reports. Of 19 areas noted as needing improvement, four improved to the satisfactory level; 15 did not. The witness stated the respondent had improved in her ability to accept constructive criticism, had less need to repeat questions, was more courteous and professional in the office and used the telephone for professional reasons only. The respondent did not show acceptable improvement in the other 15 areas.

The secretary reported this to the Board and the Board directed certification of tenure charges to the Commissioner of Education.

The purchasing officer supervisor testified. She knows the respondent's employment history and was the respondent's supervisor at relevant times. During the 90-day probationary period, the witness monitored the respondent's daily work, recorded any problems, met with the respondent weekly, suggested improvements and participated in bi-weekly meetings prescribed by the plan.

At the end of the probationary period, the witness reviewed each report. The secretary summarized the meeting and wrote the final report. The witness read and agrees with the report.

The witness also detailed specific incidents tending to illustrate the respondent's failure to remedy shortcomings.

The director of purchasing testified. He was present at the July 14, 1992 conference with the respondent. He reviewed all notes and agrees with the reports and recommendations he has read.

The former purchasing agent, who filled the position during most of the relevant time, also testified. He was the purchasing agent in spring 1991 when the respondent transferred into his office. This witness also reviewed all paperwork. He, in consultation with the office supervisor, monitored the 90-day improvement plan, secured additional resources, made recommendations and conferred with the

respondent. He kept the Board secretary advised and provided documentation at the end of the period.

The respondent presented testimony of a word processing specialist. The witness instructed the respondent and answered certain questions concerning the word processing system in use. When the respondent was transferred to the purchasing office, the witness had no contact with her. At some point, the witness' supervisor told the witness to set up classes with the respondent. The witness spoke to the purchasing agent and set up standing appointments each Wednesday afternoon at 2 p.m. with the respondent.

The witness covered basics and then went on to more advanced material. She had to cancel a few classes. The witness believes the respondent mastered operations by September 1992. In October 1992, the witness began a maternity leave. She believed the respondent was comfortable with the basic word processing system. In summary, the witness believes she had approximately six sessions with the respondent and that sessions ended in September 1992. The witness never observed the respondent in a work setting.

A building engineer from one of the district high schools testified concerning forms that passed between the purchasing office and a school building when any outside activity takes place. He has had contacts with the office supervisor, the respondent and now the respondent's replacement. He has found them of equal ability and good to deal with.

The athletic coordinator testified that her duties include scheduling of facilities. As such, she has much contact with persons in the purchasing office involved in community services.

At some point, the witness learned that the respondent had community service responsibilities; that is, the witness was involved in scheduling fields and facilities for use by community groups. The witness often spoke directly to the respondent although the respondent was not the only person she dealt with. She found the respondent helpful to deal with. The witness does not evaluate the respondent. The witness believes the respondent may have helped her to solve problems. Others in the purchasing office, however, may have helped to solve her problems.

The respondent testified concerning her employment history and her move into the purchasing office. She testified concerning the paperwork involved in use of facilities by community groups.

The witness also testified concerning her first few days on the job. Among other things, there was a dispute about whether breaks were to be informal or whether there should be two 15-minute breaks each day, one in the morning and one in the afternoon. The witness stated she was the only person who took fixed breaks and was the only union member in the purchasing department. The witness also stated that her community service work was given second priority to purchasing duties. Also, the system was being changed from a hand kept system to a computer system. The witness explained both systems.

The respondent stated that she and her supervisor both dealt with the community. In her opinion, "Two hands cannot be in the same pot." The witness acknowledged some complaints concerning community service functions from various schools, but could not be specific. She further stated there are always a few conflicts given the numbers involved. To her knowledge, conflicts were always concluded satisfactorily.

The witness had used a word processor while in her former position, but not every day. When she first used word processing equipment, she was given assistance by a trainer. When she came upon an unfamiliar job, she could call the trainer for assistance. The procedure was different in the purchasing office. In March 1991 she heard no mention of training although the switch to word processing began. There were several situations new to her. Her superiors suggested training and she thought it a good idea. She attended several sessions in the trainer's office and learned a lot. She began to feel more at ease on her job.

The respondent recalls receiving praise as the best switchboard operator the office ever had. She also testified concerning problems with specific community groups. She recalled some only generally and others in more detail. She recalled dealing with one group and assuming that they would use the facilities for religious purposes. Religious groups are charged a lesser fee than are other types of groups. The witness did not ask the requesting person what the purpose of the use would be.

The respondent did some correspondence in the purchasing office at the supervisor's direction. Often the text was changed by the supervisor.

The respondent testified concerning notice of the 90-day supervisory period. During the period there was a series of meetings with the purchasing agent, the supervisor and the respondent. Toward the end of the period, the purchasing agent changed. The witness stated that after a memorandum (A-18), she believed everything was falling into place "and that would be the end of it."

The respondent knew that the supervisor and the purchasing officer were keeping notes on her during the 90-day period. She testified concerning procedures surrounding custodial overtime and other payroll functions. She used the Regulations and Procedures For Use of Public School Facilities dated September 1, 1991 as her procedures manual. She also testified concerning certain criticisms to which she did not reply (e.g., performance evaluation, March 10, 1988 - January 20, 1989 and performance evaluation September 14, 1987 - March 9, 1988).

The witness could not recall several important events. One was a meeting with the Board secretary concerning breaks and another involved parts of her evaluation for the period ending January 17, 1992. There was contradictory testimony concerning insurance certificates and a community swim club. Although she received a memorandum from her supervisor concerning the September 9, 1992 performance meeting, she believed all superiors were happy with her notwithstanding five suggestions for improvement on the third page of the memorandum.

The respondent stated that she kept a record of contacts with the word processing trainer in a stenographic book, but the book was taken from her desk. Guidance as to costs for various uses was always available in the form of the policy, P-2.

The respondent also adduced testimony that she was pleasant, helpful and prompt in her dealings with the public. One witness stated she once or twice received a duplicate bill, but called the respondent who referred her to a bookkeeper who took care of the problem. The witness last spoke to the respondent in the summer of 1991. Another witness stated she worked as a temporary office worker in the purchasing department and heard the supervisor being "rude, nitpicking, obnoxious" to the respondent. The respondent also was

criticized loudly enough to be heard by other personnel. A former Board employee testified that all employees would receive correspondence in handwritten form, type and take it to the supervisor who would often edit and change it. The supervisor had to approve everything before it was sent out. The witness also mentioned a "tense atmosphere" in the purchasing department. A head custodian testified that he is familiar with forms sent by the purchasing department to a facility that would be used by a community group (R-4). He fills in the top of the form, lists work required, lists time expended and requires the sponsor to sign the form as well. The form then goes to the assistant principal and then to the administration building. The form provides data for billing. If the respondent did not receive a form, she would call his school and ask for data. As far as he is concerned, she did a good job. Any problems were taken care of promptly. Occasionally, his pay would be inaccurate, but the matter would always be straightened out.

Board's Argument

The Board emphasizes that it relies on sworn statements of the Board secretary, the former and present purchasing officers and the office supervisor. It is uncontroverted that the respondent had approximately three and one-half years experience in the finance office before being moved to the purchasing office, performing many of the same tasks. As early as 1989, supervisors noted the respondent's need to improve her skills (P-1, attachments 11, 12 and 13). The respondent and one of her witnesses verified that the respondent regularly contacted the trainer for aid in performing routine word processing functions. Although she used word processing equipment at least weekly and usually more often, her lack of skills was apparent. The lack became more glaring upon her reassignment to the purchasing office. There, supervisors repeatedly noted deficiencies and directed that she seek additional formal training in both data entry and word processing (P-1, attachments 2, 3 and 9). The respondent received additional training, but still failed to master basic skills. In addition, she asked co-workers for assistance regularly. Often, she posed the same questions again and again. As a result, the supervisor eventually limited the respondent to asking questions only of the supervisor.

In order to assist the respondent during the 90-day supervisory period, she was given approximately ten 30-minute word processing training sessions. These were meant to again refresh her memory about fundamental tasks on the word processing equipment (R-3). The respondent did well during the weekly sessions.

However, the trainer could not testify as to the respondent's ability to recall the information once she returned to her workplace. As shown by the periodic evaluations, the respondent could not in fact recall information she had just reviewed.

Despite five years of experience on the same word processing equipment, another year''s experience with data entry, several individualized training sessions and repeated questions of her co-workers, the respondent still could not master basic functions. The clear inference is that the respondent is simply unable to retain information.

The respondent also repeatedly failed to follow through on her work and to follow instructions. She failed to procure current insurance certificates from various community groups, although repeatedly instructed to do so (P-1, attachments 1, 2 and 4; summary conference memorandum, July 29, 1992). The repercussions and liability the Board could be exposed to as a result of a community group not securing proper insurance is obvious. Nevertheless, this point had to be explained and reexplained to the respondent. Even after having been given specific instructions, orally and in writing over the course of six months, the respondent still failed to obtain valid insurance certificates from several community service groups (summary conference memorandum, July 29, 1992).

The respondent produced seven witnesses in an effort to refute the charges. Yet few of any of the witnesses actually observed the respondent in the work place on a regular basis. None of the witnesses supervised or evaluated her. None of the witnesses testified as to the quality of her work. The respondent's witnesses could testify that they received a correct paycheck or had no problem in scheduling an event. However, they could not testify as to how the end product was produced or who actually produced it.

Based on the evidence presented, this tribunal must find that the respondent failed to rise to the level of efficiency required for her position. She presented no evidence to effectively refute the tenure charges set forth by the Board and substantiated by the evidence at hearing.

Respondent's Argument

The respondent counters that the Board's presentation was scarce in detail. The Board simply presented its administrators and supervisors and the reports and evaluations they had prepared. The Board apparently believed it met its burden of proof. It did not.

Two of the four Board witnesses based their conclusions and opinions on the information related to them by the respondent's immediate supervisor. Thus, they were hearsay witnesses.

The Board's principal witness was the respondent's direct supervisor. Her testimony, however, was general and vague. She stated she had indoctrinated the respondent into electronic data processing and purchasing and that she had many sessions and conferences with the respondent. She made records of areas in which she believed the respondent was improving and not improving, but stated she had not reviewed the 90-day supervisory plan summary prior to its issuance. The specifics with respect to examples of the respondent's work product or alleged problems were simply not provided through her testimony.

The supervisor admitted she used profanity in the work place and admitted she praised the respondent's switchboard performance. As to each of the faults she found with the respondent, the witness stated she would personally handle the matter and that it was easily resolved. Further, the supervisor never checked with the word processing trainer about the respondent's progress or asked for a additional training despite the fact that computer and word processing skill deficiencies were noted in the supervisory plan summary.

On dealing with community and outside organizations, the supervisor faulted the respondent for having charged one group religious rates. Although the group was of a religious nature, the event was social or recreational. The rental rate for Board facilities for religious purposes should not have applied. The supervisor stated she handled the matter and easily resolved it. However, the Board produced no persons with whom the supervisors spoke or with whom she alleges the respondent improperly handled a matter.

In another matter, the Board charged there was a problem in scheduling a facility for a music director. Yet the Board failed to produce the complaining party in their case-in-chief or even in rebuttal after the respondent stated there had been no problem with the music director. The Board produced no one other than its supervisory and administrative staff. That would be unremarkable in most cases. In this case, many of the respondent's responsibilities regarded the rental of Board facilities by outside groups. These groups were, in effect, the Board's customers. None of these customers with first hand knowledge of the manner in which the respondent served their needs testified for the Board.

The Board's former purchasing agent stated he observed certain things first hand rather than through the supervisor. Yet it was not clear what he had observed and he conceded much of his information came from the supervisor. He also conceded the respondent was the only employee in the department who was a union member. The witness also denied that he became angry and excited or banged his fists on his desk while reprimanding the respondent in his office.

The Board's attempt to limit testimony of its administrators to a recitation of the procedure used to document its charges broke down when the former purchasing agent stated he was following these procedures for the purpose of dismissal. He was not involved in the actual drafting of the charges and comments at the conclusion of the 90-day improvement period. Therefore, his reference to the procedure could only be to that followed during that 90-day improvement period. His statement that the real purpose of the Board's documentation and meetings during the 90-day improvement period was to justify the respondent's dismissal is most telling because it reveals that the Board was not affording the respondent an opportunity to "correct and overcome" an alleged inefficiency, but was really building its case against her. This is a misuse of statutory procedures and it cannot be countenanced.

The Board's approach was to "paper over" its case. Its testimony merely skimmed over the surface of the written allegations against the respondent. The implied argument was that because something is in writing, it is true. The respondent submits that boards of education are skilled producers of paper records with which an employee cannot compete. However, in a tenure hearing, an employee's career is on the line. The paper must be probed and the underlying facts and circumstances explored. The Board failed to establish by a preponderance of the credible evidence that the respondent was performing her duties and

responsibilities in an inefficient manner or that she had failed to substantially correct any alleged inefficiencies in the 90-day improvement period.

In her defense, the respondent presented a more complete picture of the circumstances and particulars underlying the Board's tenure charges. Six witnesses as well as the respondent herself persuasively established, among other things, that the respondent was well-regarded within Board offices and by outside organizations. The respondent also showed that the office supervisor created a tense and trying atmosphere and that the respondent did complete a computer training course and did master the necessary skills.

Upon her transfer to the purchasing office, she had to learn to perform new tasks, using a computer to a greater extent than previously. Legitimately, her supervisor raised a concern as to her skills in performing computer functions. A decision was made to have the respondent receive training with the word processing trainer.

The trainer testified that she regularly provides training to employees on the computer system and that such training had been requested and was provided to the respondent. The trainer stated that, in her opinion, the respondent was able to master the skills necessary. The Board denies that the respondent mastered them.

The witness also stated that at no time during the 90-day improvement period was she contacted by the respondent's superiors advising that the respondent was lacking in any computer skill.

The respondent submits that the Board failed to follow through with the person it designated to assist her in overcoming her alleged deficiency in computer skills. This is inexcusable and violates the statute. The Guidelines for Implementation of the Tenure Employees Hearing Law, put out by the Division of Controversies and Disputes, Department of Education, May 3, [1977], cited in Rowley v. Bd. of Ed. of Manalapan-Englishtown, 205 N.J. Super. 65, 72 (App. Div. 1985), indicates

> During the aforementioned 90 day period, members of the administrative/supervisory staff should make reasonable efforts to provide a assistance to the teaching staff member to overcome the specific inefficiencies.

The Appellate Division approved the Commissioner's decision in the case, concluding that "if a board chooses to file tenure charges of inefficiency against any teacher, the administration bears the heavy responsibility to render positive assistance to the teaching staff member to overcome his inefficiencies." Id. Secretarial and clerical staff are accorded the same protections pursuant to N.J.S.A. 18A:17-2. In the computer and word processing skills area, the Board appeared to have provided positive assistance through the trainer. However, the Board did not complete the task by providing a cohesive effort before and after filing charges so it could measure the employee's improvement by a synthesis of observations. Ibid. at 73. That did not exist here. Rather, there was an exclusive reliance on a single evaluator even though she was not the person assigned to provide the training. That was unfair and capricious. The Board's failure to comply with the statutory mandate is clear. It appears that the Board was merely going through the paces and there was little or no communication between the trainer and the supervisor.

The trainer testified there was some difficulty using the software. The trainer herself found it to be not user friendly. This was an area in which the supervisor faulted the respondent, who was new to computers.

On a related question, the Board charged that the respondent manually researched files in community services. The use of a manual system was, however, wholly acceptable for the Board's athletic coordinator. The respondent, who performed community service functions in her prior position with the Board testified that she had no input into the development of the computerized system by her supervisor and that she had previously used a manual system of folders for each school rather than the calendar organization of listing all events for all schools under a single date. She also stated she would use the manual system as an extra check on the schedule.

The respondent submits that the supervisor praised the respondent's performance on the switchboard and in shipping and that the supervisor's manner was unseemly. Three witnesses cast doubt upon the supervisor's capacity and ability generally to assist the respondent in an attempt to follow the correction plan. The manner of supervision belies the superficial propriety of the paper record.

The fact that the respondent was the only union member in the purchasing office served to make her unwelcome. The respondent stated she was

told at or about the time of her transfer that the purchasing officer did not want her in his department.

The respondent dealt effectively with custodial staff concerning overtime work related to facilities use by outside organizations. When adjustments in scheduling were necessary or there was a question concerning overtime pay for custodians, the respondent was able to resolve the matter. Despite the respondent's ability and efficiency in payroll duties, the supervisor's assignment of her to perform this task while handling the switchboard was inappropriate. In addition, the supervisor frequently interfered in the respondent's contacts with community organizations. This resulted in confusion as it was not clear for which organizations the respondent was responsible and for which the supervisor was responsible.

In summary, the respondent was a loyal and dedicated employee of the Board who, upon transfer to the purchasing department needed specific training and guidance in new job functions. The purchasing operation was becoming almost completely computerized. Training was not provided at the outset, but only after the respondent had been in the department well over a year. Nonetheless, the respondent successfully completed a program of weekly word processing training sessions. The Board relied almost exclusively on the representations of the respondent's supervisor, whose conduct in the workplace was less than professional. The Board, therefore, did not fulfill its statutory mission to provide positive assistance to the tenured employee. In this case, the Board's supervisors launched a campaign to justify its decision to dismiss the respondent from employment and to support the tenure proceeding that would have to be effected to achieve dismissal. The Board simply has not made the required case and the charges should be dismissed.

DETERMINATION

Although there is no procedural defect alleged, the respondent suggests that the charges certified by the Board to the Commissioner are insufficient. Having reviewed the charges and giving the ordinary and popular meaning to the words therein, I **FIND** and **CONCLUDE** that the charges are sufficient. Sykes v. Propane Power Corp. 224 N.J. Super. 686 (App. Div. 1988). First, they state with reasonable clarity a set of circumstances. Second, the circumstances described, if true in fact, warrant reduction in salary or dismissal.

The Board presented the witnesses and documents listed in an appendix to this decision and mentioned above. The credible testimony and documentation reveal, not unsurprisingly, a picture that is not clearly black and white. Virtually no employee is without some saving graces and virtually no supervisor is infallible. But, it is the weight of the evidence that this tribunal must address.

The Board's strongest evidence is Exhibit P-1. The Exhibit recognizes that the respondent worked from June 16, 1986 until May 19, 1991 in offices other than the purchasing office. Her service in those positions ranged from excellent in the general secretary area to good in the areas of attendance, punctuality and cooperation to improvement needed in the areas of time utilization, work quality, punctuality and dependability. Upon being reassigned to the purchasing office, an informal evaluation on April 26, 1991 indicated some weaknesses but her first formal evaluation on July 10, 1991 reflected ratings in the satisfactory to excellent range. Thereafter, performance declined and a pattern of deficiencies emerged. The Exhibit displays meticulous record keeping. The respondent suggests that it is an attempt to "paper over" a predetermined outcome. Yet, the Board would also be criticized if it failed to document completely the charges it brings.

Viewing the record in its entirety I **FIND:**

1. On June 9, 1992, the Board secretary served notice upon the respondent of the resolution, charging affidavit and statements of evidence in support concerning the charges filed against her by the secretary.

2. The notice further advises the respondent that she is being provided a 90-day period in which to overcome and correct the inefficiencies identified.

3. The notice further advises that at the end of the 90-day period, the Board will make a determination as to whether or not the noted inefficiencies have been sufficiently corrected and, if not, that further steps as the Board deems necessary under N.J.S.A. 18A:6-11 may be taken.

4. The materials provided to the respondent with the notice are unequivocal and complete. They constitute clear notice of the inefficiencies identified and how they were identified.

5. The Board secretary met with the respondent on June 12, 1992 for the purpose of reviewing the supervisory plan for the statutorily required 90-day period.

6. The supervisory plan sets forth the areas needing improvement and details a 22-part supervisory plan.

7. The plan was put into effect and progress conferences were held each two weeks in compliance with the plan.

8. The summary report identifies inefficiencies that have been corrected or overcome. It also identifies inefficiencies that were not corrected to a satisfactory degree.

9. After a summary conference with the respondent, tenure charges were filed with the Commissioner of Education.

In addition to the foregoing, I also **FIND** that the fact that the supervisor was not involved in drawing up the 90-day plan is a matter of management prerogative and has no bearing on the truth or falsity of the charges. Similarly, even if the office supervisor was not universally popular, that has no bearing on the truth or falsity of the charges. An *ad hominem* argument is no substitute for facts. Despite the respondent's urging to the contrary, the Board did not fail to establish a prima facie case.

I **FIND** the Board's witnesses' testimony to be inherently credible and consistent with common experience. The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. This tribunal, therefore, must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. D.L. and W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). The evidence is found to preponderate if it "establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). One factor that must be considered in a determination as to which party's version of an incident has the "reasonable probability of the truth" is that "the interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (citations omitted) certif. den. 10 N.J. 316 (1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with

common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The respondent's witnesses were not incredible. Their personal knowledge, however, was remote from the material part of the charges. They could and did testify to specific instances that reflected favorably on the respondent. This testimony is not disregarded.

Upon a review of the entire record and in consideration of the foregoing findings of fact, I **CONCLUDE** that the Cherry Hill Board of Education has proven tenure charges of inefficiency against Jacqueline Carson after providing a 90-day period for remediation, providing reasonable support to the respondent aimed at assisting her in overcoming her inefficiencies and that the appropriate result is dissolution of tenure and removal from position. Some improvement was indeed noted in the 90-day period. The majority of inefficiencies showed no improvement. While no one of these inefficiencies may be sufficient in itself to form a basis for removal, taken together they can lead to no other result. "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." Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943); aff'd 131 N.J.L. 326 (E. & A. 1944). The proofs support the action taken.

Accordingly, I **ORDER** that Jacqueline Carson be removed from her position as a tenured member of the clerical staff of the Cherry Hill township Board of Education effective as of the date of final decision in this matter by the Commissioner of Education.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

17 NOVEMBER 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Nov. 19, 1993
Date

Maureen R. Kibbe
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 23 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

Thomas F. Redmond
Jo-Ann Angelone
Jeffrey S. Baun
Raymond De Young
Gail Persichilli
Robert Mascio, Sr.
Virginia B. Whitaker
Jacqueline M. Carson
Jean Klein
Renee` McGrath
Robin A. Kerth
Frank D. Ford

EXHIBITS

P-1 Memorandum, De Young to Redmond, May 28, 1992, 3 pp., with attachments:

1. Memorandum, De Young to Carson, May 27, 1992
2. Performance evaluation, July 1, 1991 - June 30, 1992, with attachments
   - A. Memorandum of March 26, 1992 meeting
   - B. Instructions to Carson, April 2, 1992
   - C. Memorandum, Angelone to De Young, May 15, 1992
   - D. Memorandum, Angelone to De Young, May 11, 1992
   - E. Memorandum, Angelone to De Young, May 15, 1992
   - F. Progress Review, March 19 - April 26, 1991
   - G. Memorandum, Angelone to De Young, May 26, 1992
3. Memorandum, De Young to Carson, April 6, 1992
4. Memorandum, De young to Carson, March 31, 1992
5. Memorandum, De Young to Carson, March 20, 1992, with attachments
6. Memorandum, De Young to Carson, February 10, 1992, with attachment
7. Memorandum, De Young to Carson, February 3, 1992
8. Memorandum, De Young to Carson, January 24, 1992, with attachment

9. Performance evaluation, July 10, 1991 - January 17, 1992, with attachments
10. Performance evaluation, July 1, 1990 - June 30, 1991
11. Performance evaluation, July 1, 1989 - June 30, 1990, with attachments
12. Performance evaluation, January 21, 1989 - June 30, 1989, with attachment
13. Performance evaluation, March 10, 1988 - January 20, 1989
14. Performance evaluation, September 14, 1987 - March 9, 1988, with attachment
15. Performance evaluation, July 1, 1986 - June 30, 1987

Addendum A

Sheet 1. Memorandum, Redmond to Board, September 14, 1992
2. Letter, Redmond to Carson, June 9, 1992, affidavit attached
6. Letter, Redmond to Carson, June 9, 1992
7. Supervisory Plan, June 12, 1992
9. Memorandum, Redmond to Carson, June 30, 1992
10. Memorandum, Angelone to Carson, July 14, 1992
11. Memorandum, Angelone to Carson, July 21, 1992
12. Memorandum, Angelone to Carson, July 29, 1992
14. Memorandum, Angelone to Carson, August 17, 1992
16. Memorandum, Angelone to Carson, August 28, 1992
18. Memorandum, Angelone to Carson, September 9, 1992
20. Ninety Day Supervisory Plan Summary
23. Board resolution, September 21, 1992
25. Letter, Redmond to Carson, September 22, 1992
26. Letter, Sandler to Redmond, October 6, 1992
27. Board resolution, October 13, 1992
30. Letter, Redmond to Carson, October 14, 1992

P-2 Regulations and Procedures for Use of Public School Facilities, September 1, 1991

R-1 First Request for Admissions
R-2 Responses to First Request for Admissions
R-3 Handwritten notes re word processing procedures
R-4 Custodial Time Sheet in blank

R-5 Warehouse Requisition in blank

R-6a Handwritten letter, April 30, 1992

R-6b Typed letter, April 30, 1992

R-7 Custodial Time Sheet, September 13, 1991, Custodial Payroll Notification for week ending September 18, 1993, Payroll Time Sheet, period ending September 18, 1991

IN THE MATTER OF THE TENURE	:	
HEARING OF JACQUELINE CARSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CHERRY HILL, CAMDEN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent requested and was granted an extension of time, until December 15, 1993, to file exceptions. These and Board's reply thereto were timely filed and are summarized in pertinent part below.

Respondent's exceptions argue that the initial decision is fatally deficient and must be remanded because the ALJ failed to include specific findings of fact necessary to support his recommendation of termination as required by the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-18.3(c)6,7. As support for this contention, she asserts that

1) The ALJ failed to make findings with respect to each of the inefficiencies alleged by the Board.

> ***[T]his was a very fact-specific case involving a charge of inefficiency in which the Petitioner Board of Education *** alleged *** that Respondent had failed to correct fourteen *** specific performance areas. Yet in the Initial Decision, the ALJ makes no specific factual findings as to these fourteen separate and specific performance criteria. He simply summarizes the testimony of the parties' respective witnesses in a section entitled "Parol and Documentary Evidence" (ID at 2-7)***. He

> then proceeds to restate the parties' arguments by synopsizing their post-hearing memoranda. ID at 7-13. Finally, in a section entitled "Determination," he makes findings but only as to the aggregate credibility of the parties' witnesses and not on the specific factual issues presented. ***Nowhere is there to be found in the Initial Decision a finding with respect to any of the specific performance areas recited in the 90-day supervisory plan, e.g., "undergo scheduled training on computer/word processing/EDP"; "place all notes and written guidelines in a notebook"; meet all deadlines for completion of work." ***[T]he ALJ did not make a determination as to the facts underlying the Board's specific charges against Respondent but settled for a broad brush conclusory summary in favor of the Board.
>
> (Respondent's Exceptions, at pp. 2-3)

Respondent cites a number of appellate court cases dealing with such issues as disability claims, tax assessments, and workers' compensation claims where courts found that conclusory findings of administrative law judges and administrative agencies warranted reversal of the agency's determination and a remand for the issuance of more specific findings.

2) The ALJ failed to resolve conflicts between testimony of witnesses adduced at the hearing. Respondent proffers as examples:

> The Board alleged in its 90-day supervisory plan summary that Respondent "still cannot perform basic tasks" in computer and word processing matters. The purchasing office supervisor, JoAnn Angelone, testified that she agreed with that statement as well as all statements in the summary. IT35.*** She also testified on cross-examination that Respondent had made only "very little" improvement in computer and word processing skills. IT54. Despite this negative opinion which Ms. Angelone steadfastly held, she also testified that she had not conferred at all with the computer trainer, Ms. Gail Persichelli. Ms. Persichelli confirmed that she had no communication from the purchasing department regarding the training which she was administering to Respondent but that she had

> spoken with her own supervisor and reported to him that the training was "going fine." 2T63, 64. Ms. Persichelli, after reviewing her detailed training notes (Exh. R-3) and the specific computer skills indicated thereon testified that Respondent had mastered all of the skills of basic word processing by the end of the 90-day improvement period in September, 1992. 2T57 to 2T61.*** The ALJ, however, never resolved this conflict in the testimony in what was clearly one of the more important allegations of inefficiency raised by the Board, e.g., mastery of basic computer functions. No resolution of how the computer trainer with responsibility for providing training to personnel district-wide could opine that Respondent had satisfactorily completed the training and mastered the skill, instructed and, at the same time the purchasing department supervisor could state that she agreed with the Board secretary's summary indicating that Respondent "still cannot perform basic skills." Without a resolution of this conflicting testimony and documentation, there can be no finding on the first-listed inefficiency in the Board's 90-day supervisory plan summary.***
>
> (Respondent's Exceptions, at pp. 10-11)

Respondent contends that there are also unresolved testimony conflicts with respect to another Board-listed inefficiency, paying custodians beyond cut-off dates. She points out that a building engineer, Robert Mascio, testified that she handled these matters as well as her predecessor and her successor and that Frank Ford, a head custodian, also testified that she handled these matters well and the only problem he specifically remembered was that custodians did not turn in overtime information sheets on time.

Also, with respect to the Board's alleged inefficiency -- failing to proof all work prior to distribution -- respondent alleges that the ALJ failed to resolve conflicts which arose through her testimony and that of a former employee that the reason so many

documents had to be retyped was that the purchasing supervisor frequently made revisions of her initial drafts.

Respondent maintains that the ALJ's failure to resolve such conflicts in the record is harmful error which warrants reversal and remand.

Respondent further excepts to the ALJ's determination that the Board provided reasonable support during the 90-day improvement period aimed at assisting her to overcome her inefficiencies citing as an example its failure to have ongoing communication with the person designated to provide computer skills training. Likewise, respondent excepts to the ALJ's determination that the Board's witnesses were inherently credible without specifying which witnesses and to what substantive testimony he was referring. Respondent provides citations to areas of proferred testimony where she maintains such witnesses were evasive or vague on matters unfavorable to them or the Board.

Finally, respondent alleges that the ALJ provided no explanation or supporting rationale as to why removal was the appropriate penalty in this matter but rather he simply affirmed the penalty sought by the Board.

By way of response, the Board avers that all of the exceptions advanced by respondent essentially rest on an assertion that the ALJ improperly failed to make specific and necessary findings of fact to justify his ultimate determination, a claim which it argues is unsupportable when reviewing the initial decision.

The Board contends that on pages 13 through 16 of the initial decision the ALJ made all the factual findings necessary to support his recommendation of respondent's termination. It contends:

> ***Respondent urges that she should remain in her position absent a specific finding that she had not overcome one particular area of inefficiency, her computer processing skills. The ALJ, however, does not base his decision on the inability to have overcome any one inefficiency, but rather states that:
>
> > The majority of inefficiencies showed no improvement. While no one of these inefficiencies may be sufficient in itself to form a basis for removal, taken together they can lead to no other result.
>
> Id. at page 16. Accordingly, the ALJ did not deem it necessary to make individual factual findings with respect to each inefficiency proven by Petitioner. What the ALJ did find was that Respondent's performance, taken as a whole, leads to only one result: A recommendation for removal.
> (Board's Reply, at p. 2)

The Board argues that the ALJ's initial decision correctly determined that based on the weight of all of the evidence presented and the truthfulness ascribed to that evidence, respondent's termination was warranted. It contends that respondent's argument that there is a lack of individual findings of fact is irrelevant when reviewing the totality of circumstances such as occurred here.

The Board contends that respondent's arguments regarding its lack of support in assisting her to overcome her inefficiencies and testimony conflict arguments are unfounded.

> ***Petitioner provided repeated training for Respondent in both computer and word-processing areas, but Respondent was still unable to master basic computer skills. While Respondent correctly points out that no evidence contradicted Ms. Persichelli's testimony that Respondent did well during her training sessions, as proven by Petitioner, Ms. Persichelli was unable to testify as to Respondent's ability to recall the information after she allegedly "mastered" it. Only Respondent's supervisors could testify as to her ability to retain fundamental information, and as the ALJ found, did so in a believable well-supported fashion.
> (Board's Reply, at p. 2)

The Board further notes that respondent's direct supervisor credibly testified that she repeatedly assisted respondent with her routine office tasks. Additionally, it contends:

> One other point should be made with respect to the ALJ's heavy reliance on Petitioner's witnesses. As is pointed out in the Initial Decision, it was not the incredibility of Respondent's witnesses which created the strong preponderance in favor of Petitioner. Rather, it was their remoteness from the material part of the charges. Id. at 16. Thus, while Respondent's witnesses may have been able to testify as to specific favorable instances, they were too far removed from Respondent's daily conduct in the Purchasing Office to offer wholly relevant testimony. Id. (Board's Reply, at p.3)

With respect to the assertion that the ALJ failed to make an independent determination as to the appropriate penalty, it contends he did so on page 13 of the initial decision where he stated that the charges set forth by the Board were sufficient, as

> "they state with reasonable clarity a set of circumstances" that, "...if true in fact, warrant reduction in salary or dismissal." Id. at 13. Based on the evidence presented, the ALJ found that, in this instance, dismissal was the appropriate remedy. (Board's Reply, at p. 3)

The Board contends that it is a strongly held principle that the appropriate disciplinary measure to be imposed upon a proper finding of inefficiency is termination and cites Township of Teaneck, Bergen County v. Leon Wilburn, 91 N.J.A.R. 2d (EDU) 48 as support for this contention.

Upon an independent review of the record in this matter, which it is noted included transcripts of the hearings conducted before the ALJ, the Commissioner finds respondent's exceptions to be without merit. He concurs with the ALJ's findings and conclusion that the Board has sustained its charges of inefficiency against

respondent, after providing a 90-day period for remediation during which it accorded her reasonable support aimed at assisting her in overcoming such inefficiencies, which she was unwilling or unable to do, and, consequently, the appropriate result is respondent's removal from her position.

Contrary to the argument advanced by respondent, the Commissioner does not find the ALJ's lack of specific factual findings with respect to each individual inefficiency charge lodged against respondent violative of N.J.A.C. 1:1-18.3. Rather, he finds that his "DETERMINATION" (Initial Decision, at pp. 13-16) satisfies the necessary factual requirements of that regulatory provision and supports his ultimate conclusion, i.e., that in light of all relevant, credible evidence, the Board had proven an overall pattern of poor performance by respondent which warrants her dismissal.

The Commissioner further finds that the record supports the weight ascribed to the testimony of respondent's witnesses by the ALJ

> The respondent's witnesses were not incredible. Their personal knowledge, however, was remote from the material part of the charges.***
> (Initial Decision, at p. 16)

Accordingly, respondent is terminated from her tenured clerk position in the Cherry Hill School District as of the date of this decision.

FEBRUARY 1, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 1, 1994

27-94

EDU #9754-92
C # 27-94
SB # 13-94

IN THE MATTER OF THE TENURE :
HEARING OF JACQUELINE CARSON, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF CHERRY HILL, CAMDEN COUNTY. :
:

Decided by the Commissioner of Education, February 1, 1994

For the Petitioner-Respondent, Davis, Reberkenny & Abramwitz
(William C. Davis, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen
(Kenneth A. Sandler, Esq., of Counsel)

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

S. David Brandt abstained.

July 6, 1994

Date of mailing JUL 08 1994

28-94

KATHLEEN HAMPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 1, 1994

OAL DKT. NO. EDU 8318-93

KATHLEEN HAMPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Notice of Failure to Appear transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-14.2 and 1:1-19.2 have been reviewed. The Commissioner agrees with OAL's return of the matter due to petitioner's failure to appear. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1994

DATE OF MAILING - FEBRUARY 1, 1994

29-94

THOMAS SORRENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 3, 1994

OAL DKT. NO. EDU 5671-92

THOMAS SORRENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 3, 1994

DATE OF MAILING - FEBRUARY 3, 1994

30-94

30-94

FRANKLIN E. WESTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 3, 1994

OAL DKT. NO. EDU 00157-92

FRANKLIN E. WESTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 3, 1994

DATE OF MAILING - FEBRUARY 3, 1994

SB #30-94

(SB) 30-94

IN THE MATTER OF THE REVOCATION :
OF THE CERTIFICATES OF GREGORY : STATE BOARD OF EDUCATION
BUONTEMPO BY THE STATE BOARD OF : DECISION
EXAMINERS. :
:

Decided by the State Board of Examiners, March 31, 1994

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Balk, Oxfeld, Mandell & Cohen (Arnold S. Cohen, Esq., of Counsel)

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

Margaret M. Bennett abstained.

September 7, 1994

Date of mailing SEP 09 1994

(SB) 31-94

SB #31-94

IN THE MATTER OF THE APPLICATION :
OF THE WEEHAWKEN TOWNSHIP :
SCHOOL DISTRICT FOR DESEGRE- :
GATION/TRANSITION AID FOR 1993-94, :
HUDSON COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 20, 1994

For the Appellant, Hanly & Ryglicki (Jack Gillman, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This appeal by the Board of Education of the Township of Weehawken (hereinafter "Board" or "Weehawken") results from the fact that the District's application for a grant in the amount of $175,980 for implementation of its desegregation plan for the 1993-94 school year pursuant to N.J.S.A. 18A:6-33.15 was not accepted by the Commissioner of Education. As provided for under the statute, Weehawken had applied for grants for the 1991-92 and 1992-93 school years and had been awarded such funds by Commissioner John Ellis for those years pursuant to N.J.S.A. 18A:6-33.16. Although the application Weehawken submitted for 1993-94 was the same as those it had submitted the previous two years, it was not recommended for funding for 1993-94 since it did not receive the minimum score for such recommendation under the criteria used by the evaluation panel appointed to review

8/7/96

the applications for that year. By letter of May 20, 1994, Commissioner Leo Klagholz sustained this determination.

Weehawken filed an appeal to the State Board of Education on June 24, 1994, but the matter was placed in abeyance at the parties' request. The briefing schedule was reestablished after the parties arrived at an agreement concerning the record on appeal, and the parties' briefs were filed by April 29, 1996.

By its appeal, Weehawken is seeking an award of $175,980 either by reopening this matter or through "some other grant or loan program available to solve the problem." Brief in support of appeal, at 1. Essentially, Weehawken contends that it is entitled to such funds because it had been granted aid the previous two years on the basis of applications identical to the one it filed for 1993-94 and had spent the monies it had applied for in anticipation of also receiving a grant for 1993-94. It argues that it was arbitrary for the Commissioner to deny it the funds because, in contrast to the previous two years, the personnel who reviewed the grant applications for 1993-94 were "unfamiliar with the Weehawken desegregation plan," id. at 4-5. Weekhawken also contends that the Commissioner is estopped from "withholding" the funds because the grants were not awarded until well after the 1993-94 school year had commenced, by which point Weehawken had spent the money in reliance on the "previous conduct of the Commissioner of Education." Id. at 7. In addition, Weehawken argues that its due process rights were violated since it was not afforded "an opportunity to be heard as to the incorrectness and unfairness" of the determination not to recommend that the District receive aid for 1993-94.

Based on the terms of the applicable statutes and the submissions of the parties, we find that Weehawken has not provided any basis that would warrant either awarding it the monies it is seeking or reopening the matter for further hearing. N.J.S.A. 18A:6-33.15 provides that districts which are eligible to receive State aid under N.J.S.A. 18A:7D-33 and which are either under an order or implementing a voluntary desegregation plan may apply to the Commissioner of Education for a grant for 1) programs required for the implementation of a desegregation order, 2) the enhancement of educational programs in the district, including such other excellence initiatives as the Commissioner deems appropriate, or 3) magnet schools.

N.J.S.A. 18A:6-33.16 provides that the Commissioner shall determine the manner, form, and content of such applications, and that:

> The commissioner shall review the applications and shall, within the limit of funds appropriated or otherwise made available for this purpose, award such grants as he deems advisable or appropriate.

Thus, while Weehawken was eligible to apply for a grant under the statute, nothing in that statute entitled it, or any other eligible school district, to be awarded the funds it sought in any given year. Further, as Weehawken concedes, pursuant to the express terms of N.J.S.A. 18A:6-33.16, the Legislature conferred on the Commissioner of Education the discretion to award such grants to eligible districts as he deems "advisable or appropriate." Nothing in Weehawken's arguments demonstrates to us that Commissioner Klagholz abused his discretion by determining not to award a grant to this district for 1993-94.

We find absolutely no merit to Weehawken's contentions that the Commissioner was compelled to award it these funds because of awards that had been made by one of his predecessors. To the contrary, the words of the statute require the Commissioner of Education to make a judgment as to whether such grant is advisable or appropriate in each year for which a district applies. Weehawken does not contend that the Department of Education failed to notify it of the criteria that would be applied in 1993-94, nor does it make any substantive argument as to why it was entitled to a grant under those criteria. In this respect, we find no merit to Weehawken's suggestion that the Commissioner would have reached a different conclusion as to the advisability and appropriateness of its application had the individuals who screened the applications been "familiar" with its program. Rather, it was the District's responsibility to provide any information which it deemed critical to the success of its application when it responded to the Department of Education's Request for Proposal (RFP) for 1993-94.

Furthermore, while the delay in making the award for 1993-94 was unfortunate, that fact did not entitle the District to assume that it would receive an award for the year in question. Prior to awarding funds for 1993-94, Commissioner Mary Lee Fitzgerald directed a review by the Department of Education's internal auditor in order to determine whether undue political pressure had been used to influence the award of these grants in the first two years of the program, and we reject Weehawken's contention that Commissioner Fitzgerald's memorandum of September 3, 1993, provided it with either the assurance or any reasonable basis to conclude that it would be receiving a grant for 1993-94.

In short, Weehawken has failed to demonstrate to us that it is entitled to the money it is seeking. Moreover, given the circumstances, it is disingenuous for the District to suggest that it was not treated fairly because Commissioners Fitzgerald and Klagholz sought to assure that the grants for 1993-94 were awarded on the basis of criteria that had been provided to all eligible school districts, rather than simply awarding monies to those districts which had received grants during the previous two years. In that Weehawken has not made any showing that it would be entitled to the award it seeks under those criteria, we dismiss this appeal.

August 7, 1996

Date of mailing AUG 09 1996

School Ethics Comm. (SB) 32-94

SEC # A10-93
SEC # A10-93(b) and A07-94
SB # 32-94

SANDRA DESIMONE, JEAN GANDY, RONALD FORST AND MORRIS BURTON, INDIVIDUAL MEMBERS OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
THE NEW JERSEY SCHOOL ETHICS COMMISSION,	:	
RESPONDENT.	:	

Decided by the School Ethics Commission, May 26, 1994

Decided by the Commissioner of Education, June 23, 1994

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

For the Respondent, Marlene Zuberman, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

This appeal to the State Board of Education was brought by four members of the Board of Education of the Township of Delran (hereinafter "appellants"), who represented in their Notice of Appeal filed on June 24, 1994, that they were "individuals directly affected by advisory opinions of the New Jersey School Ethics Commission." Their Notice indicated that appellants were appealing from "final decisions of the New Jersey School Ethics Commission dated May 26, 1994 and June 23, 1994." Those "decisions," appended to the Notice, were designated as "Public Release" "Advisory Opinion A10-93" and "Public Release" "A10-93(b) and A07-94."

The file transmitted to the State Board of Education by the School Ethics Commission reflects that the "decisions" that are the subject of this appeal originated with a request to the Ethics

Oct. 5 1994

Commission made pursuant to N.J.S.A. 18A:12-31 for an advisory opinion.[1] The request was made by the attorney for the Delran Board (hereinafter "counsel") in a letter dated April 25, 1993, wherein he indicated that he was making the request on behalf of several local boards which he represented. See note 1. Counsel's request raised questions as to whether thirteen different circumstances involving collective negotiations might constitute violations of the School Ethics Act by local board members.

By letter of December 14, 1993, counsel renewed his request, this time focusing only on one question:

> Whether or not it would be a violation of the School Ethics Act for a local board of education member who was affiliated with the NJEA, or its affiliates, in various ways to vote on or participate in collective negotiations with the NJEA or its local affiliates concerning a collectively negotiated contract for a unit of employees within the school district in which the individual serves as a local board member.

Counsel also referenced a Commission "ruling" of October 26 and requested that "the [Commission] guarantee that the advisory opinion and any related application of the School Ethics Act with respect to [the] issues will be prospective only."

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[1] N.J.S.A. 18A:12-31 provides the authority under which the Ethics Commission may issue advisory opinions, providing that:

> A school official may request and obtain from the Commission an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute violation of the provisions of this act. Advisory opinions of the commission shall not be made public, except when the commission, by a vote of at least six members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the school official.

N.J.S.A. 18A:12-23 defines "school official" as a board member or an administrator.

By letter of February 9, 1994, the Commission notified counsel that it had determined at its January 26 meeting that "any advisory opinions regarding union members participating in collective bargaining negotiations will be applied prospectively."

By letter of May 26, 1994. directed to counsel, the Commission advised that "...a board member may not participate directly in negotiations if the member or a member of his immediate family...is a member of the same statewide general union."

The Commission concluded that:

> ...this ruling extends to all members of the same state wide union, regardless of the bargaining unit. It does not extend to affiliate organizations because the Commission feels that the nexus of influence in such a situation is too remote to prejudice a board member's independence of judgment. Additionally, this opinion does not extend to board members who are themselves retired members of a union, or whose immediate family members are retired members of a union since they are inactive members of the union with an extremely limited financial and personal interest in the outcome of the negotiations.
>
> It is axiomatic that decisions which result in fundamental changes in the interpretation or application of long-standing law or precedent should be applied prospectively. See, e.g. Spiewak v. Rutherford Board of Education, 90 N.J. 63, 82-83 (1982). Therefore, this decision shall apply prospectively from this date forward, and shall not apply to negotiating teams in place that are in the process of negotiating with a union of the date of this opinion. The Commission shall endeavor to make this decision known to the public.

On June 23, 1994, the Commission addressed another of the questions that had been raised by counsel for the Delran Board. In a letter directed to both counsel and another attorney, and citing its previous "ruling," the Commission advised that:

> ...a board member may not vote on a negotiated contract if the board member or member of his immediate family...is a member of the same

statewide general union that has negotiated the contract with the school board.

Referencing its earlier "opinion," the Commission concluded that:

> As with its previous opinion, this opinion does not apply to retired members of a union. This opinion is also not applicable to affiliate unions in other states, but is limited to members of the same statewide union. However, as also intended in A10-93, this opinion does limit board members from voting on collective bargaining agreements negotiated by a statewide union, where they or their spouses are covered by a collective bargaining agreement that is negotiated by the same statewide union, even though they themselves may not be members of that union, i.e. agency shop situation. The rationale for this decision is the same as that for prohibiting board members from negotiating with unions to which they or their spouses belong; a board member benefiting from a union's negotiations has a financial involvement in that agreement which might prejudice his independence of judgment.
>
> This opinion shall take effect prospectively since it is a fundamental change in long-standing practice.

Appellants filed their appeal to the State Board of Education on June 24, 1994.

On July 29, 1994, the Ethics Commission filed a motion to dismiss the appeal, contending that the State Board lacked subject matter jurisdiction over the matter and that if any review were sought, it should be from the Appellate Division. On August 3, appellants filed individual certifications opposing the motion.

By letter of August 8, both parties were advised that the briefing schedule in the appeal had been placed in abeyance pending the State Board's disposition of the Commission's motion to dismiss.

On August 10, the State Board Appeals Office received a proposed stipulation submitted by the Commission on behalf of the

parties. Under the terms of the stipulation, the State Board would consent to withdrawal of the appeal based on the agreement between the parties that the Ethics Commission would not assert lack of jurisdiction in any future proceeding conducted in the Appellate Division.

By letter of September 15, appellants notified the State Board that they had filed a notice of appeal in the Appellate Division on August 6, 1994.

We can not ignore the fact that the desire of the parties to have this matter adjudicated by the Appellate Division is not a guarantee that the Court can hear it. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 65 (1978). Subject matter jurisdiction can not be conferred by agreement of the parties, or by waiver of objection to the assumption of such jurisdiction, as is reflected in the stipulation that has been submitted to us. Id. State v. Osburne, 32 N.J. 117, 121-122 (1960).

That being the case, we could not consent to withdrawal of the appeal now before us without first ascertaining whether or not the State Board has jurisdiction over it. Cf. Lay Faculty Ass'n of Regional Secondary Schools of Archdiocese of Newark v. Roman Catholic Archdocise of Newark, 122 N.J. Super. 260, 269-271 (App. Div. 1973), supplemented, 124 N.J. Super. 369 (App. Div. 1973). Our conclusion in this respect requires a determination as to whether the "decisions" from which appellants sought to appeal are properly characterized as advisory opinions rather than final decisions. N.J.A.C. 6:2-1.1. See, e.g., New Jersey Ass'n for Retarded Citizens, Inc. v. New Jersey Dept. of Human Services, 89 N.J. 234 (1982).

We are not able to determine on the basis of the documents provided to us whether the Ethics Commission intended its opinions to be binding either on any individual or in general, or whether the Commission's intent was to issue purely advisory opinions. See N.J.S.A. 18A:28-11 (no advisory opinion as to seniority shall be binding). We are therefore compelled to remand this matter to the Ethics Commission for such clarification before we can determine whether jurisdiction over this matter lies with the State Board of Education.

We retain jurisdiction.

October 5, 1994

Date of mailing OCT 07 1994

School Ethics Comm.

(SB) 32-94

SEC # A10-93
SEC # A10-93(b) and A07-94
SB # 32-94

SANDRA DESIMONE, JEAN GANDY, RONALD FORST AND MORRIS BURTON, INDIVIDUAL MEMBERS OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY SCHOOL ETHICS COMMISSION,	:	DECISION
RESPONDENT.	:	

Decided by the School Ethics Commission, May 26, 1994

Decided by the Commissioner of Education, June 23, 1994

Remanded to the School Ethics Commission by the State Board of Education, October 5, 1994

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

For the Respondent, Marlene Zuberman, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

On October 5, 1994, the State Board of Education rendered a decision in which we concluded that, without first ascertaining whether the State Board had subject matter jurisdiction over this appeal, we could not consent to its withdrawal on the basis of an agreement between the parties to conduct any future proceedings in the Appellate Division. Our conclusion in that respect required a determination as to whether the "decisions" involved were properly characterized as advisory opinions rather than final decisions.

December 7, 1994

However, as expressed in our decision:

> We [were] not able to determine on the basis of the documents provided to us whether the Ethics Commission intended its opinions to be binding either on any individual or in general, or whether the Commission's intent was to issue purely advisory opinions. See N.J.S.A. 18A:28-11 (no advisory opinion as to seniority shall be binding). We [were] therefore compelled to remand this matter to the Ethics Commission for such clarification before we [could] determine whether jurisdiction over this matter lies with the State Board of Education.

By letter of October 31, 1994, the Executive Director of the School Ethics Commission responded to the State Board's decision, communicating to us that:

> Pursuant to N.J.S.A. 18A:12-31 and N.J.A.C. 6:3-9.14, the School Ethics Commission intended its advisory opinions to be advisory in nature. Its public opinions, passed by a vote of at least six Commission members, are to have a general application.

In reaction thereto, appellants filed a letter brief with the State Board of Education on November 30, 1994.[1] Appellants were disturbed by the fact that while the Commission's response indicated that the contested opinions were merely advisory, it also appeared to indicate that they were to have "general application." Appellants argue that the opinions were clearly intended to be binding on every member of a board of education and every school official in New Jersey and that, given the impact of these opinions, appellants deserve the right to obtain review as expeditiously as possible.

In view of the concerns appellants have expressed to us, we have carefully reviewed the Ethics Commission's response to our

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1 We note that although the Ethics Commission response was issued on October 31, 1994, appellants represented to us that they did not receive a copy of it until November 28, 1994.

remand. We find that while the response is not entirely clear, it does state that the opinions in question were issued pursuant to N.J.S.A. 18A:12-31, "Advisory Opinions." N.J.S.A. 18A:12-31 provides that:

> A school official may request and obtain from the [ethics] commission an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the provisions of this act. Advisory opinions of the commission shall not be made public, except when the commission, by a vote of at least six members, directs that the opinion be made public. Public advisory opinions shall not disclose the name of the school official.

An advisory opinion is an interpretation of the law without binding effect, rather than a decision. Black's Law Dictionary; 20 AM JUR 2d at 524. In that the Ethics Commission has now clarified that the opinions at issue are advisory in nature, we conclude that they do not constitute determinations by the Ethics Commission regarding violations of the School Ethics Act that are appealable to the State Board of Education pursuant to N.J.S.A. 18A:12-29(d). Nor do such advisory opinions constitute final decisions appealable to the State Board under N.J.A.C. 6:2-1.1.

The fact that the Commission indicated in its response to us that its advisory opinions have "general application" can not give the opinions at issue here the force of administrative rules. In this respect, we stress that although N.J.S.A. 18A:12-34 expressly provides that the State Board of Education may promulgate regulations pursuant to the Administrative Procedures Act to effectuate the purposes of the School Ethics Act, the Ethics Commission has not proposed to us that we promulgate such regulations. Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984).

Based on the foregoing, we therefore conclude that jurisdiction to review the opinions in question does not lie with the State Board of Education at this juncture, and we dismiss this appeal.

S. David Brandt opposed.

Daniel J.P. Moroney abstained.

December 7, 1994

Date of mailing DEC 09 1994

33-94

WILLIAM HUGG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PINE-LANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, nontenured custodian, appealed termination from his position, alleging it was without sufficient cause and contrary to N.J.S.A. 18A:17-41 to -48.

ALJ concluded petitioner failed to carry his burden of proof that he was denied a fair hearing. ALJ found pursuant to Rice, petitioner was given notice that his employment status was to be discussed, and that the meeting petitioner attended was not a hearing. ALJ found petitioner's Fifth Amendment rights were not violated when he chose, on advice of counsel, not to speak at such meeting. ALJ determined Board's action to terminate petitioner's position was neither arbitrary, capricious nor unreasonable. ALJ concluded one incident of offensive language and comment to a student was sufficiently flagrant to warrant petitioner's dismissal.

Commissioner adopted findings and determination in initial decision emphasizing Board complied with Rice standards.

FEBRUARY 8, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3470-93

AGENCY DKT. NO. 13-1/93

WILLIAM HUGG,

Petitioner,

v.

BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

Robert A. Gasser, Esquire, for petitioner

Richard P. Visotcky, Esquire, for respondent (Masch, Visotcky, Cerefice & Carr, attorneys)

Record Closed: December 3, 1993 Decided: December 30, 1993

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a nontenured custodian in the employ of the Board of Education of the Pinelands Regional School District (Board) appeals its action to terminate him alleging, among other things, that his termination was without sufficient cause and contrary to N.J.S.A. 18A:17-41 to -48. The Board, by way of Answer to the Petition and Affirmative Defenses, asserts, among other things, that it properly exercised its statutory authority in terminating petitioner from its employ, pursuant to N.J.SA. 18A:11-1.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on August 12, 1993 followed by a Prehearing Order, dated August 17, 1993, where, among other things, the issues to be determined were set forth as follows:

1. Whether a hearing may be conducted by a Board of an employee for charges which have been brought simultaneous with similar charges arising out of the same factual circumstances which are the basis of a criminal complaint?

2. Whether the Board abused its authority to dismiss the petitioner?

The matter was heard on December 3, 1993, at the Stafford Township Municipal Court, Manahawkin, New Jersey. The hearing record closed on December 3, 1993. On December 1, 1993, petitioner submitted a trial brief in support of his appeal.

BACKGROUND AND STIPULATED FACTS

Based upon petitioner's testimony at the herein hearing and the stipulated facts before the Honorable Thomas Grant Bernard, J.M.C., Little Egg Harbor Municipal Court, in the matter of State of New Jersey v. William D. Hugg, I **FIND** the following **FACTS**:

Petitioner has been employed as a custodian by the Board for approximately two years. Petitioner is under contract and, therefore, has not acquired a tenure status with the Board. Petitioner's work performance evaluations have generally been good. Petitioner has had no prior disciplinary actions against him. He was, however, warned not to transport female students home from the school house.

Petitioner's work day commenced at 3:00 p.m. and continued to 11:00 p.m., each week day. He was assigned a specific work area to clean for the opening of school on the following day. Petitioner generally took two work breaks during the evening; i. e., a short break at 5:00 p.m. and a lunch or dinner break at 7:00 p.m.

On November 19, 1992, at approximately 7:00 p.m., petitioner and three other employees had taken their lunch break in the school's cafeteria. The cafeteria proper is separated from the school corridor by a series of glass windows. Student T.C., a 16 year old female, appeared at one of the windows and caught petitioner's attention. Petitioner went to the window and determined that the student, by pointing, wished to get into the school auditorium to practice a play. Petitioner, pointed to his wristwatch and shook his head "no" to advise the student she could

not get into the auditorium. Petitioner further indicated to T.C. that she would need a teacher's permission to gain entrance to the auditorium. As T.C. moved away from the window, petitioner said, "I want to suck your tits." T.C. heard petitioner's statement.

Subsequently, petitioner was suspended from duty with pay on November 19, 1992. A criminal complaint was filed by Detective Dennis Brown of the Little Egg Harbor Township Police Department which charged petitioner of violating N.J.S.A. 2C:34-4(b). The complaint was remanded to the municipal court by the Ocean County Prosecutor's Office.

The Board advised petitioner, by letter, that his employment status was to be discussed at a meeting of the Board scheduled on December 9, 1992. Petitioner was invited to attend the Board meeting. Petitioner was informed that he would be allowed to address the Board concerning the alleged incident and his employment status. Petitioner appeared at the December 9, 1992, Board meeting and met with the Board in closed session pursuant to the Open Public Meeting's Act (OPMA). Upon advise from his legal counsel, petitioner did not discuss the incident nor his employment status with the Board. On December 9, 1992, in open public session, the Board voted to dismiss petitioner from his position as custodian.

On January 12, 1993, petitioner appeared before Judge Bernard and, upon stipulated facts, petitioner was found guilty of violating N.J.S.A. 2C:33-4(a), harassment. The court imposed the maximum fine of $500 in addition to an assessment of $50 to the Violent Crimes Compensation Board (VCCB).

The victim, T. C., did not testify at the herein hearing although she was present and ready to do so. Judge Bernard did, moreover, provide T.C. the opportunity to speak at the municipal court hearing where she said in part:

> Your Honor, I feel bad that he had to lose his job, and you know, that he might be in debt or, but you know, I still can't go to school which I thought was one of the safest places to be, and where I don't feel -- I feel bad that I have to worry about being in, to get my education in school.
>
> (P-1, p. 23, lns. 9-14).

PETITIONER'S LEGAL ARGUMENT

POINT I
RESPONDENT'S DENIAL OF PETITIONER'S REQUEST FOR AN ADJOURNMENT OR CONTINUANCE DENIED PETITIONER DUE PROCESS OF LAW

An examination of the Board's denial in the within matter reveals a situation where little, if any, consideration was given to petitioner's right to a fair hearing. While there is no dispute that the Board may have felt compelled to act in an expeditious manner out of concern for the student, it was nevertheless improper for the Board to deny petitioner's request for a continuance or adjournment based on the totality of the facts and circumstances presented to the Board. Neither the Board nor the student would have suffered any prejudice by delaying the matter a mere six weeks. It should be noted that the incident allegedly occurred on November 19, 1992. Petitioner was suspended on December 1st and thereafter terminated on December 9th during the hearing that is the subject of this appeal. Furthermore, petitioner became the subject of the criminal complaint on November 20, 1992 - the day after the incident allegedly took place. Considering this accelerated dimension of events it would appear that if any party was prejudiced petitioner is the likely candidate.

The New Jersey Supreme Court examined a related issue in State v. Kobrin Securities, Inc., 111 N.J. 307 (1988). The question presented in that case was whether the State could proceed with a civil fraud action against associated securities dealers while certain of them were subject to pending criminal actions arising out of the same transactions. The parties to the criminal action had in the civil proceedings asserted their privilege against self-incrimination and had therefore refused to provide discovery to the State. The trial court on its own motion placed the civil case on the inactive list.

Although the Supreme Court ultimately held that the case should be returned to the active list, the Court set forth certain considerations that bear on this case. First, the Court noted that the alleviation of tension between constitutional rights has been treated as within the province of a court's sound administration of justice.

Id. at 313 [citing People v. Coleman, 13 Cal. 3d 867, 885, 533 P.2d 1024, 1039 (1975)]. In the context of staying discovery the Court stated:

> Generally, the question should be whether refusing to stay discovery would impose undue hardship on a defendant and would thereby expose to unnecessary adverse consequences the defendant exercising the constitutional privilege. . . The defendants must demonstrate how the discovery burdens imposed upon them outweigh the public interest. The trial court shall thereafter exercise its discretion to mete out justice in both the civil and criminal litigations. . . Of course, we must be sensitive to the potential for the State's deliberately manipulating a civil procedure in order to obtain evidence against a criminal defendant. Should the government "use *** the civil discovery process to compel answers to interrogatories *** to build the government's case in a parallel criminal proceeding [it would reflect] such unfairness and want of consideration for justice as to require reversal.

A balance of the injustices in the within matter leads to the unquestionable conclusion that petitioner was denied a fair hearing and was, practically speaking, denied the effective exercise of his Fifth Amendment right against self-incrimination. By denying petitioner's request for an adjournment and thereby placing him in the dangerous position of exercising his Fifth Amendment right not to testify there could only be one outcome of the Board's deliberations, namely termination. Such a burden far outweighs any prejudice to the Board or to the student that may have occurred if an adjournment had been granted. It is significant that petitioner had been suspended without pay prior to the hearing and such suspension could have easily been maintained pending the outcome of the criminal matter. Additionally, the request was for a mere six or eight week adjournment. Respondent cannot point to any prejudice that might have developed as a result of such a short delay.

Another factor is injected into the Fifth Amendment issue as same was affected by the denial of petitioner's request. The criminal complaint in this matter was precipitated by the school district and not the student or her parents. The interrelationship between the school district and police department in the investigation of this matter demonstrates *prima facie* the State's attempt to take advantage of the pending administrative case against petitioner in order to build its case in the criminal matter. Such use of the administrative posture of the case by the police department without a doubt warranted an adjournment of the matter in the

interest of protecting petitioner's right to a fair hearing. Knowing that the police could use his testimony in the subsequent criminal matter, petitioner was left with little choice but to exercise his Fifth Amendment right.

As a final point, it should be stated that there was some concern during the hearing about petitioner's alleged strategy. It was suggested that petitioner desired a stay of the hearing in hopes of discussing the situation with the student and her parents and convincing them to accept a dismissal of the charges. The concern was that petitioner would then return to the Bord and propose the argument that since the charges were dismissed in the criminal matter the Board should then consider disciplinary action far short of termination. The denial by the Board that followed was nothing more than an attempt to turn petitioner's Fifth Amendment right on its head and use that right against petitioner so that he would be forced not to testify at the hearing, in which case the Board could terminate petitioner in the absence of any contrary evidence prior to a potential dismissal of the charges in municipal court.

It is respectfully submitted that petitioner was denied a fair hearing on December 9, 1992. By denying an adjournment the Board impinged petitioner's Fifth Amendment right against self-incrimination forcing upon petitioner the terrible consequence of losing his job. It is submitted that our forefathers could never have intended so harsh a result by exercising one's constitutional rights.

POINT II
TERMINATION OF PETITIONER'S EMPLOYMENT WAS NOT WARRANTED BY THE FACTS AND CIRCUMSTANCES OF THIS CASE

It is undisputed that the Pinelands Regional Custodial Association, of which petitioner was a member, does not set forth rules, regulations or disciplinary actions regarding such conduct as alleged by the Board. It is respectfully submitted that in the absence thereof dismissals and terminations should be governed by the provisions set forth in N.J.S.A. 18A:16-1 et seq. and N.J.S.A. 18A:17-41 et seq. Notably, N.J.S.A. 18A:6-71 et seq. limits disqualifications for employment as a custodian to convictions of crimes of disorderly persons offenses:

A. Bearing upon or involving sexual offense or child molestation as set forth in N.J.S.A. 2C:14-1 et seq.; or

B. Endangering the welfare of children or incompetents as set forth in N.J.S.A. 2C:24-4 and 2C:24-7.

In the within matter the criminal charges were resolved as a petty disorderly offense in the municipal court under N.J.S.A. 2C:33-4 (Harassment). If such an offense would not disqualify a candidate from employment by a school district it is difficult to understand why such an offense should result in termination of an employee. In that regard, the Board's decision to terminate petitioner was unreasonable. The circumstances surrounding the alleged conduct of petitioner simply do not warrant loss of employment. Petitioner was standing behind a glass partition when the alleged words were spoken and were not intended to be heard by the student. In fact, the alleged remarks, if made, were made in the presence of co-workers and for their "benefit". Furthermore, petitioner had been an exemplary employee until the time of the alleged incident and would undoubtedly continue to be such an employee once this unfortunate situation is behind him. Petitioner's employment status should not be guided by one brief moment of stupidity. Rather, any discipline should be meted out based on the totality of the facts and circumstances and in light of petitioner's otherwise fine record as a Board employee.

MOTION

At the conclusion of petitioner's case in chief, the Board moved to dismiss the Petition of Appeal grounded upon its assertion that petitioner had failed to carry his burden of proof by a preponderance of the credible evidence. Subsequent to a review of the evidence, this tribunal agreed with the Board and dismissed the Petition.

DISCUSSION AND CONCLUSIONS

I

Petitioner's claim that he was denied a fair hearing before the Board on December 9, 1992, is without merit. First, the Board did not conduct a hearing on December 9, 1992. Rather, it gave petitioner notice that it intended to discuss and take action concerning his employment status, pursuant to Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super 65 (App. Div. 1977). Under the Rice

holding, the Board is required to give petitioner notice of its intent to discuss petitioner's employment status. Petitioner is then provided the opportunity to advise the Board as to whether he wishes to have his employment status discussed in private or public session under the provisions of the Open Public Meeting Act, N.J.S.A. 10:4-6 to -21.

The Board discussed petitioner's employment status in private, providing petitioner the opportunity to speak on his own behalf. Rice, supra; N.J.S.A. 10:4-12 b. (3) and (8). Petitioner, under the advice of legal counsel, determined not to speak. The Board, thereafter, took action in open public meeting to dismiss him from his contracted position of school custodian based upon the facts before it.

I **CONCLUDE**, therefore, that petitioner's Fifth Amendment rights against self-incrimination were not violated.

Second, petitioner had not acquired a tenure status with the Board, pursuant to N.J.S.A. 18A:17-3. See, Walter c. Peck v. Board of Education of the Mainland Regional High School District, Atlantic County, 1982 S.L.D. _____; quoted in Claud Wright, Jr. and East Orange Personnel Association v. Board of Education of the City of East Orange, Essex County, 1982 S.L.D. 823, 836. Rather, petitioner was under contract with the Board and subject to termination exclusive of the requirements of N.J.S.A. 18A:6-9 to -26. The Board, therefore, under its grant of authority pursuant to N.J.S.A. 18A:11-1 c. ". . . for the employment, regulation of conduct and discharge of its employees . . .," determined that petitioner was unfit to continue service as a custodian under its employ. As the court said in Redcay v. State Board of Education, N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944), that:

> Unfitness for a task is best shown by numerous incidents. 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

School boards are entrusted by our Legislature with the duty of determining the general issue of fitness of teachers and other employees. Boards of education are sufficiently equipped to conduct a fair and impartial inquiry whenever such issue legitimately comes into question. Laba v. Newark Bd. of Ed. 23 N.J. 364, 384 (1957).

Their obligation to determine the fitness of its employees is a reflection of their duties to protect the students under their charge from a significant danger or harm. In re Fulcomer, 93 N.J. Super 404 (App. Div. 1967).

In Thomas v. Morris Township Board of Education, 89 N.J. Super 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966) the courts have stated that:

> We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.
> 89 N.J. Super at 332.

Petitioner admits and stipulates to the offensive language and comments he made to T.C. As a consequence of his offensive comments, petitioner has been convicted, in a court of competent jurisdiction of violating N.J.S.A. 2C:33-4 (harassment).

In the matter of Paterson School District v. Watson, 93 N.J.A.R. 2d (EDU) 362 at 376, the Commissioner recognized the position occupied by a school custodian as an important one where she cited the language In the Matter of the Tenure Hearing of Joseph McDougall, 1974 S.L.D. 170 at 178:

> [a] school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the school house and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties. (emphasis supplied).

The herein record clearly demonstrates that petitioner violated his position of trust by his comments to T.C., a minor and student under his authority. He was devoid of high standards of morality and failed to protect the safety and welfare of T.C. in the discharge of his duties. The Board, therefore, determined that this one incident was sufficiently flagrant to warrant petitioner's dismissal. Redcay, supra.

I **CONCLUDE** that petitioner has failed to carry his burden in the instant matter, by a preponderance of the reliable and credible evidence.

I **CONCLUDE** that the Board's action to terminate petitioner's employment was neither arbitrary, capricious nor unreasonable under the circumstances.

I **CONCLUDE**, therefore, that the Board's Motion to Dismiss should be granted.

ORDER

Accordingly, the Board's Motion to Dismiss the herein matter is hereby **GRANTED** and it is **ORDERED** that the Petition of Appeal be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

30 December 1993
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

JAN 6, 1994
Date

Maureen E. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 11 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

psa

WITNESSES

FOR PETITIONER:
WILLIAM HUGG

FOR RESPONDENT:
NONE

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE THOMAS GRANT BERNARD, J.M.C., JANUARY 12, 1993 IN THE MATTER OF STATE OF NEW JERSEY v. WILLIAM D. HUGG

FOR RESPONDENT:
NONE

WILLIAM HUGG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PINE-LANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law that the Board's action to terminate petitioner's nontenured employment as a custodian in the district was neither arbitrary, capricious nor unreasonable. He so finds for the reasons expressed in the initial decision.

In so finding, the Commissioner emphasizes that the events that took place on December 9, 1992 did not constitute a hearing, during which it might be argued that petitioner's Fifth Amendment rights were abridged. As correctly found by the ALJ, the Board merely provided petitioner access to its private discussion of his employment status, as required by Rice, supra. That petitioner chose, with the advice of legal counsel, not to speak at such meeting, when the Board invited him to do so, cannot be said to

have violated his constitutional rights, in that the Board was not compelled by law to conduct a hearing regarding petitioner's nontenured employment status.

Accordingly, for the reason expressed in the initial decision the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

FEBRUARY 8, 1994

DATE OF MAILING - FEBRUARY 8, 1994

34-94

IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY.	
AND	
NEIL SCHULMAN,	COMMISSIONER OF EDUCATION
PETITIONER,	DECISION
V.	
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY,	
RESPONDENT.	

FEBRUARY 8, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 8317-93 & EDU 8676-93
AGENCY DKT. NOS. 294-8/93 & 316-9/93

IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF GLEN RIDGE, ESSEX COUNTY.

Cherie L. Maxwell, Esq., for Glen Ridge School District
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Arnold M. Mellk, Esq., for Neil Schulman
(Wills, O'Neill & Mellk, attorneys)

Record Closed: December 27, 1998 Decided: December 30, 1993

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

This matter was transmitted to the Office of Administrative Law on September 14, 1993 for determination as a contested case.

Prior to hearing, the parties agreed to settle the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/30/93
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 13 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent
Glen Ridge Public Schools

NEIL SCHULMAN,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	
		Agency Docket No. 294-8/93
-vs-	:	OAL Docket No. EDU 08317-93N
GLEN RIDGE PUBLIC SCHOOLS,	:	
Respondent.	:	
IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF THE TOWNSHIP OF GLEN RIDGE	:	Docket No. 316-9/93 OAL Docket No. EDU 08676-93N

SETTLEMENT AGREEMENT

This Agreement made on this 21st day of December, 1993 by and between the Glen Ridge Board of Education ("Board") and Neil Schulman ("Schulman");

WHEREAS, Schulman is employed as a tenured science teacher in the Glen Ridge School District; and

WHEREAS, the Board voted on June 28, 1993 to require Schulman to submit to a medical and psychiatric examination pursuant to N.J.S.A. 18A:16-2; and

WHEREAS, Schulman filed a petition with the Department of Education challenging the Board's directive to submit to said examination; and

WHEREAS, on July 30, 1993, tenure charges against Schulman were filed with the Board of Education, alleging unbecoming conduct and incapacity as a teacher; and

WHEREAS, these tenure charges were certified to the Commissioner of Education by action of the Board on August 30, 1993; and

WHEREAS, the Board further acted on August 30, 1993 to withhold Schulman's salary increment for the 1993-94 school year; and

WHEREAS, in light of the differing factual positions of the parties as to the matters in contest, it is in the best interest of the parties to resolve the pending actions before the Commissioner of Education;

NOW THEREFORE the parties hereto agree to the following terms:

1. Schulman will immediately submit for Board action his letter of retirement from employment with the District to be effective June 30, 1994. Schulman submits said retirement notice knowingly, voluntarily and irrevocably, after consulting with counsel and receiving advice as to its ramifications.

2. For the 1993-94 school year, Schulman shall be placed on a paid leave of absence, during which time he shall not return to school or receive a teaching assignment, but shall receive his full salary, benefits and emoluments.

3. Schulman's salary increment for 1993-94 shall be retroactively restored and included in the salary paid to him during the paid leave of absence for the 1993-94 school year. All salary payments shall reflect normal payroll deductions.

4. The Board and Schulman shall execute a mutual release of claims.

5. The pending petitions, Agency Docket Nos. 294-8/93 and 316-9/93 (OAL Docket Nos. EDU 08317-93N and EDU 08676-93N respectively) shall be withdrawn, with prejudice, subject to the approval of this Agreement by the appropriate administrative agencies.

6. The parties recognize that each has been represented by counsel and that each enters this Agreement voluntarily and without coercion.

7. This Settlement Agreement is subject to the approval of the Office of Administrative Law and Commissioner of Education. In the event that these agencies disapprove of said Settlement Agreement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to the settlement.

GLEN RIDGE BOARD OF EDUCATION

Neil Schulman
NEIL SCHULMAN

Dated: 12/12/93

Marcia E. Bossart Ed D.
By

Dated: December 22, 1993

OAL DKT. NOS. EDU 8317-93 AND EDU 8676-93 (CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY.	:	
AND	:	
NEIL SCHULMAN,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered in the form of a joint stipulation of settlement have been reviewed. Based upon such review, the Commissioner must reject the terms of such accord because there is no indication that the teacher was advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.6(a)1 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. The State Board has ruled in In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846, that such disclosure should be part of any agreement which results in loss of position.

Accordingly, the instant settlement is rejected and remanded to the Office of Administrative Law for further action consistent with this determination.

IT IS SO ORDERED.

FEBRUARY 8, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 8, 1994

34-94

123-94R
(34-94)

IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
NEIL SCHULMAN,	:	DECISION ON REMAND
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

MAY 17, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1909-94
AGENCY DKT. NOS. 294-8/93 and
316-9/93

IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF GLEN RIDGE, ESSEX COUNTY,
and
NEIL SCHULMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY,
Respondent.

Arnold M. Mellk, Esq., for Neil Schulman
(Wills, O'Neill & Mellk, attorneys)

Cherie L. Maxwell, Esq., for Glen Ridge School District
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 31, 1994 Decided: April 4, 1994

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

This matter was transmitted to the Office of Administrative Law on February 28, 1994 for determination as a contested case.

On March 31, 1994 the parties submitted a Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/4/94
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

4/6/94
Date

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 11 1994
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

am

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent
Glen Ridge Public Schools

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OFFICE OF LAW
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NEIL SCHULMAN,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	
-vs-	:	OAL Docket No. EDU 1909-94
GLEN RIDGE PUBLIC SCHOOLS,	:	Agency Docket No. 294-8/93
Respondent.	:	
IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF THE TOWNSHIP OF GLEN RIDGE	:	Agency Docket No. 316-9/93

SETTLEMENT AGREEMENT

This Agreement made on this 21 day of March, 1994 by and between the Glen Ridge Board of Education ("Board") and Neil Schulman ("Schulman");

WHEREAS, Schulman is employed as a tenured science teacher in the Glen Ridge School District; and

WHEREAS, the Board voted on June 28, 1993 to require Schulman to submit to a medical and psychiatric examination pursuant to N.J.S.A. 18A:16-2; and

WHEREAS, Schulman filed a petition with the Department of Education challenging the Board's directive to submit to said examination; and

WHEREAS, on July 30, 1993, tenure charges against Schulman were filed with the Board of Education, alleging unbecoming conduct and incapacity as a teacher; and

WHEREAS, these tenure charges were certified to the Commissioner of Education by action of the Board on August 30, 1993; and

WHEREAS, the Board further acted on August 30, 1993 to withhold Schulman's salary increment for the 1993-94 school year; and

WHEREAS, in light of the differing factual positions of the parties as to the matters in contest, it is in the best interest of the parties to resolve the pending actions before the Commissioner of Education;

NOW THEREFORE the parties hereto agree to the following terms:

1. Schulman will immediately submit for Board action his letter of retirement from employment with the District to be effective June 30, 1994. Schulman submits said retirement notice knowingly, voluntarily and irrevocably, after consulting with counsel and receiving advice as to its ramifications. Schulman specifically acknowledges that he has been advised of the duty of the Commissioner of Education pursuant to N.J.A.C. 6:11-3.6(a)(1) and In re Cardonick concerning referral to the State Board of Examiners for possible action regarding Schulman's teaching certification.

2. For the 1993-94 school year, Schulman shall be placed on a paid leave of absence, during which time he shall not return to school or receive a teaching assignment, but shall receive his full salary, benefits and emoluments.

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3. Schulman's salary increment for 1993-94 shall be retroactively restored and included in the salary paid to him during the paid leave of absence for the 1993-94 school year. All salary payments shall reflect normal payroll deductions.

4. The Board and Schulman shall execute a mutual release of claims.

5. The pending petitions, Agency Docket Nos. 294-8/93 and 316-9/93 (OAL Docket Nos. EDU 08317-93N and EDU 08676-93N respectively) shall be withdrawn, with prejudice, subject to the approval of this Agreement by the appropriate administrative agencies.

6. The parties recognize that each has been represented by counsel and that each enters this Agreement voluntarily and without coercion.

7. This Settlement Agreement is subject to the approval of the Office of Administrative Law and Commissioner of Education. In the event that these agencies disapprove of said Settlement Agreement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to the settlement.

GLEN RIDGE BOARD OF EDUCATION

Neil H. Schulman
NEIL SCHULMAN

Dated: March 21, 1994

Marcia E. Bossart, Ed.D.
By

Dated: March 28, 1994

3C

IN THE MATTER OF THE TENURE HEARING OF NEIL SCHULMAN, SCHOOL DISTRICT OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
NEIL SCHULMAN, PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY, RESPONDENT.	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

MAY 17, 1994

DATE OF MAILING - MAY 17, 1994

COMMISSIONER OF EDUCATION

35-94

BETTY HOPKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 8, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3695-93
AGENCY DKT. NO. 420-9/92

BETTY HOPKINS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Respondent.

Richard A. Friedman, Esq., on behalf of petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Frederick W. Hardt, Esq., on behalf of respondent

Record Closed: January 10, 1994 Decided: January 11, 1994

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of an appeal filed by petitioner with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-10 *et seq; N.J.S.A.* 18A:17-3. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13. The parties have now submitted a stipulation of settlement in the matter which is annexed. Having reviewed the terms of the settlement and it appearing that it fully disposes of all issues in controversy and was entered into voluntarily, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are **CONCLUDED**.

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

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

1/11/94
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

1/12/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 1994
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

FREDERICK W. HARDT
SUITE 101
300 CHESTER AVENUE
P.O. BOX 840
MOORESTOWN, N.J. 08057
(609) 234-4141
(609) 387-0054
ATTORNEY FOR RESPONDENT

BETTY HOPKINS,	:	OFFICE OF ADMINISTRATIVE LAW
	:	
Petitioner,	:	OAL DOCKET NO.: EDU 03693-93 S
	:	
vs.	:	
	:	
BOARD OF EDUCATION OF TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	STIPULATION OF SETTLEMENT
	:	
Respondent.	:	

It is stipulated and agreed between the parties in full and complete settlement of all the difficulties between them arising out of the facts which give rise to the matter in which this Stipulation is entered as follows:

1. Betty Hopkins agrees to accept a thirty (30) day suspension from her employment with the Pemberton Township School District provided that the term of the suspension shall be reduced to three (3) days suspension if Betty Hopkins is not the subject of further disciplinary action during the six (6) month period described in the paragraph below. At the conclusion of the six (6) month period set forth within this

paragraph, the personnel file of Betty Hopkins and the Board records shall only reflect a three (3) day suspension. The net effect requires that Betty Hopkins lose three day's pay from the District for her actions in this matter.

2. The Board of Education agrees that the above penalty may only be used for future disciplinary actions during a six (6) month period commencing on March 1, 1993. During this six (6) month period, should Betty Hopkins be the subject of further disciplinary actions, the penalty imposed above may be taken into consideration by the Board in determining the appropriate penalty to be imposed should the subsequent disciplinary proceedings lead to a determination of guilt. Thereafter, however, the Board agrees that the above disciplinary action will not be considered in any other subsequent disciplinary proceeding.

3. Betty Hopkins agrees to accept the determination made by the Pemberton Board of Education in the matter and penalties imposed by this agreement. This means that she agrees to stay at her present post and to withdraw all challenges to the action of the Board. The Board of Education, by this Agreement, waives all rights which it has to bring tenure or disciplinary charges arising out of the facts which are an issue in this matter.

4. Nothing contained in this agreement shall prohibit Betty Hopkins from applying for future promotions,

ERICK W. HARDT

transfers, or the like. Should Betty Hopkins not be the subject of further disciplinary proceedings during the period described in Paragraph 2 of this Agreement, the above disciplinary proceeding shall not be considered in Betty Hopkins' applications for future promotions, transfers, or the like.

5. The parties note that Betty Hopkins was suspended initially for a sixty (60) day period. The Board has reimbursed Betty Hopkins for a portion of this time and agrees within thirty (30) days of the date of this agreement to reimburse her without interest for any days for which reimbursement has not already paid.

6. By the execution of this agreement, the parties authorize their respective attorneys to execute any and all documents on their behalf to effectuate the intent of this Stipulation.

PEMBERTON BOARD OF EDUCATION

Dated: 12/16/93

By _____
Randolph Thacher, Chairman

ATTEST:

_____
Mark Cowell, Secretary

Dated: Oct. 25, 1993

_____
BETTY HOPKINS

ERICK W. HARDT

OAL DKT. NO. EDU 3695-93

BETTY HOPKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

FEBRUARY 8, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 8, 1994

36-94

HEDWIG P. HALEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 8, 1994

OAL DKT. NO. EDU 7262-93

HEDWIG P. HALEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Upon review of the record in this matter, the Commissioner notes correspondence from the Administrative Law Judge dated January 20, 1994 indicating that this matter was duly withdrawn at the Office of Administrative Law on November 10, 1993 and, consequently, subsequent proceedings including the issuance of an initial decision were undertaken in error.

Accordingly, the Commissioner accepts this matter as withdrawn pursuant to N.J.A.C. 1:1-19.2. As such, it is no longer deemed to be a dispute before him and is hereby dismissed with prejudice.

IT IS SO ORDERED.

FEBRUARY 8, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 8, 1994

37-94

GWEN T. SAMUELS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	
RESPONDENT.	:	

FEBRUARY 9, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7791-92
AGENCY DKT. NO. 377-7/92

GWEN T. SAMUELS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,
Respondent.

Robin Elenko, Esq., for petitioner
(Reinhardt & Schachter, attorneys)

Nathanya Simon, Esq., for respondent
(Schwartz, Simon & Edelstein, attorneys)

Record Closed: December 27, 1993 Decided: January 6, 1994

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 7, 1992, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

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

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

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

2. The settlement disposes of all issues in controversy, is in the interest of the parties and public, and comports with *Cardonick v. Bd. of Ed. Boro. of Brooklawn*, State Board Decision (April 8, 1983).

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 1994

DATE

OFFICE OF ADMINISTRATIVE LAW

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RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement is executed by and between GWEN T. SAMUELS (hereinafter referred to as "Samuels") and the Board of Education of the Borough of Roselle (hereinafter referred to as "Board").

WHEREAS, at a duly constituted public meeting of the Board held on April 28, 1992, a Resolution was adopted by the Board approving the release of non-tenured personnel effective June 30, 1992, as listed on an attachment, which list included the Petitioner Samuels (a/k/a Gwen S. Herbert); and

WHEREAS, Petitioner Samuels contested the non-renewal of her employment alleging improper notice, and filed a Petition of Appeal with the Commissioner of Education (Agency Reference Number 377-7/92) which was transmitted to the Office of Administrative Law and assigned to Administrative Law Judge Judith Klinger (Docket Number EDU 07791-92N); and

WHEREAS, Samuels and the Board desire to fully and finally resolve and settle all claims between them arising out of Samuels' employment with the Board and all other actions and claims arising from any employment actions taken by the Board concerning Samuels;

NOW, THEREFORE, in consideration of the mutual promises, covenants and terms contained herein, the parties do hereby agree as follows:

1. Samuels agrees to withdraw her Petition of Appeal from further processing at the Office of Administrative Law and the Commissioner of Education.

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2. The Board agrees to pay Samuels the sum of ten thousand dollars ($10,000), without deductions, within thirty (30) days after receipt of the Final Decision by the Commissioner of Education.

3. Samuels does hereby release and discharge the Board from any and all claims, rights and causes of action of any nature whatsoever arising from, or in any way connected with her employment with the Board, together with the facts and circumstances surrounding the action taken by the Board on April 28, 1992. This Release expressly terminates all proceedings which Samuels now has, or may later have, and includes any and all claims for damages, reinstatement, salary, fringe benefits, and any other expenses incurred by Samuels in any way relating to or arising from, or in any way connected with, her employment with the Board.

4. This Agreement is subject to ratification by the Board, which is anticipated at the Board Meeting of November 9, 1993.

5. This Release and Settlement Agreement contains the entire agreement and understanding between the parties, and constitutes full and final settlement of all claims. This Release and Settlement Agreement shall be governed by the laws of the State of New Jersey. Each party hereto has had ample opportunity to consult with competent representation concerning the terms and conditions of the settlement, and each party knows and understands the contents herein, and enters into this settlement of their own free will and without any inducement not contained herein.

IN WITNESS WHEREOF, the parties hereunto set their hands and seals as of the dates indicated.

Dated: Nov 5 1993

Gwen T. Samuels
GWEN T. SAMUELS

WITNESSED BY:

Robin Elenko
Attorney-at-Law State of New Jersey

Dated: nov 5, 1993

BOARD OF EDUCATION OF THE
BOROUGH OF ROSELLE

By: Elroy Sanders

WITNESSED BY:

JOSEPH W. CZYSZ,
BUSINESS ADMIN./BOARD SECTY.

OAL DKT. NO. EDU 7791-92

GWEN T. SAMUELS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 9, 1994

DATE OF MAILING - FEBRUARY 9, 1994

38-94

BARBARA CIULLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY, AND SUPERINTENDENT OF RIVER VALE PUBLIC SCHOOLS, CARMINE CERASA,	:	DECISION
RESPONDENT,	:	
AND	:	
DIANA LEE,	:	
INTERVENOR-RESPONDENT.	:	

FEBRUARY 9, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7811-92
AGENCY DKT. NO. 379-7/92

BARBARA CIULLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY, AND SUPERINTENDENT OF RIVER VALE PUBLIC SCHOOLS, CARMINE CERASA,
Respondent,
and
DIANA LEE,
Intervenor-Respondent.

Richard T. Garofalo, Esq., for petitioner
(Wells, Garofalo, Jaworski & Liebman, attorneys)

Richard H. Bauch, Esq., for respondent
(DeMaria, Ellis, Hunt, Salsberg & Friedman, attorneys)

Lauren E. McGovern, Esq., for intervenor-respondent
(Springstead & Maurice, attorneys)

Record Closed: January 11, 1994 Decided: January 13, 1994

New Jersey is an Equal Opportunity Employer

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter was transmitted by the Department of Education to the Office of Administrative Law as a contested case on October 7, 1992 as the result of the filing of a petition of appeal by Barbara Ciulla alleging that the Board violated her tenure and seniority rights when it eliminated her position. According to petitioner, another teacher who was retained by the Board had less seniority than did she. Subsequently, that other teacher was permitted to intervene in the case.

A prehearing conference was conducted by the undersigned administrative law judge on December 2, 1992 and hearings were scheduled to commence in June 1993. Thereafter, counsel advised that the parties had reached tentative agreement with respect to the terms and conditions of a stipulation of settlement and, as a result, the hearing dates were adjourned.

A stipulation of settlement, signed by the parties and/or their counsel, has now been submitted to me for review and recommended approval to the Commissioner of Education. I have reviewed the terms of the stipulation and **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures appearing on the settlement agreement; and

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

I therefore **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and order that the parties comply with its terms and that these proceedings be **CONCLUDED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 13, 1994
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

1/18/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 20 1994
Date

OFFICE OF ADMINISTRATIVE LAW

amr

DeMARIA, ELLIS, HUNT, SALSBERG & FRIEDMAN
744 Broad Street, Suite 1400
Newark, New Jersey 07102
(201) 623-1699

Attorney(s) for Respondents
Board of Education of the Township
of River Vale and Carmine Cerasa

BARBARA CIULLA,

Petitioner,

vs.

BOARD OF EDUCATION THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY and SUPERINTENDENT OF RIVER VALE PUBLIC SCHOOLS, CARMINE CERASA,

Respondents.

-and-

DIANA LEE,

Intervenor.

STATE OF NEW JERSEY

BEFORE THE
COMMISSIONER OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 379-7/92
OAL Docket No. EDU 07811-92N

STIPULATION OF SETTLEMENT

The parties to this Stipulation of Settlement ("Stipulation"), Petitioner Barbara Ciulla ("CIULLA"); Respondent Board of Education of the Township of River Vale ("BOARD"); Respondent Carmine Cerasa ("CERASA"); and Intervenor Diana Lee ("LEE"), desiring to avoid the time and expense of continued litigation and further desiring to amicably resolve the above-captioned action, hereby set forth their agreement as follows:

1. In consideration for the promises made below, CIULLA hereby withdraws, with prejudice, the above-captioned action, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

2. Within thirty (30) days following the issuance of a final administrative decision by the Commissioner of Education, approving the within Stipulation and its terms (the "Approval"), the BOARD will pay to CIULLA the total sum of Six Thousand ($6,000.00) Dollars, in complete settlement of all claims which CIULLA has or might have against the BOARD and CERASA, their officials, employees, agents and attorneys, including, but not limited to any claims for backpay, frontpay, severance pay, vacation pay, accumulated and unused sick leave, compensatory damages, punitive damages, liquidated damages, damages for pain, suffering and emotional distress, disability payments, attorneys' fees, expert witness fees, medical expenses, and expenses and costs which CIULLA and/or her attorneys may have incurred.

3. To the extent that the parties are permitted to do so by law, the amount set forth at Paragraph 2, above, shall be allocated as compensation for CIULLA's "pain and suffering" and other personal injuries; provided however, that the parties agree that in the event this allocation is not consistent with applicable law, it shall have no effect on the validity and binding effect of this Agreement which shall remain fully enforceable and binding upon the parties; and provided further that CIULLA hereby releases, saves and holds the BOARD and CERASA harmless for any claims by any governmental agencies for additional taxes and/or penalties relating to amounts paid to CIULLA by the BOARD pursuant to this Agreement.

4. In consideration for the above agreements, CIULLA will forever release the BOARD and CERASA and their officers, officials, agents, attorneys, representatives, heirs, successors and assigns from any and all claims arising under or relating in any manner whatsoever to the above-captioned action, including, *but*

not limited to, claims arising under (1) the Constitution of the United States; (2) the Americans with Disabilities Act, 29 *U.S.C.* § 791 *et seq.*; (3) the Constitution of the State of New Jersey; (4) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*; (4) Title VII of the Civil Rights Act of 1964, as amended, 42 *U.S.C.* § 2000(e) *et seq.*; (5) the Civil Rights Act of 1866, 42 *U.S.C.* § 1981 *et seq.*; (6) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.*, including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*; and all regulations promulgated thereunder; (7) the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*; (8) any express or implied contracts she may have; (9) any collective negotiations agreement(s); (8) federal or state common law; (10) any Board policy, administrative regulation or practice; and (11) any federal, state or local statutes, ordinances and regulations. Specifically excluded from this Release are my rights to obtain medical insurance coverage at my own expense as authorized by the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA").

5. This Stipulation is not and shall not in any way be construed as an admission by the BOARD or CERASA, or any of their officials, officers, agents, attorneys, employees or representatives of the commission of any acts of discrimination whatsoever against CIULLA, by themselves or any other person or entity, or that the BOARD or CERASA, or any of their officers, officials, agents, attorneys, representatives, heirs, successors and assigns violated any federal or state constitutional prohibitions or any federal, state or local law, ordinance or regulation, or that any employment decision or action affecting CIULLA was the result of any acts which were unwarranted, unjustified, discriminatory, otherwise unlawful or in violation of an express or implied contract of employment, or in breach of any statute, regulation or public policy of the State of New Jersey, but instead constitutes the good faith settlement of all matters, and the BOARD and CERASA specifically disclaim any liability to CIULLA or any other person or entity, on the part of

themselves or their officers, officials, agents, attorneys, representatives, heirs, successors and assigns. The parties have entered into this Stipulation for the sole purpose of resolving claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation and CIULLA shall not purport to be the prevailing party in any action.

6. LEE hereby agrees to withdraw her Notice of Motion for Summary Decision filed with the Office of Administrative Law on or about October 4, 1993, subject to the Approval of the Commissioner of Education.

7. CIULLA understands that she has up to twenty-one (21) calendar days from October 11, 1993, which is the date on which she was given this Stipulation, to decide whether or not to sign this Stipulation. Further, she understands that at any time during the seven (7) calendar days after the date on which she signs this Stipulation, she may revoke her agreement to this Stipulation. Finally, CIULLA understands that this Stipulation will not become effective or enforceable and she will not receive the payment identified in Paragraph 2 above, until the period during which she may revoke her agreement to this Agreement has expired and thereafter she has given BOARD a written statement, annexed hereto as Exhibit "A," that she has not revoked her agreement to this Stipulation.

8. The language of all parts of this Stipulation shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.

9. This Stipulation of Settlement represents the full and complete agreement of the parties hereto and may be modified only by a writing signed by all parties hereto. This Stipulation supersedes any and all prior or contemporaneous written and/or oral statements or representations.

10. CIULLA represents and certifies that she has carefully read and fully understands all of the provisions and effects of this Stipulation, and has thoroughly

discussed all aspects of this Stipulation with her attorney, that she has voluntarily entered into this Stipulation, and that neither the BOARD nor CERASA nor their officers, officials, agents, attorneys, representatives, heirs, successors and assigns, have made any representations concerning the terms or effects of this Stipulation other than those contained herein.

3 e

WHEREFORE THE PARTIES AND THEIR ATTORNEYS HEREBY STIPULATE AND AGREE TO THE ABOVE DESCRIBED TERMS AND CONDITIONS OF SETTLEMENT.

Barbara Ciulla
BARBARA CIULLA

Sworn to and Subscribed before
me this 1 day of ~~October~~, NOV.
1993

Richard T. Garofalo
An Attorney at Law in
the State of New Jersey

WELLS, GAROFALO, JAWORSKI & LIEBMAN
Attorneys for Petitioner, Barbara Ciulla

By: Richard T. Garofalo
Richard T. Garofalo

Dated: NOV. 1. ~~October~~, 1993

BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE

By: Bert Ammerman
Bert Ammerman

Attest: Anthony J. Mistretta
Anthony J. Mistretta
Board Secretary

Dated: October , 1993

DeMARIA, ELLIS, HUNT, SALSBERG & FRIEDMAN
Attorneys for Respondents, Board of Education of the Township of River Vale and Carmine Cerasa

By: _____
Richard H. Bauch

Dated: ~~October~~ November 30, 1993

SPRINGSTEAD & MAURICE
Attorneys for Intervenor, Diana Lee

By: _____
Lauren E. McGovern

Dated: ~~October~~ November 11, 1993

NOV 1, 1993

To the Members of the Board of Education
of the Township of River Vale:

Please be advised that, pursuant to Paragraph 7 of the Stipulation of Settlement previously signed by me and delivered to you, this letter serves as formal notification to you that I am not revoking my agreement as set forth in the Stipulation of Settlement.

Sincerely,

Barbara Ciulla

Barbara Ciulla

EXHIBIT "A"

OAL DKT. NO. EDU 7811-92

BARBARA CIULLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY, AND SUPERINTENDENT OF RIVER VALE PUBLIC SCHOOLS, CARMINE CERASA,	:	DECISION
RESPONDENT,	:	
AND	:	
DIANA LEE,	:	
INTERVENOR-RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.

In so deciding, it is observed that the Commissioner of Education has no jurisdiction over tort claims and has no authority to grant relief in the form of damages as specified in paragraphs 2 and 3 of the settlement. Accordingly, the Commissioner makes no comment concerning those portions of paragraphs 2 and 3 of the instant settlement bespeaking "damages" or "pain and suffering."

With this observation noted, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

FEBRUARY 9, 1994

DATE OF MAILING - FEBRUARY 9, 1994

COMMISSIONER OF EDUCATION

- Bd. of Examiners

(SB) 38-94

SBE #229-9/93-22
SB # 38-94

IN THE MATTER OF THE TEACHING :
CERTIFICATES OF RICHARD A. MILLER : STATE BOARD OF EDUCATION
BY THE STATE BOARD OF EXAMINERS. : DECISION ON MOTIONS
:

Decided by the State Board of Examiners, June 16, 1994

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Thomas W. Williams, Esq.

The appeal in this case is from an action by the State Board of Examiners on June 16, 1994, to revoke respondent Richard A. Miller's New Jersey teaching certificates. This action followed proceedings initiated by an Order to Show Cause why respondent's teaching certificates should not be revoked that was issued by the Board of Examiners.

The Board of Examiners issued the Order To Show Cause when it became aware that respondent had agreed to surrender his New York teaching certificates as part of a settlement with the State of New York, in return for which the State of New York withdrew charges it had preferred against him for fondling a student in 1974. The Board of Examiners provided respondent with the opportunity to make written submissions, but an evidentiary hearing was not conducted in the matter.

Respondent appealed the Board of Examiners' action to the State Board of Education and, as required by our regulations, he thereafter filed a brief in support of his appeal. In the appendix to his brief, respondent included a Report of Certificate

December 7 1994

Invalidation which had been provided to New Jersey by the National Association of State Directors of Teacher Education and Certification (NASDTEC) (Exhibit B) and a letter from NASDTEC's counsel to respondent's attorney explaining the procedures that NASDTEC followed (Exhibit C).

Counsel representing the State Board of Examiners then moved to suppress respondent's appeal brief and appendix for going outside the record.

In response, respondent argues that the NASDTEC report is of necessity part of the record because it was this report that had provided the notice to New Jersey which led the Board of Examiners to issue the Show Cause Order in the first place. To the extent that the documents in question were not part of the record, respondent cross-moved to include them.

After reviewing this matter, we agree with respondent and, therefore, we deny the motion filed by the State Board of Examiners to suppress respondent's appeal brief and appendix. To the extent that Exhibits B and C are not part of the record transmitted to us by the Board of Examiners, we grant respondent's cross-motion that these items be included in the record before the State Board.

Given our disposition of these motions, we direct that counsel for the Board of Examiners now respond to the substance of the underlying appeal by filing her answering brief within ten days of this decision.

Daniel J.P. Moroney abstained.

December 7, 1994

Date of mailing DEC 09 1994

39-94

ANTHONY ROSSI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL DISTRICT, ET AL., CAMDEN COUNTY,	:	
RESPONDENT.	:	

FEBRUARY 9, 1994

OAL DKT. NO. EDU 4444-93

ANTHONY ROSSI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL DISTRICT, ET AL., CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record and Notice of Failure to Appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-14.4 and 1:1-3.3 have been reviewed. The Commissioner agrees with OAL's return of this matter due to petitioner's failure to appear. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

FEBRUARY 9, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 9, 1994

40-94

C #40-94L
SB #18-94

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
	:	DECISION ON MOTION
V.	:	
ROSE ANDREWS,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 14, 1994

For the Petitioner-Respondent, Carter, Van Rensselaer & Caldwell (William J. Caldwell, Esq., of Counsel)

For the Respondent-Appellant, Gebhardt & Kiefer (Richard P. Cushing, Esq., of Counsel)

The State Board of Education grants appellant's motion for a stay of the Commissioner's decision in this matter. Crowe v. De Gioia, 90 N.J. 126 (1982). See Yakus v. United States, 321 U.S. 414, 440 (1944).

Maud Dahme abstained.

July 6, 1994

Date of mailing JUL 08 1994

40-94 L

C #40-94L
SB #18-94

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY, PETITIONER-RESPONDENT, V. ROSE ANDREWS, RESPONDENT-APPELLANT.	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, February 14, 1994

Decision on motion by the State Board of Education, July 6, 1994

For the Petitioner-Respondent, Carter, Van Rensselaer & Caldwell (William J. Caldwell, Esq., of Counsel)

For the Respondent-Appellant, Gebhardt & Kiefer (Richard P. Cushing, Esq., of Counsel)

The Board of Education of the Township of Union (hereinafter "Board") filed a petition with the Commissioner of Education alleging that Rose Andrews (hereinafter "respondent"), a member of the Board, had a disqualifying inconsistent interest pursuant to N.J.S.A. 18A:12-2. The Board maintained that respondent, an employee of a transportation company under contract with the Board, was required, pursuant to Oehlke v. Hoffman and Board of Education of the Township of Tewksbury, decided by the Commissioner, 1991 S.L.D. 1241, aff'd with modification by the State Board, October 6, 1993, to either cure the conflict or resign from the Board.

In a letter decision dated February 14, 1994, the Commissioner, based solely upon review of the petition of appeal and the

Oct. 5, 1994

parties' briefs, agreed with the Board. Citing Oehlke, supra, the Commissioner declared that "prior decisional law has expressly held that employment as a bus driver with a company under contract to the board of education renders such employee ineligible for board membership unless his or her employment ceases...." Commissioner's Decision, slip op. at 1. "[B]ased on the principles enunciated in Oehlke," the Commissioner found that pursuant to N.J.S.A. 18A:12-2, the respondent was required to either cure the conflict by giving up her position with the transportation company or forfeit her seat on the Board.

On March 18, 1994, the Commissioner denied respondent's motion for a stay of his decision.

Respondent filed the instant appeal with the State Board of Education, and on June 1, 1994, we granted her motion for a stay of the Commissioner's decision.

After a thorough review of the record, we reverse the decision of the Commissioner and remand for further proceedings.

Contrary to the Commissioner's assertion, Oehlke does not stand for the proposition that employment as a bus driver with a transportation company under contract with a district board automatically renders such employee ineligible for board membership pursuant to N.J.S.A. 18A:12-2. Our decision in Oehlke was expressly predicated upon the particular facts therein following a hearing in the Office of Administrative Law.

As found by the Administrative Law Judge ("ALJ") in that case, the respondent board member therein worked as a school bus driver for the company which was the successful bidder for the board's transportation contract. At the time, the respondent

"additionally held the significant position of power as President of the Board. He neither withdrew from his employment nor totally abstained from all participation in deliberations which affected his employer." Oehlke, supra, 1991 S.L.D. at 1250. The ALJ found that respondent had participated in discussions "which no doubt influenced colleague votes, especially as they related to school transportation issues." Id. The ALJ further found that various members of the board's transportation committee asked respondent questions and sought his advice and suggestions concerning route alignments. Id. at 1245. In addition, the ALJ found that respondent allowed the use of his farm property within the township for the storage of the company's buses.

Based upon our review of the record, we concluded that the respondent in Oehlke had an inconsistent interest pursuant to N.J.S.A. 18A:12-2 as a result of the bus company's contractual relationship with the board "and that the conflict under the facts in this particular case" was of such a "substantial, material and pervasive nature as to disqualify respondent from continued service on the Board." Oehlke, supra, State Board's Decision, slip op. at 5 (emphasis added). Thus, our determination disqualifying the respondent therein from board membership was expressly predicated on the particular facts established in that case, including respondent's position and leadership responsibilities on the board and the manner in which he had exercised such responsibilities. We did not "expressly hold," as the Commissioner asserts, that employment as a bus driver with a transportation company under contract with the district board in and of itself constitutes a conflict of such nature as to render the employee ineligible for board membership.

Consequently, the Commissioner erred in summarily disposing of this matter on the basis of Oehlke. We therefore reverse the decision of the Commissioner and remand to him for further proceedings consistent with our decision herein in order to determine whether respondent had an inconsistent interest under the particular facts of this case of such a "substantial, material and pervasive nature" as to disqualify her from membership on the Board.

We do not retain jurisdiction.

S. David Brandt opposed.

Maud Dahme abstained.

Attorney exceptions are noted.

October 5, 1994

Date of mailing OCT 07 1994

41-94

41-94

DW ELECTRIC, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 17, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 11741-93
AGENCY DKT. NO. 409-12/93

DW ELECTRIC, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,
Respondent.

William H. Kenney, Esq., for petitioner (Archer & Greiner, attorneys)

James P. Granello, Esq., for respondent

Record Closed: January 18, 1994 Decided: January 18, 1994

BEFORE **JOSEPH LAVERY,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 10, 1993, for emergent relief prior to plenary hearing.

The parties now seek to have the matter dismissed with prejudice (see attached stipulation of dismissal with prejudice). Based on this representation, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED with PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 12, 1994
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

1/20/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 26 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033
(609) 795-2121
Attorneys for Petitioner

BY: WILLIAM H. KENNEY, ESQUIRE

DW ELECTRIC INCORPORATED, Petitioner, vs. DELAWARE TOWNSHIP BOARD OF EDUCATION, Respondent.	:	COMMISSIONER OF EDUCATION STATE OF NEW JERSEY OAL DOCKET # EDU-11741-93 **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matters and things in controversy in the above entitled action having been amicably resolved between the parties, it is hereby STIPULATED AND AGREED that the Petition, Amended Petition and all claims which were or could have been brought in the within action be and the same are hereby DISMISSED WITH PREJUDICE and without costs to any party.

ARCHER & GREINER
A Professional Corporation
Attorneys for Petitioner

By: _____
WILLIAM H. KENNEY

JAMES P. GRANELLO, ESQUIRE
Attorneys for Respondent

BY: _____
JAMES P. GRANELLO

Dated: January 14, 1994

ARCHER & GREINER
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
HADDONFIELD, NJ 08033

OAL DKT. NO. EDU 11741-93

DW ELECTRIC, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered in the form of an initial decision dismissal have been reviewed. No exceptions were filed by the parties. Upon careful and independent review of the record, which includes as part of the initial decision a document identified as a Stipulation of Dismissal with Prejudice, the Commissioner must remand the matter for explanation of the terms of the amicable resolution reached by the parties in this matter. Because the case was transmitted to the Office of Administrative Law as a contested matter pursuant to N.J.S.A. 52:14B, the parties may not settle their controversy without the Commissioner's consideration of the terms of the settlement accord.

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

IT IS SO ORDERED.

FEBRUARY 17, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 17, 1994

41-94

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(41-94)

DW ELECTRIC, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

MAY 19, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2002-94
(ON REMAND EDU 11741-93)
AGENCY DKT. NO. 409-12/93

DW ELECTRIC, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,
Respondent.

William H. Kenney, Esq., for petitioner (Archer & Greiner, attorneys)

James P. Granello, Esq., for respondent

Record Closed: March 2, 1994 Decided: April 15, 1994

BEFORE **JOSEPH LAVERY,** ALJ:

This matter was remanded by the agency head to the Office of Administrative Law (OAL) on March 2, 1994, for an explanation of the terms of the amicable resolution reached by the parties.

The parties have prepared a stipulation indicating the terms of that resolution, which is fully incorporated herein, by reference and attachment.

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

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

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

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

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

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

April 15, 1994

DATE

ALJ

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

4/15/94

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 1994

DATE

OFFICE OF ADMINISTRATIVE LAW

ml

JAMES P. GRANELLO, ESQ.
530 Prospect Avenue
Little Silver, New Jersey 07739
(908) 842-4114
Attorney for Respondent

DW ELECTRIC INCORPORATED,	:	STATE OF NEW JERSEY BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:	
		OAL DOCKET NO. EDU 11741-93
vs.	:	
DELAWARE TOWNSHIP BOARD OF EDUCATION,	:	
Respondent.	:	

STIPULATION SUBMITTED BY THE PARTIES PURSUANT TO THE REQUEST MADE BY THE COMMISSIONER OF EDUCATION FOR AN EXPLANATION OF THE TERMS OF THE AMICABLE RESOLUTION REACHED BY THE PARTIES

1. On November 23, 1993, the Delaware Township Board of Education acted to reject all bids on electrical work on Project 2212. At the same meeting, the Board approved the award of six (6) separate construction contracts on Project 2212 totaling over $2.3 million dollars.

2. Thereafter, the Board of Education took steps to rebid the electrical work and the second set of bids resulted in the lowest bid being $20,660 lower than the bid submitted by DW Electric, the petitioner herein.

3. On or about December 7, 1993, the petitioner DW Electric filed a petition of appeal seeking to overturn the Board's decision to reject all electrical bids. As part of this litiga-

tion, petitioner challenged the Board's action as a violation of the Open Public Meetings Act.

4. After over a month of litigation, the parties were prepared to take depositions under oath with administrative officials and Board members being deposed. This discovery would have been in lieu of written interrogatories and production of documents and would have cost both sides a considerable amount of additional money and time.

5. The petitioner then offered to settle this matter by withdrawing its petition of appeal with prejudice in return for $2,500 to defray some of its costs for litigation up to that point in time.

6. In light of the extremely favorable second set of bids for electrical work and the need to respond to these bids in a timely manner, on January 13, 1994 the Board entered into an agreement for the dismissal of this litigation and all other claims with prejudice by the petitioner DW Electric for the sum of $2,500.

Respectfully submitted,

ARCHER & GREINER
A Professional Corporation
Attorneys for Petitioner

By: _____
William H. Kenney

JAMES P. GRANELLO
Attorney for Respondent

By: _____
James P. Granello

DATED: February 28th, 1994

OAL DKT. NOS. EDU 2002-94 and EDU 11741-93 (ON REMAND)

DW ELECTRIC, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

MAY 19, 1994

DATE OF MAILING - MAY 19, 1994

43-94

JAMES BAUER AND ANN BAUER, PARENTS OF CHRISTIAN BAUER, AND CHRISTIAN BAUER, INDIVIDUALLY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

FEBRUARY 22, 1994

OAL DKT. NO. EDU 7266-93S

JAMES BAUER AND ANN BAUER, PARENTS OF CHRISTIAN BAUER, AND CHRISTIAN BAUER, INDIVIDUALLY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 22, 1994

DATE OF MAILING - FEBRUARY 22, 1994

44-94

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

SYNOPSIS

Board certified tenure charges of unbecoming conduct, incapacity and other just cause against respondent, middle school teacher, for allegedly making inappropriate sexual comments to his female students.

In light of the evidence and testimony of witnesses, ALJ found respondent did initiate inappropriate classroom discussions, thus engaging in unbecoming conduct that warranted loss of his tenured position.

Commissioner adopted findings and determination in initial decision and ordered respondent dismissed from his position. Matter was referred to State Board of Examiners for further appropriate action.

FEBRUARY 22, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8919-92S
AGENCY DKT. NO. 441-9/92

IN THE MATTER OF THE TENURE HEARING OF FRANK ROBERTS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY

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

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

Record Closed: November 8, 1993 Decided: December 13, 1993

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

The Trenton Board of Education ("Board") voted to certify tenure charges against the respondent, a school teacher in the district. The Board forwarded the certified charges to the Commissioner of Education ("Commissioner"), pursuant to *N.J.S.A.* 18A:6-1. The Commissioner than transferred the case to the Office of Administrative Law ("OAL") as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -21 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on January 15, 1993, and a prehearing order was entered on January 21, 1993. The hearings on the charges commenced on April 22 and 23, 1993, and were then adjourned to permit

the petitioner to seek relief in regard to certain evidential rulings made in the course of its case. The hearing resumed on July 26 and 28, 1993, and after the close of the testimony on the 28th, the parties' joint request for transcripts was granted. Following the receipt of the transcripts counsel filed briefs and closing arguments and the record closed on November 8, 1993.

THE NATURE OF THE CHARGES

In the Statement of Charges filed by the Board with the Commissioner on September 21, 1992, the Board charged that while employed as a tenured teacher in the district the respondent had, during the period from November 1991 through January 1992, "participated and allowed classroom discussion with and among six (6) female students" of (1) the details of his sex life with his wife, (2) his students' sexual activity, (3) his opinion on oral sex, (4) the physical attributes of a female student who was absent, and (5) "being propositioned by drug addicts ("crackheads") to engage in sexual activity for monetary compensation." The Board charged that this conduct constituted "conduct unbecoming a teacher."

THE EVIDENCE

The Board's Proofs

The Board's initial witness at the hearing was Ke.G., an 8th grade student at the Martin Luther King, Jr. Middle School ("King School") in Trenton. Ms. G. is 17 years old. During the 1991-92 school year, she was a student in the respondent's wood shop class. Due to the condemnation of the wood shop at the King School, this class was held in the front of the school's auditorium. According to the witness, during the several months that she attended this course, which ran from November to February, the students were "not taught anything." According to the witness' recollections, the class would simply sit around and talk after Mr. Roberts took attendance. Mr. Roberts would initiate conversations, which were "sometimes" about sex. He would participate in these discussions, although she was unsure whether he always began them. Sometimes she would sleep during the class, or would listen to her portable stereo ("Walkman"). While she stated that he did not always talk about sex, she characterized that topic as being the topic for conversation "most of the time."

Ms. G. could not recall when the sex related conversations first began, and she never reported that they were occurring prior to February 3, 1992. It was only after she was sent for by the principal that she was asked and told about the conversations in Mr. Roberts classroom. At that time a number of other students in the same class were present. At first the students were all together and then they were alone. She also related her story to the school nurse, Ms. Hunt, and then to a Division of Youth and Family Services ("DYFS") worker. The conversation with Ms. Hunt was held before the DYFS worker arrived and Ms. Hunt took notes. Asked to write a statement by school principal Albert Williams, Ms. G. did not do so. While she could not recall the reason that she did not write one, she noted that during that period she was out of school a good deal due to her pregnancy. She gave birth in April, 1992.

Ms. G. could not recall the specific dates when the discussions concerning sex occurred, but she said that "when she was there they talked about sex." As for the specific topics of discussion, she referred to comments made by Mr. Roberts about how he had sex with his wife on rainy days, comments about boys ejaculating "the third time" and then the "fourth time" "like juice", and a comment about another student that her "butt" was "like Jell-O." He also asked Ms. G. if she was having sex, to which she replied "no." Mr. Roberts also discussed positions for sex. According to the witness, they would all be sitting around and he would ask them questions such as "how they do it."

Ms. G. denied that she had ever complained about anyone else in regard to alleged sexual misconduct. As for the respondent, he never asked her for sex nor did he ever touch, threaten or hurt her.

On cross-examination, counsel explored the circumstances of the interviews and statements given by Ms. G. at the time that the alleged conversations were reported to the school administration. She stated that the Hunt interview was conducted by the nurse herself, who took notes. No one else was present during this interview, which took place before Mr. Williams interviewed her. Ms.G. told her "all that she testified to today," but the witness acknowledged that she did not relate that the teacher had said anything about he and his wife having sex. Ms. G. did not tell Ms. Hunt that she found anything that Mr. Roberts had said to be offensive.

The interview with Mr. Williams took place in a group atmosphere with the other girls present, and the witness was never alone with Mr. Williams. Conversations with the DYFS worker took place later, with the nurse "in and out" of this interview.

Ms. G. related that on one occasion when she was in class she took off her Walkman and heard Mr. Roberts talking about sex. On some occasions she was sleeping in class and would wake up and listen to the conversations.

Ms. G. was questioned about the conditions in the auditorium at the time that the wood shop class was meeting in it. She did not recall other activities taking place in the room at the time of the class and related that if Mr. Roberts saw other students in the room who did not belong there he could ask them to leave.

The witness recalled that Mr. Roberts spoke about a final examination and that this was a big concern because "they did not do anything in the class." A test may have been scheduled for the first week in February. All of the students were mad when Mr. Roberts said that they had to take the test. They "didn't know what it was about." This occurred two days before the statements were made to Mrs. Hunt. She could not recall if she was in class on the day in between this discussion about the test and the day that the girls spoke to Mrs. Hunt.

Ms. G. claimed that Mr. Roberts participated in "all of the sex conversations." She does not remember any in particular, but "he always had something to say."

The witness stated that she was never disciplined by Mr. Roberts. She did not know if other students in the class were disciplined. He never told the girls not to talk about sex.

Ms. G. related that at the time that one of the girls, "M.," said that she was going to tell the principal about what had occurred in the class, Mr. Roberts responded that "they won't believe you."

The witness said that she did not review Mrs. Hunts' notes after the interview. She did not tell her that Mr. Roberts had said anything about he and his wife not having enough sex.

M.Ti., another student in the class, testified that she was 15 years old at the time that she was in the wood shop class with Mr. Roberts. She had been in his metal shop class the year before, a class which was actually held in the metal shop. As for the wood shop class in 1991-92, it was held in the auditorium and Mr. Roberts did not teach anything. All that the class consisted of was talk amongst the six female students and Mr. Roberts. There were no males in the class. The conversations were about such things as church, parties and "sex;" this latter a topic "every day." He talked about his sex life with his wife, what he and his wife did sexually on rainy days, that he had sex with his wife when he was working on his farm and that they had sex "all over the house." She also reported that he commented that boys who "eat a girl must have a small penis." The witness recalled that Mr. Roberts had asked Ke. about her boyfriend who was in jail and had told her that when he "would be out he going to want sex from her." He asked Ke. about the positions the boyfriend and she "be having sex in, and she told him." As she recalled, the talk about sex began around Christmas. At first she did not pay any attention to the comments. They first began in late December and continued on into January. She spoke to her mother about them because she felt that they were "not right in the classroom."

According to Ms. Ti.,this conversation took place "in the middle of the marking period before February." The girls reported the conversations in late January, first telling a Ms. Bussey and then Messrs. Carter and Williams, these reports being made in early February. Ms. Ti. explained that she was out of school in late January due to a death in the family and when she returned she was told by other students in the class, Sa. R. and Ke. G., that Mr. Roberts had talked about her while she was absent. She was told that he had made a comment the she had a "big backside" and something was said about "Jell-O." When she was told about this she told Mr. Roberts that she was going to report the conversations which were taking place in the class. He "laughed" and "didn't say anything," but she also recalled that he said that Mr. Williams was "not going to believe you" because he, Mr. Roberts, was a teacher and she a student. Several of the students told Ms. Bussey in late

January "what happened what he was talking about." She advised them that they should tell "nobody, I'll explain--I mean I'll talk to Mr. Roberts to myself."

After the girls had been told by Mr. Roberts about a final examination that he was going to give them despite the fact that they had not been taught anything in his class, the girls decided to tell about what was going on in the class. In response to their protests to Mr. Roberts about the exam, he told them that he would supply them with the answers to the test. Ms. Ti. responded to this "offer" by saying to him that doing so would not be "right." The girls left the auditorium at the end of the class period and as they proceeded towards the office they met Mr. Carter, the school disciplinarian, in the hallway. After first giving Mr. Carter "a little detail" of the sex conversations, the students met with Mr. Williams. They provided him with the details of the events and then, when Ms. Ti.'s mother came to school in response to the school's request, she spoke to Mr. Williams and her mother "alone." A further report was made to Ms. Hunt, but the witness recalled that this happened on the day following the Williams meeting. The meeting with Mr. Williams was at first one involving all the girls, the session with Mrs. Hunt was a solo meeting at which Mrs. Hunt took notes. She also prepared a written statement for Mr. Williams. As for the written statement she was instructed to write down "what happened in the classroom." Sa. R., another of the students from the class, was present when she wrote out this statement. However, she did not ask for nor did she receive any assistance in preparing the written statement. The statement is an accurate and truthful rendition of what occurred in the wood shop class.

The witness was unsure whether all six of the girls in the class were present in the hallway when they spoke to Mr. Carter, as it is possible that K.G. was not there. After meeting Carter, they next spoke with Mr. Williams as a group, then with him alone. The next conversation was with Mrs. Hunt, alone.

Asked to describe the nature of the conversations that took place in the wood shop class besides those about sex, the witness mentioned discussions about church and about how the preacher preached and how people "got into the spirit of the church." The witness also recalled an incident when the teacher got upset because a boy visited her in class. This was before she had gone to Mrs. Bussey. A boy in the hallway "kept bothering her." Mr. Roberts said that she could not "have her boyfriend come in here." "That's your boyfriend." She said that she told Mr.

Roberts "no," denying that such a relationship existed. She claimed that she was not "mad," about this and that Mr. Roberts was not either. In fact, she described the teacher as "just joking."

The witness denied any recollection that Mr. Roberts had requested that a Ms. Winrow, a teacher at King School, "calm her down." However, as she recalled the matter, he had asked this teacher to help get a boy out of the auditorium.

Ms. Ti. stated that Mr. Roberts did not start all of the conversations about sex, but he was always involved in them, a fact about which she had "no doubt." He did start the talks about sex acts, and never attempted to stop the sex related discussions. There was talk about labor as well. If the conversations started out to be about boyfriends or about parties, he would steer the conversation toward sex. One of the things he mentioned was about a place in Trenton called Five Points, near the Battle Monument. Mr. Roberts said that he was there working on somebody's house and a "crack lady" offered to give "head" for $5.

The witness was questioned as to whether anyone had demanded or suggested anything about a bribe. She advised that one of the students, Ke.G., had laughed and said to Mr. Roberts as they were going to tell Mr. Williams about his discussions that if he gave each of them a dollar they would not tell. No mention was made of $50.

According to the witness, the discussion with Mrs. Bussey occurred on the same day as she learned about Mr. Roberts' comments about her backside. The students went to Mr. Williams on the same day that they learned about the test.

S.R., a 14 year old, testified that she was a student of Mr. Roberts in metal shop in 7th grade and again in wood shop in 8th grade. She reported that the wood shop class met in the auditorium and did "no work." They "just talked." Mr. Roberts would talk about himself and his wife and what they did out on the street. He talked about sex and about how "people are today." He spoke about other "things that she did not remember." She recalled that there was "sex talk," but she was not sure how often it occurred. However, she did recall that it started around the "beginning of the marking period."

Ms. R. was among the group of students who first reported the sex conversations to Mr. Carter. These conversations were about such things as what Mr. Roberts was doing with his wife, about boys and about "when they come and all that stuff." After telling Mr. Carter about this, they spoke to Mr. Williams and to the nurse and she told each of them the same things. At the request of Mr. Williams, she wrote a statement, with no one helping her to do so. At the time she and other girls and a teacher were present, but no one spoke about what to write. The statement, P-2, is accurate as to the matters described.

Ms. R. stated that Mr. Roberts talked about such matters as working on his farm and after a hard day "going with his wife," which she said was having sex with his wife, and also about sex on rainy days. In further description of the conversation about boys "coming," that is, ejaculating, he said that the first time it was "all come," but that by the fourth time it was "only juice shooting there." He also reported that he and his wife had sex "all over the house, on the table and stuff."

Ms. R. was present when Mr. Roberts commented on M.Ti.'s "big butt" (his words). She told M. Ti. what he had said, as Ms.Ti. was not there when the comment was made.

The witness stated that she was the youngest student in the class, 14 years old at the time, while the others were 15-16 years old. She claimed that the girls got along well with each other and that no one was the leader of the group. On cross-examination she said that she did not recall if Mr. Roberts spoke about church. She felt that the sex conversations began in November-December and that while they did not occur everyday, they did happen on "most days." Among the discussions that she recalled, she spoke of his commenting and questioning Ke. about the positions that she and her boyfriend used for sex because Ke. was pregnant. Ms. R. could not recall what Ke.'s reaction to this questioning was, whether she was upset or how she responded, if at all. As for her own reaction to the sex talk in the class, Ms. R. stated that she did not feel that such was a proper topic for discussion in class, but she never spoke to her parents or anyone about it until the girls went to see Mr. Carter.

The witness recalled that at times during the class in the auditorium there were people in the back of the room, and while Mr. Roberts would speak "like a regular person" when talking about sex, she did not know if anyone in the back of

the auditorium heard any of what he said. She denied any recollection of either cheerleading or music activities taking place in the auditorium while the wood shop class was meeting in that room.

Ms. R. did not know if at times the students were the ones who initiated the sex conversations, nor did the witness know if Mr. Roberts ever told them that they should stop such talk.

The witness denied that she ever became upset while in Mr. Roberts class and threw books and/or supplies down. She also did not recall that a boy had come to the class to see M. Ti.

As Ms. R. recalled the circumstances leading to the students reporting the goings on in the class, Sh.B. wanted to tell Mr. Williams about the conversations about sex. When told of their intention to report this, Mr. Roberts replied that "[T]hey won't believe you." When the students met Mr. Carter in the hallway they probably did talk as a group and then they went to Mr. Williams as a group as well, although she was not sure if Ke. was there. They then spoke to the nurse together and then alone as she made notes. The conversation with the nurse may have taken place on the next day and she did not know whether they, or she, had returned to Mr. Williams after speaking to the nurse.

As for the test that the girls were advised that they would have to take, she could not remember whether Mr. Robert had offered them help in regard to the test, such as an offer of the answers.

Ms. R. denied that there was any talk about money being paid to the students so that they would not tell the principal about the conversations.

Asked to clarify her recollections of the particular sexual comments made by Mr. Roberts, the witness said that they were fresh in her mind at the time that she spoke to the nurse and that she probably told the nurse more than she was able to tell in the hearing. She recalled that he talked about both "boys" and "he" personally coming four times, but she was unsure as to whether she told the nurse about both of the references. In the written statement she only referred to his remarks as to "boys" in this context. The witness also recalled conversations about

Five Points and crackheads and giving them $5 for oral sex. (There was no suggestion in her testimony that Mr. Roberts ever suggested that he had in fact done this, only that he had mentioned that such propositions were made by such persons). She acknowledged that she had not referred to this matter in her statement. Finally, the witness stated at the hearing that Mr. Roberts did not use curse words in class.

Sh.B., now 16 years old, testified that she was in the wood shop class. She also was a student of the respondent in the 7th grade metal shop. She recalled that the wood shop course was a marking period in length and was held in the auditorium. The parties stipulated to her description of the class as having sat in the first row of the auditorium with Mr, Roberts seated at a desk about 3-4 feet in front of them. As there was no equipment for the girls to use, the class consisted of talk "about a lot of things." Mostly the talk was about sex, and the witness did not recall what else they talked about. Sex was a topic of discussion everyday. Ms. B. recalled that this sex talk began about the middle of the marking period. As she recalled, Mr. Roberts talked about his wife and he having sex often when first married, and that the "come" at first had lots of sperm, but that after the fourth or fifth time it would be nothing but "juice." Another comment was in regard to a supposed relationship between men who performed oral sex and the size of their penises. He also made mention of how he had sex, and she remembered that the girls asked questions as how could he be on top of his wife due to his heavy weight. He claimed that his weight did not matter. She testified that the students "teased him a lot." As for the students, they did not talk about their sex lives, but he did ask her how she and her boyfriend had sex due to the fact that she was pregnant. Finally, he did mention Five Points, crackheads and propositions for oral sex for money. He mentioned that he owned a house in that area.

Ultimately, the students reported the conversations. Ms. B. was not present the day Mr. Roberts supposedly commented upon Mr. Ti's body. However, as the witness recalled, this comment made Ms. Ti. "mad" and this was the spark for the talk of reporting Mr. Roberts. As for the test, Ms. B. claimed that she did not recall anything about a test, but she denied that they had done any work in the class.

The witness testified that the group of girls told Mr. Roberts that they were going to report him and the nature of the conversations right before they went to do so and that he told them to "go ahead they ain't going to believe you."

As they first spoke to Mr. Carter in the hallway, Mr. Roberts was at the auditorium doorway. After talking to Mr. Carter as a group, they then went as a group to speak to Mr. Williams and then spoke to him alone, then spoke to Ms. Hunt the the same day, first in a group and then alone. The nurse did not seem to believe them. She was asked to write a statement by Ms. Hunt and Mr. Williams. She did not, but cannot remember why.

On cross-examination, the witness reflected further upon Mr. Roberts' reaction to the information that the girls were planning to report him. She "could see that he was concerned, but he tried to play the role that he wasn't." When the bell rang and the girls started to leave he did not try to stop them. There was no talk about money as far as she could recall.

As she remembered the comments made by him and what she told this judge at the hearing, Ms. B. stated that she had told the nurse everything she had testified to in the hearing. He talked about what he did when younger, about having sex "all over the house," and about not having had as much weight on him then. She recalled telling the nurse about the "sperm" and "juice" comments, about what he said he would do when he was first married. He also spoke of his not "eating pussy, that's something only little dick boys do." He told the girls that he "kept his wife satisfied." He talked about labor.

Ms. B. did remember that boys did sometimes come into the class and that Mr. Roberts would have to send them away. She also recalled that there were times when someone came into the class to "calm" girls, but she did not recall anyone named "Winrow" doing so.

The witness stated that she did not suggest that the class go to Mr. Williams, but she did not remember who specifically suggested that they do so. She claimed that the motivation to report Mr. Roberts arose from the comments he had made about M.Ti. and also from a statement he made that all the girls would receive "zeros." While she could not recall when he said it, she did state that he had mentioned that "we supposed to been havin' a test."

Ms. B. testified that Mr. Roberts did use "curse words" in the class. He did not talk about church in class. She denied that she was at anytime talking about sex

herself and that Mr. Roberts had told her to stop. He did have occasion to discipline her when she cut a class and he saw her. He "got her suspended by the office," but she could not recall when this happened. She also got into trouble in other classes, and in the 8th grade she "got into a lot of trouble."

As for the atmosphere in the auditorium at the time that the class was in session, the witness stated that people who were cutting class would be in the back of the room, and sometimes the chorus or cheerleaders were there. As for these occasions, Mr. Roberts did not talk about sex when the chorus or cheerleaders were present. He spoke in a normal tone. Ms. B. did not recall that other students were sent to Mr. Roberts during class because other teachers were having trouble with them. However, she said that the girls would talk at lunch about the things that Mr. Roberts said and that as a result other students wanted to come and sit in the back and listen.

Albert Williams, the principal of Martin Luther King Jr. Middle School, testified that he has been employed by the Trenton Board of Education for 28 years. Mr. Roberts has been on the staff since Mr. Williams was first assigned to the school 16 years ago. Roberts did go to another school for a few years, but has been back at King School for about 3 years. Mr. Williams acknowledged that about 5 or 6 years ago he recommended that Mr. Roberts not have his contract renewed. Mr. Roberts was involved in an incident in which a child lost a finger in Mr. Roberts' class, a matter resulting from Mr. Roberts' negligence. He was glad when the teacher was transferred to another school. Mr. Williams "may have told personnel that (Mr. Roberts') transfer back was a mistake," but he is not sure if he did say this.

Mr. Williams explained that the wood shop course was a quarter-year course which was paired with Home Economics and Family Living. The teachers decide as to the makeup of the class, that is, they decide who to take in to the class for each quarter. The shop had been condemned by the State Department of Vocational Education. Despite efforts to see that the shop was available for use for the class, it was necessary for Mr. Roberts to hold his class in the auditorium. He was expected to teach the class the subject matter as best as possible in the absence of the usual tools and equipment.

The auditorium is a very large room with 528 seats in rows A-Z and then AA-FF. The school has 58 teachers and if 10-12 are absent and they get 3 substitutes it is sometimes necessary to send a class to the auditorium. If this occurred, the class would not be seated in the proximity of Mr. Roberts' class. Disciplinary students were not sent to Mr. Roberts. His vice principal was called up during Desert Storm and sent to Saudi Arabia and as a result Mr. Williams was very familiar with the discipline matters at the time of these events. However, he agreed that he did not know if Mr. Carter sent students to Mr. Roberts.

Mr. Williams first became aware of the sex related complaints against Mr. Roberts on February 3, 1992, when Mr. William Carter came to him about a problem that had to be addressed immediately. Mr. Carter told him the "essence" of what the female students had said about Mr. Roberts. He gave an "overview" of many of the comments reported by the students. Mr. Williams spoke to the students "immediately" in his classroom office. He asked the group what the general nature of their complaint was. They responded individually. Some interrupted others at times. He described their demeanor as being in line with their individual personalities, some taking the matter seriously and some not. The girls were not told anything about the possible consequences for Mr. Roberts at this meeting, although later on he did when he spoke to them after they had spoken to the school nurse. After he heard these comments from the girls, Mr. Williams asked Ms. Hunt, the school nurse, to listen to what they had to say. It was necessary for him to decide whether he needed to call DYFS about the matter. After the nurse spoke with the students, he contacted their parents. It is possible that he may have mentioned consequences after the students had spoken with the nurse, but he did not tell them that he might lose his right to teach. Additionally, he did not tell the girls that if they were not telling the truth that there might be consequences for them. He merely asked them to give an account of what had happened in the classroom, not using the word "truth" in this request. DYFS was called and came to the school the next day.

Mr. Williams was told that the discussions in class had started shortly after the start of the second rating, or marking, period. The girls told him that they had mentioned something about a "rear end" remark to Mrs. Bussey. When he asked her about this, she acknowledged that they had spoken to her, and when he asked

Mrs. Bussey why she had not reported the complaint, she responded that she had "merely forgot about it."

Mr. Williams reported that when he spoke to M.Ti. she was visibly upset and was deeply concerned about what her parents would say. She repeated events "over and over" and was "making sure that she gave accurate information."

Ke.G. was concerned but not overwhelmed. She was pregnant at the time. She reported that Mr. Roberts had questioned her concerning what sexual positions she used while expecting.

Sh.B. was very vocal and expressive. She provided a lot of detailed descriptions of what was said. She referred to Five Points, sex "on a table," sex "all over the house," and boys "eating out" and a mention of this as related to the small size of the boys penises, all as matters discussed by Mr. Roberts.

The principal related that at the time of the first talk with the girls he had not specifically told them that he wanted them to tell the truth. He told them that he wanted them to give "an account of what had happened in the classroom." He did not remember whether he had asked them why there had been no earlier report of what was occurring. He recalled that both the group and the individuals mentioned that no work had been done in the class, that a test was to be given, and that all they did was to talk about sex, boyfriends, parties and weekends. No one denied that the sexual comments were made. He asked the students to write a statement of what they had told him and they were to do so in a classroom. He recalls that at the first group meeting that he had with the girls he took no notes. At that time he told them that he did not want this matter to run rampant through the school. However, he did not recall whether he told them not to discuss the matter amongst themselves.

The girls did mention, and were concerned about, the examination and the fact that they had received no instruction in the class. This was "probably" mentioned at the first group meeting. Nothing was said about any offer of the test answers by Mr. Roberts, nor was there any mention of any offer of money. The parties stipulated that the test issue was not mentioned in the Statement of Evidence filed by the Board with the Commissioner.

Sandra Bussey, now a teacher/disciplinarian for the Trenton Board of Education and assigned as a staff member to M. L. King, Jr. School for 21 years, testified that she had a conversation with M.T. during the 1991-92 school year in which Ms. Ti. told her that she had gone to the bathroom at the end of the school day and was told by a student of a remark supposedly made by Mr. Roberts referring to her "behind." Mrs. Bussey was not sure whether her conversation with Ms. Ti. took place in the presence of anyone else. Mrs. Bussey told the student to tell her parents of the matter and to bring them in to talk to Mr. Roberts and Mr. Williams. After this, the matter "slipped her mind." She did not remember the date of this conversation and does not recall that any other concerns were expressed.

RESPONDENT'S CASE

Prior to the presentation of the testimony presented on behalf of the respondent, it is noted that the parties entered into a stipulation that prior to the present charges Mr. Roberts' evaluations were satisfactory and there were no disciplinary charges brought against him for his conduct as a teacher.

Frank E. Roberts testified in his own behalf. Mr. Roberts holds a B.A. degree from the University of Arkansas-Pine Bluff and a Masters in Business Management from Central Michigan University. He has taken supervisory course work at Temple University. He holds a Principal Certification (1979), a Supervisory certificate (1979), a Vocational Carpentry certificate(1973) and a Teacher of Industrial Arts certificate (1972). He has been employed by the Trenton Board of Education since September 1970 and in 1991-92 was assigned to the M.L. King, Jr. Middle School, where he had taught from 1970-86 and then again since 1990, after being assigned to the Dunn School from 1986-90. He has never before faced a tenure charge and has never had an increment withheld.

The wood shop class consisted of six girls. The marking period started near the end of November. The class had no tools or machines, but had a book and a workbook. At times the band was in the auditorium, or decorating was taking place for the Christmas program, or a class which needed a substitute was in the room, or discipline cases were sent to the auditorium. The classes were not supervised until a substitute teacher appeared. As a result he had to supervise such classes, at least to

some degree. While he was not responsible for disciplining students, at the same time, he "could not let them take over." Sometimes the band, choir or the decorating group had a teacher present.

When Mr. Roberts learned that he was to conduct his wood shop class in the auditorium he went to Mr. Williams to see if there was any possibility of his being able to hold the class in a classroom. He was told to remain in the auditorium, this despite the fact that the shop renovation was "completed." On perhaps two occasions there were assemblies held in the auditorium and then he was sent to a regular classroom. This happened once before Christmas and once in January.

As the witness recalled the makeup of the class, at the end of November M.Ti. and Ki.S. were in the class, Sh.B. was assigned to the class, but was at that time suspended. Ke.G. came to the class at the end of November or early December, T.C. came in December. It was "almost impossible" to teach shop in the circumstances that he was faced with. The students "wanted to do shop," and didn't want to read. He tried to teach, but they did not even want to hear it. He had to tell them to "shut up" and although they would then be quiet for a while they would start up again. He went to Mr. Williams and asked that the class be put in the shop, but was told to remain in the auditorium.

Mr. Roberts asserted that he tried to teach the students. He has them perform exercises in a workbook. However, M. Ti. was the only student who did any of the work. These exercises included listing the different types of tools. Some of the students did try the exercises, however, some of them could not read well. He tried to have them match tools with questions. The problem with getting any work done was a combination of the difficulty of the work and the refusal of the students to do the assignments.

The witness described several of the students' behaviors. In December their behavior was "very bad." Sh. B. was the best behaved. However, "something was wrong with her." She used "cuss words" "every word." She was in a fight in January which he had to break up and "she was not in class that often." She was always talking about sex and he had to send her to Mr. Carter twice, for talking about sex and for using profanity. She would leave the in-school suspension and come back to his class. The second time that she was suspended was because of sex

talk. She talked about having had sex with a man that she ran away with, describing how the first time he "come and the next time he come again." She stated that she was "really screwing him." This was all said out loud, to the class.

Ms. G. was pregnant. She would come into class first and would run and jump off of the stage. He would get her to sit down and she would then fall asleep. Ms. S. would come in late, walk the hallways, go to the store and come back with cake and would not sit down. She made noises and tried to leave when he turned around. Ke. G. was hyperactive and stood on chairs.

In regard to M. Ti., the witness explained that she "talks real loud." The first day in class her boyfriend was in the hallway and she jumped up and went into the hallway. Mr. Roberts asked him to leave, but he did not, then did, and then he came back again. Ms. Ti. denied that the boy was her boyfriend and that the boy had come to see her and it was necessary to get Mrs. Winrow to come into the class to calm the girl down.

On another occasion, Mr. Roberts had to get something out of his truck and when he went to do so he saw Ms. Ti. in the hallway. She said "something smart" under her breath. In class she talked out loud frequently. When he would tell her to stop she would do so for a while and then would start again.

The respondent testified that the class was advised in a bulletin given out "once every week" of a test scheduled for February 4. Ms. Ti. said that she would not take the test. Sh.B. said that if they told the principal that Mr. Roberts had talked about sex in the class that they would not have to take the test. When she was asked for $100 in exchange for the girls not telling Mr. Williams about this alleged sex conversation, he replied that they should "go tell."

Mr. Roberts denied that he had talked about M.Ti.'s body. She told him that she was told that he had done so by Sa.R.

As for Ms. Ti., Mr. Roberts described her as a follower who had stated after the remark was made about him paying $100 that "Yea, I'll take the $100." Several boys often came to see her at class and he had to chase them away.

According to his recollection of the class, Sh.B. had first come to the class in December, after having been suspended. She always talked about sex when she did come to class. He "wrote her up" the first day that she was in class for using profanity and she was placed on in-school suspension. Around January 10, she began to talk about sex and this was the first sexual discussion to take place in the classroom. She described how she and her boyfriend had "sex all over the house" and how for two weeks her mother did not know where she was. She mentioned in graphic terms that she and her boyfriend had engaged in mutual oral sex. She described them as having had intercourse several times and related descriptions of the consistency of his ejaculate after these episodes, the last of which was described as "nothing but juice." He sent her out of the classroom and she was suspended. Sometime after the 10th of January, she asked him if he and his wife had sex and he replied that they had five children. Mr. Roberts denied that he used any sexual terms or described any sexual acts in the course of this brief exchange. According to Mr. Roberts, the sexual talk only occurred when Sh. B. was in class and it ended when she was not there.

The respondent asserted that the next talk about sex occurred on February 3. In front of the class, Sh.B. asked in graphic terms if he performed oral sex upon his wife. He responded "no way." He also denied ever having been propositioned for oral sex by crackheads when asked by Sh.B. if this had ever occurred while he was working on Brunswick Avenue, where she claimed to have seen him working. Ke.G. claimed that her boyfriend had climbed through the window of her home to have sex with her while her mother was in the house. At the time that this question was posed he was trying to get the class ready to take a final examination. Whenever he had tried to read to the class they had talked, they did not want to "hear it." In response to the sex talk Mr. Roberts told the students to stop. M.Ti. and Sh.B. each suggested that he give them $100. He could not tell if they were serious or not, and when he said to "go tell" about the alleged sex talk someone said "give me $50." At this point Sh.B. said "let's go tell." The next day Mr. Williams came to his class at 2 P.M. and told him to come to the nurses' office. He was then told that a DYFS representative was at the office and was also told by Mr. Williams "something about talking about sex."

Mr. Roberts coached basketball at the King School in 1991-92 and has been a member of the Army National Guard for 18 years, now serving as an administration specialist.

On cross-examination the respondent explained that during the school year in question he had four other classes assigned to him in the auditorium, but the class in question was the only one that had only female students. In 1990-91 he had taught all female classes at the school.

Mr. Roberts claimed that shop renovation was completed prior to the end of the first marking period, with all but the "big machines" in place. He did not know whether the State had to approve the room before it could be used. He never spoke to the district's industrial shop supervisor about using the shop.

The witness acknowledged that he owns rental property on Brunswick Avenue. It is possible that he mentioned this fact to his students, but he is not sure if he did so. There is a great deal of drug traffic in that area. While he had heard "rumors" of females in that vicinity having propositioned for sex, he did not discuss this subject with his class.

Queried as to his teaching efforts with this class, the witness said that he tried to teach and that at times the girls would listen for 10-15 minutes. The rest of the time he would "go over the stuff, they didn't listen." He hoped that somebody would learn something. The test, which would have been part multiple choice and part true/false, would have tested the student on shop tools and shop safety. Asked by the judge to more fully explain the course and the teaching which he undertook, the witness explained that a typical day involved a roll call and then instruction, or attempts at instruction, using the book. He would "go over things" such as safety, with the basic safety aspect of the course taking 2 weeks. He would "read and explain." He contended that he offered a $1,000 scholarship to anyone who graduated from the 12th grade.

When the band was in the auditorium he would not teach. He would move the class to the right rear corner of the room. The band practiced in the room for 6 or 7 days before the Christmas program. He asked Mr. Williams for another room, but he did not want to get into a confrontation. He claimed that the director

of secondary education, Mr. Breza, sent a directive that he be moved out of the auditorium. He received a copy. According to the respondent, Mr. Williams put the copy of the letter in his mail box. He went to Williams about the letter and was told by the principal that the class would stay in the auditorium.

Mr. Roberts insisted that when he sought suspension of Sh.B. for her sex talk in class that he noted the reason as her having talked about sex. The particular incident took about five minutes.

The witness recalled an incident in which M. Ti. and he passed each other in the hallway and she commented "I can't stand that fat thing." In response, he stopped and looked at her.

Charles Stubblefield, a retired, 28-year employee of the Trenton School District, was a teacher of mechanical drawing. He worked with Mr. Roberts at King School for 15-20 years. He always had a very good, very positive attitude toward Mr. Roberts and enjoyed working with him. They socialized on a limited basis and they worked summers in security work together. He was aware that Mr. Roberts had a good relationship with his students and faculty and was always "involved in their (the students) progress." His reputation for honesty and integrity was very good and the students felt comfortable around him.

Jack Washington, a teacher at Trenton High School since 1980 and prior to that at the Junior School, now M. L. King School, first met Mr. Roberts at that institution. They have kept in touch from "time to time." and had a very good relationship. As of the 1991-93 period Mr. Roberts had a very good reputation and Mr. Washington had heard nothing negative about him. He was a big brother to students, especially incorrigible ones.

Marie Faust, employed by the school board for 26 years and a reading specialist at King School, has known the respondent for 18 years. In her duties at the school she works with students from different classrooms. As she has learned, Mr. Roberts has a very good reputation with the faculty for his professionalism and his compassion with faculty and students. He is well thought of and has very good interaction with students. Ms. Faust has been in Mr. Roberts' class on one occasion.

Joseph S. Zuccarello, who teaches music education in the M.L. King School, has known Mr. Roberts for about seven years. The shop was located across the hall from the music room. He has never heard anything bad about Roberts, who has a good reputation. In his own opinion, Roberts seemed like an "all right guy" and a strict disciplinarian. He would "line kids up to calm them down."

In the 1991-92 school year, Mr. Zuccarello taught band and occasionally had students practicing on instruments in the auditorium. The piano was also located there and had to be used on occasion for rehearsals. Prior to the Christmas program in 1991 the rehearsals were held in the auditorium for about one week, 3 or 4 times a day.

Nora Stackhouse, an art teacher, testified that she has known Mr. Roberts from the time he spent at the Dunn Middle School. She recalls that she collected money for him at the time that his daughter died. Ms. Stackhouse testified that Sh.B. was in her class in 1991-92 and made "inappropriate comments" in class. During the 3rd marking period the girl rarely came to school. One day she asked someone where she bought her "drawers" (underwear) and proceeded to state that her boyfriend bought hers at "such and such a store." Ms. Stackhouse told the girl that this was not a proper subject to discuss in public. When directed to stop the conversation, Ms. B. did so.

James E. Smith, a social studies teacher at M. L. King School since 1965, has known Roberts for many years professionally, although not in any outside-of-school context. In 1991-92 Ms. Sh. B. was in his class along with Ms. Ta.F. One day they were involved in a "wrangle" about a boyfriend, talking about "who had who and who did what." The students became quite loud and he had to tell them more than once to stop. He recalls a remark for Ms. B. to the effect, "you only got my leftovers." He believes that she was suspended.

REBUTTAL

Albert Williams was recalled by the district and testified that if he had received a directive from Mr. John Breza concerning the location of Mr. Roberts' shop class, he would have complied with it. He received no such directive. As for the other classes which the respondent said had met in the auditorium, he

acknowledged that there were others sent there pending the availability of substitutes. Band and choir activities were scheduled around the class schedule in the auditorium as much as possible. In fact, Mr. Williams described himself as "very particular about this." However, the witness acknowledged that there was a likelihood that Mr. Roberts' class was interrupted, but he could not speak to the frequency of this.

Mr. Williams denied that Sh.B. was suspended for talking about sex in Mr. Roberts' classroom. He would usually know of such a matter. In the period from late December through the early part of February and beyond, the school was operating without a vice principal as the vice principal had been called to active duty in Desert Shield/Desert Storm. Mr. Williams was responsible for suspensions. Mr. Carter was not the vice principal, but he assisted teachers with discipline. He did not have the authority to suspend students himself, but could recommend action and impose in-school suspension on his own.

Mr. Williams denied any knowledge of any sex conversations occurring in Mr. Smith's class. He also denied that Mr. Roberts ever complained to him about getting out of the auditorium.

Discussion and Analysis

In this case the Board of Education charges that a long-time teacher in the district conducted himself in a highly inappropriate manner in regards to the types of discussions that he purportedly permitted, and to a large extent participated in, in his classroom. The Board's witnesses in support of the charges are the very female students with whom Mr. Roberts is alleged to have spoken about details of his sex life, his wife's sex life, and about the girls' own sexual activities. In response to these allegations of impropriety, the respondent claims to be innocent, a victim of the evil machinations and manipulations of students who chose to allege baseless charges because they bore him some ill will, apparently due to his insistence on testing them on materials and concepts which he asserts they had, to a large extent, refused to be instructed in. Granting only that he may have in a minimal and indirect way spoken of his sex life in response to the prodding of the girls, Mr. Roberts contends that he committed no improper acts which would expose him to a legitimate tenure charge.

Initially, it is apparent that the female students who were in Mr. Roberts wood shop class in the auditorium during the period in question were not completely "innocent" regarding sexual matters. At their then ages of about 13 to 15 and in today's world, their familiarity with sex in general and the particulars of sexual relations, as well as terms associated with these matters, is not entirely surprising. In addition, at least two of the girls had been pregnant. With this said, I am not at all surprised and fully expect that during the course of a semester in Mr. Roberts' class, sexually oriented discussions and comments would have passed between some or perhaps all of the girls, and some of these might even have been loud enough for the teacher to hear. However, while open discussions of sex amongst the students would not appear to be the sort of talk that a teacher in a classroom should tolerate, and certainly not to the extent that it might interfere with the learning process, the specific charges here focus not on acts of passive toleration, but instead on acts of active encouragement, even to the extent of actual initiation of the conversations.

The circumstances under which the respondent was asked to teach the wood shop class were certainly not conducive to an effective teaching and learning experience. An auditorium setting is very different than a shop setting. Nevertheless, unless instructed otherwise by his superiors, Mr. Roberts was obligated to do the very best job possible in teaching whatever information could be imparted to his students in the awkward and inadequate setting provided to him in the absence of an available shop. Because he did not have machines, tools and metal to work with did not excuse him from teaching duties, yet at the same time, it must be recognized that given the limitations of the setting, the ability of any teacher to fully and adequately teach students about something as "hands-on" as wood shop would necessarily be compromised. That the students might be less than enthused, might be more prone to distraction and that the class as a whole might "wander" from the subject matter appropriate to a greater extent than might otherwise be normal all appear to be reasonable assumptions based on the record of the circumstances involved.

The key to this case is, of course, the credibility of the witnesses, the students themselves and Mr. Roberts, and to an extent that of Mr. Williams. Consideration of the credibility of the girls must focus on such matters as the sense of the story they tell, the inconsistencies and gaps therein and the possible motives

which may have led them, individually and as a group, to prevaricate. As for the respondent, his own testimony forms the primary bulwark of his defense, and, in addition to his obvious personal motivations for expressing the case as he does, the record must be searched to see if his defense is secure, or if, when viewed in the light of the petitioner's evidence, it is infected with fatal deficiencies.

The story told by these complaining witnesses is in many ways a similar one, though not each recalled all of the same details, or on occasion, in the same way. The testimony of each of the women can be picked apart to a greater or a lesser degree. That said, having considered the testimony of each both together and as individuals, I am satisfied that on the whole, their story of a teacher who spoke openly about sex, at times even crudely, at times of his and his wife's own experiences and at other times probed the sexual conduct of his students, was true. This is not to suggest that all the particulars of their versions of the facts are accepted. For instance, I do not for the moment accept the characterization of the frequency of the sex oriented comments and discussions in class, and especially those initiated by Mr. Roberts, as the sort of "all the time" thing that the students testified to. While the proofs from all of the involved individuals, both students and teacher, were at best vague as to the nature of the activities that took place in the class on a day-to-day basis for the several months of the course, and while I cannot judge from the proofs to any satisfactory degree the relative amounts of time spent on some form of teaching and learning, on general talks of a non-sexual nature, on sex-related conversation and upon other things, I have no doubt whatsoever that a characterization of the sex talk as compromising the bulk of what went on in the auditorium for the months of November, December and January up to February 3 is quite inaccurate, whether by carelessness of thought, lack of real and realistic recall, or by design. Nevertheless, on balance, I am convinced by a preponderance of the credible evidence that there were several occasions when Mr. Roberts did initiate conversations, or at times perhaps engaged in monologues, about sexual matters. While the respondent paints the testimony regarding these very specific recollections of comments by the teacher, often of a most private nature, as the mere creations of rebellious and angry students seeking to avoid a test, I do not accept that explanation as at all sufficient to explain either the basic fact of the charges or the specific matters testified about. Instead, I am convinced that the sometimes flawed remembrances of the women contained a substantial element of truth, that, in fact, Mr. Roberts' comments were sometimes about sex, about his sex

life and about the sex life and physical features of his female students. While it is not impossible to conceive that all of the specific statements mentioned by the students were in fact creations of their own minds, I **FIND** that the references to Mr. Roberts' early marital sex life, his conduct with his wife and views on oral sex do not suggest such an origin, but appear far more likely to have arisen directly from the teacher's own mouth. Thus, while the students' testimony may be properly characterized as less than perfect, at times inconsistent and even exaggerated, in the main, I **CONCLUDE** that the essence of the charges are true.

It is a fact that the first report of the sexual nature of conversations taking place in the class came at the same time as the matter of the impending test came to a head. However, as the testimony revealed, the assertion on the part of the students in early February that all was not right in their classroom was not the first comment made that suggested that Mr. Roberts was engaging in highly inappropriate, even actionable, conduct. The report received by Ms. Ti. regarding Mr. Roberts' alleged remark as to her posterior was reported to Sandra Bussey several days before the students had any inkling that a test was to be given. While Ms. Bussey failed to give this complaint serious attention, and acknowledged that she did not pass any word of it to the school administrators, nevertheless, the fact that she confirmed that she was told of this remark, and the lack of any identifiable, viable motive for this complaint to have been made up, strongly supports the conclusion that Ms. Ti. was in fact told that Mr. Roberts had said what she reported to Ms. Bussey. While the information which Ms. Ti. imparted to Ms. Bussey was admittedly of a hearsay nature, when coupled with the later reports of the way in which Mr. Roberts was conducting himself in class, this first report of untoward conduct serves both as a reference to an impropriety itself and, coming as it did before the test announcement, important proof that even before the events which the respondent suggests formed the motivation for the charges, the teacher was already acting improperly and the students' claims to this effect thus take on an added degree of credibility.

The timing of the complaints does of course raise some concern that they were made solely, or mostly, in retaliation for the teacher's insistence that the unwilling students undergo testing on subject matter that they had not taken the trouble to learn. That the girls may have been angry with Mr. Roberts and that their anger may have in fact been the single motivating factor which provoked them to

advise the administration of the events occurring in the class is by no means impossible. However, the girls motivation for "squealing" upon the teacher need not be a pure one, so long as the conduct complained of actually occurred. Nor is it of any moment whether the students in fact were not offended by the conversations in the classroom. Indeed, it is entirely possible that these young teenagers, sitting in a class with little real work to do, were not very disturbed at all when their teacher spoke about sex, even on a personal level. There is even the suggestion in the record that some of it struck students as funny. No allegation of improper touching, advances or blatant harassment has been made by these students. A little, or a lot of sex talk, may have been seen by them as "all right," even despite later claims of "uneasiness" at least until the teacher told them that they would have to be tested on material which to a great extent had not been taught to them. Once this occurred the students rebelled, but I **FIND** that their action, even if spurred to a large degree by "selfish" motives, was not grounded in fabrication and deceit.

Mr. Roberts testified that several of the students demanded money from him in exchange for not telling the principal about alleged sex conversations. Ms. Ti. agreed that there was a reference by a student to the payment of money, but in her story the amount referred to was $1, not the $50 or $100 mentioned by the respondent. Ms. R. did not recall any such mention of money, but the mere fact that not all of the stories coincide is not in itself any proof of their falsity, especially where the remark may not have been overheard, or taken at all seriously if heard by all the students.

The respondent presented testimony from witnesses which was apparently intended to demonstrate that one or more of the students had a propensity to talk openly and inappropriately about sexual matters in class. The purpose of this evidence may have been to bolster Mr. Roberts' testimony concerning the fact that the sex talk in his class originated, (and according to him was essentially confined) with the students. Of course, as already mentioned here, that students of this age and experience might speak of sex, even openly and inappropriately, does not totally surprise this judge, and further, at least in the case of the underwear conversation reported by Ms. Stackhouse, such a discussion hardly rises to the level of sexual banter reported as occurring in Mr. Roberts' classroom. The flare-up over boyfriends and the sexual overtones contained therein reported by Mr. Smith is perhaps more in line with the type of talk which is the subject of concern

here, but such jealous quarrels and arguments by themselves cannot be all that unusual amongst teenagers, even if laced with sexual innuendo. That Ms. B. was a party to such an admittedly inappropriate discussion in Mr. Smith's classroom hardly suggests some propensities which would explain away the allegations against Mr. Roberts, even while conceding that the girls were, I am sure, not free from blame for at least some of the sexual discussions which did develop in Mr. Roberts' class.

The respondent argues that the "investigation" of the girls' allegations against Mr. Roberts was "substantially flawed." The recent *Michaels* decision has focused attention upon the need for great care in the methods used to gather evidence from child witnesses, especially in sex-related cases. *State v. Michaels*, 264 *N. J. Super.* 579 (App. Div. 1993). In *Michaels*, a criminal case involving very young children and allegations of sexual abuse at a day care center, the court outlined steps which it viewed as necessary in order to assure that the evidence gathering process was untainted. Such conditions as the use of highly trained interviewers, unbiased and free of preconceived notions of guilt, an absence of "rewards" which might induce children to lie, and steps to prevent the influence of one child's statements upon another's were noted. In the present case, it is fair to say that the conditions outlined in the *Michaels* decision were not always present. The initial complaint to Mr. Williams was made to a man who was not necessarily well inclined to Mr. Roberts, and the interview process did allow for the possibility of an exchange of students' thoughts, whether by design or chance. Thus, the investigative process was not as pristine as the *Michaels* court required. However, the conditions found in *Michaels* were not quite the same as in the present case. The nature of the allegations in *Michaels* was significantly different than in the present case. There, the tender age of the students was a very significant factor. The children in the day care class were about three years old. They were not much older at the time the investigation was conducted. Here, the students were teenagers. While it is by no means assured that each student was completely capable of independent and untainted thought and expression, the likelihood that all those involved were simply going along for the ride with more assertive "leaders" appears to be very limited. I **FIND** that there is not the slightest suggestion that any of the school personnel involved in gathering the stories of the students did anything at all to influence the students in any way, and an independent investigator was brought in from DYFS, although this record unfortunately does not reveal any details of the discussions

which that investigator had with the students.[1] While the considerations outlined in *Michaels* in regard to the evidence-gathering process where very young children are involved are no less important where the age of the children is older, the type of investigation which occurred here, the lack of "suggestion" or prompting by those gathering the facts, and the totality of the circumstances all point to a different conclusion as to the acceptability of the investigative process and the lack of taint which that process may have imparted to the student witnesses, both at the time they told their stories and at trial, than the court reached in *Michaels.* On the whole, despite the fact that the investigation could no doubt have been conducted in a manner more in tune with the pronouncements of the *Michaels* court, I **FIND** that the process was not tainted, certainly not to any degree which would negate the reliability of the evidence gathered from these witnesses, who have been subjected to substantial and searching questioning at trial as well.

The testimony of the witnesses presented in support of the respondent is apparently meant to demonstrate that he is a caring teacher, a strong disciplinarian and hardly the type to engage in the kind of completely inappropriate conduct involved here. Despite this positive picture of him, I **FIND** that the allegations made by the students were for the most part truthful, and therefore I **FIND** that the positive evidence of Mr. Roberts' character does not negate the finding that he is guilty of the misconduct alleged.

CONCLUSION

Based upon the evidence presented, I **FIND** that the respondent did participate in and initiate classroom discussions of his own, his wife's and the students' sex lives, had discussions or engaged in monologues regarding oral sex, made a comment about the physical attributes of one of his female students, and related to his students alleged propositions for oral sex for money purportedly

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1. The petitioner did not succeed in attempts to persuade either the Commissioner or the Superior Court to allow the confidential DYFS investigation, report and related testimony to be presented. The OAL and Commissioner currently lack the authority to order disclosure, the OAL because the statute limits the authority to do so to a "court," *N.J.S.A.* 9:6-8.10a(6), *Matter of Tenure Hearing of Tyler,* 236 *N.J. Super.* 478 (App. Div. 1989), *cert. den* 121 *N.J.* 615.

involving himself and "crackheads." As for all of these activities, they were totally unrelated to any classroom work, were absolutely uncalled for and inappropriate, and were not at all the sort of conversation that a teacher would be expected to have with his students, most certainly in a wood shop class. That Mr. Roberts' conduct was violative of the standards expected of a public school teacher cannot be doubted. I **CONCLUDE** that he engaged in conduct unbecoming a public school teacher and therefore is subject to action affecting his tenure, pursuant to *N.J.S.A.* 18A:6-1.

PENALTY

The record discloses that the respondent has not previously been the subject of any disciplinary action. However, the charges here are most serious. That the students involved were not of very tender years, and in fact in some cases were themselves mothers, or about to be, does not detract from the seriousness of the misconduct to any degree. Sexual conversations between teachers and students in any place but a sex education class are fraught with potential for misunderstanding and when reduced to the personal level are totally indefensible. This is not a situation where the evidence is of some personal and private counseling, which might perhaps under very limited conditions be at least tolerable even if not necessarily to be encouraged. Here, the sexual talk was open, blatant, and apparently geared to nothing more than the titillation of the participants, most notably and improperly that of the frequent initiator of the conversations, the teacher, the very person who should have ended those conversations started by the pupils.

I **CONCLUDE** that Mr. Roberts' misconduct must result in the loss of his tenure. The nature and extent of his ongoing misconduct during much of a semester demands nothing less by way of punishment.

ORDER

It is **HEREBY ORDERED** that the respondent's tenure shall be forfeited.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 13, 1993
Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

12/16/93
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 21 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

FOR THE PETITIONER:

P-1ID Statement of Ti., dated February 5, 1992
P-2ID Statement of Sa.R.

FOR THE RESPONDENT:

R-1ID Statement of Evidence
R-2ID Nurse's note
R-3 Diagram

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions contend that the ALJ erred by crediting and accepting the testimony of the "complaining" students instead of his testimony. He incorporates his post-hearing brief and essentially highlights the arguments set forth in that document, which generally credits and emphasizes his testimony and that of his witnesses while impeaching, re-characterizing or downplaying the testimony of the students.

Respondent argues that the Board's case was solely based on student testimony with no testimony being presented by any adult who heard the comments respondent was alleged to have made. In such instances he maintains that the Commissioner has previously ruled that such testimony must be viewed with great caution and scrutiny (In the Matter of the Tenure Hearing of Polito, 1974 S.L.D. 666; In the Matter of Wolf, 231 N.J. Super. 365 (App. Div. 1989), which he contends the ALJ did not do in the instant matter. Respondent makes

extensive reference to his post-hearing brief which cites numerous transcript provisions, analyzes testimony of each of the witnesses and presents inferences which he contends should be drawn from such testimony.

Respondent's exceptions summarize by alleging that the ALJ's decision was fatally flawed and should be overturned for the following reasons:

> 1. The factors previously noted at pages 1 through 6 and 23 and 24 of Respondent's post hearing brief.
>
> 2. The fact that the students themselves spoke frequently about sexual matters, which some of them admitted in their testimony, but most of them denied, which raises significant doubts about their credibility.
>
> 3. The fact that Respondent testified that it was SB, not him, who spoke about sex, a likelihood corroborated by two adult witnesses.
>
> 4. The overall lack of credibility of the student witnesses; that their testimony was evasive, vague, inconsistent internally and with each others' testimony.
>
> 5. That the students had a motive to lie, particularly their unhappiness with the test requirement and that some of them had been disciplined previously by Respondent and had run ins with him.
>
> 6. The exaggerated nature of the students' claims, which were that Respondent spoke about sex almost each and every day, for almost the whole class period.
>
> 7. The fact that all of the students, at least for the first meeting in which the complaint was made, met together with Mr. Williams as a group, hearing each others' versions of their story. Indeed, when the students left to see Mr. Williams, they were laughing just before that in Respondent's class.
>
> 8. The fact that the students claimed that they complained about all of this to Ms. Bussey before, yet the only complaint to Ms. Bussey was the alleged comment about MT's backside, and that

only by MT (who did not hear the comment), that no other complaint about any other statement or incident was made to Ms. Bussey.

9. The fact that the students prior to going to Mr. Williams, demanded money from Respondent.

10. The circumstances in which the statements were allegedly made, in the auditorium, with other classes going on, where certainly other persons would have heard them.

11. The fact that with the possible exception of the one remark to Ms. Bussey, no complaints were ever made to any other school personnel until the test incident.

(Respondent's Exceptions, at pp. 9-10)

In reply, the Board references the various submissions before the ALJ and urges affirmance of the initial decision. In response to respondent's attacks on the ALJ's general credibility determinations, it cites Campanile v. Middletown Board of Education, Monmouth County, decided by the Commissioner March 2, 1982; McKnight v. Mercer Vocational-Technical Schools Board of Education, 1986 S.L.D. 117; and Onulak v. Metuchen Borough Board of Education, 1986 S.L.D. 1372 for the proposition that the Commissioner must defer to the trier of fact who actually saw and heard the witnesses on questions of credibility where there is conflicting evidence and the factual findings are supported in the testimony provided at the hearing.

With respect to respondent's contention that the ALJ failed to apply sufficient caution and scrutiny to the testimony of the Board's student witnesses as required by Polito, supra, the Board argues:

***To the contrary, the ALJ has applied sufficient caution and scrutiny to the testimony of the students. The ALJ's decision sets forth an exacting analysis of the consistencies and differences of their testimony in addition to other witnesses. The ALJ writes:

The story told by these complaining witnesses is in many ways a similar one, though not each recalled all of the same details, or on occasion, in the same way. The testimony of each of the women can be picked apart to a greater or lesser degree. That said, having considered the testimony of each both together and as individuals, I am satisfied that on the whole, their story of a teacher who spoke openly about sex, at times even crudely, at times of his and his wife's own experiences and at other times probed the sexual conduct of his students, was true. This is not to suggest that all the particulars of their versions of the facts are accepted. For instance, I do not for the moment accept the characterization of the frequency of the sex oriented comments and discussions in class, and especially those initiated by Mr. Roberts, as the sort of "all the time" thing that the students testified to. While the proofs from all of the involved individuals, both students and teacher, were at best vague as to the nature of the activities that took place in the class on a day-to-day basis for the several months of the course, and while I cannot judge from the proofs to any satisfactory degree the relative amount of time spent on some form of teaching and learning, on general talks of a non-sexual nature, on sex-related conversation and upon other things, I have no doubt whatsoever that a characterization of the sex talk as compromising the bulk of what went on in the auditorium for the months of November, December, and January up to February 3 is quite inaccurate, whether by carelessness of thought, lack of realistic recall, or by design. Nevertheless, on balance, I am convinced by a preponderance of the credible evidence there were several occasions when Mr. Roberts did initiate conversations, or at times perhaps engaged in monologues, about sexual matters. While the respondent paints the testimony regarding these very specific recollections of comments by the teacher, often of a most private nature, as the mere creations of rebellious and angry students seeking to avoid a test, I do not accept that explanation as at all sufficient to explain either the basic fact of the charges or the specific matters testified about. Instead, I am convinced that the sometimes flawed remembrances of the women contained a substantial element of truth, that, in fact, Mr. Roberts' comments were sometimes about sex, about his sex life and about sex life and physical features of his female students. While it is not impossible to conceive that all of the specific statements mentioned by the students were in fact creations of their own

> mind, I FIND that the references to Mr. Roberts' early marital sex life, his conduct with his wife and views on oral sex do not suggest such an origin, but appear far more likely to have arisen directly from the teacher's own mouth. Thus, while the students' testimony may be properly characterized as less than perfect, at times inconsistent and even exaggerated, in the main, I conclude that the essence of the charges [is] true. (Initial Decision, at pp. 24-25)
>
> (Board's Exceptions, at pp. 2-3)

Upon careful and independent review of the record in this matter, which includes transcripts of the four days of hearings before the ALJ, the Commissioner determines to affirm the decision of the ALJ for the reasons fully and clearly articulated therein.

The Commissioner finds respondent's exceptions, which largely raise arguments addressed at length in the initial decision, unpersuasive. Specifically, the Commissioner is fully satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that he carefully measured conflicts, inconsistencies, and potential biases in deciding which testimony to credit in reaching his findings of fact.

Accordingly, for the reasons well expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law sustaining the Board's tenure charges of unbecoming conduct against Mr. Roberts, and dismissing him from his tenured teaching position as of the date of this decision. This decision will be referred to the State Board of Examiners for any action it deems appropriate pursuant to N.J.A.C. 6:11-3.6(a)1.

IT IS SO ORDERED.

FEBRUARY 22, 1994

DATE OF MAILING - FEBRUARY 22, 1994

COMMISSIONER OF EDUCATION

44-94

EDU #8919-92S
C # 44-94
SB # 16-94

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK ROBERTS,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
	:	

Decided by the Commissioner of Education, February 22, 1994

For the Petitioner-Respondent, Sumners, Council, George & Dortch (Thomas W. Sumners, Jr., Esq., of Counsel)

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

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

August 3, 1994

Date of mailing AUG 04 1994

45-94

IN THE MATTER OF THE TENURE	:	
HEARING OF SHERRY SALMANSOHN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

FEBRUARY 25, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3947-92
AGENCY DKT. NO. 215-5/92

CITY OF ELIZABETH BOARD OF EDUCATION,
Petitioner,
v.
SHERRY SALMANSOHN,
Respondent.

Vito A. Gagliardi, Esq., for petitioner
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Nancy I. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 22, 1993 Decided: January 13, 1994

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

In May 1992, the City of Elizabeth Board of Education (petitioner) certified tenure charges against Sherry Salmansohn (respondent), alleging that respondent had engaged in corporal punishment and/or inappropriate physical intervention relative to students, including a specific allegation pertaining to September 27, 1991, as well as allegations that respondent had made inappropriate remarks to students. Respondent requested a hearing, and the matter was transmitted by the State

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Department of Education to the Office of Administrative Law on May 27, 1992 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Conferences were held throughout the proceedings. Hearings were ultimately scheduled to commence on December 1, 1993. On that date, the parties continued settlement negotiations which had previously commenced and reached a resolution of the matter. The terms of the settlement were placed on the record, and respondent testified that she understood the terms of the settlement, entered into it voluntarily, and understood that if the settlement is adopted by the Commissioner of the Department of Education, the Commissioner may refer the matter to the State Board of Examiners to review whether or not respondent's teaching certificate should be revoked.

An executed Stipulation of Settlement was subsequently filed on December 27, 1993. The stipulation provides, in part, that respondent makes certain admissions and resigns her position of employment as a teacher with petitioner effective April 1, 1994 and that she will receive her current rate of pay through the date of her resignation, less mitigation. Attached herewith are copies of the stipulation and of a resolution adopted by petitioner approving the stipulation.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8TH Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan 13, 1994
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

1/20/94
Date

Maureen R. Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 20 1994
Date

Jayne L. Vecchia
OFFICE OF ADMINISTRATIVE LAW

le

[redacted]

Resolution: Settlement Sherry Salmansohn

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BOARD OF EDUCATION

Date: Dec. 14, 1993

ROLL CALL	AYE	NAY	ABSTAIN
MR. BURKETT	/		
MS. COLE	/		
MRS. HOLZAPFEL	/		
MR. MARTIN	/		
MRS. POCH			
MRS. SAN PEDRO	/		
MR. SULLIVAN	/		
MR. VENERO	/		
MR. MC GUIRK			

[redacted]

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ELIZABETH BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education filed tenure charges in May 1992 against Sherry Salmansohn, a teacher at the Cleveland Middle School; and

WHEREAS, she was suspended without pay at that time but has been paid her full salary as of the 121st calendar day following the certification of charges, per N.J.S.A. 18A:6-14; and

WHEREAS, the parties have reached a resolution of this matter which is in their interest and public interest,

IT IS HEREBY RESOLVED THAT the Board approves resolving this matter pursuant to the terms of the attached agreement and authorizes the Board Attorney to execute same.

Elizabeth, New Jersey
December 14, 1993

BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Respondent

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

OAL DKT. NO. EDU 3947-92N
Agency Dkt. No. 215-5/92

In The Matter of the Tenure Hearing of: SHERRY SALMANSOHN, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY	STIPULATION OF SETTLEMENT

The parties to the above matter have agreed to an amicable resolution of this litigation. The resolution is based upon an agreement as to the following facts:

1. The Respondent, Sherry Salmansohn, is a tenured teacher employed by the Petitioner, School District of the City of Elizabeth, Union County.

2. In April, 1992, Thomas J. Ficarra, Administrative Assistant to the Superintendent of Schools, and Deborah E. Dixon, Principal of the Cleveland Middle School, filed tenure charges against the Respondent with the Petitioner, which charges were subsequently certified to the Commissioner of Education in May, 1992. The charges consisted of allegations that the

Respondent had engaged in corporal punishment and/or inappropriate physical interventic relative to students under her care, including a specific allegation that on September 27, 1991, the Respondent had placed her hands around the neck of a student in a threatening manner placing the student at risk of physical harm, and allegations that the Respondent made inappropriate remarks to students.

3. The Respondent admits that on September 27, 1991, she did grab student J.C. in the presence of another teacher. The Respondent states that this action was taken because of her belief that she needed to grab the student to protect herself from immediate physical harm.

4. The Respondent admits that she did on certain occasions make inappropriate remarks to her students. The Respondent had previously admitted to these circumstances in either written memoranda or verbal statements to her supervisors.

5. With regard to the remaining allegations of inappropriate physical intervention ar corporal punishment, the Petitioner has no adult eyewitnesses to any of those situations other than the situation involving the student J.C., the incident to which the Respondent has stipulated in Paragraph No. 3 of this agreement. In light of the Respondent's admission in Paragraph 3, in light of Respondent's resignation from her tenured employment as set forth below and in light of the fact that in order to prove these charges it would be necessary to produce student witnesses, whose recollections may be unreliable and for whom the appearance would be traumatic, it would not be in the public interest to proceed with the remaining allegations against the Respondent.

6. Based on the hearing in this matter being scheduled for December 1, 2, 3 and 22, 1993, and allowing time for the filing of post-hearing briefs, as well as 45 days each for the

decisions of the Administrative Law Judge and the Commissioner of Education, the Respondent would receive her full salary from the Petitioner through at least April 1, 1994 if this case proceeded to hearing.

7. The Respondent understands that the Commissioner of Education has the right to review this settlement, and may accept or reject it. If the Commissioner accepts the settlement, the Respondent understands the Commissioner has the right to refer the decision to the State Board of Examiners to review whether or not the Respondent's teaching certificate should be revoked.

Based upon the above factual agreement, the parties hereby agree to resolve this matter on the following basis:

1. Sherry Salmansohn hereby resigns her position of employment as teacher with the Elizabeth Board of Education effective April 1, 1994;

2. The Board of Education will withdraw the tenure charges in this matter;

3. The Respondent will receive her current rate of pay through the date of her resignation less mitigation by alternate earnings;

4. Other than the facts set forth in the stipulation of facts above, this agreement shall not constitute an admission or denial by either party of any of the remaining factual allegations of the tenure charges against the Respondent; nor shall this settlement have any precedential value with regard to any of the remaining allegations;

5. The terms of this agreement shall not be effective until such time as the Board of Education has officially voted on acceptance of this agreement. Counsel for the Board of

Education shall immediately communicate to the Administrative Law Judge in writing when th Board of Education has either approved or denied approval of this agreement;

6. The terms of this agreement are expressly conditioned upon the review and approval of the Commissioner of Education. In the event the approval of the agency head is not given, the terms of this agreement shall be void and have no force and effect whatsoever.

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Attorneys for the Petitioner
By:

VITO A. GAGLIARDI, JR., ESQ.

BALK, OXFELD, MANDELL & COHEN
Attorneys for the Respondent
By:

NANCY I. OXFELD, ESQ.

SHERRY SALMANSOHN, Respondent

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IN THE MATTER OF THE TENURE HEARING OF SHERRY SALMANSOHN, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) In so deciding, the Commissioner notes that the ALJ's recitation of the procedural history of this matter includes the statement that respondent testified that she understood that the Commissioner may refer this matter to the State Board of Examiners to review whether or not respondent's teaching certificate should be revoked. (Initial Decision, at p. 2) In light of the very serious nature of the allegations regarding corporal punishment raised herein, yet recognizing, as did the ALJ, the difficulties the Board faces in

meeting its burden, the Commissioner directs this matter be referred to the State Board of Examiners for further action as it deems appropriate pursuant to N.J.S.A. 6:11-3.6. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 25, 1994

DATE OF MAILING - FEBRUARY 25, 1994

(SB) 45-94

SB #45-94

BOROUGH OF WANAQUE,	:	
APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 9, 1994

For the Appellant, Robert G. Rosenberg, Esq.

Following rejection of the proposed 1994-95 budget for the Board of Education of the Lakeland Regional High School District by the voters of the Borough of Wanaque, the governing bodies comprising the regional district were unable to reach agreement on the amount necessary to be certified to the board of the regional district in order to provide a thorough and efficient education to the district's students. Consequently, on June 9, 1994, the Commissioner of Education, acting pursuant to N.J.S.A. 18A:13-20,[1] determined to certify the amount of $6,830,623 for the district's

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1 N.J.S.A. 18A:13-20 provides:

> Should said governing bodies fail to so certify or fail to agree and certify different amounts for said purposes, then the commissioner shall determine and certify the amount or amounts which in his judgment shall be necessary to provide a thorough and efficient system of schools in such regional district, to the board of education of the regional district.

JAN. 4, 1995

general fund and directed that such amount be included in the tax levy of such municipalities for 1994-95.

By notice to the Commissioner dated September 1, 1994, the Borough of Wanaque (hereinafter "appellant") filed an appeal from that decision. By letter dated September 13, the director of the Bureau of Controversies and Disputes returned the notice of appeal to the appellant, advising that tax certifications pursuant to N.J.S.A. 18A:13-20 were final determinations of the Commissioner and were properly appealed to the State Board of Education.

By letter dated October 3, postmarked October 20 and received on October 21, appellant filed its notice of appeal with the State Board. Counsel for appellant requested to file the appeal late "in order to have a proper adjudication of what the [appellant] feels is valid and reasonable grounds for reducing the tax levy certified by the Commissioner on June 9, 1994." By letter dated October 25, counsel for appellant was advised that, under the circumstances, the filing date of the appeal would be the date on which it was filed with the Commissioner. In that the notice had been returned to appellant, we requested counsel for appellant to provide the documents filed with the Commissioner so that the State Board could determine the date on which they had been filed.

Counsel for appellant complied with such request and, by letter dated November 9, 1994, he was advised that the notice of appeal was deemed filed on September 1, 1994, the date of its filing with the Commissioner. However, counsel was also informed that since the Commissioner's decision was dated June 9, 1994, the notice of appeal to the State Board had been due on or before July 12, 1994. As a result, he was notified that this matter was being

referred to the Legal Committee of the State Board for consideration of the effect of appellant's failure to file timely notice of appeal.

In that a determination by the Commissioner of Education pursuant to N.J.S.A. 18A:13-20 constitutes a final decision by the Commissioner appealable to the State Board, see N.J.S.A. 18A:6-27; N.J.A.C. 6:2-1.1, an appeal therefrom must be taken "within 30 days after the decision appealed from is filed" and is subject to the regulations governing such appeals. N.J.S.A. 18A:6-28. The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

We conclude that the statutory filing requirement with which the appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on June 9, 1994 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on June 12. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellant was required to file its notice of appeal to the State Board on or before July 12, 1994. The appellant's notice, however, was not deemed filed until September 1, 1994, when it was filed with the Commissioner.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Counsel for appellant has provided no indication of the circumstances surrounding the filing or justification of any kind for filing beyond the statutory time limit.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

January 4, 1995
Date of mailing JAN 06 1995

47-94

DOLORES KOJAK,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured Speech Correctionist whose position was reduced in 1990-91 to a 4/5 position, alleged Board violated her tenure rights under N.J.S.A. 18A:28-5 when it hired a Learning Disabilities Teacher Consultant (LDTC) for a 3/5 position for the 1992-93 school year.

ALJ concluded Board violated petitioner's tenure rights when it assigned a nontenured teacher to perform duties within the scope of the certificate held by petitioner. (Bednar) ALJ ordered Board to restore petitioner to full-time employment with mitigated compensation from September 1, 1992.

Commissioner concurred with findings and determination in initial decision and directed petitioner's restoration with mitigated compensation, noting that discretion was left to Board in assessing how petitioner's full-time service should be apportioned between her duties as an LDTC and a Speech Correctionist.

FEBRUARY 25, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9851-92
AGENCY DKT. NO. 502-11/92

DOLORES KOJAK,
Petitioner,
v.
BOARD OF EDUCATION OF THE MOUNT ARLINGTON SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Paul E. Griggs, Esq., for respondent

Record Closed: November 29, 1993 Decided: January 14, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Dolores Kojak, a tenured teacher employed by respondent, Board of Education of the Borough of Mount Arlington (Board), alleges that the Board violated her tenure rights under *N.J.S.A.* 18A:28-5. For the academic year 1990-91, Kojak's position as a speech correctionist was reduced from full time to a 4/5 position due to a reduction in force. Thereafter, in 1992 the Board hired a nontenured

employee as the 3/5 learning disabilities teacher consultant (LDTC) in a 3/5 position. Petitioner has an LDTC endorsement, and thus, contends that she is entitled to full-time employment consisting of a combination of the speech correctionist and LDTC positions.

Respondent argues that educational reasons require a flexible schedule of the LDTC. Petitioner's assignment to the part-time LDTC and speech correctionist positions would restrict the flexibility of the LTDC position and cause a profound effect on the schedules and educational programs of the students and the overall operation of the school district.

The matter was transmitted to the Office of Administrative Law on December 21, 1992, as a contested case. A prehearing conference was held on April 13, 1993, and a hearing was held on October 21, 1993. Both parties submitted post-hearing briefs and replies and the record closed on November 29, 1993.

The issue is whether the Board's failure to reinstate petitioner to a full-time position consisting of the combined speech correctionist and LDTC assignments violated her tenure rights.

STIPULATION OF FACTS

The following stipulated facts are adopted as findings of fact:

1. Dolores Kojak's employment history with respondent began on September 1, 1972, and is summarized below:

School Year	Position	Full or Part-Time Service
1972-73	Speech Correctionist (district-wide)	half-time
1973-74	Speech Correctionist (district-wide)	full-time
1974-75	Speech Correctionist (district-wide)	full-time
1975-76	Speech Correctionist (district-wide)	full-time
1976-77	Speech Correctionist (district-wide)	full-time
1977-78	Speech Correctionist (district-wide)	full-time
1978-79	Speech Correctionist (district-wide)	full-time
1979-80	Speech Correctionist (district-wide)	full-time
1980-81	Speech Correctionist (district-wide)	full-time
1981-82	Speech Correctionist (district-wide)	full-time

1982-83	Speech Correctionist (district-wide)	full-time
1983-84	Speech Correctionist (district-wide)	full-time
1984-85	Speech Correctionist (district-wide)	4/5-time
1985-86	Speech Correctionist (district-wide)	4/5-time
1986-87	Speech Correctionist (district-wide)	full-time
1987-88	Speech Correctionist (district-wide)	full-time
1988-89	Speech Correctionist (district-wide)	full-time
1989-90	Speech Correctionist (district-wide)	full-time
1990-91	Speech Correctionist (district-wide)	4/5-time
1992-93	Speech Correctionist (district-wide)	4/5-time
1993-94	Speech Correctionist (district-wide)	4/5-time
1991-92	Speech Correctionist (district-wide)	4/5-time

2. Dolores Kojak holds the following educational certificates and endorsements issued by the New Jersey State Board of Examiners:

Certificate or Endorsement	Issue Date
Speech Correctionist	7/71 (J-1)
Speech Language Specialist	11/86 (J-2)
Elementary Teacher (K-8)	6/71 (J-3)
Teacher of the Handicapped	2/83 (J-4)
Teacher of the Deaf and Hard of Hearing	12/75 (J-5)
School Psychologist	8/82 (J-6)
Learning Disabilities-Teacher Consultant (LDTC)	12/86 (J-7)
Principal/Supervisor	6/87 (J-8)

3. Ms. Kojak was reduced from full-time to 4/5 employment as of the 1990-91 school year due to a reduction in force based on legitimate budgetary and/or enrollment considerations.

4. Respondent's school district is limited to grades K through 8. Grades 7 and 8 are departmentalized.

5. For 1992-93 and 1993-94, petitioner's 4/5 schedule requires her to work full days on Monday through Thursday with no assignment on Fridays. (J-13 and J-14).

6. Candace Shanks' employment history with respondent began effective September 1, 1992 based on a hiring resolution on September 8, 1992 and is summarized below:

School Year	Position	Full or Part-Time Service
1992-93	LDTC	3/5 time
1993-94	LDTC	3/5 time

7. Candace Shanks is not tenured. For 1992-93 her 3/5 schedule required her to work full days on Mondays, Tuesdays and Fridays. For 1993-94, Ms. Shanks' schedule normally requires her to work on Tuesdays, Wednesdays and Thursdays. On days other than those listed, Ms. Shanks had no assignment with respondent's district.

8. Candace Shanks holds the following educational certificates and endorsements issued by the New Jersey State Board of Examiners:

Certificate of Endorsement	Issue Date
Learning Disabilities-Teacher Consultant (LDTC)	3/82 (J-9)
Teacher of the Handicapped	7/86 (J-10)
Elementary Teacher (K-8)	12/70 (J-11)

9. The current job description for the position of Learning Disabilities-Teacher Consultant in use in respondent's district is attached as Exhibit J-12.

ARGUMENT

Petitioner contends that her tenure rights extend to the LDTC position. Specifically, petitioner's educational services certification includes the endorsements of both speech language specialist (formerly, speech correctionist) and LDTC. Thus, her right to be employed as an LDTC is within the scope of the tenure she earned by working as a speech correctionist. Petitioner relies on *Dennery v. Board of Ed.*, 131 *N.J.* 626, 634 (1993), which recognized that an educator with tenure under any endorsement entitled him or her to tenure under other endorsements that are

subsumed under the same certificate. Therefore, petitioner submits that her tenure rights extend to the LDTC position and that her reduction to a part-time employee authorizes the assertion of tenure rights against a nontenured LDTC.

Petitioner further contends that she is entitled to a full-time position under the educational services certification either as a 4/5 speech language specialist and 1/5 LDTC or as a 3/5 LDTC and a 2/5 speech language specialist. Petitioner does not assert authority over how the Board must distribute the work; the distribution of assignment is within the Board's discretion. Petitioner maintains that her assignment to either three full days of the LDTC position and the remaining two days to the speech language position, or an assignment of 4/5 speech language specialist and 1/5 LDTC would permit the Board to maintain flexibility over both positions. Therefore, the Board's desire for flexibility and its reliance on "educational policy" does not outweigh petitioner's statutory tenure right to a full-time position.

Respondent argues that it is unreasonable and contrary to sound educational policy to require the Board to fragment the part-time LDTC position. Notwithstanding petitioner's tenure entitlement under the special services certification, Kojak is not seeking a full-time LDTC position. Instead, she seeks to fragment the 3/5 LDTC position and attach it to her current schedule in order to create a full-time position. Thus, those cases which recognize tenure entitlement for an employee holding educational services certificate are not applicable here because those employees claimed a right to a full-time position. *See, Dennery v. Bd. of Educ., supra, 131 N.J.; Ellicott v. Bd. of Educ., Frankford*, 251 *N.J. Super.* 342 (App. Div. 1991). Respondent further argues that those cases did not address educational policy or reasonableness when awarding an employee a full-time position based upon tenure entitlement.

Respondent submits that neither Kojak's current position as the speech language instructor nor the LDTC position can be fragmented. Kojak is the district's only speech language instructor and carefully schedules her instructional time to accommodate her student needs at the two schools of respondent. More flexibility is attached to the LDTC position because more than the teacher and the students are involved. The LDTC schedule must accommodate teachers, students, parents and

out-of-district schools. Moreover, the LDTC job description envisions that one person be responsible for all LDTC duties.

In support of its position, respondent relies on the testimony of William Desmond, Superintendent of the Schools. Desmond testified that the LDTC must be flexible to accommodate the schedules of parents, teachers, evaluations and conferences. Thus, to assign Kojak to a portion of the LDTC position or the entire 3/5 position with the balance of her time assigned to speech would adversely impact the ability to schedule meetings and the educational programs of the students. Additional scheduling problems would occur because Kojak must travel between two schools. Thus, it is submitted that scheduling difficulties make it unreasonable to require the Board to fragment the current LDTC position or to require that it employ another speech teacher to satisfy Kojak's tenure rights. To do so would require the Board to stand on its head to accommodate the tenure rights of Kojak.

DISCUSSION AND CONCLUSIONS

Tenure is a legislative status, not acquired in any specific assignment, but in the positions which require one to hold appropriate certificates issued by the Board of Examiners. *N.J.S.A.* 18A:28-5. The parties do not dispute that petitioner has acquired tenure to serve in the capacity of a speech language specialist and an LDTC. Further, it is well established that a tenured teaching staff member subject to a reduction in force, has entitlement to an assignment within the scope of her certificate against nontenured individuals. *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239, 242 (App. Div. 1987), *certif. den.* 110 *N.J.* 512 (1988). However, respondent argues that based on educational reasons, petitioner is not entitled to claim the part-time LDTC position in order to regain full-time employment.

I have carefully considered respondent's position that Kojak's full-time employment obtained from the 3/5 LDTC position would fragment her current position and/or the LDTC position. I have also considered the credible testimony of Desmond. The LDTC's schedule must be flexible to accomplish and coordinate the overall duties of the CST, team meetings, parent conferences and student evaluations. Additionally, the LDTC oversees approximately fifty special education students with seven students in out-of-district placement, and the others assigned

to the two schools in the district.. Desmond estimates that the LDTC spent approximately ten percent of her time monitoring the out-of-district students. Thus, he concluded that if Kojak were assigned to the 4/5 speech language specialist position, she would then be locked into the LDTC position on Fridays with no flexibility to schedule LDTC duties on other days. Thus, the need for flexibility is a sound educational reason against assigning Kojak to a portion or the entire 3/5 LDTC position.

On the other hand, Kojak presented equally credible testimony to rebut the inference raised by the Board's flexibility argument. As speech language specialist, Kojak is a participant in the CST meetings, students annual reviews and individual education plan (IEP) and parent conferences. Thus, as one member of a multidisciplinary team, Kojak has demonstrated that she can coordinate her schedule to attend these meetings. Further, her speech language instruction time is coordinated on a master schedule. The schedule identifies what day and period the students are assigned to speech, and those periods which Kojak uses for travel time, teacher preparation time, lunch hour, and CST meetings. The schedule is changed four to five times during the year in response to student needs and administrative duties.

Accordingly, I reject as unpersuasive the Board's argument that adhering to Kojak's claim to full-time employment under a combined LDTC and speech learning specialist positions would adversely effect student schedules or create an unreasonable situation. Additionally, the Board's refusal to assign Kojak to the LDTC position because it desires to maintain a level of flexibility is contrary to the legislative intent granting New Jersey employees the right to tenure. Indeed, the Supreme Court has stated that:

> the Legislature has determined that the utility of tenure to improving education outweighs any costs in decreased "flexibility." That is a policy determination that has been made by the Legislature. It is not proper for courts to override that determination on the basis of their independent policy conclusions.

Spiewak v. Rutherford Bd. of Ed., 90 *N.J.* 63, 79 (1982).

Further, the Commissioner has forced boards of education to reschedule and combine classes held by nontenured teachers in order to effect the rights of a tenured teacher. In *Taxman v. Piscataway Bd. of Ed.*, 93 *N.J.A.R.* 2d (Vol. 4A) 189 (Comm. of Ed.), the Commissioner ordered that three part-time teaching positions be consolidated to permit a tenured teacher to continue working. In *Fox v. Morris School District Bd. of Ed.*, 93 *N.J.A.R.* 2d (Vol. 4A) 139 (Comm. of Ed.), the Commissioner allowed petitioner to combine 3/5 of one nontenured teacher's full-time position and 2/5 of another nontenured teacher's full-time position to create a full-time position under her tenure rights. Finally, "educationally based reasons" used by boards of education to deny claims of tenure against nontenured individuals are no longer viable. In *Grosso v. Bd. of Ed., New Providence*, 1990 *S.L.D.* 1750, 1753, the State Board of Education rejected respondent board's "'educationally based reasons' argument" in assessing the rights of tenured individuals in a RIF.

Consequently, I **CONCLUDE** that the Board violated Kojak's tenure rights when it assigned a nontenured teacher to perform duties within the scope of the certificate held by Kojak, the tenured employee.

ORDER

It is **ORDERED** that the Board of Education of the Mount Arlington School District promptly restore Kojak to full-time employment together with back pay and other lost benefits from September 1, 1992, less mitigation.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan 14, 1994
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

1/20/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

le/e

APPENDIX

LIST OF WITNESSES

For Petitioner:
Dolores Kojak

For Respondent:
William Desmond

LIST OF EXHIBITS

C-1	Stipulation of Facts
J-1	Certificate-Speech Correctionists: Dolores Kojak
J-2	Certificate-Speech Language Specialist: Dolores Kojak
J-3	Certificate-Elementary School Teacher: Dolores Kojak
J-4	Certificate - Teacher of the Handicapped: Dolores Kojak
J-5	Certificate-Teacher of the Deaf or Hard of Hearing-Dolores Kojak
J-6	Certificate-School Psychologist: Dolores Kojak
J-7	Certificate-Learning Disabilities Teacher Consultant: Dolores Kojak
J-8	Certificate-Principal/Supervisor: Dolores Kojak
J-9	Certificate-Learing Disablities Teacher Consultant: Candace Shanks
J-10	Certificate-Teacher of the Handicapped: Candace Shanks
J-11	Certificate-Elementary School Teacher: Candace Fielding
J-12	Job Description - (LDTC)
J-13	Master Schedule of D. Kojak 1992-93
J-14a	Master Schedule-Speech for Edith Decker School
J-14b	Master Schedule-Speech for Mt. Arlington School

OAL DKT. NO. EDU 9851-92

DOLORES KOJAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record of this matter, the Commissioner concurs with the findings of fact and conclusions of law set forth in the initial decision that the Board violated petitioner's tenure rights when it assigned a nontenured teacher to perform duties within the scope of petitioner's educational services certificate. Consequently, the Commissioner directs petitioner's restoration to full-time employment together with back pay and other lost benefits from September 1, 1992, less mitigation. In so directing, discretion is left to the Board in assessing how petitioner's full-time service should be apportioned between her duties as a Learning Disabilities Teacher Consultant and a Speech Correctionist. The Commissioner does not retain jurisdiction.

IT IS SO ORDERED.

FEBRUARY 25, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 25, 1994

48-94

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

FEBRUARY 25, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 907-93
AGENCY DKT. NO. 510-12/92

LOIS MARIANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,
Respondent.

Lois Mariano, petitioner, *pro se*

Anthony P. Sciarrillo, Esq., for respondent

Record Closed: December 22, 1993 Decided: January 14, 1994

BEFORE **RALPH J. TOLOMEO**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 3, 1993 for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was scheduled for a hearing on September 1, 1993. Prior to the scheduled hearing date the parties agreed to settle this matter and have prepared the attached Order and Stipulation of Settlement.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 14, 1994
DATE

Ralph J. Tolomeo
RALPH J. TOLOMEO, ALJ

Receipt Acknowledged:

1/20/94
DATE

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 20 1994
DATE

Jayne L. Vecchia
OFFICE OF ADMINISTRATIVE LAW

ro

ANTHONY P. SCIARRILLO, ESQ.
381 Franklin Avenue
Belleville, New Jersey 07109
(201) 450-9777

Attorney for Respondents

LOIS MARIANO,
Petitioner,

vs.

CRANFORD BOARD OF EDUCATION,
ET ALS,

Respondents.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BEFORE THE COMMISSIONER
OF EDUCATION

DOCKET NO. 510-12/92

ORDER
and
STIPULATION OF SETTLEMENT

THIS matter having been heard by the Court in the presence of Lois Mariano, the Petitioner, and Anthony P. Sciarrillo, Esq., attorney for the Cranford Board of Education, eta als, the Respondents;

WHEREAS, on or about December 1, 1992 Petitioner, Lois Mariano, filed the within matter receiving Docket No. EDU-00907-93N, Agency Reference No. 510-12/92; and

WHEREAS, on or about January 27, 1993, Respondent filed an Answer and Affirmative Defenses to the within Petition; and

WHEREAS, on or about May 6, 1993, a telephone prehearing conference was conducted by the Honorable Ralph Tolomeo, Office of Administrative Law; and

WHEREAS, on or about May 14, 1993 a conference was conducted between the Petitioner and the attorney for the Respondent; and

WHEREAS, on or about August 31, 1993, a conference was conducted between the Petitioner and the Respondent which resulted in an amicable resolution of all issues arising from this matter; and

WHEREAS, on or about September 1, 1993, the parties advised the undersigned that this matter had been resolved between the parties as set forth below;

NOW, THEREFORE, for good cause shown;

IT IS on this 23rd day of December, 1993,

ORDERED:

1. The Respondent agrees to review the Family Living parent notification letters now used by the Cranford Public Schools to ensure their compliance with N.J.A.C. 6:29-4.1,2:

a. statutory right to exempt with no penalty to credits
b. the exact location of curriculum and an outline of the curriculum
c. the complete, current and approved list of materials to include video and teacher resources
d. the name of the course instructor
e. the timely mailing of the above with the intent to inform and include parents.

2. The Respondent agrees to conduct a review of the Peer Development Program at Cranford High School during the 1993-1994 school year and prepare a written report which shall be provided to the Members of the Board of Education and the Petitioner.

3. The Respondent will develop and adopt procedures for the selection, invitation and use of outside speakers who would address gatherings of students in the Cranford Public Schools.

4. The Respondent agrees that the Family Life Education Program shall be taught by certificated staff members employed by the Respondent.

5. The Respondent agrees to eliminate Planned Parenthood, its affiliates and materials in any form from its programs and its payment as a line item in the school budget.

6. The Petitioner shall withdraw the Petition filed in the above captioned matter.

7. The Petitioner hereby releases, waives, and forever discharges any and all past, present and future claims she may have against the Board arising out of this action with the Board.

8. Each party has entered into this Agreement freely and voluntarily and without any inducement not contained in this document.

9. This Agreement contains the entire agreement and understanding between the parties and constitutes full and final settlement of any and all issues arising out of this action between the Petitioner and the Respondent.

10. This Agreement shall be governed by the laws of the State of New Jersey.

11. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

12. The terms and conditions of this Agreement shall not be precedent setting, nor shall it extend to any matters past, present or future between the parties.

13. The parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under all circumstances surrounding this matter.

14. The terms and conditions of this Agreement are subject to the ratification and approval by the Respondent.

15. In view of the circumstances surrounding this matter, the parties agree that the terms and conditions of this Agreement are consistent with the public interest.

16. The parties have entered into this Agreement with a full understanding of their rights and the contents of this Agreement.

17. Each party has had an opportunity to consult with legal counsel concerning the terms and conditions of this Agreement.

18. This Agreement shall have no bearing or effect on any other proceeding of any type for the purposes of establishing precedent, policy or past practice, and shall not be admissible in, or utilized in connection with, any such proceeding.

19. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seals to this Agreement effective on the 23rd day of December, 1993.

Ralph J. Solone
SLJ ~~I.S.C.~~

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE FOREGOING.

Witness:

Lois Mariano
LOIS MARIANO, Petitioner

Jeanette F. Nixon
JEANETTE F. NIXON
Board Secretary
CRANFORD BOARD OF EDUCATION

Thomas E. Bonhag
THOMAS BONHAG
President
CRANFORD BOARD OF EDUCATION

49-94

SUSAN MARTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning elementary teacher alleged she had tenure in her position when the Board acted to refuse renewal of her employment for the 1992-93 school year, thus violating her tenure rights.

ALJ determined petitioner had tenure, having satisfied statutory requirements and the dictates of Spiewak at the time of the Board's action and therefore was wrongfully terminated. ALJ ordered petitioner reinstated to her position with mitigated compensation.

Commissioner concurred with findings and determination in initial decision and ordered petitioner restored with back pay and benefits less mitigation.

FEBRUARY 28, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 4575-92

SUSAN MARTIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent.

Kenneth I. Nowak, Esq., for petitioner
(Zazzali, Zazzali , Fagella & Nowak, attorneys)

Victor E. D. King, Esq., for respondent
(King, King & Goldsack, attorneys)

Record Closed: December 13, 1993 Decided: January 24, 1994

BEFORE **ARNOLD SAMUELS,** ALJ:

The petitioner, Susan Martin, contests the respondent's termination of her employment as a teaching staff member by not renewing her contract for the 1992-93 school year. She claims that this action by the Board of Education of the City of

Plainfield (Board) violated her tenure and seniority rights. The Board denies that the petitioner had attained tenure, and in any event, wishes to prove that her teaching performance has been unsatisfactory, thereby justifying her removal from employment.

PROCEDURAL HISTORY

The petitioner filed her verified petition with the Commissioner of Education on May 18, 1992. A timely answer was filed by the respondent on June 16, 1992. The matter was transmitted to the Office of Administrative Law on June 18, 1992, for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

A telephone prehearing conference was held in the Office of Administrative Law on September 16, 1992. The resulting prehearing order defined and limited the issues to be decided, provided for discovery, scheduled a hearing, and regulated other procedural aspects of the matter. After the completion of discovery and one adjournment of the hearing date, the matter was scheduled for hearing on December 7, 1993.

On October 8, 1993 the petitioner filed a motion for summary decision. Papers in opposition were filed by the respondent on November 8, 1993, followed by a reply memorandum by the petitioner. Oral argument on the motion was heard on November 24, 1993. The record closed on December 13, 1993, after receipt of the last paper filed by counsel.

DISCUSSION

Summary decision may be granted to a party if the papers which have been filed show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to prevail as a matter of law. *Judson v. Peoples of Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74, (1954); *R.* 4:46-2.

The same concept is applicable to administrative proceedings in the Office of Administrative Law. *N.J.A.C.* 1:1-12.5(b).

> A contested matter can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law. *Matter of Robros Recycling Corp.* 226 *N.J. Super.* 343, 350, (*App. Div.* 1988), *certif. den.* 113 *N.J.* 638, (1988).

A summary judgment (decision) is designed to allow the judge quickly and inexpensively to dispose of any case which does not present any genuine issue of material fact requiring disposition at a hearing. *Judson, supra,* 17 *N.J. at* 74. The role of the judge in such a motion is to determine whether there is a genuine issue of material fact, but not to decide the issue if such an issue exists. *Id.* at 73.

The standards governing the grant or denial of summary decision emphasize that a party opposing a motion is not to be denied an evidential hearing unless the moving party sustains his or her burden of clearly showing the absence of a genuine issue of material fact. Thus, it is "the movant 's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Id.* at 74. All inferences of doubt are to be drawn against the movant and in favor of the party against whom the motion is directed. The papers supporting the motion are closely scrutinized and the opposing papers are indulgently treated. *Id.* at 75.

This matter is unquestionably ripe for summary decision, particularly since the respondent has acknowledged that the petitioner has correctly stated the material facts. The Board's argument relates instead to the legal standards to be applied to those facts. Its position is that Ms. Martin's employment for a period of time at the adult learning center, as an hourly employee teaching adults and paid with Federal or State funds, should not be counted towards the acquisition of tenure. Additionally, the respondent wishes an opportunity to prove that the petitioner is an unsatisfactory elementary school teacher who should not be entitled to tenure protection.

The **FACTS** are as follows:

The petitioner has held a certification, since 1972, as an elementary school teacher.

The petitioner taught in the district's adult learning center on a part-time basis for 10 months from December 1988 through September 1989. She taught basic skills/ESL (English as a second language) to adults working toward high school degrees. She was paid a hourly rate, based on the teacher's contractual salary guide. This teaching was continuous without a break for the summer of 1989.

The petitioner was hired and began full-time employment for the Board on September 25, 1989, teaching basic skills in an elementary school. This continued for the entire school year through June 30, 1990.

The petitioner's contract was renewed for the following school year, beginning September 1, 1990 through June 30, 1991. She taught second grade in an elementary school.

The petitioner was rehired for the 1991-192 school year. She taught fourth grade for the entire year, from September 1, 1991 through June 30, 1992.

The total period of time petitioner taught for respondent in accordance with the above, was 3 years and ten months. This consisted of ten months teaching basic skills/ESL in the adult learning center, part-time, followed immediately by three consecutive academic years.

The positions held by the petitioner, as set forth above, required her to hold appropriate certificates issued by the Board of Examiners. Her elementary school teacher's certificate satisfied that requirement.

In April 1992, the petitioner was advised that her contract would not be renewed for 1992-93 school year.

This appeal followed. The petitioner claims that her employment should not have been terminated as set forth above, and that the Board was required to rehire her because she had acquired tenure and the protections afforded to teaching staff members thereunder.

N.J.S.A. 18A:28-5 governs the acquisition of tenure:

> The services of all teaching staff members . . . . . in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> > (a) Three consecutive calendars years, or any shorter period which may be fixed by the employing board for such purposes;
> >
> > (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> >
> > (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

This statute was definitively discussed in *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63, 1982. There, the petitioner teachers were remedial and supplemental teachers, not under contract. They were paid hourly and received no sick leave, personal days, health insurance, holiday pay, vacations or pension benefits. All of the teachers held valid teaching certificates appropriate to their positions and each of them had been employed with the school district for more than three years.

The court stated that the tenure act, *N.J.S.A.* 18A:28-1 to -18, granting teachers in New Jersey the right to tenure, makes that tenure a mandatory term and condition of employment and supersedes contractual terms. The court recognized that the plain language of *N.J.S.A.* 18A:28-5 governs tenure determinations.

> "an employee of a board of education is entitled to tenure if: (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; (3) she has served the requisite period of time. *Spiewak, supra* 90 *N.J.* at 74.

Satisfaction of these requirements creates a "presumption of eligibility for tenure unless a statutory exception applies." *Ibid.*

In finding in favor of the petitioner teachers the *Spiewak* court held that the conditions under which they had worked fell within the express terms of the statute. Their teaching positions required certification; they possessed the proper certifications; and they had worked the requisite amount of time. The specific elements of teachers' contracts, such as hourly pay, no benefits or sick leave, were irrelevant because "public employees and employers may not agree to contractual terms that contravene a specific term or condition set by statute. . . We have specifically stated that the tenure provisions of *N.J.S.A.* 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away." *Spiewak* at 76.

Moreover the court found no statutory exceptions which would preclude granting tenure to the teachers.

Since the facts in the instant matter show that Ms. Martin satisfies the foregoing statutory requirements for tenure, that status cannot be denied her on the basis of an hourly pay schedule or the fact that she may have been paid with Federal funds.

> "All professional staff members [of adult basic skills learning centers] shall possess standard New Jersey teaching certificates. Documentation shall be copies of teaching certificates. *N.J.A.C.* 6:30-2.6(a)6i.

The petitioner worked in a position for which a teaching certificate is required and she holds the required certification.

Finally the facts clearly indicate that the petitioner worked the equivalent of more than three academic years within a period of four consecutive academic years, satisfying the requirements of *N.J.S.A.* 18A:28-5(c).

In addition, neither the statute or the regulations thereunder provide for an exception to the granting of tenure based on Federal funding or hourly salary.

The respondent's argument that tenure should be denied because petitioner taught at an adult learning center and was evaluated by different criteria than used to evaluate elementary teachers, also cannot be recognized as an exception to her qualification for tenure. Teachers in adult basic education programs must hold a teaching certificate. That certificate need only be a basic instructional certificate, since no specific certificate is required by the regulation for a person to teach basic skills to adults. See *Milwit v. BOE of the City of Jersey City*, OAL DKT. No. EDU 465-87 (EDU 2899-86 on remand) (November 24, 1987) aff'd, Comm'r. of Educ. (Jan. 8, 1988), aff'd. (App. Div. June 8, 1989.) See also *Rabolli v. Board Of Education of the Bergen County Vocational Technical Schools*, OAL DKT. NO. EDU 7717-82 (January 13, 1983), aff'd. Comm'r. of Educ. (March 18, 1983), aff'd. St. Bd. of Educ. (July 6, 1983).

Therefore the ten months spent by petitioner as a teacher of adult basic skills, with a valid teacher's certificate, are properly counted toward the acquisition of tenure.

There is also no exception in the tenure statute, as interpreted in *Spiewak*, that relates to evaluation criteria. Therefore, the fact that petitioner was evaluated by criteria different from those used to evaluate elementary or high school teachers is irrelevant.

There also is no statutory provision that exempts basic skills or ESL courses from tenure consideration. Such courses are included as part of recognized adult basic skills programs. *N.J.A.C.* 6:30-2.1. Those who teach these courses must also possess standard New Jersey teaching certificates. *N.J.A.C.* 6:30-2.6(a)6i. Therefore, respondent's attempt to remove the time spent by petitioner while teaching such courses from time counted toward the acquisition of tenure cannot prevail.

Finally, unsatisfactory performance by the petitioner, even if proved, is not a relevant factor related to the acquisition of tenure. There is no statutory exception that provides for an assessment of teaching quality. Teachers may be dismissed for inefficiency, incapacity or conduct unbecoming a teaching staff member or for other just cause. *N.J.S.A.* 18A:28-5. Once tenure has been achieved, specifically delineated charges and hearing procedures must follow, if a teacher is to be removed. See, *N.J.S.A.* 18A:6-10. Since the petitioner has clearly acquired tenure, the quality of her performance may only be tested, in relation to the retention of her position, in accordance with the requirements of *N.J.S.A.* 18A:6-10. Such an inquiry and procedure is beyond the purview of this contested case.

CONCLUSIONS

It is therefore **CONCLUDED** that no genuine issues of material fact exist and the petitioner has shown, as a matter of law, that she acquired tenured in accordance with the applicable statute prior to her summary removal from her teaching position.

It is further **CONCLUDED** that the Board's action, in refusing to renew her teaching contract for the 1992-93 school year violated Ms. Martin's tenure rights, and that action should be **REVERSED**.

ORDER

It is therefore **ORDERED** that the petitioner, Susan Martin, should be reinstated to her position, with backpay and all applicable benefits, less any sums received by her by way of pay or salary from any substituted employment during the period that she was deprived of her position.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 24, 1994
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

1/26/94
Date

Hope Blackburn Acting Director
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 1994
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

List of Exhibits:

The exhibits attached to the parties' briefs and memoranda of law are incorporated herein by reference.

OAL DKT. NO. EDU 4575-92

SUSAN MARTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge that petitioner had tenure as a teaching staff member under N.J.S.A. 18A:28-5 and the dictates of the New Jersey Supreme Court in Spiewak, supra, at the time the Board refused to renew her teaching contract for the 1992-93 school year. As such, the Board's action was a violation of petitioner's tenure rights and must be reversed.

Accordingly, the recommended decision of the ALJ is adopted for the reasons stated therein. The Board is hereby ordered to restore petitioner to her teaching position and accord her back pay and all applicable benefits less mitigation of any monies earned during the period of her wrongful termination.

IT IS SO ORDERED.

FEBRUARY 28, 1994

DATE OF MAILING - FEBRUARY 28, 1994

COMMISSIONER OF EDUCATION

50-94

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID S. SOLLENBERGER,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY VOCATIONAL AND	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
CAMDEN COUNTY.	:	
	:	

FEBRUARY 28, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6831-93S
AGENCY DKT. NO. 234-6/93

IN THE MATTER OF THE TENURE HEARING OF DAVID S. SOLLENBERGER, CAMDEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL DISTRICT, CAMDEN COUNTY.

William C. Davis, Esq., for petitioner Board of Education of the Vocational School in the County of Camden (Davis, Reberkenny & Abramowitz, attorneys)
Kenneth A. Sandler, Esq., for respondent David S. Sollenberger (Selikoff & Cohen, attorneys)

Record Closed: January 24, 1994 Decided: January 28, 1994

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

This tenure proceeding came before the Office of Administrative Law ("OAL") following transmittal from the Commissioner of the Department of Education ("Commissioner"), pursuant to *N.J.S.A.* 52:14B-1 to -13 and *N.J.S.A.* 52:14F-1 to -21. A prehearing conference was held on October 12, 1993, and a Prehearing Order was issued on October 21, 1993. Thereafter, the matter came on for hearing before this administrative law judge on January 19 and 20, 1994.

Mr. Sollenberger was charged with having engaged in conduct which demeaned a student's rights and having been insensitive to her as an African-American and to have acted in a discriminatory fashion because of the race, creed, color, national origin or ancestry of the student.

Following presentation of substantially all of the testimony, including the testimony of the complaining student and of the respondent, the parties entered into discussions and reached a resolution of the issues in dispute between them. Pursuant to that agreement, which was spread on the record at the hearing on January 20, 1994, and which has been incorporated in a written stipulation of settlement which is attached hereto and made a part hereof, the parties have agreed that the respondent, who was previously suspended from his employment without pay for part of May 1993 and the remainder of the school year in June 1993 and who was thereafter reinstated to the payroll pursuant to the 120-day statute while remaining suspended from his teaching duties, will continue on suspension through the remainder of the 1993-94 school year and will be removed from the payroll as of January 28, 1994, and shall remain suspended without pay through the remainder of the current school year. Based upon the facts of this case as established in the testimony, which is largely undisputed as to the incident involved, this administrative law judge has agreed to approve this settlement, subject to the Commissioner's review. The following constitutes a general description of the circumstances involved in the incident in question and the reasons why this administrative law judge believes that this settlement is an appropriate one.

Testimony reveals that David S. Sollenberger has been employed by the Camden County Vocational and Technical School District at its Gloucester Township campus for approximately 22 years, during which he has received generally favorable evaluations. The incident in question occurred on April 27, 1993, when a student, then known as K.C., but also known as Sister A-N. H.B., ("Sister B.") came to

Mr. Sollenberger's United States History class wearing a turban.[1] According to Sister B., she had worn the turban at the class several days previously, but Mr. Sollenberger had been absent. On the day in question, when Sister B. entered the classroom, Mr. Sollenberger, according to his testimony, asked Ms. C. why "she had that rag" on her head and whether she was going to "tell his fortune or read his palms." This occurred during the five minutes before the start of class and as soon as he made these comments Sister B. requested permission to go to the ladies' room. He assumed that she was going to remove the turban. Pursuant to school policy hats are generally not permitted to be worn in class, although apparently in the past exceptions have been made where individuals have worn hats or other headgear for "religious" reasons. While Sister B. was in the ladies' room Mr. Sollenberger began to instruct his class on the day's activities, which were to include a test. According to the teacher the students had approximately ten minutes or so to look at their notes and prepare for the test. During this time Sister B. was seated and still wearing her turban. Mr. Sollenberger walked to her desk and asked her what she had on her head. She replied that it was a turban and he said that he knew that and asked her why she was wearing it. According to both witnesses, she responded that it was the "Moorish National Headdress." He then asked her if she was a Muslim, to which she responded "No, Moslem." Mr. Sollenberger testified that he then told her that "Muslim" and "Moslem" mean pretty much the same thing. He was not sure what response she made to this, but she apparently did not agree with him and said that her uncle told her that the proper term was "Moslem." According to Sister B.'s testimony Mr. Sollenberger insisted that the Moors were Muslim, to which she responded that the proper word was Moslem. At this point she recalled that he began to pull out books and pull down a map and made a comment to her that she did not know "shit from shinola, baby, so I don't know why you wear it." At this point she got up and left class.

1 Sister B. has indicated that she is a Moor and does not consider herself as an African-American or Black. The charge refers to conduct which demeaned African-American students because of race, color, national origin, etc. It is of course Sister B.'s perfect right to define herself as she chooses. Because the charge is directed at conduct which is specifically identified as discriminatory toward African-Americans, I note that observation of Sister B. would suggest to the reasonable observer some degree of African heritage. The Moors were historically a North African people. Thus, even without the student's agreement as to the characterization of her as an African-American, which is generally, although too narrowly associated with those demoninated as Black, the evidence would support that the student discriminated against was reasonably identified as an African-American.

Mr. Sollenberger testified that in his world cultural history course he taught about Islam and that he tried to use the situation for an "educational advantage." He pulled down a map of the Mediterranean world and began to tell about how Islam had spread into Morocco, the area of North Africa where the Moors lived. According to him Sister B. interrupted him several times, apparently continuing to dispute his use of the word Muslim and at one point she said that Muslim was a type of cloth. He corrected her and said that that cloth was muslin. He then offered her a dictionary which she refused and she said that he did not know what he was talking about, to which he replied "Oh and you do." He then asked her to discuss what the five pillars (essential principles) of Islam were. She replied that she "didn't know." According to Mr. Sollenberger at this point he was getting "a little bit irritated" because he had been trying to use the circumstances for educational purposes and trying to involve her more and it was "not coming off." He was "surprised she didn't have any knowledge of the religious significance here." At this point he acknowledged that he said "it seems that you don't know shit from shinola about this."

As stated, the testimony of the parties concerning this incident did not vary to any significant degree. In his testimony Mr. Sollenberger acknowledged that he had been insensitive and had acted incorrectly and apologized to the student and her family who were seated in the courtroom. He explained that right from the beginning he felt terrible about what had happened and asked if he could meet with the family and apologize to them, but was told that "they don't want you teaching." It was never his intention to insult the student, her family or her heritage.

The incident in question was a most unfortunate one. The school had a policy against the wearing of hats or other headgear, although apparently exceptions had been made for religious reasons. According to testimony from the school principal, the proper way for a teacher to deal with the question of whether someone's headgear fell within the "exemption" was to refer the matter to the principal's office. In the circumstances in this case Mr. Sollenberger, confronted with the student wearing a turban, made an initial inquiry of her as to what was on her head. He started off the matter in a most unfortunate, inappropriate and insulting way, referring to the turban as a rag. The connotations involved here are evident.

The situation then deteriorated, for the teacher, rather than sending the student directly down to the principal's office or advising her that she would not be permitted to continue to wear the headgear after that day unless she had permission, began to confront the student. I believe that Mr. Sollenberger, who I **CONCLUDE** was a very sincere individual, never intended to insult Sister B., her family, her heritage, her race, or creed. However, the nature of the discussions that ensued, with a teacher debating a student over the proper term to be applied to an ethnic or religious group, with the teacher diverting from the U.S. History classwork to a public, one-on-one "discussion" of a matter which, while having overall cultural and religious significance, was not specifically relevant to his class' course work, was inappropriate. The situation continued to decline, with the teacher putting the student on the spot, "testing" her about her knowledge of certain fundamentals of the Islamic religion. While discussions of the five pillars of Islam might well be relevant to a general discussion of Islam and its influence in the world in a world cultural history course, to ask an individual student who happens to apparently be a member of that group to answer such a question puts the student on the spot and held her up to possible humiliation and even ridicule. After her failure to answer the question, the teacher concluded this incident with a completely uncalled for, inappropriate humiliating and unprofessional comment.

There is no question but that the actions of Mr. Sollenberger in the course of the incident described were out of line. Even if he saw the opportunity to make use of a circumstance to educational advantage, there were ways to do this without putting the child on the spot, without subjecting her to a one-on-one grilling, without holding her up to humiliation and without seeming to convey some possible contempt for her, her religion, her ethnicity, etc. The child, and her parents, were fully within their rights to feel that the teacher's actions were completely wrong and that some action had to be taken against him.

Balanced against the unfortunate, inappropriate and unprofessional actions engaged in by Mr. Sollenberger on April 27, 1993, are a lengthy career as a teacher in the Camden County Vocational system during which he has apparently been an effective and well-liked instructor. Testimony from students who spoke of his positive attributes suggested that he is a teacher who can provide his students with much learning in an atmosphere that many students find quite appealing. But

for this incident there would be no doubt that Mr. Sollenberger's continued presence as a teacher in the school would be a valuable asset to the community.

The record reveals that Mr. Sollenberger was once previously reprimanded, in 1982, involving an incident in which certain apparently racist remarks were made by students in his classroom to a person who had come into the class. Mr. Sollenberger was present when these comments were made, although he at the time denied hearing most, if not all, of the comments. The reprimand was based upon his asserted failure to stop the comments. Testimony revealed that shortly after this incident Mr. Sollenberger's hearing was tested and it was found that he had auditory nerve damage. Since that time he has worn hearing aids. While the reprimand sits in his file, and while it does constitute a form of discipline, there is nothing about the specifics of that incident that would suggest in any way that Mr. Sollenberger was actually engaging in racist activity or that he actually condoned it. While I cannot be certain whether he did or did not hear the comments made, I do not find that that incident in any way suggests that the penalty involved in the present case should be enhanced due to the existence of a previous discipline.

The parties have agreed to resolve this case based upon a settlement which suspends Mr. Sollenberger from employment without pay for a considerable period of time. This settlement properly recognizes the need for swift and strong action against any conduct which holds up individuals to embarrassment, humiliation and ridicule because of their religious, ethnic or cultural beliefs or background. Such conduct cannot be condoned. At the same time, the settlement recognizes that Mr. Sollenberger is, has been and there is no reason to believe will not continue to be a strong asset for his school district. He is an individual with a long history of educational achievement whose abilities and success with his students should not be easily discarded. The specifics of the incident involved, while most unfortunate and inappropriate, do not suggest that Mr. Sollenberger entered into this matter with any vicious intent, that he intended in any way to demean Sister B., her Moorish heritage, her status as an African-American, her heritage, etc. However, the effect of the comments, the manner in which he went about them, the confrontational nature, and the extremely improper conclusion of his comments all had the very effect which I have no doubt he never intended to cause. Mr. Sollenberger's initial motivation here was positive however, his manner of going about what he wanted to do was wholly wrong. For that he must pay a serious

penalty, as a punishment for his conduct, as a warning to him about his future and as a message to all as to the necessity for extreme care and sensitivity when dealing with matters that touch upon peoples' beliefs, heritage, etc.

Based upon the incident involved, the background of this teacher, his sincere apology to the student and parents, his continued worth to the district, and the value of the message being sent by the punishment imposed, I **FIND** that the terms of the settlement entered into by the parties are appropriate. I will therefore approve the settlement, subject to the Commissioner's review.

For the reasons expressed, it is **ORDERED** that the parties shall comply with the terms and conditions of the settlement agreement.

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

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

January 25, 1994
Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

2/1/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 04 1994
Date

OFFICE OF ADMINISTRATIVE LAW

mjm

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Cherry Hill, New Jersey 08002
(609) 667-6000
Counsel for Petitioner

JAN 24 12 00 PM '94
STATE OF

IN THE MATTER OF THE TENURE HEARING OF DAVID SOLLENBERGER, CAMDEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL DISTRICT, CAMDEN COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION AGENCY DKT. NO. 234-6/93 OAL DKT. NO. EDU 6831-93S

SETTLEMENT TERMS AS SPREAD ON THE RECORD
BEFORE THE HONORABLE JEFF MASIN ON
JANUARY 20, 1994

David S. Sollenberger shall continue on suspension from his position as an employee of the Board of Education of the Vocational School in the County of Camden for the balance of the 1993-94 school year and shall be removed from the payroll of said Board of Education effective January 28, 1994 for the remainder of the 1993-94 school year.

SELIKOFF & COHEN
Attorneys for Respondent
David S. Sollenberger

By: Kenneth Sandler
Kenneth A. Sandler, Esq.

DAVIS, REBERKENNY & ABRAMOWITZ,
Attorneys for Petitioner
Board of Education of the
Vocational School in the
County of Camden

By: William C. Davis
William C. Davis, Esq.

OAL DKT. NO. EDU 6831-93S

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID S. SOLLENBERGER,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY VOCATIONAL AND	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
CAMDEN COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

FEBRUARY 28, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 28, 1994

51-94

EDISON TOWNSHIP EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning Association alleged Board provided counseling services to students through non-certificated personnel. Association contended respondent's contract with the University of Medicine and Dentistry of New Jersey for crisis intervention therapists (CIT) was invalid because it interfered with the rights of guidance counselors and child study team members and was undertaken by certified employees of the district.

ALJ found petitioner failed to show that its members had been supplanted and that CIT functions had to be accomplished with certified school employees. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

MARCH 2, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10362-90
AGENCY DKT. NO. 294-8/90

EDISON TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., on behalf of petitioner (Klausner, Hunter, Cige & Seid, attorneys)

R. Joseph Ferenczi, Esq., on behalf of respondent; **James E. Stahl,** Esq., on behalf of respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)[1]

Record Closed: November 8, 1993 Decided: December 22, 1993

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a complaint filed by petitioner with the Commissioner of Education pursuant to the School Laws, *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. A hearing was conducted on March 23 and 24, 1992, and March 1 and 2, 1993. The last brief was received on November 8, 1993, after which the record closed.

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[1] Mr. Ferenczi began the case for respondent but could not continue for reasons of ill health; Mr. Stahl was then substituted as counsel.

The question presented is whether respondent's contract with the University of Medicine and Dentistry of New Jersey (UMDNJ) for crisis intervention therapists (CITs) is invalid because it interferes with the rights of guidance counselors and child study team (CST) members, and must be undertaken by certified employees of the district.

Petitioner presented a series of witnesses. Frank Petrucelli has been a guidance counselor at respondent's J.P. Stevens High School for twenty-five years. He testified generally that guidance counselors are available to advise students in areas of educational, vocational, social and personal planning. This includes assisting students with career choices, as well as identifying students with special needs and social and emotional problems. Students with specific problems receive counseling. Mr. Petrucelli testified that respondent's contract with UMDNJ for CITs commenced in 1985; since that time he no longer sees the students with "big problems." He defined this to include drug and alcohol abuse, suicide attempts, seriously disruptive or violent students, truants, problems of anorexia and bulimia, and neglected and physically abused students.

Mr. Petrucelli's testimony was presented in March 1992 and, at that point in the school year, two students in his caseload had been referred to a CIT; one was suffering from severe depression and the other was disruptive. Mr. Petrucelli is responsible for approximately 160 student files at any one time and this quantity did not change with the advent of CITs. He testified that students now tend to present more difficult problems than he faced in his early years as a guidance counselor. He offered that guidance counselors cannot really handle the clinical aspects of many of these problems and "can use all the help [they] can get."

Shirley Moss has been a school psychologist for twenty years. Prior to 1985 she was called in to advise students in crisis, but this changed with the advent of CITs. She described one incident a few years ago involving a suicide which occurred in the early morning; the news spread throughout the school as the day began. It was two hours before the CITs came on the scene and, in the meantime, she and her colleagues handled the matter by counseling and consoling students. When the CITs arrived they took charge and shunted the school staff aside. There was a second incident at the high school sometime later involving a suicide attempt. The CIT was not available to take the student to the hospital in her car. Ms. Moss had to do so at

approximately 5:30 p.m.; she waited with the student until a relative arrived. Ms. Moss testified that her training includes crisis intervention.

Ms. Moss also testified in March 1992; at that point in the school year none of her cases had been serious enough to be seen by a CIT. Ms. Moss acknowledged that the crisis intervention program has been a benefit to the school, but she felt that the CST was better suited to perform this work because its members know the children and are committed to them and to the school.

Julian Hill is a school social worker who has been employed by respondent for twenty-three years. He is a member of a CST. Mr. Hill testified that he has counseled non-classified students and has worked in emergency situations. He indicated that for the past three years he has been worked exclusively with out-of-district placements and has not interacted with the CITs. As far as he knows the crisis intervention program has been a benefit to the students it serves.

Karl Ziegler has been employed at respondent's J.P. Stevens High School as a guidance counselor for twenty-two years. He counsels students on an individual and group basis. Prior to 1985 he was involved with students in crisis; now these students go directly to the CITs. Mr. Ziegler acknowledged that he has no clinical training. Before the advent of CITs, approximately 15 percent of his time was devoted to crisis intervention; 10 percent of his time is so spent now. He testified that he carries a caseload of approximately 220 students and this did not change with the advent of CITs. Mr. Ziegler testified that his primary function is education and that most of his time is spent advising students on college preparation and the like. Mr. Ziegler testified that there had been nine guidance counselors at J.P. Stevens High School and now there are only seven.

Respondent also presented a series of witnesses. Dr. Joseph Kreskey is superintendent of schools and has been employed by the district for thirty-eight years. In 1985 the guidance and pupil services functions were under his supervision. Dr. Kreskey testified that at that time he and his staff were concerned about teenage suicide and other difficult problems facing students. There was general agreement that more focused clinical counseling was necessary. Dr. Kreskey's conversations with the CST members and guidance counselors led him to conclude that they were fully occupied and could not devote substantial time to ongoing crisis intervention. During this period staff were identifying these types of problems, but, in the main, such students were referred out to UMDNJ and other agencies. That system

presented problems because of scheduling and the stigma associated with going to a mental health clinic. Dr. Kreskey opened discussions with UMDNJ and together they concluded that these clinical services would reach the largest number of students in need if they were brought into the school. Dr. Kreskey testified that UMDNJ's ability to provide a large backup network in case of difficulty was also a factor in their selection. The level of services offered under the UMDNJ contract has continued to expand and presently there are five full-time CITs in the district: one in each high school, two for the four middle schools, and one for the elementary schools.

Dr. Kreskey testified that the CIT service is not mandated by the Department of Education, but it is nevertheless vital. The general workload for guidance counselors and CSTs has not changed as a result of the presence of CITs. Dr. Kreskey testified that the school psychologist and school social worker focus on educational problems, while CITs deal mainly with the clinical issues of the crisis. Dr. Kreskey also explained the reduction in the number of guidance counselors at J.P. Stevens High School. There had been nine counselors, but one acted as supervisor and that position was eliminated after it had been vacant for a few years. When another counselor retired a second position was eliminated. Dr. Kreskey testified that overall enrollment at J.P. Stevens has dropped from 1,850 to under 1,600 and the present complement of seven counselors is more in line with the ratio of students to counselors at the other high school in the district. Dr. Kreskey noted, however, that in 1985 there were five full-time CSTs in the district and now there are seven.

Carol J. Billow is a supervisory clinician employed by the UMDNJ, at its community mental health center (CMHC) in Piscataway. She supervises the CITs working in respondent's district. Ms. Billow testified that she hires people with a clinical background in psychology or social work and they participate in ongoing crisis intervention training. She coined the phrase crisis intervention therapist to distinguish her personnel from guidance counselors, school psychologists and other district employees. She testified that CITs do individual and group therapy on a daily basis with students. This is not what the members of the CST or the guidance counselors do.

Mary M. Ace is employed as a CIT by UMDNJ/CMHC in Piscataway and she is assigned to J.P. Stevens High School on a full-time basis. Her formal title is clinician III. Ms. Ace testified that her daily responsibilities involve evaluating adolescents and making appropriate dispositions. These students have a variety of serious problems like depression, family divorce, suicidal ideation, and the like. When a matter

requires referral to a guidance counselor or to the CST she does so. Sometimes, when necessary, she refers students to an outside agency.

Frank Cangelosi is the principal of Edison High School and he is familiar with the CIT program as it operates in his school. Mr. Cangelosi has regular meetings with the CIT and concerned staff to discuss student problems. These meetings are often used to decide which students require the services of the CST, a guidance counselor, or the CIT. Mr. Cangelosi testified that the CITs have been effective because of the expertise they bring to these issues.

Edward Tetelman is director of the Office of Legal and Regulatory Affairs in the State Department of Human Services. He was called to testify about the New Jersey School Based Youth Services Program, which became operational in 1988. The program is intended to provide adolescents in difficulty with an opportunity to complete their education, and it involves crisis intervention, individual and family counseling, drug and alcohol abuse counseling, training and the like. It operates in a number of high schools throughout the State and, like respondent's CIT program, offers more intensive clinical counseling in and around school sites. When the program was being planned, Mr. Tetelman inquired orally of Leo Klagholz, then director of the Division of Teacher Preparation and Certification in the Department of Education, whether those providing such services needed to be certified. Director Klagholz responded preliminarily in a letter that no certification was necessary (R-5). No more formal ruling was sought. This is the substance of the record.

The decision to contract for services is generally a matter of managerial prerogative and is only limited where such action conflicts with specific rights established under the school law. *In re IFPTE Local 195 v. State*, 88 *N.J.* 393 (1982); *Hunterdon Central High School Education Association v. Hunterdon Central High School Board of Educ.*, 1988 *S.L.D.* 2468, 2474 (May 4, 1988), aff'd No. A-5036-87T2 (App. Div. June 28, 1989). Thus, to prevail, petitioner must show that its members have been supplanted and that CIT functions must be accomplished with certified school employees. This has not been done. Petitioner's witnesses testified that they were involved in crisis intervention prior to the CIT contract in 1985, and not since. Yet, each continues to carry a full caseload and the nature of their work is unchanged. Mr. Zeigler thought that he spent about 5 percent less time now on crisis intervention than in the past. At most, only a few students out of the witnesses' caseloads were seeing a CIT. Dr. Kreskey, who was a credible witness,

clarified this apparent inconsistency; school staff had been more involved in crisis intervention before 1985, but this consisted mainly of identifying students in need of counseling and referring them to an outside agency. The staff generally did not undertake ongoing therapy with such students; they did not have the time. Mr. Petrucelli was forthcoming when he testified that guidance counselors were not equipped to handle many of these problems. All of petitioner's witnesses acknowledged that the CITs are doing an important job well. Thus, I find that, in the main, crisis intervention in the form of ongoing psychological counseling was not being done by school staff prior to 1985. Matters that required this type of attention were generally referred out.

Petitioner's authorities are inapposite without a finding that the rights of existing staff have been infringed by outside contractors who do substantially similar work. In *Cochran v. Watchung Hills Regional High School Bd. of Educ.*, 1985 S.L.D. 1878, full-time CST positions were reduced to half-time slots in a reduction in force (RIF). The State Board of Education found, however, that the half-time positions were then to be supplemented with outside contracts for work previously done by these CSTs. It held that the district had simply reorganized and transferred functions to a less-expensive provider, which violated tenure rights and the requirement that core CST functions be carried out by school employees. The State Board faced similar issues in *Impey v. Board of Educ. of the Borough of Shrewsbury*, 92 *N.J.A.R.*2d (Vol. 4) 197, 203 (Education), *aff'd*, 92 *N.J.A.R.*2d. (Vol. 4) 427 (Education). There, a full-time speech correctionist position was abolished pursuant to a RIF and the district approved a contract with an educational services commission to provide this service on a part-time basis for a lesser sum. This decision was sustained on review because, unlike *Watchung Hills*, the action was taken in good faith and there were no other restrictions on the school board's freedom of contract. In *Hunterdon Central, supra,* 1988 *S.L.D.* 2468, custodians were replaced when their work was contracted out. This too was approved by the State Board because the decision was made in good faith and, while tenure rights were extinguished, no rule required that this work be done by district employees.

In each of these cases, work that had been done by tenured staff was contracted out to their detriment. The State Board's decision in each case measured the good faith of the district and whether the law required that the work be accomplished with school employees. Collectively, these administrative decisions stand on footings announced in *Viemeister v. Board of Educ. of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949). There, the position of principal was eliminated, the

petitioner's contract was terminated and a new position of "teaching principal" was created and filled with a staff member. The court found that the work of a principal continued and that the district had merely shifted titles around, which, if sustained, would seriously undermine tenure rights.

The facts at bar are far from these examples. The existing staff has not been diminished at all. As indicated above, petitioner's witnesses did not even assert that their workload had been reduced or substantially changed. The closest petitioner came to the allegation that its members had been supplanted was in testimony that the number of guidance counselors at J.P. Stevens High School had been reduced from nine to seven in the last few years. Dr. Kreskey explained, however, that school enrollment at J.P. Stevens had dropped and that when positions became vacant they were eliminated to bring the student/guidance counselor ratio into line with Edison High School. The reduction had nothing to do with the CITs; indeed, there has been an increase in the number of CSTs in the district.

Petitioner also cites *N.J.S.A.* 18A:26-2, which requires teachers to be certified employees, and *N.J.S.A.* 18A:16-1, which provides generally for the hiring and firing of personnel, for the proposition that the services being performed by CITs must instead be performed by staff members. These statutory sections are not specific to our situation and in the absence of a clear restriction or showing of bad faith, respondent is free to contract as it wishes. *See N.J.S.A.* 18A:18A-1 *et seq.*

Based on the foregoing, it is my conclusion that petitioner has failed to establish that respondent supplanted any of its members and it is **ORDERED** that this petition be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/22/93
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

12/23/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 29 1993
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

List of Witnesses

On behalf of Petitioner:

Frank Petrucelli
Shirley Moss
Julian Hill
Karl Ziegler

On behalf of Respondent:

Edward Tetelman
Dr. Joseph Kreskey
Carole J. Billow
Mary M. Ace
Frank Cangelosi

List of Exhibits

On behalf of Petitioner:

P-1	Guidance and Counseling Services
P-2	Job Description for Guidance Counselor
P-3	Guidelines for Guidance and Counseling
P-4	Policy and Procedures for Reporting Child Abuse and Neglect
P-5	The Disaffected Student
P-6	Student Dropouts
P-7	The Disruptive Student
P-8	Pupil Records
P-9	Policy - Board of Education of Edison
P-10	Proposal for Identification and Intervention
P-11	Evaluation of On-Site Clinical Services at Edison High School
P-12	Contract for 1987-88 school year for Dr. Kreskey
P-13	Overview of Clinical Crisis Intervention Program
P-14	Contract for 1988-89 school year for Dr. Kreskey
P-15	Letter to Dr. Kreskey from Carol J. Billow, dated June 20, 1988

P-16 Overview of Clinical Intervention Program 1988-1989
P-17 Resolution
P-18 Resolution
P-19 On-Site Clinical Services for 9/1989 - 6/1990

On behalf of Respondent:

R-1 New Jersey School Based Youth Services Program
R-2 Charts
R-3 School Based Youth Services Program
R-4 Report
R-5 Memorandum to Edward Tetelman from Leo Klagholz
R-6 Description of Program
R-7 Criteria Based Performance Standards for Mental Health Clinician 3

OAL DKT. NO. EDU 10362-90

EDISON TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed a timely copy of its post-hearing brief as exceptions to the initial decision.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law that respondent's contract with the University of Medicine and Dentistry of New Jersey (UMDNJ) for crisis intervention therapists (CITs) is valid, there having been made no demonstration that said contract interferes with the rights of guidance counselors and child study team (CST) members or in any other way supplants any of the Association's members. In so finding, it bears emphasizing that the record demonstrates that the level of services to pupils with educational disabilities has not been diminished. The record further establishes that the CITs are not providing special education services that require specific certification pursuant to N.J.A.C. 6:28-3.8(a)1.i or N.J.A.C.

6:28-1.1(f). See also R-5 in evidence. Finally, the testimony below supports a finding that the contractual arrangement herein provides valuable related services without infringing on the rights of certificated personnel. Petitioner's exceptions add nothing new to the record of this matter to persuade the Commissioner otherwise.

Accordingly, for the reasons expressed by the ALJ below, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

MARCH 2, 1994

DATE OF MAILING - MARCH 2, 1994

51-94

EDU #10362-90
C # 51-94
SB # 20-94

EDISON TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 2, 1994

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

For the Respondent-Respondent, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl (James E. Stahl, Esq., of Counsel)

On August 14, 1990, the Edison Township Education Association (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education alleging that a contract entered into by the Board of Education of the Township of Edison (hereinafter "Board") with the University of Medicine and Dentistry of New Jersey ("UMDNJ") for crisis intervention therapists ("CIT") was invalid because it interfered with the rights of guidance counselors and child study team members. Petitioner maintained that the education laws required that the services being provided by the CIT's had to be provided by certified teaching staff members directly employed by the district board of education, and, therefore, that subcontracting for these services was prohibited.

On December 22, 1993, an Administrative Law Judge ("ALJ") recommended that the petition be dismissed. The ALJ stressed that

SEPT. 7, 1994

the decision to contract for services was generally a matter of managerial prerogative, limited only where such action conflicted with specific rights conferred by the school laws. The ALJ found that crisis intervention in the form of ongoing psychological counseling had generally been referred out even prior to 1985, when the Board had first contracted with UMDNJ for such services. He determined that the CIT's had not supplanted any of petitioner's members and that the size of the staff directly employed by the Board had not diminished in number in relationship to the student population and the ratios at similar schools in the district. He observed that petitioner's witnesses had not suggested that their workload had been reduced or substantially changed in any way and rejected petitioner's contention that the services at issue had to be provided by certified teaching staff members.

In determining that the services being provided by the CIT's did not have to be provided by certified teaching staff members, the ALJ referred to a memorandum written on August 3, 1989, by Dr. Leo Klagholz, then Director of the Division of Teacher Preparation and Certification. The memorandum had been prepared in response to an inquiry from Edward Tetelman, then an assistant commissioner with the Department of Human Services, who had asked whether it was necessary for staff involved in the School Based Youth Services Program developed by DHS to be certified.[1] Exhibit R-5, in evidence. Dr. Klagholz had responded that if the services

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[1] We note that the New Jersey School Based Youth Services Program, which was developed by the Department of Human Services in 1988, is not at issue in this case. Nor does the record indicate the relationship, if any, between the Board herein and that program. The record indicates, however, that, like the School Based Youth Services Program, the UMDNJ program provides crisis intervention.

being provided by the School Based Youth Services Program were "noneducation" services outside the budget of the school, then the staff delivering those services would not be required to possess certification. He also indicated that it would not be necessary for them to be certified if project staff were performing functions that were essentially different from those associated with jobs regulated by the State Board of Education.

On March 2, 1994, the Commissioner adopted the ALJ's findings and conclusions and dismissed the petition. The Commissioner agreed that petitioner had failed to show that the contract with UMDNJ had interfered with the rights of guidance counselors and child study team members or had in any way supplanted any of petitioner's members. The Commissioner also found specifically that:

> ...the CIT's are not providing special education services that require specific certification pursuant to N.J.A.C. 6:28-3.8(a)1.i or N.J.A.C. 6:28-1.1(f). See also R-5 in evidence.

Commissioner's Decision, slip op. at 11-12.

Petitioner has filed the instant appeal to the State Board of Education, contending that the Board violated the education laws by unlawfully supplanting its guidance counselors, school social workers and psychologists with UMDNJ employees performing the counseling function of crisis intervention.

Initially, we can not avoid confronting the fact that one of the items in the record before the ALJ was a memorandum prepared by the current Commissioner of Education prior to his appointment. Nor can we ignore that the Commissioner's decision relied on that document in deciding one of the pivotal issues in this case.

R. 1:12-1 of the rules governing the courts of New Jersey provides in pertinent part that "[t]he judge of any court shall

disqualify himself on his own motion and shall not sit in any matter, if he...(d) has given his opinion upon a matter in question in the action; or...(f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." There is no valid reason for the conduct of those acting in a quasi-judicial capacity to be governed by a lesser standard. Bd. of Ed. of Town of West Orange v. Intern. Union Eng., 109 N.J. Super. 116, 119 (App. Div. 1970).

As detailed above, Dr. Klagholz prepared the memorandum when he was Director of the Division of Teacher Preparation and Certification in response to an inquiry by an assistant commissioner in the Department of Human Services as to whether it was necessary for Human Services staff providing crisis intervention and related counseling services in high schools to possess certification issued by the Department of Education. The memorandum was not prepared for purposes of this litigation.[2] Nonetheless, the Board herein introduced the memorandum as evidence that it was not necessary that the CIT's it had contracted through UMDNJ be certified, and the ALJ's decision on the issue was made with reference to that evidence. In concurring with the ALJ's position, the Commissioner expressly cited that evidence, thereby indicating his reliance on it.

Given that he had authored this evidentiary exhibit, the prudent course would have been for the Commissioner to have recused himself from deciding this matter and instead to have designated an assistant commissioner to act in his place pursuant to N.J.S.A.

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2 See, supra, n.1.

18A:4-33. However, an additional problem revealed by our review eliminates the necessity for us to evaluate whether this alone would invalidate the Commissioner's decision.

The record "certified" to us on behalf of the Commissioner[3] includes a memorandum dated January 27, 1994, from the Acting Director of the Office of Controversies and Disputes to three officials within the Department of Education: the Acting Assistant Commissioner of the Division of Professional Development and Licensing, the Director of the Office of Special Education, and the Manager of the Office of Student Support Services. The Acting Director requested that those officials "review the attached initial decision" in this case and provide to her their "written comments on the issues presented" therein. The file includes the written responses of the Acting Assistant Commissioner of the Division of Professional Development and Licensing and the Director of the Office of Special Education. Bringing their expertise in their respective areas to bear on the Initial Decision, and having nothing from the record before them other than that decision, each official advised that the ALJ's recommended decision was correct. The Commissioner, incorporating specific language from these memoranda, adopted the Initial Decision.

The problem here lies not in the fact that the Commissioner relied on the opinions of personnel within our agency in deciding this case, but rather in the fact that the written materials setting forth those opinions were not properly made part of the record.

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3 See N.J.A.C. 6:2-1.8, which specifies what is included in the record in a case appealed to the State Board and which requires the Commissioner to certify and remit the record to the State Board on notice of appeal.

Review of the case law leaves no question that the Commissioner could not consider such materials without divulging their substance and providing the parties with the opportunity to address them. As articulated by the Supreme Court of New Jersey in the context of administrative proceedings:

> The determination of the Commissioner [of Banking and Insurance] cannot be made to rest upon information outside the record in the case before him which the parties have not had the opportunity to meet. This principle of exclusiveness of the record was discussed in Mazza v. Cavicchia, 15 N.J. 498 (1954) and was held there to be established law in this state. We said in that case, 15 N.J., at page 514:
>
> "In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' Benjamin, Administrative Adjudication in New York, 207 (1942). Unless this principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision? Or consult another's findings of fact, or conclusions of law, or recommendations, or even hold conferences with him?"
>
> Beyond question the use of expert knowledge gained by the Department is a desirable attribute of the administrative process, but it need not be applied in a manner which is unfair. By taking appropriate official notice of such material and making such facts part of the record and giving the parties fair opportunity to meet, explain or refute it, the Commissioner can satisfy the requirements of fairness and adequately protect the interest of all concerned.

Elizabeth Federal S.&L. Assn. v. Howell, 24 N.J. 488, 506-507 (1957).

"[I]t is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." Mazza, supra, at 516. Accord, Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd, 64 N.J. 582 (1974) (to secure essential fair play and minimize the risk of fundamental error, parties were entitled to be furnished with and provided opportunity to address hearing officer's report to the Commissioner and law committee's report to the State Board).

Moreover, the Administrative Procedure Act, while authorizing the agency to take notice of generally recognized technical facts within the specialized knowledge of the agency, requires that the parties "shall be notified either before or during the hearing or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed." N.J.S.A. 52:14B-10(b).

The parties in this matter were given neither notice of the written opinions relied on by the Commissioner nor afforded the opportunity to respond to them. The magnitude of the impact of this failure on the administrative due process rights of the parties is highlighted by the fact that the opinions relied on were based solely on each official's review of the Initial Decision without the benefit of reviewing the factual record. We therefore set aside the decision of the Commissioner.

The State Board of Education is the ultimate administrative factfinder and decision maker in school matters. Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif.

den., 121 N.J. 615 (1990); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982). Accordingly, we have undertaken an independent de novo review limited to those items properly included in the record of this case, including the transcripts of the hearings held in the Office of Administrative Law ("OAL"). We find that the record was well developed during the proceedings in OAL and, based upon our review of the record, we conclude that we need not protract the proceedings in this matter by remanding it. The decision of a public employer to subcontract is a matter of managerial prerogative, In re IFPTE Local 195 v. State, 88 N.J. 393 (1982), and we find that petitioner has failed to establish that the contract at issue herein violated any provisions of the education laws and implementing regulations.

Like the ALJ, we find no evidence in the record that any staff members employed by the Board have been supplanted as a result of the Board's contract with UMDNJ. It is apparent from the record that much of the intervention work in the more serious situations arising in the district was referred to outside agencies even prior to the time when the district entered into the UMDNJ contract. In fact, a guidance counselor testifying for the petitioner noted that, in dealing with severe crises, "[w]e can use all the help we can get." Tr. 3/22/92, at 39. Further, there is no indication that the workloads of staff members in the district have been reduced or even significantly altered as a result of the contract. One of petitioner's witnesses estimated that he currently spends 10% of his time doing crisis intervention work, as compared to 15% before the Board contracted with UMDNJ. Tr. 3/1/93, at 35-38. Nor is there evidence that any positions have been eliminated by the Board as a result of contracting for the services provided by the CIT's.

We also find that petitioner has failed to demonstrate that the functions performed by the CIT's in this particular case were of such character as to have required that they be performed by certified teaching staff members directly employed by the district board. As the ALJ concluded, neither statutory provision cited by petitioner provides support for such a conclusion. N.J.S.A. 18A:16-1 merely authorizes district boards of education to employ such officers and employees as it determines to be necessary and to fix their compensation and terms of employment. N.J.S.A. 18A:26-2 does not prescribe who must be directly employed as teaching staff members, but rather provides that:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing services to, pupils in such public schools and of such other certificate, if any, as may be required by law.

Whether or not the duties performed by individuals providing services in a school district are of such character as to require certification issued by the State Board of Examiners is determined by the rules that have been adopted by the State Board of Education. See, e.g., Rumson-Fair Haven Education Association and New Jersey Education Association v. Board of Education of the Rumson-Fair Haven Regional School District, decided by the State Board, August 5, 1987, aff'd, Docket #A-291-87T8 (App. Div. 1988). In this instance, petitioner has not demonstrated that any of the duties performed by the CIT's require certification as a guidance counselor, N.J.A.C. 6:11-11.11, school social worker, N.J.A.C. 6:11-11.8, or school psychologist, N.J.A.C. 6:11-11.12. Nor does the record support petitioner's contention that certification as a

substance awareness coordinator was required during the period relevant to this litigation in order to authorize an individual to perform the duties assigned to the CIT's.[4]

Finally, as the ALJ found, petitioner has failed to point to any provision in the education laws which would preclude the Board from contracting for the services at issue irrespective of whether the individual providing the service might be required to possess certification.

Accordingly, based on the evidentiary record before us and for the reasons expressed by the ALJ, as well as those expressed herein, we reject the petitioner's contention that the Board's contract for crisis intervention therapists with UMDNJ violated the education laws. We therefore dismiss the petition. We, however, remind the Board of its responsibility for assuring that the CIT's are properly certified if they are performing duties of such nature as to require that they possess appropriate certification in order to fulfill such functions.

Margaret M. Bennett abstained.

September 7, 1994

Date of mailing SEP 09 1994

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[4] We note that the petition herein was filed in August 1990. N.J.A.C. 6:11-11.5, which provides for certification as substance awareness coordinators, did not become effective until October 15, 1990. Furthermore, although the record indicates that as part of their responsibilities in the district, the CIT's acted as "substance abuse counselors," at least in terms of assessment and evaluation of students, tr. 3/2/92, at 68-72, 88-94, 102-106, we need not determine for purposes of this appeal whether they would now be required to possess certification as substance awareness coordinators. N.J.A.C. 6:11-11.5. Even if the duties of the CIT's were of such nature as to require that they now possess that endorsement in order to be authorized to perform these functions, there is no requirement in the education laws that substance abuse counselors must be directly employed by a district board.

52-94

IN THE MATTER OF THE TENURE	:	
HEARING OF STEVEN LUDWIG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF NORTH BERGEN, HUDSON COUNTY.	:	

MARCH 2, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4125-93
AGENCY DKT. NO. 53-3/93

IN THE MATTER OF THE TENURE HEARING OF STEVEN LUDWIG, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY

Paul J. Giblin, Esq., for petitioner North Bergen School District (Giblin & Giblin, attorneys)

Victor P. Mullica, Esq., for respondent Steven Ludwig (Mullica & Mullica, attorneys)

Record Closed: December 17, 1993 Decided: January 27, 1994

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

The Board of Education of North Bergen (Board) certified tenure charges of unbecoming conduct and other just cause against respondent, Steven Ludwig, under *N.J.S.A.* 18A:6-11. Ludwig is a tenured teacher employed by the Board. By resolution adopted on March 17, 1993, the Board found probable cause to certify tenure charges of unbecoming conduct and other just causes which, if true, were sufficient to warrant Ludwig's dismissal or reduction in salary.

Count 1 alleges that during the summer of 1992, while assigned to teach summer school at North Bergen High School, Ludwig requested his students to maintain journals. Ludwig made sexually suggestive entries into the journals of R.P., a summer school student. As a result of his conduct, R.P. withdrew from the North Bergen school system. The Board submits that Ludwig's conduct and behavior evidences a complete disregard for Board procedure and applicable law, establishes

a poor precedent for other teaching staff members, and constitutes conduct unbecoming a teacher.

Count 2 alleges that Ludwig's "flirtatious conduct coupled with his unbecoming conduct and irregular behavior has impaired the expected educational process" of the students in his charge. Also, Ludwig has disrupted the orderly process of the schools to which he has been assigned. Specifically, when Ludwig was assigned to teach the HOPE (Helping Overaged Pupils Emerge) program at the high school, a new teacher had to be assigned to cover his eighth grade classes at the Mann Elementary School. While Ludwig was teaching the HOPE program, R.P. saw him in the hall at the high school and she became visible upset over his inappropriate behavior towards her during summer school. Ludwig was reassigned to his eighth grade classes. Consequently, the HOPE program was disbanded due to the instability caused by Ludwig's removal. Additionally, his eighth grade classes were disrupted due to the change in teachers.

On March 24, 1993, the Board filed its written tenure charges with the Commissioner of Education (Commissioner). Ludwig filed an answer on April 29, 1993. The Commissioner transmitted the matter to the Office of Administrative Law (OAL) on May 5, 1993 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a proposed settlement, subject to the approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. of Ed.*, OAL DKT. NO. EDU 7093-81 (Feb. 17, 1982) Comm'r of Ed., (April 7, 1982), State Board (April 6, 1983), the record of any proposed settlement must include:

> the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding his rights, and [a finding] that the agreement is consistent with the public interest. (*State Board* at 5, 6)

On December 13, 1993, the OAL held a public hearing on the issue whether the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. The parties have submitted a written stipulation, dated September 2, 1993, setting forth the terms of the agreement. In

addition, the record contains twenty-nine joint exhibits which are attached and fully incorporated in this decision.

Based on my review of the record and the testimonial evidence I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Steven Ludwig, age 39, has been employed as a teacher by the Board for seventeen years.

2. Ludwig's activities as an eighth grade teacher in the North Bergen school system were as follows:

> Organized field trips for the eighth grade to Washington, D.C., Boston, Philadelphia;
> Yearbook Moderator for 1990, 1991 and 1992;
> Student Council Moderator 1990 and 1991--took Student Council on field trips to West Point and Statue of Liberty/Ellis Island;
> Organized and moderated class polls for 1990, 1991, and 1992;
> Organized faculty basketball games to help raise money for Student Council;
> Organized talent show (1988) to help raise money for Student Council;
> Organized two dances per year (1986-1992) to help raise money for Student Council;
> Union vice president 1991, 1992, and 1993;
> Union building representative, 1988-1992.

3. Ludwig's teacher evaluations from 1977 to the present have been consistently good. Also, in the written comments Ludwig's teaching abilities were rated highly.

4. Ludwig has received numerous letters attesting to his professionalism as a teacher, and commendations attesting to his conscientiousness and dedication as an educator.

5. Ludwig has been awarded a Certificate of Recognition by the State of New Jersey, as Outstanding Teacher of the Year in the Governor's teacher recognition program, and he is listed in Who's Who Among America's Teachers 2nd Edition 1992, Volume 1.

6. Ludwig was examined by Nicholas A. Marchese, M.D., Director of Psychiatry, Saint Francis Community Health Center, Jersey City, New Jersey. Dr. Marchese practices in forensic and adult psychiatry. Dr. Marchese examined Ludwig on July 19 and 22, 1993 and concluded that "[w]ithin reasonable medical probability, it is my opinion that I

cannot find any overwhelming evidence or symptomatologies that would cause Mr. Ludwig to be a source of risk or danger to anyone in the classroom." (J-1).

7. Ludwig categorically denies that he engaged in conduct unbecoming a teacher regarding this student, R.P.

8. The Board is unable to locate R.P., and it does not believe that it can successfully substantiate the charges brought against Ludwig.

9. Before entering into this agreement, Ludwig had full opportunity to consult with legal counsel, who had explained the meaning of the settlement to him. Ludwig is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate.

10. This settlement fully disposes of all issues and controversies.

I **CONCLUDE** that the terms of the settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan 31, 1994
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

1/31/94
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1994
DATE

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

srf

APPENDIX

Witness List

For petitioner:

Steven Ludwig

EXHIBITS

J-1 Medical Report of Dr. Nicholas A. Marchese
J-2 Extra curricular school activities of Steven Ludwig
J-3 Teacher Evaluation/Observation of Steven Ludwig for school year 1986-87 by Anthony L. Titus, vice-principal
J-4 Annual Evaluative Teacher Performance Report for all subjects for school year 1987-88 by Anthony L. Titus, vice-principal
J-5 Teacher Evaluation/Observation of Steven Ludwig for school year 1987-88 by Peter J. Clark, principal
J-6 Teacher Evaluation/Observation of Steven Ludwig for school year 1988-89 by Peter J. Clark, principal
J-7 Teacher Evaluation/Observation of Steven Ludwig for school year 1989-90 by Peter J. Clark, principal
J-8 Teacher Evaluation/Observation of Steven Ludwig for school year 1990-91 by Anthony J. Poerio, vice-principal
J-9 Teacher Evaluation/Observation of Steven Ludwig for school year 1991-92 by Peter J. Clark, principal
J-10 Teacher Evaluation/Observation of Steven Ludwig for school year 1992-93 by Anthony J. Poerio, vice-principal
J-11 Teacher Evaluation/Observation of Steven Ludwig for school year 1977-78 by Mildred Gordon
J-12 Teacher Evaluation/Observation of Steven Ludwig for school year 1979-80 by Patrick Capotorto
J-13 Teacher Evaluation/Observation of Steven Ludwig for school year 1980-81 by Thomas J. Muir

J-14 Teacher Evaluation/Observation of Steven Ludwig for school year 1981-82 by Mildred Gordon with commendations by Thomas J. Muir

J-15 Teacher Evaluation/Observation of Steven Ludwig for school year 1982-83 by Mildred Gordon

J-16 Teacher Evaluation/Observation of Steven Ludwig for school year 1985-86 by Anthony C. Vecchione, Chairman of English Department

J-17 Letter dated March 10, 1983 of Henry Helstoski, Superintendent of Schools concerning extra curricular activities with attachment

J-18 Student Assistance Resource Program dated May 10, 1983

J-19 Letter dated March 21, 1991 of Anne M. Magnus, Staff Development Committee Chairperson

J-20 Letter dated March 21, 1991 of Peter J. Clark, principal

J-21 Letter Dated March 21, 1991 of Allen Warszniter, eighth grade teacher

J-22 Letter dated April 1, 1991 of John Ellis, Commissioner, Department of Education referring to Steven Ludwig being selected as an outstanding teacher through the Governor's Teacher Recognition Program

J-23 Letter dated May 9, 1991 of Jim Florio, Governor of the State of New Jersey, concerning his presenting Steven Ludwig with the Governor's Award for Outstanding Teaching

J-24 Certificate of Recognition to Steven Ludwig, re The Governor's Teacher Recognition Program signed by John Ellis, Commissioner of Education

J-25 Newspaper dated April 11, 1991 referring to Steven Ludwig being selected as the Teacher of the Year in North Bergen

J-26 Letter dated May 31, 1991 of Peter J. Fischbach, Assistant Superintendent, acknowledging attendance of Steven Ludwig at the spring 1991 Computer In-service Course held at John F. Kennedy School

J-27 Photocopy of *Who's Who Among America's Teachers*, 2nd Edition 1992, Volume I, referring to Steven Ludwig as one of the best teachers in America selected by the best students, listing biographical background

J-28 Seven letters on behalf of Steven Ludwig by parents of students and teachers in the North Bergen Public School System

J-29 Nineteen letters on behalf of Steven Ludwig by teachers, parents and superiors in the North Bergen Public School System

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF STEVEN LUDWIG, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY, NJ.

SETTLEMENT
OAL DKT NO. EDU 4125-93 N

DEPARTMENT OF EDUCATION
NO. 53-3/93

The Petitioner, School District of the Township of North Bergen, and the Respondent, Steven Ludwig, have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the Petitioner and Respondent.

Respondent has been loyally engaged in the school district of North Bergen as an eighth grade teacher since December 15, 1976, for a total of seventeen (17) years.

1. The Respondent will be suspended without pay from March 17, 1993, until September 7, 1993.

2. The Respondent will have a one time increment withholding during the 1993-1994 school year.

3. The Respondent will obtain an acceptable medical report as desired by the Board, though he is of the opinion that it is not necessary. The cost of the examination and report will be borne by the Board and it will be paid forthwith upon receipt of the report and invoice.

4. The Respondent will continue in his tenured teaching staff position effective September 1, 1993.

5. The Petitioner withdraws tenure charges which were certified against the Respondent on March 17, 1993.

6. The Petitioner and its employees are hereby authorized to execute and effectuate the terms of this agreement.

7. This Agreement will become effective when it is approved by the Office of Administrative Law and the Commissioner of Education. Any disapproval shall not interfere with the rights of the Board to pursue the matter further.

Maurena Luzzi, as to President Board of Education

9-2-93
NORTH BERGEN BOARD OF EDUCATION

Jack Duffy, as to Secretary Board of Education

9-2-93
NORTH BERGEN BOARD OF EDUCATION

Victor Mullica, Esq., as to Steven Ludwig

Steven Ludwig
STEVEN LUDWIG

IN THE MATTER OF THE TENURE	:	
HEARING OF STEVEN LUDWIG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF NORTH BERGEN, HUDSON COUNTY.	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants, whose controverted matters have been duly transmitted to OAL, against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to N.J.A.C. 1:1-19.1.

MARCH 2, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 2, 1994

53-94

J.B. AND N.B., as guardians ad litem for J.B., AND J.B., individually,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents of senior high school student (J.B.) alleged that Board's denial of their son's entry into National Honor Society (NHS) was arbitrary, capricious and unreasonable. Petitioners had previously challenged denial of J.B.'s entry in his junior year, which denial was affirmed by the Commissioner and the State Board.

ALJ dismissed petition as moot by virtue of J.B.'s graduation from high school. ALJ found no constitutional issues were raised and matter was of limited public concern. Moreover, ALJ determined to dismiss for mootness as matter was an improper subject for review for reasons of judicial economy and lack of "immediacy" of the controversy.

Commissioner adopted findings and determination in the initial decision emphasizing it was "too speculative" to assume that adding NHS membership to J.B.'s resume would have so significant an impact on his future educational or professional prospects as to warrant a full-scale hearing with its attendant judicial and administrative costs.

MARCH 7, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7505-93

AGENCY DKT. NO. 242-6/93

J. B. and N. B., AS GUARDIANS
***AD LITEM* OF J. B., AND J. B., INDIVIDUALLY,**
Petitioners,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF JEFFERSON,
MORRIS COUNTY,
Respondent.

Richard J. Schachter, Esq., for petitioners
(Schachter, Trombadore, Offen, Stanton & Pavics, attorneys)

Robert M. Tosti, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: January 10, 1994 Decided: January 27, 1994

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This contested matter was transmitted by the Department of Education to the Office of Administrative Law on August 10, 1993, following the filing in June 1993 of a petition of appeal by J. B. and N. B., guardians *ad litem* for their son, J. B , and by J. B. individually. In the appeal the parents alleged that their son had been denied membership in the National Honor Society Chapter at Jefferson Township High

School in his senior year (1992-93), and that this was arbitrary, capricious and unreasonable. Attached to their petition of appeal was a copy of a letter dated June 1, 1993, to petitioners' attorney from the law firm which previously served as counsel to the respondent. This advised that part of the Board's rationale had to do with the fact that in a recent decision by Administrative Law Judge Marylouise Lucchi-McCloud, a previous challenge made by the petitioners and their son regarding their son's nonselection for National Honor Society membership for the 1991-92 school year, when he was a junior, has been rejected. Indeed, the initial decision by Judge Lucchi-McCloud, which had been issued on April 5, 1993, was adopted by the Commissioner of Education on May 17, 1993. *See, J. B. and N. B., as Guardians Ad Litem of J. B., and J. B., Individually v. Board of Education of the Township of Jefferson, Morris County*, OAL Dkt. No. EDU 2385-92, decided April 5, 1993, affirmed by the Commissioner May 17, 1993. On October 6, 1993, after the instant case was transmitted to OAL, the Commissioner's decision was affirmed by the State Board of Education, SB Docket # 33-93.

In early August 1993, when the Jefferson Township Board of Education (Board) filed its answer to the petition of appeal, one of its separate defenses set forth that the petitioners were collaterally estopped from "re-litigating the within claim." Thus, the Board reserved the right to file an appropriate motion in respect to that defense. On September 30, 1993, the undersigned conducted a telephone prehearing conference and paragraph 1B(3) of the prehearing order identified one of the issues to be: "Is the petition moot since petitioner graduated from high school in June 1993?" Thus, paragraph 13 of the prehearing order specifically provided the Board with an opportunity prior to December 15, 1993, to file a motion to dismiss the petition based upon any of its separate defenses. Pursuant to that opportunity the Board moved for dismissal, a memorandum in opposition was filed on behalf of petitioners and a reply memorandum has been received from the Board. For the reasons set forth below I have determined to grant the Board's motion to dismiss upon the ground that the petition of appeal has been rendered moot by virtue of J. B.'s graduation from Jefferson Township High School in June 1993.

FINDINGS OF FACT

The limited number of facts essential to a determination with respect to the motion to dismiss for mootness are not in dispute. Specifically, during the 1991-92 school year, J. B. was a junior at Jefferson Township High School and applied for membership in the National Honor Society. A selection committee reviewed his application and determined by a vote of five against and none in favor to deny membership to him. That determination was appealed to the Commissioner of Education, who referred the matter to the Office of Administrative Law as a contested case in April 1992. Hearings were conducted in September 1992, and following her receipt of posthearing memoranda, Judge Lucchi-McCloud reviewed the facts (both disputed and undisputed), and on April 5, 1993 issued her initial decision wherein she determined that the actions of the Board and its selection committee with respect to J. B.'s application for National Honor Society membership in 1991-92 were neither arbitrary, capricious nor unreasonable. Accordingly, finding that the petition of appeal failed to state a claim upon which relief could be granted, she ordered that it be dismissed. As noted, her decision subsequently was adopted by the Commissioner of Education and now has been affirmed by the State Board of Education.

During the 1992-93 school year J. B. was a senior at Jefferson Township High while his prior appeal was pending. He again submitted an application for membership in the National Honor Society and following review of his application by a selection committee (not the same one which acted during his junior year) it was rejected. J. B. graduated from Jefferson Township High School at the conclusion of the 1992-93 school year and is a first year undergraduate student at the University of Pennsylvania.

DISCUSSION

The first point raised by the Board in connection with its motion to dismiss is that the appeal is "moot." As noted, I agree. What I believe to be persuasive authority for my determination is the decision in *Oxfeld v. New Jersey State Board of Education,* 68 *N.J.* 301 (1975). In that case the petitioners had challenged the constitutional validity of a regulation promulgated by Columbia High School in South Orange/Maplewood dealing with limitations on the distribution of student

literature. A challenge to the regulation by several students was rejected by the Commissioner of Education and his decision thereafter was affirmed both by the State Board of Education and the Appellate Division. The New Jersey Supreme Court granted certification because a substantial constitutional issue was raised. However, in a short *per curiam* affirmance, the majority determined that since the original petitioners were no longer students at Columbia High School, therefore they were no longer subject to the regulation, and the case was "indeed moot." *See, Oxfeld v. New Jersey State Board of Education, supra, 68 N.J.* at 303. In reaching that result the Supreme Court rejected a claim that nevertheless it should entertain jurisdiction because of the nature of the constitutional issue involved, noting that despite the First Amendment's implication in the case it did not view the dispute as presenting an issue of great public importance compelling "definitive resolution." *Ibid.* In a dissent, two justices maintained that since the parties themselves chose not to pursue the mootness issue before the Supreme Court, despite a "clear signal" to do so from the Appellate Division, and since there was broad public interest with respect to prior restraints, the court should have dealt with such a vital issue of basic constitutional concern. *Id.* at 305.

In my view, the facts of the instant case present a substantially less compelling argument for consideration than even was present in the *Oxfeld* case. First, there are no constitutional issues raised or implicated in any substantial way in this case. Moreover, whether or not the particular selection process used by the Jefferson Township Board of Education in J. B.'s case is in accordance with appropriate standards, or was applied in a reasonable manner, clearly is of limited "public" concern at best. To require the parties, the Office of Administrative Law and the educational authorities on review to devote their time and resources in such a circumstance is distinctly inappropriate. Indeed, the *Oxfeld* appeal was held to be moot even though the challenged regulation remained in existence at Columbia High School and other students who had not yet graduated remained subject to it.

Petitioners argue that the matter should not be dismissed as moot because J. B. can still obtain meaningful relief even though he now attends college, whereas the petitioners in the *Oxfeld* case could not. Thus, they point out that "potentially" it is important for J. B. to be able in the future to list on his resume or *curriculum vitae* any honors which he received, including membership in the National Honor Society

While I can appreciate petitioners' abiding and continuing interest in J. B.'s wanting to obtain admission to the National Honor Society, I still believe that the *Oxfeld* decision dictates a dismissal on the grounds of mootness. Again, the issue obviously is not one of great public importance and whether J. B. might prevail ultimately on the merits following a plenary hearing does not, in my view, require that such an opportunity be given to him even though he now is a first year student at college. It simply is too speculative to assume that adding National Honor Society membership to J. B.'s resume will have any meaningful future impact on his educational or professional career and on that slim basis proceed to a full-scale plenary hearing with the attendant financial and other resource burdens mentioned above.

Furthermore, as noted in the decision in *Anderson v. Sills*, 143 *N.J. Super.* 432 (Ch. Div. 1976), questions that have become moot prior to judicial scrutiny generally have been held to be an improper subject for review on two grounds: (a) for reasons of judicial economy and restraint courts do not decide issues which are hypothetical or where a judgment cannot grant effective relief; or (b) where there is a "change in circumstances so that a doubt is created concerning the immediacy of the controversy." *Anderson v. Sills, supra,* at 437. Clearly, in the instant case J. B.'s graduation from Jefferson Township High School in June 1993 constitutes a major "change in circumstances" and in light of the purely speculative potential value of inclusion of National Honor Society Membership on his resume or *curriculum vitae*, there is no "immediacy" which must be addressed.

Having determined that the petition of appeal may be dismissed on the ground of mootness, it is not necessary for me to address the additional arguments raised by respondent in its motion for dismissal--*res judicata* and/or collateral estoppel. Suffice it to say, however, that the the reasons set for by petitioners in opposition to dismissal on those grounds are substantial ones, especially in light of the disputed fact allegations which surround those issues.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth above, I **CONCLUDE** that in light of the undisputed facts the instant petition of appeal is moot and it is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 27, 1994
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

1/31/94
Date

Hope R Blackburn KR
DEPARTMENT OF EDUCATION

FEB 4 1994
Date

Mailed to Parties: Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

J.B. AND N.B., as guardians ad litem for J.B., AND J.B., individually,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law (ALJ) have been reviewed. Petitioners filed timely exceptions pursuant to N.J.A.C. 1:1-18.4, and the Board duly submitted a reply thereto.

Petitioners' exceptions first distinguish the facts in Oxfeld, supra, from the instant matter. They disagree with the ALJ's declaring the instant petition moot because they believe that contrary to the facts in Oxfeld, the Board's decision in denying J.B. National Honor Society (NHS) membership and the reasons for that denial do not represent a fleeting experience that dissolves because J.B. in now graduated from high school. Rather, they claim the Board's decision represents a once-in-a-lifetime opportunity that has been tainted by an unfair process. Petitioners aver that a procedural dismissal would permit the NHS or any school committee practicing discriminatory practices insulation from liability merely because a petitioner no longer has a physical nexus to the school.

Petitioners also except to the ALJ's conclusion finding no constitutional issue implicated in this case, claiming that parents

have constitutional rights under the 14th Amendment, where due process rights are construed to concern the rearing and education of their children. They further disagree with the ALJ that this matter is of limited concern to the public interest, instead arguing that parents' rights and school accountability are issues of great public concern. Finally, petitioners except to the ALJ's finding that it is too speculative to assume that adding NHS membership to J.B.'s resume will have any meaningful future impact on his educational or professional career, contending that if J.B. prevails on the merits he will have earned the right to bear the NHS distinction.

Upon careful and independent review of the record of this matter, the Commissioner affirms the findings and conclusion of the Office of Administrative Law.

The Commissioner would concur with petitioners that Oxfeld, supra, is distinguishable from the instant matter, in that the petitioners therein were found to be no longer affected by rules to which they were no longer subject and petitioner J.B. herein claims direct and lasting personal consequences as a result of the Board actions in dispute. The fact remains, however, as found by the ALJ, that on the present record it is simply too speculative to assume that adding NHS membership to J.B.'s resume would have so significant an impact on his future educational or professional prospects as to warrant a full-scale hearing with all of its attendant judicial and administrative costs.

Accordingly, for the reasons expressed in the initial decision and herein, the Petition of Appeal is dismissed.

IT IS SO ORDERED.

MARCH 7, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 7, 1994

53-94

EDU #7505-93
C # 53-94
SB # 17-94

J.B. AND N.B., as guardians ad litem for J.B., AND J.B., individually,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 7, 1994

For the Petitioners-Appellants, Schachter, Trombadore, Offen, Stanton & Pavics (Richard J. Schachter, Esq., of Counsel)

For the Respondent-Respondent, Rand, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

Petitioners, J.B., a student at Jefferson Township High School, and his parents, filed a petition with the Commissioner of Education challenging the refusal by the Board of Education of the Township of Jefferson (hereinafter "Board") to provide reasons for denying J.B. membership in the National Honor Society ("NHS") during the 1992-93 school year.[1] J.B. was a senior during 1992-93 and graduated at the end of that school year.

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1 We note that the prehearing order in this case included as an issue whether the reasons for rejecting petitioner's application were arbitrary, capricious or unreasonable.

We note further that petitioners had previously challenged the Board's action in denying J.B. membership in the National Honor Society during the 1991-92 school year. Such petition was dismissed by the Commissioner in a decision subsequently affirmed by the State Board. Petitioners' appeal of the State Board's decision is currently pending before the Appellate Division. See J.B. and N.B., as Guardians Ad Litem of J.B., and J.B., Individually v. Board of Education of the Township of Jefferson, decided by the Commissioner, May 17, 1993, aff'd by the State Board, October 6, 1993, appeal pending (App. Div.).

Nov. 2 1994

On January 27, 1994, an administrative law judge ("ALJ") recommended dismissal of the petition as moot, citing Oxfeld v. New Jersey State Board of Education, 68 N.J. 301 (1975). In view of J.B.'s graduation, the ALJ concluded that it "simply is too speculative to assume that adding National Honor Society membership to J.B.'s resume will have any meaningful future impact on his educational or professional career and on that slim basis proceed to a full-scale plenary hearing with the attendant financial and other resource burdens..." Initial Decision, slip op at 5.

On May 7, 1994, the Commissioner of Education adopted the findings and conclusions of the ALJ and dismissed the petition. The Commissioner, while concurring with the petitioners that Oxfeld, supra, was distinguishable from this matter in that petitioners herein claimed direct and lasting personal consequences as a result of the Board's action, agreed with the ALJ that the impact on J.B. was too speculative to warrant a full-scale hearing with its attendant judicial and administrative costs.

Petitioners have filed the instant appeal to the State Board, arguing that the Commissioner erred in dismissing their petition as moot.

We agree. The wrong alleged herein is one capable of repetition yet evading review. See Cain v. New Jersey State Parole Board, 78 N.J. 253, 255 (1978); State v. Allen, 73 N.J. 132, 138-39 (1977). The decision by the Board to uphold the denial of NHS membership to J.B. for the 1992-93 school year occurred in April 1993, and the instant petition was filed in June 1993. Dismissing such petition as moot effectively denies administrative review to students rejected for NHS membership during their senior year.

Consequently, we conclude that the instant petition should not be treated as moot and dismissed. We therefore reverse the Commissioner's decision and remand this matter to him for further proceedings on the merits of petitioners' claims.

Attorney exceptions are noted.

November 2, 1994

Date of mailing NOV 04 1994

53-94

EDU #7503-93
C # 53-94
SB # 17-94
EDU # 2826-95
C # 592-97R
SB # 100-97

J.B. AND N.B., as guardians ad litem for J.B. AND J.B., individually,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 7, 1994

Remanded by the State Board of Education, November 2, 1994

Decision on remand by the Commissioner of Education, November 14, 1997

For the Petitioners-Appellants, Schachter, Trombadore, Offen, Stanton & Pavics (Richard J. Schachter, Esq., of Counsel)

For the Respondent-Respondent, Rand, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

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

May 6, 1998

Date of mailing MAY 08 1998

54-94

MICHAEL T. GAVAN, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY AND TRI-PLEX INDUSTRIES,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, unsuccessful bidder, challenged award of bid for new light fixtures and ceilings to respondent bidder. Board contended petitioner failed to submit additional qualification statements required under specifications.

ALJ found that a board may require information beyond the qualification affidavit mandated by the Division of Building Construction in the Department of Treasury. Moreover, ALJ determined that petitioner did not challenge the specifications before the sealed bids were opened; therefore, petitioner could not challenge the specifications after the opening of bids. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

March 7, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6295-93
AGENCY DKT. NO. 250-7/93

MICHAEL T. GAVAN, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,
Respondent.

Bruce R. Demeter, Esq., for petitioner (Simon & Demeter, attorneys)

Richard K. Sacks, Esq., for respondent

Record Closed: December 16, 1993 Decided: January 31, 1994

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

Michael T. Gavan, Inc., petitioner, challenged a contract awarded by the Lakewood Board of Education, respondent, to Tri-Plex Industries on or about June 28, 1993.

The matter was opened before the Commissioner of Education by filing of a petition of appeal, including a prayer for emergent relief and stay of Board action, on July 1, 1993. On July 2, 1993, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 through 15 and N.J.S.A. 52:14F-1 through -13. Oral

argument on the motion for emergent relief was heard on July 7, 1993, at the Office of Administrative Law facility in Mercerville (Trenton). On July 8, 1993, an order issued denying the motion for emergent relief and stay of Board action and giving the reasons therefor. That order also directed the matter to proceed to plenary hearing. However, the parties agreed there are no essential facts in dispute and the matter now proceeds on briefs. Gavan seeks a determination of the statutory scope of authority a Board of Education has under N.J.S.A. 18A:18A-27 and N.J.A.C. 6:20-7.2 to require, independently, additional qualification information from a bidder beyond the qualification affidavit mandated by the Division of Building Construction in the Department of Treasury (DBC).

ARGUMENTS

Petitioner's Arguments

Gavin asserts that local board of education bid requirements that a bidder submit qualification statements in addition to statutorily required DBC qualification affidavits are improper and conflict with the Public School Contracts Law, N.J.S.A. 18A:18A-1 through -59. Public policy considerations require that a local board's consideration of a bidder's qualifications to perform project work should be limited to the statutorily mandated DBC qualification affidavit.

The authority to qualify perspective bidders for board of education construction projects has been delegated to DBC. The affidavit required by DBC assures local boards that contractors bidding on a project are qualified to do the work and are responsible contractors. These determinations are objectively made by the DBC. A board cannot accept a bid without a DBC qualification affidavit attached.

A district board requirement that additional information must be provided by a bidder, such as AIA form A305, violates the intent and plain meaning of the statutes and codes governing the public schools bidding process. The statutes and codes do not provide for a board's independent and additional subjective review and determination of a bidder's qualification.

A board's review of qualification information in addition to DBC affidavits also violates and threatens the public policy goals of the public bidding process and laws. The ability of a district board to review additional qualification

information and to pass judgment independently on a contractor's qualifications, despite the DBC having concluded same, undermines the objective standard of bidder review that is established and protected by the Public Schools Contract Law. A local board's ability to review a bidder's qualifications raises the spectre and perception of potential favoritism, corruption and an unbalancing of the bidding process.

Respondent's Arguments

The Board argues that a board of education is not foreclosed from requiring information concerning qualification and financial condition in bids solicited under the Public Schools Contract Law. Further, the petitioner is barred from contesting the requirements of the specifications.

A board of education is under the legal obligation to award contracts that require public bidding to the lowest responsible bidder. Responsibility must be determined by the local board and, in considering and judging the responsibility, a board may examine experience, financial ability, required and available facilities, and moral integrity. To do this, a board must be able to request information that reasonably assists it in making a fair decision. The right to require additional information, even where prior State level qualification and classifications have been obtained, has been recognized by New Jersey courts. The requirements for classification enumerated at N.J.S.A. 18A:18-26 are intended to be minimum requirements. They are not to be construed as limiting a board's right to inquire further into responsibility.

It is settled in New Jersey that an unsuccessful bidder cannot challenge specifications once sealed bids have been opened publicly. The petitioner here did not object to the requirements for a financial statement before the sealed bids were opened. As a result, the petitioner cannot now challenge the specifications.

DETERMINATION

In early 1993, the Lakewood Board of Education solicited bids for new light fixtures and ceilings to be installed in several school buildings. The bidding documents included a requirement that each bidder submit AIA form A305, Contractor Qualification Statement. The document was required in addition to a prequalification-classification statement issued by DBC.

The petitioner did not include the AIA document in its sealed bid package. The Board decided that Gavan's bid was not responsive and incomplete. Gavan's bid was not considered. Gavin did not object to the requirements contained in the bid specifications until after the bids were opened.

Gavin moved for emergent relief and stay of board action. The procedural history and outcome of that action are recited above.

This tribunal is now asked to consider whether a local board exceeds the authority granted it by statute and code when it requires additional qualification information beyond the mandated DBC qualification document. For the reasons that follow, the tribunal determines that a board may require information beyond the mere fact of DBC qualification.

The ability to perform the work is the essence of any contract for public work. Bil Jim Const. Co., Inc. v. Manchester Bd. of Ed., 236 N.J. Super. 603 (Law Div. 1989); Donald F. Begraft, Inc. v. Franklin Bd. of Ed., 133 N.J. Super. 415 (App. Div. 1975).

As Judge Serpentelli observes in Bil Jim, N.J.S.A. 18A:18A-26 imposes the requirement that all bidders be prequalified to perform the work involved in the contract. The prequalification protects a vital and ligitimate public interest as well as protects the bidders' interest.

Pursuant to N.J.S.A. 18A:18A-27(d), the State Board of Education delegated the classification function to the Department of the Treasury in 1979. The purpose of the bidding laws is to protect the public by placing bidders on an equal footing and insuring that competition eliminates the possibility of fraud, extravagance or favoritism in the expenditure of public moneys. Skakel v. North Bergen Tp., 37 N.J. 369 (1962). Bidders are induced to participate in the bidding process by the promise of impartiality.

The statutory scheme requires that the Board accept bids only from bidders who have the appropriate qualification certificate. A challenge to the Board's prequalification requirements must show that they are arbitrary, capricious or unreasonable. Bil Jim, 236 N.J. Super. at 607.

N.J.A.C. 6:20-7.2 provides

> Pursuant to N.J.S.A. 18A:18A-27, the authority to qualify bidders for district board of education contracting for Department of Education contracting is delegated to the Department of Treasury. Such action is to be governed by rules adopted by the Department of Treasury for this purpose.

Gavin insists that no other qualification statement or form is contemplated or required by statute or code. I cannot read the statute or the regulation as so limiting. Apparently, the Superior Court similarly concluded in Albert F. Ruehl Co. v. Bd. of Trustees, Industrial Ed., 85 N.J. Super. 4 (Law Div. 1964). The court held that a plumbing contractor, by failure to submit a financial statement called for in the bidding specifications on a school construction project, lost the right to be classed as a bidder. Its bid was properly rejected and the contract awarded to the lowest bidder who had complied with the instructions to bidders, even if the plumbing contractor had received a classification by the State Department of Education. At the time Ruehl was decided, the State Board of Education established the regulations for prequalification of bidders pursuant to N.J.S.A. 18A:18A-27. In 1979, the State Board of Education exercised the option given in the statute and delegated to the Department of Treasury the authority to qualify bidders subject to the Public School Contracts Law.

In either situation, however, the court has endorsed a local board's right to require information beyond that provided by the DBC certificate.

Gavan argues the information requested on the AIA form A305 duplicates much of the information that a contractor must submit to the DBC for qualification and classification. Therefore, it lends no material facts to a school board's evaluation of a contractor's qualifications. Again, I cannot agree. The AIA form A305 does require information beyond that which may be inferred from a DBC certificate and, importantly, it provides more recent financial data than may underlie the DBC.

Gavan also deems the AIA form A305 requirement as introducing an improper and subjective measure into the process of evaluating a bidder. The DBC qualification affidavit provides for objectivity while the AIA form A 305 undermines it.

This, simply, is a *non sequitur.* The data on the AIA form A305 are objective. They add objective information for the board's consideration. It is difficult to see how data -- concededly more extensive -- similar to that provided the DBC can be subjective at the same time the DBC's certification is objective.

Last, Gavan asserts it submitted a bid on another public project, the bid also requested submission of a DBC qualification affidavit and an AIA form A305, Gavan did not submit the AIA form A305 with its low bid and did submit its DBC qualification affidavit. Gavan was awarded the contract upon is post-bid submission of the AIA form A305. Gavan submitted the form, under protest. Gavan was not permitted to do so in the present case.

This seems a bit like arguing that two wrongs make a right. The other matter is beyond the scope of this tribunal's review. This decision must determine whether the bidding requirements in this case were improper.

Having considered and rejected each of the petitioner's arguments, the matter can be decided. However, the Board makes an important argument and an instructive one. In Saturn Constr. Co. v. Middlesex County Freeholders, 181 N.J. Super. (App. Div. 1981), the court made it quite clear that an unsuccessful bidder cannot challenge the specifications after the opening of bids. Citing Camden Plaza Parking v. Camden, 16 N.J. 150 (1954); Waszen v. Atlantic City, 1 N.J. 272 (1949) and James Petrozello Co., Inc. v. Chatam Tp., 75 N.J. Super. 173 (App. Div. 1962), the court stated Saturn did not have standing to challenge the specifications. Inasmuch as it is undisputed that Gavan did not challenge the specifications before the sealed bids were opened, it cannot now challenge the specifications.

For the foregoing reasons, the petition of appeal is **DISMISSED.** It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

31 JANUARY 1994
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

2/1/94
Date

Hope R. Blackburn, ACTING DIRECTOR
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 07 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

OAL DKT. NO. EDU 6295-93

MICHAEL T. GAVAN, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY AND TRI-PLEX INDUSTRIES,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record in this matter, including the exceptions advanced by petitioner, the Commissioner determines that such exceptions essentially recast and reargue issues which were fully and fairly considered and addressed by the Administrative Law Judge in his initial decision and need not be herein reiterated. The Commissioner agrees with the findings and conclusion of the ALJ for the reasons clearly articulated by him in the initial decision.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter.

COMMISSIONER OF EDUCATION

MARCH 7, 1994

DATE OF MAILING - MARCH 7, 1994

54-94

EDU #6295-93
C # 54-94
SB # 19-94

MICHAEL T. GAVAN, INC.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND TRI-PLEX INDUSTRIES,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 7, 1994

For the Petitioner-Appellant, Simon & Demeter
(Bruce R. Demeter, Esq., of Counsel)

For the Respondents-Respondents, Richard K. Sacks, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed by the Administrative Law Judge.

July 6, 1994

Date of mailing JUL 08 1994

55-94

MAXINE J. PIJEAUX,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner contended that Board's action terminating her employment as Superintendent of Schools was invalid because two Board members were serving illegally.

ALJ determined Board acted within the scope of its powers, legally and contractually, when it voted upon the termination of petitioner's contract of employment. ALJ found that the two Board members in question were de facto Board members because they held office under color of a known election or appointment and their ineligibility was unknown to the public at the time they were seated. ALJ further concluded that there was no reason to make a determination as to whether petitioner's other claims were time-barred since she was entitled to no relief on the merits. Petition was dismissed.

Commissioner adopted findings and determination in initial decision concurring with the ALJ that petitioner cannot prevail on the merits of her claim as a matter of law.

MARCH 8, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7711-93
AGENCY DKT. NO. 255-7/93

MAXINE J. PIJEAUX,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

James P. Granello, Esq., for petitioner

Raymond L. Hamlin, Esq., for respondent (Ashley and Charles, attorneys)

Record Closed: January 6, 1994 Decided: January 21, 1994

BEFORE **EDITH KLINGER**, ALJ:

On July 6, 1993, petitioner, Maxine J. Pijeaux, filed a petition with the Commissioner of Education seeking back pay and other relief on the grounds that the respondent, Orange Board of Education (Board), did not validly terminate her contract of employment because two of the Board members were serving illegally at the time the action was taken.

Respondent filed its answer on August 3, 1993 and on August 13, 1993, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

At a telephone conference with the parties, held on October 21, 1993, it was determined by the undersigned that respondent's proposed motion for summary decision should be made at the earliest possible time and further proceedings in the matter were delayed pending decision on the motion.

The Board's motion was filed on November 3, 1993. Petitioner's response was due on November 18, 1993, with the record, for purposes of the motion, to close on November 24, 1993. On November 15, 1993, petitioner requested an extension of time to respond, pending discovery of the Board's procedures. Petitioner filed a cross motion for summary decision on December 1, 1993. When no response was received for either motion by January 6, 1994, the record was closed without further communication to or from the parties.

I **FIND** that, other than the facts set forth below, no further facts are necessary in order to render summary decision in this matter. Therefore, I **FIND** that there was no reason to further extend petitioner's time to respond so that she might make further discovery.

REVIEW OF UNDISPUTED FACTS

Pijeaux was employed by the Board as its superintendent of schools pursuant to a contract of employment. A provision of the contract allowed either party to terminate the agreement unilaterally upon ninety days notice.

The employment contract in question ran from January 1, 1990 to December 31, 1992 "unless earlier terminated." On June 9, 1992, the Board voted to terminate the agreement pursuant to its terms.

On November 20, 1992, Pijeaux filed a petition with the Commissioner of Education seeking to recover payment for her unused sick days and vacation days. She raised no question about the validity of the Board's action to terminate her contract. The matter was transmitted to the Office of Administrative Law as a contested case and was assigned to James A. Ospenson, Administrative Law Judge (ALJ), for hearing under the OAL DKT. EDU 9852-92, agency docket 501-11/92.

On or about February 25, 1993, petitioner learned from a newspaper article that two of the Board members, Roland Sanon and Luz Cantor, who had voted to terminate her contract, were not registered voters in Essex County and Sanon was not a citizen of the United States. This made them ineligible to serve on the Board and both submitted their resignations at about this time. Six of the seven Board members present voted on the resolution to terminate petitioner's contract.

On March 17, 1993, Pijeaux moved to amend her petition to allege that the Board's action was invalid because two of the Board members who voted on the resolution were ineligible to serve at the time they voted. She sought back pay for the period beginning with the date her contract was terminated through December 31, 1992, the date it would have ended in accord with its terms.

Respondent moved to dismiss the petition on the grounds that the issues of unused sick time and vacation time were purely contractual and not within the jurisdiction of the Commissioner of Education. It also opposed petitioner's motion to amend her complaint.

In his Decision on Motion, dated May 3, 1993, Judge Ospenson dismissed the matter on the grounds that the petition only alleged breaches of contract, not education, law, and therefore, the Commissioner of Education lacked the jurisdiction to decide the issues raised. Petitioner's motion to amend her petition was dismissed without prejudice, since the Commissioner had not been given the opportunity to determine whether a contested case existed as to the new issues.

The Commissioner affirmed Judge Ospenson's decision on June 17, 1993. She agreed, at page 9, that "petitioner's claims regarding the validity of the Board's vote to terminate should more properly be brought to the Commissioner as a new cause of action" rather than as an amendment to the existing petition. She specifically declined to make a finding as to the timeliness of filing those claims, pursuant to *N.J.A.C.* 6:24-1.2(c), and she cautioned "against construing her decision above as an automatic waiver of filing deadline should petitioner be found to have filed out of time."

Pijeaux's present complaint, alleging the invalid Board action, was filed on July 6, 1993.

THE MOTIONS OF THE PARTIES

The Board moved for summary decision on the grounds that the present petition was not filed in a timely manner, pursuant to *N.J.A.C.* 6:24-1.2(c), and that the acts of the *de facto* Board members with respect to Pijeaux are not subject to challenge if performed validly within the scope of the authority of their positions.

Petitioner made a cross-motion for summary decision on the grounds that she brought her petition promptly upon learning of the illegal service of the two Board members and, in additon, that the Board's termination of her contract and its refusal to award her a six and one-half percent increase in salary were invalid acts because of the participation of the two illegal members. She also raised the issue of an alleged breach of her employment contract by the Board when it failed to give her the minimum five percent increase in salary in 1992 which was called for by her contract. Both of the issues involving the Board's failure to increase Pijeaux's salary were apparently raised for the first time in this motion. Neither appears in her prior petition nor in her petition filed on July 6, 1993.

THE VALIDITY OF THE BOARD'S ACTION

Petitioner argues that the presence on the Board of two members who were not legally able to serve invalidates all Board actions upon which these Board members voted. This is contrary to long-established law.

Petitioner's position rests upon a flawed definition of a *de facto* office holder. In *Jersey City v. Dep't of Civil Service*, 57 *N.J. Super.* 13, 27 (App. Div. 1959), the court sets out the following comprehensive definition of a de facto officer:

> An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised.
>
> First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.
>
> Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.
>
> Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

> Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such. (38 *Conn.*, at 471-4720)

From this definition, it can be seen that it is irrelevant that neither Cantor nor Sanon were legally eligible to be elected or approved to the Board. I **FIND** that they are de facto board members because they held office under color of a known election or appointment and their ineligibility was unknown to the public at the time they were seated. I further **FIND** that it is not relevant to their status as *de facto* Board members whether they, or any other members of the Board, failed to take the oath of office.

The Board which ordered the termination of Pijeaux's contract was the *de facto* board of education.

> Its members had certainly a color of title, and their actual incumbency was complete. . . . Under these circumstances the acts of the board, in which third persons are interested, cannot be impugned on the ground that the title of the members is defective.
>
> [*Kimball v. Hendee*, 57 *N.J.L.* 307, 309 (S.Ct.1894).]

This is still the law. In his decision of May 3, 1993, OAL Dkt. EDU 9852-92, at page 4, Judge Ospenson quoted the following from *Monsees v. Bd. of Ed. of Bloomingdale*, 1982 *S.L.D.* 1409-10:

> A *de facto* school officer is one who has entered into possession of a school office and assumed to exercise the functions thereof by virtue of an apparent election or appointment that is illegal of irregular. 78 *Corpus Juris Secundum*, 133, p.876. . . . It is well-established that the acts of a *de facto* officer are valid and may not be challenged and set aside on the grounds that he did not hold title de jure. The acts of a *de facto* school officer, which a *de jure* officer would be authorized to do, are, if performed in the prescribed manner, as valid and binding on the public and third persons as the acts of *de jure* officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or *quo warranto* proceeding that subsequently terminates in the ouster of the *de facto* officer from office. 78 *C.J.S.* 133, p. 877. *See also, Oliver v. Jersey City*, *N.J.L.* 634, 636-43 (E. & A. 1899). There can be no question, therefore, that, in general the acts in which [the member] participated while he occupied a seat on the Board, were validly performed and are not subject to challenge by reason of the fact that he was *de facto* and not *de jure*. . .

Judge Ospenson added that, "Only as against a successor in office to a *de facto* board member is it said illegal tenure is invalid from inception. *Cf.,Visotcky v. City Council of City of Garfield*, 113 *N.J. Super.* 263, 267 (App. Div. 1971)."

The cases cited by petitioner, particularly Visotcky, supra, do not support her contention that acts of *de facto* boards members are void since these cases concern challenges to the service, rather than to the acts, of board members.

The Board was acting within the scope of its powers, legally and contractually, when it voted upon the termination of Pijeaux's contract. *N.J.S.A.* 18A:16-1. The vote was taken at a meeting where six of the seven members of the Board were present. Five of the six voted to terminate the agreement. The petitioner has raised no question that her termination was arbitrary or capricious.

Based upon the above, I **CONCLUDE** that there is no basis to invalidate the resolution of the Board, dated June 9, 1992, which terminated Pijeaux's contract of employment. For the same reasons, I **CONCLUDE** that there is no basis to invalidate the Board resolution denying Pijeaux a six and one-half percent increase in salary.

THE TIMELINESS OF THE PETITION

N.J.A.C. 6:24-1.2(c), referred to as the "90-day rule," provides as follows:

> (c) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency which is the subject of the requested contested case hearing.

Respondent states that Pijeaux first raised the issues concerning the allegedly invalid acts of the Board in March 1993, approximately nine months after the Board resolved to terminate her contract. She did not file the present petition until July 6, 1993, four months after her motion to amend her prior petition to add these issues was denied by Judge Ospenson on May 3, 1993, and after the initial decision was affirmed by the Commissioner on June 17, 1993. Respondent argues that operation of the 90-day rule was tolled neither by Pijeaux's lack of knowledge of the invalid service of two Board members until February 1993 nor by her unsuccessful attempt to amend her pleading in March 1993. Therefore, the

Board asserts, her petition was not filed until about thirteen months after the date of the Board action and is barred by operation of *N.J.A.C.* 6:24-1.2(c).

I **CONCLUDE** that petitioner's two issues related to Board action or lack of action with respect to her salary are clearly barred by the ninety-day rule; they were never raised until December 1993, far more than ninety days after the Board's action. They were not even raised until ten months after she learned about the illegal service of two board members in February 1993 and five months after she filed the second petition in this matter in July 1993.

I **CONCLUDE** that there is no reason to make a determination as to whether petitioner's other claims are time-barred since, in any case, she is entitled to no relief on the merits; there is no basis for her challenge to the action of the Board terminating her contract.

CONCLUSIONS AND ORDER

I **CONCLUDE** that respondent is entitled to summary decision, dismissing Pijeaux's complaint because, on the basis of the undisputed facts, she is entitled to no relief as a matter of law. For the same reason, I **CONCLUDE** that petitioner is not entitled to summary decision.

Consequently, it is **ORDERED** that petitioner's motion for summary decision is hereby **DENIED**. It is further **ORDERED** that respondent's motion for summary decision is hereby **GRANTED** and the petition of Maxine J. Pijeaux is **DISMISSED** with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 21, 1994
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

1/25/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 1994
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

OAL DKT. NO. EDU 7711-93

MAXINE J. PIJEAUX,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ, for the reasons expressed in the initial decision, that petitioner cannot prevail on the merits of her claims as a matter of law. Therefore, the Commissioner deems it unnecessary and declines to reach to the timeliness of any of these claims notwithstanding that findings and conclusions on certain of them were made by the ALJ.

Accordingly, the recommendation of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed in the initial decision at pages 4 - 6 above.

IT IS SO ORDERED.

MARCH 8, 1994

DATE OF MAILING - MARCH 8, 1994

COMMISSIONER OF EDUCATION

56-94

56-94

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BALDI, TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MARCH 9, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8321-93
AGENCY DKT. NO. 300-8/93

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BALDI, TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY

Thomas E. Monahan, Esq., on behalf of petitioner, Toms River Regional School District (Gilmore & Monahan, attorneys)

Thomas W. Cavanagh, Jr., Esq., on behalf respondent, Michael Baldi (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: February 1, 1994 Decided: February 10, 1994

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of tenure charges filed by petitioner pursuant to the School Law, *N.J.S.A.* 18A:6-10 *et seq.*, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13. The parties have now submitted a stipulation of withdrawal in the matter which is annexed. Having reviewed the terms of the stipulation and it appearing that it fully disposes of all issues in controversy and was entered into voluntarily, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of the stipulation and that these proceedings be and hereby are **CONCLUDED**.

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

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

2/10/94
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

2/15/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 18 1994
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

CHAMLIN, ROSEN, CAVANAGH & ULIANO
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268 Norwood Avenue
P.O. Box 38
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(908) 229-3200
Attorneys for Respondent
Michael C. Baldi

----------X DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of
MICHAEL C. BALDI Toms River Regional School District, Ocean County

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

----------X

DOCKET NO. 300-8/93

STIPULATION OF WITHDRAWAL

This matter having come before the Office of Administrative Law pursuant to the filing of tenure charges against the Respondent on August 12, 1993; and,

Whereas the Toms River Regional School District has determined to withdraw the aforementioned charges based upon a resolution of the controversy as set forth herein and demonstrated same by the adoption of a resolution in connection therewith, the parties do hereto, through their counsel, execute the following Stipulation and request that the charges be withdrawn by the Office of Administrative Law as a result of the following findings:

1. The tenure charges preferred against Respondent, Michael Baldi, consist of a single count which includes a singular charge that he pled guilty to possession of under 50 grams of marijuana. The offense to which the Respondent pled was a disorderly persons offense which is a petty offense, not a crime within the meaning of the New Jersey Constitution and as such, a conviction for said offense does not give rise to any disability or legal disadvantage based upon the conviction of a crime. N.J.S.A. 2C:1-4. In accordance therewith, the State affirmatively agreed at the time of the guilty plea not to seek

a forfeiture of respondent's teaching certificate.

2. The Respondent was employed as a licensed and certificated educator in the Toms River School System beginning in the Academic year 1976-1977, and his active employment continued through the scholastic year 1991-1992. During his 16 years in the school system, he was never the subject of prior tenure charges nor of an attempt at incremental denial. During the 16 year period, his observation/evaluations were consistently among the highest qualitative assessment available to him from his supervisors. Also within his tenure as a health and physical education teacher, he led a curriculum revision committee and was a strong advocate for the fitness development programs in the school district.

3. The Respondent began as an assistant wrestling coach at Toms River North High School in 1976 and began as the varsity head coach for wrestling, also at Toms River North, during 1981-1982. During the 10 years he served as a varsity coach, he helped develop an outstanding program culminating in his selection as the Region 6 Coach of the Year by the New Jersey Wrestling Coaches Association in 1989. During that same year, his varsity team won the NJSIAA Group 4 State Championship. He successfully assisted numerous young men in becoming district and regional wrestling champions and coached three State placed winners. During his tenure as a wrestling coach, he inaugurated the Mat Watchers Association which consisted of parents of student athletes in the wrestling program and acted as a supplement to the regular booster organization. Additionally, he volunteered one or two weeks a summer for nearly 15 years to accompany his student athletes to the Penn Wrestling Camp, and many went on to wrestle at

and attend college.

4. The single incident in question took place at a time when school was not in session, did not occur on school grounds, and did not involve any contact with students.

The parties have agreed, therefore, that based upon the foregoing and other considerations, the matter should be resolved by way of a mutual agreement between the parties which resulted in the adoption of a resolution by the Toms River Regional Board of Education (copies of which having been forwarded to the Office of Administrative Law) to accept his resignation effective January 19, 1994 and to withdraw the tenure charges presently pending pursuant to the matter hereinabove referenced.

THOMAS W. CAVANAGH, JR., ESQ.
Attorney for Respondent

THOMAS E. MONAHAN, ESQ.
Attorney for Petitioner

Dated: January 19, 1994

I do hereby resign my full-time teaching position with the Toms River Board of Education effective immediately, in conjunction with the withdrawal of tenure charges which were filed by the Toms River Board of Education, and are currently pending.

MICHAEL C. BALDI

DATED: January 17, 1994

Sworn and subscribed to before
me this day of , 1994.

DOLORES T. MANIGRASSO
A Notary Public of New Jersey
Commission Expires May 11, 1994

2d

OAL DKT. NO. EDU 8321-93

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BALDI, TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision of the Office of Administrative Law, accepting withdrawal of this matter based on consideration set forth in a stipulation of the parties, have been reviewed.

The Commissioner concurs with the ALJ that, under the circumstances, this matter is no longer a contested case and is, therefore, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 9, 1994

DATE OF MAILING - MARCH 9, 1994

57-94

57-94

R.A., on behalf of her minor children, S.H. AND D.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parent disputed Board's claim that her children were nonresidents.

ALJ concluded case was moot as statute (N.J.S.A. 18A:38-1) was amended by P.L. 1993, c. 380. Petitioner is now entitled to hearing with the Board relative to issues of domicile and removal and thereafter, she may appeal its decision to the Commissioner.

Commissioner deemed matter withdrawn without prejudice to petitioner's right to appeal any determination against her by the Board of Education following hearing.

MARCH 9, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION WITHDRAWAL
TRANSMITTING CASE BACK
TO DEPARTMENT OF EDUCATION
OAL DKT. NO. EDU 11873-93
AGENCY DKT. NO. 416-12/93

EWING TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
R.A., ON BEHALF OF HER MINOR CHILDREN S.H. AND D.A.,
Respondent.

Robert Merryman, Esq., for petitioner (Carroll and Weiss, attorneys)

R.A., mother of S.H. and D.A., respondent, appearing pursuant to N.J.A.C. 1:10B-5.1

Record Closed: January 19, 1994 Decided: January 31, 1994

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

R.A.'s children, S.H. and D.A., had been attending Ewing Township schools for several years when Ewing Township public school officials alleged that they were not domiciled in Ewing Township and its superintendent removed them from its school. See N.J.S.A. 18A:38-1.

R.A. denied the school system's allegations, alleged that her children were domiciled in Ewing Township and requested an order allowing her children to re-enter and continue in their classes.

Consistent with the statute then in effect, the New Jersey Department of Education transmitted the case to the Office of Administrative Law ("OAL"), where, after a hearing, an order was entered requiring the Ewing Township Board of Education to allow the children to continue in the Ewing schools until a plenary hearing could be held and a final administrative decision was entered in the case. However, prior to the plenary hearing, the relevant statute was amended to provide, first, for a hearing before the school district board of education on the issues of domicile and removal and, second, that after such hearing, a parent or guardian may contest the board's decision before the Commissioner of the New Jersey Department of Education (who may transmit the case to the OAL for a hearing). See N.J.S.A. 18A:38-1(b)(2), N.J.S.A. 18A:6-9 and N.J.S.A. 52:14B-1 to -15.

Given the above, i.e., pursuant to the "time of decision" rule, this case must be considered moot and withdrawn.

PROCEDURAL HISTORY

By letter dated November 16, 1993, the school system notified R.A. of its allegations and intention to remove her children from its schools as of November 23, 1993. By letter dated December 3, 1993, the school system notified R.A. that her "appeal for continued enrollment [was] denied" and that "[her] children [would] be disenrolled as of Friday, December 10, 1993." On December 13, 1993, the school system removed S.H. and D.A. from their previously attended classes. On December 15, 1993, R.A. filed a "petition" (treated here as a motion for emergent relief) with the Commissioner of Education, denying the Board's allegations, etc., and demanding that her children continue in their Ewing classes. On December 15, 1993, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL"), where it was filed as a contested case. See N.J.S.A. 18A:6-9, N.J.S.A. 52:14B-1 to -15 and N.J.A.C. 1:1-3.1.

On December 17, 1993, the motion for emergent relief was heard in the OAL in Trenton (Hamilton Township) and I entered an order requiring the Board to re-enroll and continue D.A. and S.H. in their fifth-grade and kindergarten classes, respectively, pending a final administrative adjudication of this case. (The Board made the allegations in issue, i.e., that the children have changed their domicile from Ewing to Trenton, and brought the claim for relief in issue, i.e., that the children should be removed from the Ewing schools. Therefore, the Board has been and is named as "petitioner" in my order's caption. See N.J.A.C. 1:1-2.1 "Petitioner." The Board

[superintendent] unilaterally removed the children from the Ewing school before they were afforded due process, i.e., a hearing before an independent fact-finder. This wrongful action, however, did not transform the children into "petitioners," although they were inadvertently named as such when the case was transmitted to the OAL.) On December 27, 1993, Win L. Tillery, Assistant Commissioner of Education, issued a "decision on motion" affirming the December 17, 1993 order.

The case was scheduled for a hearing on January 20, 1994, in the OAL, however, consistent with N.J.S.A. 18A:38-1(b)(2), the Board submitted that the hearing in the OAL should not be held.

LEGAL CONCLUSIONS

There is no dispute that, at the time this contested case was filed, pursuant to N.J.S.A. 18A:38-1, as it then existed, and N.J.S.A. 18A:6-9, a dispute relative to the domicile of school children was to be determined by the Commissioner of the Department of Education.

There is also no dispute that effective January 10, 1994, N.J.S.A. 18A:38-1(b)(2), states the following:

> If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by them gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district [1]or the child is not kept in the home of another person domiciled within the school district and supported by them gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection,[1] the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner [1]within 21 days of the date of the decision[1] and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. [1]The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days.[2] No child shall be removed from school during the [2]21-day period in which the parent may

> contest the board's decision or during[2] the pendency of the proceedings before the commissioner. . . .
>
> [P.L. 1993, c. 380; Emphasis added.]

Pursuant to the "time of decision" rule, when, after the filing of a contested case, a statute has been amended, the statute should be applied to the case, as it exists at the time of the decision. See Ziffrin, Inc., v. United States, 318 U.S. 73, 78, 63 S.Ct. 465, 87 L. Ed. 621 (1943).

Given the above, I **CONCLUDE** that this case is moot and the hearing on this case should not be held.

In the event, pursuant to N.J.S.A. 18A:38-1(b)(2), the superintendent applies to the Board for removal of the children, they will be entitled to a hearing there and, if R.A. wishes, she may appeal the Board's decision to the Commissioner.

ORDERS

I **ORDER** this case withdrawn as moot and transmitted back to the Commissioner of the Department of Education.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/31/94
Date

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

2/2/94
Date

Hope F. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 07 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jz

OAL DKT. NO. EDU 11873-93

R.A., on behalf of her minor children, S.H. AND D.A.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,		
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
	:	
RESPONDENT.		
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that the need for a hearing on the present appeal has been obviated by enactment of P.L. 1993, c. 380, which prescribes a specific procedure for hearing before the Board of Education prior to a residency dispute being brought to the Commissioner of Education for adjudication pursuant to N.J.A.C. 6:24-1.1 et seq.

Accordingly, the Commissioner deems this matter withdrawn without prejudice to petitioner's right to appeal any determination against her by the Board of Education following the hearing required pursuant to P.L. 1993, c. 380.*

IT IS SO ORDERED.

MARCH 9, 1994

DATE OF MAILING - MARCH 9, 1994

COMMISSIONER OF EDUCATION

*The Commissioner does not agree that the Board should be named as petitioner in this matter, as the instant appeal was filed by R.A. in order to obtain relief from the actions of a Board agent consistent with the requirements of N.J.A.C. 6:24-1.1 et seq.

58-94

58-94

EDWIN W. HARRIS, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GLOUCESTER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 17, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 793-93
AGENCY DKT. NO. 507-11/92

EDWIN W. HARRIS,
Petitioner,
v.
BOARD OF EDUCATION OF GLOUCESTER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, GLOUCESTER COUNTY,
Respondent.

Allen S. Zeller, Esquire for petitioner (Freeman, Zeller and Bryant, attorneys)

Alan R. Schmoll, Esquire for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: February 2, 1994 Decided: February 7, 1994

BEFORE **JOSEPH E. KANE, ALJ:**

This matter was transmitted to the Office of Administrative Law on January 29, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

February 7, 1994
Date

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

2-9-94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 18 1994
Date

OFFICE OF ADMINISTRATIVE LAW

psa

FILED

FEB 2 12 11 PM '94

STATE ADMIN.

SETTLEMENT AGREEMENT
AND RELEASE

This AGREEMENT is by and between Gloucester County Vocational-Technical School District (District) and Edwin W. Harris (Harris) as follows:

1. The parties hereto have been engaged in litigation instituted by Harris whereby he has claimed that the District wrongfully violated his tenure of employment rights and which the District has denied.

2. The parties have engaged in settlement discussions and they have concluded that the dispute should be resolved in order to avoid the continuing costs of litigation and the uncertainty of outcome.

3. The District expressly denies that it violated any employment rights of Harris and his right to damages of any kind including his right to back pay and other emoluments.

4. The parties agree that to terminate the litigation and its associated costs and uncertainties, the District shall pay to Harris the sum of twelve thousand ($12,000.00) dollars in full and final settlement of all claims of whatsoever kind which Harris may have, it being understood by the parties that such payment shall not constitute back pay or lost wages and/or benefits.

5. Harris hereby expressly releases the District, its servants, agents and employees from all claims, whether statutory, regulatory, common law or otherwise, arising out of his employment by the District.

6. Harris has been represented by both counsel and his labor organization and he has, after consultation, approved this settlement freely and voluntarily.

7. The District agrees to give Harris a positive recommendation of employment consistent with his performance evaluations while employed by the District.

8. The parties agree that, except as may be required by law, or other administrative or agency requirements, to not disclose the terms of this settlement and either party may take appropriate legal steps to enforce the confidentiality hereof upon a breach thereof. In the event that a court determines that such breach occurs and enjoins further breaches, the moving party shall be entitled to recover attorney fees and associated legal costs related thereto.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on this 29th day of September, 1993.

Attest: (Seal)

Board Secretary

Witness

Alan R. Schmoll

Gloucester County Vocational-Technical School District

By: (L.S.)
President

Edwin W. Harris, Jr. (L.S.)

Allen S. Zeller

S093093

OAL DKT. NO. EDU 793-93

EDWIN W. HARRIS, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GLOUCESTER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

It is noted that the Board paid petitioner money pursuant to this settlement on December 22, 1993. Parties are hereby reminded that effectuating settlement terms prior to their approval by the Commissioner is improper and done at the peril of the parties.

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

COMMISSIONER OF EDUCATION

MARCH 17, 1994

DATE OF MAILING - MARCH 17, 1994

59-94

59-94

ROBERT A. DOMBLOSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELVIDERE, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured Business Education teacher who taught computer classes, alleged Board improperly riffed him and reduced his position to part-time for the 1993-94 school year while retaining nontenured mathematics teacher to teach computer courses.

ALJ found mathematics computer courses were not similar to those taught by petitioner and petitioner did not have any tenure and seniority rights to such math position. ALJ granted summary decision to the Board. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

MARCH 17, 1994

March 17, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7260-93
AGENCY DKT. NO. 276-7/93

ROBERT A. DOMBLOSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF BELVIDERE, WARREN COUNTY,
Respondent.

Gail S. Oxfeld, Esq., attorney for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Allan P. Dzwilewski, Esq., attorney for respondent (Green & Dzwilewski, attorneys)

Record Closed: January 24, 1994 Decided: February 1, 1994

BEFORE **MARIE P. SIMONELLI,** ALJ:

STATEMENT OF THE CASE

Petitioner appeals from the decision of respondent Board of Education of the Town of Belvidere, Warren County (the Board) reducing him to part-time status, allegedly in violation of petitioner's tenure and seniority rights, by riffing petitioner while a non-tenured teacher taught computer courses.

PROCEDURAL HISTORY

On April 28, 1993, the Board reduced petitioner to a part-time Business Education teacher, effective for the 1993-94 school year.

On July 22, 1993, petitioner filed a Petition of Appeal. On August 3, 1993, the Commissioner of Education transmitted this matter to the Office of Administrative Law for a hearing.

On January 3, 1994, the Board filed a Motion for Summary Decision. Petitioner filed his opposing papers on January 24, 1994.

FINDINGS OF FACT

Having reviewed the Certifications submitted by the parties, I **FIND** the following **FACTS:**

Petitioner was hired in September 1969 as a full-time business education teacher at Belvidere High School. Petitioner obtained tenure and seniority in that position.

Petitioner possesses Certificates as a Secondary School Teacher of General Business Studies, a Secondary School Teacher of Bookkeeping and Accounting and a Secondary School Teacher of Typing. Petitioner does not possess any certificate or endorsement in mathematics.

Beginning in the 1984-85 school year, the Mathematics Department offered two computer courses, Computer Math and Programming in Pascal. Each computer course had Algebra I as a prerequisite and each was taught by a certified mathematics teacher. Richard Jorgensen (Mr. Jorgensen), a non-tenured, certified mathematics teacher, presently teaches these computer courses.

Since the 1985-86 school year, petitioner taught two computer courses offered by the Business Education Department, Computers in Business and Personal Computers The Computers in Business course had a prerequisite of one year of

typing and one year of either accounting or shorthand and the Personal Computers course had a prerequisite of one-half year of typing.

The common elements among all of these computer courses are that they utilize BASIC programming, they teach print formatting, they were taught five times a week and the students received 2.5 credits. Other than these elements, there is a striking difference between the content of the computer courses taught to the mathematics students and the content of the computer courses taught to the business education students.

For example, the Curriculum Guide for the Computer Math course refers to mathematical terminology such as "roots", "calculations", "numbers in exponential form", "mathematical operations requiring special print formats", "counting", "computing the average of a set of numbers", "polynomials", "algorithm", "adding" and "multiplying". The Curriculum Guide for the Programming in Pascal course refers to "problem analysis", "coding mathematical expressions", "addition", "subtraction", "multiplication", "division", "writing mathematical expressions in Pascal format" and "interpreting Pascal-format mathematical expressions".

On April 28, 1993, the Board approved a Resolution that reduced petitioner's position from full-time to part-time for the 1993-94 school year.

CONCLUSIONS OF LAW

To acquire tenure in a teaching position, a teacher must have an appropriate certificate for that position. *Ellicott v. Board of Education*, 251 *N.J. Super.* 342, 348 (App. Div. 1991). The scope of the tenure is limited by the certificate held by the teacher. *Ibid.*

In addition, a tenured teacher with proper certification can claim, as against a non-tenured teacher, seniority rights to a position that is within the tenured teacher's certification. *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362, 364 (1983). Seniority only accrues within the specific subject area in which the tenured teacher is certified and has actually served *N.J.A.C.* 6:3-5.1; *Lichtman*, 93 *N.J.* at 366, 368-369; *Capodilupo v. W Orange Tp Ed Bd.*, 218 *N J Super* 510, 515 (App. Div. 1987).

In the present case, it is undisputed that petitioner does not possess any certificate or endorsement in mathematics. He, therefore, has no tenure and seniority rights to Mr. Jorgensen's position.

It also is important to emphasize that the mathematic computer courses in question have been offered by the Mathematics Department as part of the mathematics curriculum and they always have been taught by a certified mathematics teacher since the 1984-85 school year, nearly 10 years. During that time, petitioner apparently never raised his alleged entitlement to teach those computer courses.

Furthermore, the mathematics computer courses are not similar to those taught by petitioner.

Based upon the foregoing, I **CONCLUDE** that there is no genuine issue as to any material fact and that the Board is entitled to summary decision as a matter of law.

ORDER

I, therefore, **ORDER** that the Board's motion for summary decision be and hereby is **GRANTED**. I further **ORDER** that petitioner's appeal be and hereby is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 1, 1994
DATE

MARIE P. SIMONELLI, ALJ

Receipt Acknowledged:

2/3/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 7 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 7260-93

ROBERT A. DOMBLOSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELVIDERE, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record in this matter, the Commissioner finds petitioner's exceptions unpersuasive. He concurs with the findings and conclusion of the Administrative Law Judge and adopts the initial decision as the final decision in the matter for the reasons stated therein.

Accordingly, summary decision is granted to the Board and the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

MARCH 17, 1994

DATE OF MAILING - MARCH 17, 1994

59-94

EDU #7260-93
C # 59-94
SB # 24-94

ROBERT A. DOMBLOSKI,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWN OF BELVIDERE, WARREN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 17, 1994

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen (Gail S. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Green & Dzwilewski (Allan P. Dzwilewski, Esq., of Counsel)

The decision of the Commissioner of Education dismissing the petition is affirmed substantially for the reasons expressed by the Administrative Law Judge ("ALJ") as adopted by the Commissioner. We add that there has been no showing that the controverted computer courses offered by the mathematics department were of such nature as to require certification other than in mathematics. We also note that the record indicates that petitioner had been employed on a full-time basis until the 1993-94 school year, when he was reduced to part-time status as the result of a reduction in force. Consequently, we attach no particular relevance to the ALJ's statement that petitioner had not previously claimed an entitlement to teach the courses at issue herein.

August 3, 1994

Date of mailing AUG 04 1994

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LINDA M. PARENTE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning lunch aide alleged Board improperly discontinued her employment in violation of her First Amendment rights.

ALJ determined that but for a constitutionally impermissible reprimand, petitioner would have been reemployed as a lunch aide for the 1992-93 school year. ALJ found that the nonrenewal of a nontenured school employee's one-year contract may not be predicated upon the exercise of her constitutional right to freedom of expression. ALJ ordered the reprimand removed from petitioner's file and ordered petitioner reinstated to her position with mitigated back pay.

Commissioner adopted findings and determination in initial decision.

MARCH 17, 1994

March 17, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7808-92
AGENCY DKT. NO. 385-8/92

LINDA M. PARENTE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,
Respondent.

Linda M. Parente, petitioner, pro se

James E. Stahl, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: November 5, 1993 Decided: February 3, 1994*

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

This matter was commenced on August 10, 1992, when Linda M. Parente (hereinafter petitioner) filed a petition with the Commissioner of Education alleging that her employment as a lunch room aide had been impermissibly discontinued by the Metuchen Board of Education (hereinafter respondent) in violation of her First Amendment rights. An answer was filed on behalf of respondent on August 27, 1992 and on October 7, 1992 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F- 1 to -13.

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* An extension of time to issue the initial decision was requested and granted pursuant to N.J.S.A. 52:14B - 10c.

The matter was originally assigned to Robert S. Miller, Administrative Law Judge, who conducted various telephone conferences and otherwise handled the matter until June 14, 1993 when he granted petitioner's motion to recuse himself. On or about July 27, 1993 the matter was reassigned to the undersigned administrative law judge. An in person prehearing conference was conducted on August 25, 1993, at which time the following were identified as issues for determination at hearing:

1. Did respondent's May 8, 1992, reprimand violated petitioner's First Amendment rights?

2. Did respondent fail to re-employ petitioner for the 1992-93 school year for a reason which violated petitioner's First Amendment rights?

3. If the answer to questions number 1 and 2, or either of them, is yes, what are the appropriate remedies?

The hearing was scheduled for September 27, 1993 and took place as scheduled. Following the close of testimony the record remained opened for the receipt of written submissions. A letter memorandum on behalf of respondent supplementing the memorandum of law which had been submitted at the hearing was received on October 13, 1993. A letter memorandum on behalf of petitioner was received on October 18, 1993. A reply on behalf of respondent was received on October 28, 1993 and a reply on behalf of petitioner was received on November 5, 1993, whereupon the record closed.

FINDINGS OF FACT

Some of the facts relevant to a determination of this matter are not in dispute and I therefore find the following as uncontested facts.

Commencing in September 1989 petitioner was employed by respondent at the Mildred B. Moss School as a lunch room aide. At the conclusion of each school year thereafter, after indicating her interest in continued employment, she received a notice from the Board of Education similar to the one marked J-11 in evidence:

> At its Special Business Meeting held 7/30/91 the Metuchen Board of Education reappointed you for the 91-92 school year at an hourly rate of $5.45.

Petitioner's duties in this position included supervising elementary school children coming to and going from lunch as well as supervising in the cafeteria and on the playground. It was petitioner's job to maintain safety throughout the lunch hour and to help the children be peaceful. Throughout her employment with respondent she did an excellent job; she was well liked by children, parents and staff.

On May 6, 1992, Douglas Stokes, an individual aide assigned to assist "H," a special education student who had been classified by respondent as emotionally disturbed, reported to Fred Cohen, Principal of the Mildred B. Moss School, that petitioner had made certain comments to students in the classroom with H. at the end of the lunch period. Mr. Cohen then summoned petitioner to his office. What actually transpired, what petitioner said to the students and the substance of the conversation between petitioner and Mr. Cohen will be discussed hereinafter in the section related to disputed facts.

On May 7, 1992 Mr. Cohen handed petitioner an envelope containing the following memorandum, erroneously dated May 8, 1992:

> After our brief discussion on Wednesday, May 7, (sic) I feel it is important to write this letter to reinforce the concern I expressed to you.
>
> Information was brought to my attention that you have been instructing children if they have a problem during lunchtime with a particular student, they should go home and tell their parents. It was further mentioned that you also remarked that perhaps the parents should write letters of complaint. When I spoke to you about this incident, you said that you have always done this since the beginning of the school years. I want to underline the fact that in our meeting of May 7 (sic) I expressed to you that I find this type of behavior to be very disturbing. Parental involvement in school matters is the sole responsibility of the teachers or the principal. You should bring any school problem that arises to my attention or to the attention of the classroom teacher.
>
> In conclusion, I want to make it very clear to you that I am extremely concerned about the above incident and your response to it. It is not in our best interest to have anyone overriding the authority of the teachers or the administration. I would hope this is an isolated incident and there will be no other complaints in the future. (J-1 in evidence)

Petitioner continued to perform her lunch aide duties until the end of the school year. On the last day of school Mr. Cohen told all of the aides that anyone who wished to return to the job the following school year should write him a note. At

the conclusion of the 1991-92 school year petitioner received the following letter, dated June 29, 1992, in the mail from Gennaro Lepre, superintendent for respondent:

> Before I recommend the 1992-93 school aide appointment list to the Board of Education, I believe that the matter of your reprimand should be fully settled; I have the feeling it is not.
>
> Although we should meet to discuss it, and we can do so at your convenience, I would first ask you to send me your written account of the incident and what you believe led up to it. Your statement may be as broad as you feel it should be, because I would also be interested in knowing your perception of what preceded it and what came afterward. If you have any questions, please feel free to call me.
>
> Your cooperation and candor will be appreciated, and I look forward to your response. (J-2 in evidence)

Before she could respond, petitioner received another letter, this one dated July 8, 1992 from Mr. Lepre providing:

> I do not wish to rush you, but as I stated in my first letter to you, I cannot submit my employment recommendation until this matter has been settled. If I do not hear from you by Wednesday, 7/15/92, which is when I will be preparing the agenda for what shall most likely be the last meeting of the summer, I will assume you do not wish to be considered further. A copy of my first letter to you is attached. (J-3 in evidence)

On July 13, 1992 petitioner wrote a letter setting forth the circumstances and information requested by Mr. Lepre. She addressed the letter to Mr. Cohen, however, with a copy to Mr. Lepre. In conclusion she stated:

> In addition, I want to let you know that I plan on aiding in the school year starting this September. However, I do not wish to aide at Moss School and would prefer to be at Campbell. (J-4 in evidence)

Mr. Lepre replied by return mail, dated July 14, 1992:

> Thank you for sending me a copy of your July 13, 1992 letter to Mr. Cohen, which you say is a response to his letter dated May 8, 1992. Technically, your letter does provide the information I asked for, although I do have many questions about it. Please call my office with some dates and times that would be convenient for you, and I will schedule a meeting for you, Mr. Cohen, and me to discuss the matter.

> In the meantime, however, I note that you do not wish to aide at Moss School, and I accept that, but would like to aide at Campbell School. I would suggest that you make your desire known to the Campbell School principal, who has the responsibility for the hiring of aides for his building. He may or may not have a position opening for which he would like to consider you, but, at this point, that is strictly between you and him.
>
> If you have any questions, please call me; if not, please call in your preferred meeting dates. (J-5 in evidence)

Petitioner declined to meet with Mr. Lepre, stating in a letter dated July 20, 1992 to him, " My summer schedule prohibits me from meeting with you." In the same letter she indicated that she had hoped that the matter would have been resolved by a simple apology from Mr. Cohen and that the letter dated May 8, 1992 would have been removed from her file. There were several other pieces of correspondence back and forth between petitioner and Mr. Lepre. One letter from Mr. Lepre to petitioner, dated July 31, 1992 provided in pertinent part:

> As I had explained, I felt that there might be misunderstandings complicating or exacerbating the problem which could be clarified if you, Mr. Cohen, and I met to discuss it face to face; it certainly could not have hurt. I truly do not wish to appear to doubt you, but it is very hard to believe that you have so full a summer schedule that you could not have spared an hour or two for such a meeting. Not meeting forces me to choose between what you have said and what Mr. Cohen has said, and I will have to side with him; I don't think it would serve any purpose to continue our correspondence.
>
> I will ask Mr. Cohen to reconsider removing the reprimand in the not too distant future, and I will also ask him now to not mention the reprimand if he is called as a reference for you; I am sorry this happened, and I wish you good luck. (J-9 in evidence)

Petitioner's reply dated August 7, 1992 advised Mr. Lepre that she intended to file the within action and provided in pertinent part:

> If I believed that an in person meeting with you and Mr. Cohen would bring a fair resolution to this situation, and if equitable conference conditions were observed, I would certainly attend. I would, however, want the "many questions" you referred to in your July 14, 1992 letter (copy attached) in written form prior to any meeting.
>
> I truly do not wish to appear to doubt you but it is very hard to believe that you would be unable to say in written form the thoughts you would express verbally. Not writing down your honest thoughts and questions forces me to turn elsewhere for

> justice in this very serious matter. I believe you should have acted immediately upon seeing Mr. Cohen's unjust and unfair letter dated May 8, 1992, (copy attached). Even if you had never heard from me you should have questioned Mr. Cohen, for in that letter it is clear he wants to discourage children from telling their parents what happens to them at school. His statement, "Parental involvement in school matters is the sole responsibility of the teachers or the principal" should have been sufficient reason for you to become involved and speak to him. As I explain in detail in my July 13, 1992 letter (copy attached) I simply told the children, if they had any problems their parents could and would help them. I told them their parents loved them best. My letter explained the events of Wednesday, May 6, 1992 very clearly. I believe it would not be hard for you or Mr. Cohen to ask any questions or to express any view in written form. It certainly is the most definitive way to communicate.
>
> . . . (J-10 in evidence)

Within a few days thereafter, petitioner did file the within action. The only other correspondence from Mr. Lepre to petitioner was a one sentence letter, dated September 9, 1992 stating:

> At its regular business meeting of September 8, 1992, the Metuchen Board of Education accepted your resignation from the position of Moss School Lunch Aide. (J-12 in evidence)

This concludes the recitation of uncontested facts.

The facts which are in dispute relate to the circumstances which gave rise to the issuance of the reprimand, J-1 in evidence. Petitioner testified that on May 6, after lunch when the children were lining up to go out to the playground, H. shoved and pushed a number of children who were standing peacefully in line, not an unusual behavior for H. H. then told the children that it would not help if they told their parents because "parents can't help you with what happens at school." Petitioner testified that she said to the children, "Oh yes they can; they can phone; they can write; they can come in for a conference." She told them that they should tell their parents what goes on at school and trust that their parents who loved them best would take care of the situation. She also said that she told them that there was nothing a parent could not know about. After they had all gone out to the playground several of the children came up to her to complain again about H's behavior. She testified that the children told her that their teacher did not listen to them when they told her what H. did and that she had responded that perhaps the teacher had been very busy and that they could always try again later during a quiet time or talk to the principal. This whole conversation did not take very long, she

testified. She further testified that as she was returning H's class to their classroom after lunch, she heard some children behind her saying that they were "going to get this guy because nothing could be done" and that once they were inside the classroom she had said to the students that if anyone did anything to hurt them or make them uncomfortable, they should tell their parents and their parents could write a letter about it and that they should then not worry about it. Douglas Stokes was in the classroom at the time; the regular classroom teacher was not there, not having returned from lunch yet.

After petitioner left the classroom she was checking on children in a couple of other classrooms who were waiting for their teachers to return from lunch, when Mr. Cohen had motioned to her to come to his office. According to petitioner, Mr. Cohen pushed ahead of her into his office then immediately turned around and blocked her from proceeding any further into the office. Mr. Cohen asked petitioner whether she had told the children to tell their parents about problems and that they could write about them and when she said yes, she had always done it, Mr. Cohen promptly became very angry and began yelling and screaming at her. She testified that every time she tried to get a word in to explain, Mr. Cohen yelled "I don't want to hear any buts" and that he also said "I will decided what, if anything the parents know about what happens to their children at school" in such a loud voice that petitioner's ears hurt. Petitioner testified that Mr. Cohen was so out of control that she simply said, "All right, whatever you want. You're the principal" and left. Petitioner testified that she was very upset that Mr. Cohen had yelled at her and that she was also upset about the content of what he had said to her since she believed that children should be encouraged to tell their parents about anything that was upsetting them or anything that went on at school. She testified that she had assumed that Mr. Cohen was under a great deal of pressure to have behaved in such a manner since he had never before raised his voice or behaved unprofessionally. She fully expected that he would apologize the next day, she testified. However, the apology did not come. Instead she received J-1 in evidence which she indicated she did not understand. She further testified that after she had received Mr. Lepre's June 29, 1992 letter, J-2 in evidence, she had indicated her desire to return to her lunchroom duties in her July 13, 1992 letter to Mr. Cohen with a copy to Mr. Lepre. The last paragraph of the letter was intended to indicate that she preferred to work at Campbell School but that she would have worked at Moss if that were the only option. She testified that when she had originally applied for the job of aide, she had filled out an application at the Board office and that on another occasion when she had asked the principal of Campbell School about the possibility of working

there he had said to check at the Board office. Accordingly, when Mr. Lepre suggested in one of his letters that she contact the principal of Campbell to ascertain whether there was an open position, she had concluded that Mr. Lepre was simply giving her the run around. She acknowledged that the real reason she did not wish to meet with Mr. Lepre was not her busy summer schedule as she wrote but rather her concern that any meeting with Mr. Lepre and Mr. Cohen would not be "peaceful," a word she used frequently in her testimony. She indicated that she had heard Mr. Lepre yell at others during conversations. In fact, Mr. Lepre had yelled so loudly in a telephone conversation with petitioner's sister, petitioner was able to hear his voice in the next room of her sister's house, she testified. She did not wish to be subjected to any further yelling, but she would have gone to a meeting if Mr. Lepre had complied with her request for a list of the questions she would be asked. She also speculated that a reason for the treatment she had received from Mr. Lepre might be his annoyance at a lawsuit filed against the district by her sister.

Finally, in response to a question from the undersigned concerning whether there was any reason for Douglas Stokes to misrepresent what she had said to the students, she testified that she had on one occasion spoken to Mr. Stokes on the playground when he was supposed to be supervising H. and wasn't; she had pointed out that H. was involved in a dangerous activity where he might get a splinter in his eye and she had pointed out to Mr. Stokes that he needed to supervise H.

Mr. Cohen testified that Mr. Stokes had come to him with the concern that petitioner was with a number of students and had told them that if they were to tell their parents to write a letter about H., H. would probably be removed from the regular classroom and they would not have a problem. Mr. Cohen denied that he had kept petitioner standing in the doorway but rather he asserted that the conversation had taken place in his office but close to the doorway so that he could keep an eye on the students who were still in the hallway after lunch. He testified that he did not yell or raise his voice but merely told petitioner that he did not feel it was her responsibility to advise students to tell their parents anything. He further testified that he had offered petitioner an opportunity to discuss the matter and that she had not responded other than to say something to the effect "I thought I could." He denied that he had yelled and screamed at all and further denied that he had not allowed her to speak. He also denied seeing petitioner hold her hand to her ear or hearing her say, "Whatever you want, you're the principal." Finally, he testified that having had a discussion with petitioner he did not think it was necessary to talk with her again about it and that even after he read her July 13,

1992 letter, he still thought her behavior was cause for a reprimand since "I think that should come from the teacher", he said.

Mr. Lepre testified that Mr. Cohen had advised him about the incident within a day or so of May 6. He stated that he had been concerned because he had been advised that the comment was about "H", that it was not a general "talk-to-your-parents-if-something-is-bothering-you" comment. He testified that he had been aware of problems with H., that he was not surprised that there were problems because of H's E.D. classification and background. He testified that he had involved himself by sending the June 29, 1992 letter to petitioner because it was his understanding that after the incident petitioner and Mr. Cohen were not talking to each other and he did not feel he could recommend to the Board that they hire an aide who was not talking to her building principal. He testified that he knew petitioner had been a very fine aide and that he had simply wanted to clear up the situation by talking with both petitioner and Mr. Cohen before he made a recommendation to the Board. He acknowledged that he had some concerns about the reprimand, J-1 in evidence, and that he had not entirely agreed with Mr. Cohen. "We need to sit down and talk about who can say what, when. We're not constitutional scholars," he stated. Concerning the procedure for obtaining a position at Campbell School, he initially testified that he would not necessarily know about a vacancy at Campbell which is why he had told petitioner to contact the building principal, but later he stated that petitioner had not been recommended for reemployment by him for two reasons: one, she did not want to work at Moss as she had stated in her July 13, letter, and two, that there was no position at Campbell. He categorically denied that petitioner's nonrenewal had anything to do with her sister's lawsuit against the district.

Petitioner further testified on rebuttal that she had said nothing about H., that she was not against mainstreaming of classified students and that she had no desire to see H. removed from the school.

With respect to the disputed facts, I find them to be as reported by petitioner in her testimony. Petitioner was an extremely candid, sincere and credible witness. Her testimony was entirely consistent with the many written exhibits which were prepared closer in time to the event. I specifically find that she did not say that parents should write letters to the Board in any effort to get H. out of class or anything similar; petitioner was simply discussing with the children concerns which they had brought to her about parental inability to address problems at school. It is

clear from her testimony that the conversations related to parental involvement had arisen initially because of H's behavior and his statements to the students that their parents could not do anything about it. The advice which petitioner gave the students, however, was couched in general terms that if anyone did anything to hurt them or make them feel uncomfortable they should tell their parents, in addition to telling their teachers and the principal if they wished. Mr. Cohen's testimony, on other other hand, simply was not credible. His answers to the questions posed both by the Board attorney and by petitioner were not forthcoming and explanatory but rather were limited and even somewhat evasive. Exactly what Douglas Stokes reported to him on May 6, 1992 is not clear since Mr. Stokes was not produced by respondent although he is still employed by them. It is possible that Mr. Stokes was annoyed with petitioner because she had reminded him that he should be doing his job and that he misrepresented what she said. If in fact he had reported that petitioner made statements about getting rid of H. or getting him out of class, however, common sense dictates that those statements would have appeared in the reprimand J-1 which they clearly do not. Furthermore, I am persuaded that, as petitioner testified, Mr. Cohen did not allow her to explain as they were standing in the door to his office on May 6, and that he verbally abused her by yelling so loudly that it hurt her ears.

Although Mr. Lepre was basically a credible witness, it was apparent from his testimonial demeanor that petitioner's concerns that a meeting with him would not be peaceful were justified; on several occasions be became loud and agitated. With respect to his testimony I **FIND** that he was aware of the employment situation at Campbell School at the time he referred petitioner to the building principal and that this was just an avoidance technique. I further **FIND** that the lawsuit filed by petitioner's sister was not a factor in any of his actions. There was no proof from petitioner on this issue, only speculation, and Mr. Lepre's denial was credible.

APPLICABLE LAW AND DISCUSSION

Although respondent has repeatedly referred to petitioner as a non-contractual, at-will employee, the facts establish that she did have an annual, hourly contract, subject to renewal each year without tenure. Generally, a nontenured school employee does not have the right to have an employment contract renewed. See Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131, 143 (App. Div. 1973), aff'd., 64 N.J. 582 (1974). However, while a board has broad discretion with respect to the appointment, transfer, dismissal or nonrenewal of these employees, its

actions are limited by First and Fourteenth Amendment protections. Specifically, the nonrenewal of a nontenured school employees' one-year contract may not be predicated upon the exercise of her constitutional right to freedom of expression. See Id. at 144.

While Winston, supra, involved a nontenured teacher's employment rights, it follows that other nontenured employees should be afforded the same rights and protections. The Supreme Court, addressing whether a teacher's lack of tenure rights to reemployment defeated the claim that his nonrenewal violated the First Amendment, stated:

> even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly.
>
> [Perry v. Sindermann, 408 U.S. 593, ____, 92 S.Ct. 2694, ____, 33 L.Ed. 2d 570, 577 (1972) (citations omitted.)]

Of course, this does not mean that a school board may never limit the free expression of its employees. However, "the free speech rights of public employees may be limited only where absolutely required by the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968). A balancing test may be used for determining the appropriateness of a given limitation on an employee's speech. This test requires that the public importance of the employee's statement must be weighed against the public employer's interest in effective an efficient fulfillment of its responsibilities to the public. Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed 2d 708 (1983).

The "speech" involved in the instant case involved statements made to school children suggesting that, in addition to talking to their teachers and lunchroom personnel, they inform their parents about problems in school. Generally, when we think of constitutionally protected speech we think of "political speech" or public discourse. In fact, in order to qualify as protected speech, the expression must touch

upon a matter of public concern. Pickering, supra and Connick, supra. However, answers to questions posed by students qualifies as protected speech under the First Amendment. In 1973, the River Dell Board of Education was prevented from implementing a policy which would have prohibited teachers from discussing with students ongoing labor negotiations between the board and the teachers' union. River Dell Ed. Assoc. v. River Dell Bd. of Ed., 122 N.J. Super. 350, 358 (Law Div. 1973). Central to the decision was the fact that, as in the instant case, the "speech" was in response to concerns and questions initiated by the students. Id. at 357. The court found that the board had failed to show that "the conduct sought to be curtailed would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Id. at 357, quoting Tinker v. Des Moines Independent Comm. School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731. Furthermore, the court found that any disturbance or controversy raised by the discussions were no reason to bar freedom of speech. Id. at 357.

In the present matter, although respondent has alleged in its written memorandum that petitioner violated an official policy of the district when she advised the school children to talk to their parents, no evidence at all was offered concerning the existence of any such policy, and some such official policies regulating public employees' free speech rights have been held to be constitutionally impermissible, in any event. See Hall v. Pennsauken Tp. Mayor, etc., 176 N.J. Super. 229 (App. Div. 1980) and Ramirez v. County of Hudson, 167 N.J. Super. 435 (Ch. Div. 1979). Petitioner's comments were not critical comments aimed at any of her supervisors, such as to disrupt the functioning of the school system nor is there any indication that petitioner's comments, as opposed to respondent's reaction, interfered with the operation of the school. Cf. Czurlanis v. Albanese, 721 F.2d 98, 107 (3rd Cir. 1983) ("First Amendment protected county employee's allegations of inefficiency, waste and possible fraud in the Division of Motor Vehicles and any disruption of the Division was primarily the result, not of the plaintiff's exercise of speech, but of his supervisor's attempts to suppress it.") It is clear, from the foregoing that petitioner's comments cannot constitutionally form the basis of any disciplinary action against her, including a reprimand. "The constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech." Bennis v. Gable, 823 F.2d 723, 731 (3rd Cir. 1987). Accordingly, I **CONCLUDE** that the reprimand must be removed from petitioner's file.

With respect to whether the board failed to renew petitioner's employment for the 1992-93 school year because of her reprimand, I **CONCLUDE** that petitioner has established by a preponderance of the competent and credible evidence that the reprimand was the proximate cause for her nonrenewal. Mr. Lepre's letter of June 29, 1992, J-2 in evidence, states, "Before I recommend the 1992-93 school aide appointment list to the Board of Education, I believe that the matter of your reprimand should be fully settled." Although Mr. Lepre's efforts to resolve the situation between petitioner and Mr. Cohen were appropriate, his conclusion to support Mr. Cohen when petitioner declined to come to a meeting, was not. It is clear from the face of the reprimand that it was constitutionally impermissible and Mr. Lepre even admitted at the hearing that he did not entirely agree with Mr. Cohen. It is just as clear that the issuance of the reprimand was the reason for petitioner's nonrenewal. Respondent's position that petitioner resigned is disingenuous. Petitioner clearly advised respondent in her letter of July 13, 1992, J-4 in evidence, that she planned on aiding in the school year 1992-93. Her statement that she did not wish to aide at Moss School and would prefer to be at Campbell was simply that, an expression of a preference. She successfully completed the school year after the May 6, 1992 reprimand and could have worked with Mr. Cohen if she had to; she simply preferred not to because she was hurt and angry by the unjust reprimand. I **CONCLUDE** that but for the constitutionally impermissible reprimand, petitioner would have been reemployed as a school lunch aide for the 1992-93 school year, and accordingly, she is entitled to reinstatement with back pay. The issue of mitigation of damages was not specifically addressed at the hearing in this matter; there was some discussion about the fact that petitioner had attended school herself during the 1992-93 school year, but whether that was a decision which was made because she was not reemployed or whether it would have been made anyway, is not clear. If the parties cannot agree concerning the appropriate amount of compensation for back pay, this matter can be retransmitted by the Commissioner for a determination on that issue.

Finally, it appears that an apology from Mr. Cohen for the manner in which he reprimanded petitioner on May 6, 1992 would have gone a long way toward defusing this situation, even though the parties would have continued to disagree about the substance of the reprimand. Whether Mr. Cohen and petitioner can reestablish an appropriate working relationship following the conclusion of this case is a matter which will have to be determined by the parties. It appears that there are other schools to which petitioner could be assigned as a lunch aide and upon her reemployment, such reassignment would probably be appropriate.

For all the foregoing reasons, it is hereby **ORDERED** that respondent remove from petitioner's personnel file the reprimand, dated (erroneously) May 8, 1992. It is further **ORDERED** that respondent reinstate petitioner in her position with the district as school lunch aide with back pay retroactive to September 1992.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 3, 1994
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

2/3/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 09 1994

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

DOCUMENTS IN EVIDENCE

J-1 Letter from Fred Cohen, principal, to petitioner, dated May 8, 1992
J-2 Letter from Gennaro Lepre, superintendent, to petitioner, dated June 29, 1992
J-3 Letter from Gennaro Lepre, superintendent, to petitioner, dated July 8, 1992
J-4 Letter from petitioner to Fred Cohen, dated July 13, 1992 (2 pages)
J-5 Letter from Gennaro Lepre, superintendent, to petitioner, dated July 14, 1992
J-6 Letter from petitioner to Gennaro Lepre, dated July 20, 1992
J-7 Letter from petitioner to Gennaro Lepre, dated July 25, 1992
J-8 Letter from Gennaro Lepre to petitioner, dated July 22, 1992
J-9 Letter from Gennaro Lepre to petitioner, dated July 31, 1992
J-10 Letter from petitioner to Gennaro Lepre, dated August 7, 1992 (3 pages)
J-11 Memorandum to petitioner from Metuchen Board of Education, dated 8/27/91
J-12 Letter from Gennaro Lepre, superintendent, to petitioner, dated September 9, 1992

WITNESSES

For petitioner:

Linda M. Parente

For respondent:

Fred Cohen
Gennaro Lepre

OAL DKT. NO. EDU 7808-92

LINDA M. PARENTE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by the respondent Board of Education were untimely filed, being due on February 22, 1994 (13 days from the February 9, 1994 date of mailing pursuant to N.J.A.C. 1:1-18.4) but not received until February 23, 1994, and are accordingly not considered below.

Upon review of the record, the Commissioner concurs that the reprimand of petitioner for her May 6, 1992 exercise of permissible free speech was improperly issued and must be removed from her file. The Commissioner further concurs that but for that exercise, petitioner would have been rehired as a school lunch aide, so that her termination was based on constitutionally prohibited grounds and must be declared null and void.

Accordingly, the initial decision of the Office of Administrative Law ordering removal of the May 8, 1992 letter of reprimand from petitioner's file and directing petitioner's re-

employment with back pay, less mitigation as appropriate, is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 17, 1994

DATE OF MAILING - MARCH 17, 1994

60-94

EDU #7808-92
C # 60-94
SB # 21-94

LINDA M. PARENTE,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 17, 1994

For the Petitioner-Respondent, Linda M. Parente, pro se

For the Respondent-Appellant, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl (James S. Stahl, Esq., of Counsel)

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

July 6, 1994

Date of mailing JUL 08 1994

61-94

61-94

J.C., Jr.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning high school student appealed final ineligibility determination, based on the "eight-semester rule," of the New Jersey State Interscholastic Athletic Association (NJSIAA) so as to permit his participation in the 1993 football season. Emergent relief was denied and petitioner submitted an amended petition clarifying that relief sought extended to baseball and basketball seasons as well as football.

Commissioner concurred with NJSIAA that petitioner had been accorded full due process and that he was not entitled to a waiver of the eight-semester rule. Article V, Section 4F of the bylaws clearly provides that all handicapped/classified students are to be accorded eight semesters of eligibility, not eight semesters of actual play or eight semesters from the time of their classification. Moreover, with respect to petitioner's claim that his secondary schooling was extended through his repetition of ninth grade for reasons beyond his control due to district's failure to classify him upon his father's request or sooner, the Commissioner found that NJSIAA's determination was not arbitrary, capricious or unreasonable under the circumstances, so that he will not substitute his judgment for that of the Association. Petition was dismissed.

MARCH 17, 1994

J.C., Jr.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioner, Michael E. McGann, Esq. (Waldman, Moriarty and McGann)

For Respondent, Michael J. Herbert, Esq. (Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin)

This matter initially came before the Commissioner of Education by way of a petition for emergent relief filed on November 15, 1993 and perfected on November 18, 1993, pursuant to the Commissioner's authority under N.J.S.A. 18A:11-3 to hear and decide appeals from decisions of the New Jersey State Interscholastic Athletic Association (NJSIAA). Therein, petitioner sought to appeal the September 10, 1993 final ineligibility determination, based on the so-called "eight-semester rule," of NJSIAA so as to permit his participation in the 1993 football season ending on November 25, 1993. Following NJSIAA's response on November 18, 1993 and a reply thereto filed by petitioner on November 22, 1993, the Assistant Commissioner delegated to hear this matter pursuant to N.J.S.A. 18A:4-34 issued a decision dated November 22, 1993 denying emergent relief due to petitioner's failure to meet the criteria of Crowe v. DeGioia, 90 N.J. 126 (1982).

On January 14, 1994, following correspondence with the Bureau of Controversies and Disputes, petitioner submitted an amended petition clarifying that the relief sought extended to the baseball and basketball seasons as well as to the by-then-mooted issue of participation in football. Accordingly, consistent with the briefing schedule established by the Bureau, an answer and transcript of underlying proceedings were filed by NJSIAA on January 25, 1994, and a reply to these submissions was filed by petitioner on February 2, 1994. On February 23, 1994, the remaining portions of the record of proceedings before NJSIAA were submitted, and the record of the appeal before the Commissioner was closed.

Certain operative facts of this matter are not in dispute and are as follows:

1. Petitioner was born on April 23, 1975 and commenced his high school education in September 1989 upon entering Keansburg High School.

2. In or about October 1989, during his ninth grade school year, petitioner began to suffer from a severe case of contact dermatitis.

3. In or about March of 1990, still during ninth grade, petitioner's father requested a child study team evaluation, but none was conducted. No further demands were made, nor action taken, in pursuit of this request.

4. Petitioner was required to repeat ninth grade due to receiving "no credit for the 1989-90 school year based on his attendance." (See letters of February 4, 1993 and July 1, 1993 from school principal, Petitioner's Exhibits C and H.)

5. In Fall 1992, petitioner participated in football, his first semester of participation in interscholastic athletics.

6. In January 1993, petitioner's physician stated, via letter, his opinion that petitioner was unable to fulfill his academic requirements for ninth grade due to the severity of his foot condition.

7. On February 4, 1993, the principal of Keansburg High School applied on petitioner's behalf for a waiver of NJSIAA's eight-semester rule based on petitioner's medical-related absences. With this letter, the principal included a letter from the vice-principal opining that participation in athletics had greatly improved petitioner's behavior and self-esteem.

8. On February 17, 1993, the NJSIAA Eligibility Committee declared petitioner ineligible to participate in interscholastic athletics beyond June of 1993, finding that his repetition of ninth grade was not due to insurmountable circumstances, as there was no demonstration that petitioner's inability to complete school requirements was necessarily or exclusively due to his foot condition.

9. Petitioner appealed this determination to the Eligibility Appeals Committee, which, on April 21, 1993, affirmed the Eligibility Committee's ruling.

10. On April 23, 1993, petitioner's father requested a child study team evaluation, which was promptly conducted and resulted on June 21, 1993 in classification of petitioner as Emotionally Disturbed.

11. On July 1, 1993, the principal of Keansburg High School again requested a waiver of the eight-semester rule, this time based on petitioner's June 21 classification.

12. On August 23, 1993, the NJSIAA Eligibility Committee declared petitioner ineligible to participate in interscholastic athletics, finding that his late classification could not serve as a basis for waiver of the eight-semester rule because, under the particular circumstances of this case, it could not be found that the continuation of petitioner's secondary schooling beyond four years was for reasons outside his control.

13. Petitioner appealed, and on September 10, 1993, the Eligibility Appeals Committee affirmed the prior decision. Appeal to the Commissioner of Education ensued in mid-November 1993, followed by an amended appeal in mid-January 1994 as set forth above.

14. Petitioner's father is a member of the Keansburg Board of Education, and has been since 1990.

PETITIONER'S POSITION

Petitioner argues that he is entitled to a waiver of the eight-semester rule on two grounds: 1) that his repetition of ninth grade was due to the district's not responding to his father's initial request for classification, thereby causing his failure for the year and extending his school career for reasons beyond his control; or alternatively, 2) that petitioner's eight semesters of eligibility should be reckoned from his first participation in interscholastic athletics in Fall 1992, since he is now a classified student.

In the first instance, petitioner argues that, had the district classified him at the time of his first request, he would have been ungraded and therefore would not have suffered an academic failure. In the second, he argues that NJSIAA bylaws expressly provide that, for classified students, the eight-semester eligibility limit begins with the first semester of participation in interscholastic athletics; therefore, petitioner remains eligible notwithstanding that eight semesters have passed since he entered high school. Petitioner further notes that he is neither overage, unusually large or a "star" player, so that there is no attempt here at "red shirting" or other unfair athletic advantage. Finally, he contends that participation in interscholastic sports effectively serves as "therapy" for his handicapping condition.

NJSIAA'S RESPONSE

NJSIAA contends that petitioner was accorded full due process before it, in not one, but two separate hearings, and that

after evaluating all the arguments and evidence, NJSIAA reasonably concluded that petitioner was not entitled to a waiver of the eight-semester rule. It summarizes its position as follows:

> Article V, Section 4E of the Bylaws, sets forth the academic credit rule, which requires that all student athletes must pass the equivalent of one-quarter of the minimum credits (27-1/2) for graduation as established by the Department in the previous year. (NJSIAA Handbook, p. 37) Article V, Section 4F of the Bylaws allows classified students to be exempted from this rule, but not from the eight semester, age, transfer or other eligibility rules of the Association. (NJSIAA Handbook, p. 64, 65) To maximize participation by classified students, the NJSIAA urges guidance departments to work with students to obtain an early classification, so these students are provided a full four years of opportunity to compete in interscholastic sports, even when they cannot meet the academic standards set forth in Article V, Section 4E. (See NJSIAA Handbook, p. 39.)
>
> Recognizing that attempts might be undertaken by parents and/or schools to misuse classifications so as to provide additional opportunities for student-athletes to participate in sports, the NJSIAA has cautioned its members as follows:
>
> > Where waivers of the age or eight semester rule are sought on grounds that a student is handicapped, the NJSIAA will carefully assess the circumstances under which the student was classified. TO PREVENT "RED SHIRTING," WAIVERS WILL NOT BE GRANTED WHERE CLASSIFICATION OCCURRED JUST PRIOR TO/OR DURING THE STUDENT'S SECONDARY SCHOOLING. (See NJSIAA Handbook, p. 59, emphasis in original.)
>
> In this case, there was absolutely no evidence that J.C. was prevented from participating for four years at Keansburg, other than his academic failures in his Freshman year. This student's parents first attempted to excuse those academic failures on the grounds of a foot condition three years after the event. When that did not succeed, his father, who is a member of the local Board of Education, was able to obtain a prompt classification of his son, leading to the second appeal.***
>
> J.C., Jr. has been afforded extraordinary due process by the NJSIAA, and has failed to offer any compelling reasons for the Commissioner to overturn two separate

> decisions of the [Association]. The eight-semester rule has been approved by the Commissioner, and has been adopted by Keansburg High School, as a member school. The fact that J.C. is now spending a fifth year in high school is not due to circumstances beyond his control. There is nothing in the record (other than his academic failures as a Freshman), which would have prevented J.C. from participating in sports for the full four years accorded to all high school students in this State. For example, he could have participated in sports as a Freshman in 1989-90 or as a Sophomore in 1991-92, but simply chose not to do so. Now that J.C., Jr. is in his fifth year of high school, he seeks to have the Commissioner provide him with yet another year of eligibility without any reasonable basis.***As the NJSIAA Interpretive Guidelines state:
>
> > Member schools must be aware of the fact that waivers are only intended to equalize opportunities among otherwise eligible students who cannot strictly comply with the eligibility rules because of circumstances beyond their control, and is not intended to provide such students with an actual advantage over the great majority of students.*** (NJSIAA's Letter Brief, at pp. 7-9)

As a matter of law, NJSIAA argues that it applied its rules reasonably and after full due process, so that, consistent with well-established decisional precedent, its determination in this matter is not susceptible to upset by the Commissioner even where he would judge otherwise in a de novo review. Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 S.L.D. 259; J.F. v. NJSIAA, decided October 19, 1992.

COMMISSIONER'S DETERMINATION

Upon careful consideration, the Commissioner determines to affirm the decision of NJSIAA denying petitioner a waiver of the eight-semester rule.

With respect to petitioner's contention that NJSIAA rules provide for a classified student's eight semesters of

eligibility to begin with his or her first participation in interscholastic athletics, both the NJSIAA bylaws and NJSIAA's reasonable interpretation of them preclude such a reading. Article V, Section 4F of the bylaws clearly provides that

> (1) Course Waiver - All handicapped/classified students, as defined by the New Jersey State Department of Education, shall comply with the athletic eligibility rules and regulations of the NJSIAA (with the exception of Section 4-E of this Article V re: Credits)***.
>
> CL[ARIFICATION] Classified students are ungraded; therefore, the first semester of their eight consecutive semesters of eligibility will start with the first semester of their participation in interscholastic athletics at the freshman, junior varsity or varsity level. Guidance Departments must provide the Athletic Director with ages of all Classified students so they can be assured of four (4) years of eligibility prior to becoming ineligible at age nineteen. (NJSIAA 1993-94 Handbook, p. 39, emphasis in original)

This latter directive, read in context with the preceding paragraph, is clearly intended to do no more than ensure that classified students, who may not be conventionally placed with respect to grade and age, are accorded eight semesters of eligibility through coordinating their entry into interscholastic athletics, at whatever level, with the four-year period prior to their becoming ineligible at age 19. The rule is clearly not intended to provide eight semesters from the first point of actual play regardless of when a student becomes otherwise eligible, as this would accord a special advantage contrary to both the clear language of Section 4F(1) above and the overall intent of NJSIAA bylaws, guidelines and operating principles. Therefore, petitioner's claim to continued

eligibility under NJSIAA bylaws on grounds that he did not participate in sports prior to Fall of 1992 must fail.

With respect to petitioner's claim that his secondary schooling was extended, through his repetition of ninth grade, for reasons beyond his control due to the district's failure to classify him upon his father's request or sooner, the Commissioner likewise finds that NJSIAA's determination must stand. The role of the Commissioner in matters of student eligibility is not to substitute his own judgment for that of NJSIAA, but rather to determine whether NJSIAA's ruling was arbitrary, capricious or unreasonable. Koh and Kim, supra. While the Commissioner is cognizant of the prior ruling in In the Matter of the Athletic Eligibility of C.G., School District of the Township of Piscataway, Middlesex County, 1990 S.L.D. 66, and while the record of the present matter includes a series of documents from which it could be inferred that petitioner might have performed better in ninth grade had he then had the counseling later provided as a result of his classification, under the particular circumstances operating herein it cannot be said that NJSIAA acted unreasonably or arbitrarily in concluding that petitioner should not be granted a waiver. The record of this matter does not include, as did the record in C.G., compelling expert testimony as to the specific effect of the petitioning student's handicap on prior educational performance, nor did the timing and circumstances of C.G.'s classification raise the type of questions legitimately posed by the sequence of events underlying petitioner's request herein.

Accordingly, as the Commissioner finds and determines that NJSIAA's ruling denying petitioner's request for a waiver of the eight-semester rule so as to permit his continued eligibility for participation in interscholastic athletics must be upheld as reasonably based, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 17, 1994

DATE OF MAILING - MARCH 17, 1994

62-94

62-94

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

SYNOPSIS

Petitioner, tenured science teacher, alleged Board improperly withheld his salary increment for the 1993-94 school year. Board contended its withholding was based on unsatisfactory performance due to poor classroom management skills.

ALJ found Board's discretionary exercise of its statutory authority to withhold salary increment should not be overturned unless action was patently arbitrary or without reasonable basis or induced by improper motives. (Kopera) Petitioner herein failed to meet his burden of proving that the Board acted unreasonably.

Commissioner adopted findings and determination in initial decision and dismissed petition.

MARCH 21, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6836-93
AGENCY DKT. NO. 257-7/93

FATHY IBRAHIM,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK,
Respondent.

John L. Schettino, Esq., for petitioner
(Giblin & Giblin, attorneys)

Robin T. McMahon, Associate Counsel, for respondent
(Marvin L. Comick, General Counsel, attorney)

Record Closed: December 14, 1993 Decided: February 15, 1994

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

Statement of the Case

This is an appeal by a teacher from the decision of the Newark Board of Education ("Board") to withhold his salary increment for the 1993-94 academic year under *N.J.S.A.* 18A:29-14.

Procedural History

On July 7, 1993, petitioner Fathy Ibrahim ("Ibrahim") filed a petition with the Commissioner of Education ("Commissioner") alleging that the decision of the board to withhold his annual salary increment was arbitrary, capricious and unreasonable. On July 16, 1993, the Board filed its answer denying the allegations. Subsequently, on July 21, 1993, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case. The OAL held a hearing on December 14, 1993. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Most of the relevant evidence is undisputed. I **FIND:**

Fathy Ibrahim is an experienced teacher who has been employed in the Newark public school system for nine years. He holds a bachelors's degree from Alexandria University in Egypt and has postgraduate training in chemistry from Rutgers University.

Starting in 1984-85, Ibrahim taught science at various high schools in the district, first at Barringer High School, next at Shabazz High School, then at University High School and, for the last three years, at Weequahic High School. During 1992-93, Ibrahim was assigned to teach five classes of general science. Supervisors who made observations of his performance consistently rated him as unsatisfactory in such areas as class management and development of rapport with his students. Significantly, Ibrahim does not deny the accuracy of their observations. Instead, he seeks to shift the blame for his own inadequate performance to the absence of written standards, the alleged lack of support from school administrators and the behavior of the students themselves.

Bruce Bennett, chair of the science department, was Ibrahim's immediate supervisor in 1992-93 and has since been promoted to vice principal at Weequahic High School. An educator with nearly thirty years experience, Bennett described specific instances when Ibrahim was unable to control the students in his class. As

early as September 28, 1992, Bennett visited one of Ibrahim's classes for approximately fifteen minutes. He noted that the atmosphere was "disorderly" and that "many students [were] not paying attention." Although Bennett supervised ten other science teachers, Ibrahim was the only one whose students were misbehaved and inattentive. Class assignments are made at random.

A few days later, on October 2, 1992, Bennett visited Ibrahim's seventh period class for a formal observation which lasted nearly forty minutes. Again, the classroom environment was chaotic. It took a valuable ten minutes of learning time for the class to settle down and begin work. Most of the fifteen students in the class were talking while the teacher was trying to teach. In an effort to be heard above the noise, Ibrahim raised his voice. Or, as he himself put it, "my students didn't want to hear me so I [would] shout." Candidly, Ibrahim acknowledged that the students "didn't behave well." However, he attributed their misconduct to the fact that many of them were repeating a subject which they had previously failed. At one point in his testimony, he bitterly complained that his students "are not interested at all" and that they "don't want to listen."

Meanwhile, the classroom situation continued to deteriorate. On October 6, 1992, Bennett had to enter Ibrahim's class on two occasions in order to admonish students about their unruly behavior. Students were sitting in very close proximity to each other, making the possibility of cheating very easy. Some of the students were talking loudly and, for whatever reason, did not seem interested in the quiz they were taking. Other students seemed to be copying answers from their neighbors. Once more, Bennett had to suggest that Ibrahim change the seating arrangements.

In a post-observation conference on October 8, 1992, Bennett made several helpful suggestions on how Ibrahim could improve his classroom management skills. Some of these suggestions are so basic that it should not have been necessary to tell them to a seasoned teacher. For example, Bennett told Ibrahim that the desks in the classroom were placed too close together and should be "spread out so that students couldn't talk to each other." Likewise, Bennett reminded Ibrahim that "shouting is not an effective disciplinary technique and that students "enjoy getting the teacher to shout." Moreover, Bennett advised Ibrahim to avoid delivering lengthy lectures because students quickly become bored. Bennett recommended

that Ibrahim plan lessons which engage the students through activities and question-and-answer discussions.

Another administrator reported similar classroom conditions on other occasions. Vice principal Jill Watkins paid a visit to Ibrahim's period eight class on December 3, 1992. She also observed that students "were not paying attention," that there was "much talking" and that students appeared "disinterest[ed]." Rather than varying his teaching techniques to appeal to all students, Ibrahim concentrated his teaching efforts on "a small group of four or five kids." Ibrahim's instructions were so unclear that Watkins herself could not understand them. The students appeared "very confused" and "didn't do the work."

During an informal observation of Ibrahim's on January 27, 1993, Bennett saw four girls, "seated together," who "talk[ed], nonstop" throughout the lesson. This particular class was comparatively small, with only ten students present. Nearly the entire period was devoted to copying notes from the blackboard, with no time for discussion, no feedback from the students and no intellectual stimulation . According to Bennett, "actual teaching didn't take place." Ibrahim's attempts to reprimand the four talkative students were futile; the girls remained defiant, disrespectful and noncooperative. While Bennett was watching, Ibrahim never separated the foursome from each other or isolated them from the rest of the class. Ibrahim claimed, however, that he managed to separate the four students after the Bennett's departure.

Two days afterwards, on January 29, 1993, school administrators intervened twice to restore order in Ibrahim's classes. Bennett, whose office is located immediately adjacent to Ibrahim's room, went to Ibrahim's first period class "because of the high volume of noise coming from the classroom." Several of Ibrahim's colleagues had complained that the noise was disturbing their classes. Bennett had to remove one of the students whom Ibrahim could not control. Plaintively, Ibrahim acknowledged that he had tried to conference the offending students, but they would not respond "because they were totally misbehaving." While on her rounds that same day, Watkins also "heard a general commotion coming from [Ibrahim's] room" and saw the door "opening and closing." When she entered the classroom, "[m]any students were out of their seats" and "running in

and out of the room." She too had to quiet the class down, which she was quickly able to do by her authoritative demeanor.

Bennett made a second formal observation of Ibrahim's class on March 25, 1993. Although Ibrahim had clearly made an effort to implement some of Bennett's suggestions, such as asking questions rather than merely lecturing, the classroom atmosphere was still lax and not conducive to learning. When two students arrived late, Ibrahim failed to challenge them or demand a late pass. Despite the fact that the class consisted of only eight students, Ibrahim still had difficulty maintaining their interest. Once more, Bennett "had to reprimand one of [Ibrahim's] students about his behavior." For his part, Ibrahim admits that some of his children "were acting up" that day and that "they do it all the time."

In a constructive way, Bennett suggested to Ibrahim that his repeated misuse of a particular word might contribute to the students' lack of respect. Apparently, Ibrahim misinterpreted this well-intentioned advice as criticism of his foreign accent. Shortly after learning that Bennett had given him an unsatisfactory rating, Ibrahim filed a written grievance with the principal of Weequahic High School on April 19, 1993, contending that Bennett "offers me only negative criticism, but provides no solution." One of Ibrahim's complaints, raised in writing for the first time, was that Bennett had ignored his earlier request for a demonstration lesson. Nevertheless, the proofs show that Bennett had encouraged Ibrahim to observe the classroom techniques of other accomplished teachers and put off arranging a formal demonstration out of concern that it might further undermine Ibrahim's tenuous authority over his own class.

Even after the second formal evaluation, Ibrahim continued to experience disciplinary problems in his class. Thus on May 25, 1993, the same day that the Board voted to withhold his increment, Bennett had to return Ibrahim's class again. On that date, "a loud female voice [was] laughing and talking while the teacher was giving a test."

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold "a teacher's salary increment for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). Section 14 is clearly meant to vest local school boards with the ability to withhold increments from teachers who have not performed well during the previous year. *Probst*, at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that the increment be paid.[1] A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernard Twp. Bd. of Educ. v. Bernard Twp. Educ. Ass'n*, 79 *N.J.* 336 (App. Div. 1975). When reviewing such determinations, the Commissioner is prohibited from substituting her own judgment for that of the local board. Her scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, or without reasonable basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. *Kopera*, at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the

---

[1]As the result of legislation effective January 4, 1990, an increment withholding "for predominately disciplinary reasons" is subject to grievance procedures. *N.J.S.A.* 34:13A-26. The withholding of a teaching staff member's increment based on actual teaching performance is still appealable to the Commissioner of Education. *Assembly Labor Committee Statement* to Assembly Bill No. 4706 (1989). *See River Dell Bd. of Educ. v. Canal*, 93 N.*J.A.R.* 2d (Vol. 4A) 784 (Comm'r of Ed.). Because the withholding in this case arose out of Ibrahim's teaching performance, the Commissioner has jurisdiction over the appeal.

evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts.

At the outset, Ibrahim contends that he should have been provided with written standards by which the quality of his performance would be judged. However, he must have been aware that it is unacceptable for a teacher to lose control over the students in his classroom. Proofs strongly establish that Ibrahim's supervisors repeatedly brought his deficiencies in class management to his attention, both verbally and in the form of written evaluations. Ibrahim's protestation that he did not know the expectations to which he would be held is unsupported by the record. Instead, the evidence shows that Ibrahim's problems persisted after he received detailed explanations of his shortcomings and had ample opportunity to confer with his evaluator.

Nor were Ibrahim's troubles caused by inadequate support from his supervisors. To the contrary, Bennett did what he reasonably could to suggest better approaches and encourage improvement, without interfering in Ibrahim's relationship with his students. Similarly, Ibrahim cannot put the blame on his students. None of the other teachers encountered the same degree of resistance and disinterest from their students.

In reviewing increment withholding cases, it must be remembered that "the purpose of the statute is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Twp.*, 79 *N.J.* at 321. Put another way, an annual increment is not a statutory right, but a reward for good performance. *North Plainfield*, 96 *N.J.* at 594. Under the factual circumstances present here, petitioner has failed to meet his burden of proving that the Board acted unreasonably when it voted to withhold his salary increment.

Order

It is **ORDERED** that the relief requested by petitioner is denied.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 15, 1994
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Feb. 16, 1994
Date

Hope R. Blackburn, Acting Director
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1994
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX
List of Witnesses

1. Bruce Bennett, science department chair, Newark public school district

2. Jill Watkins, high school vice principal, Newark public school district

3. Fathy Ibrahim, science teacher, Newark public school district

List of Exhibits

No.	Description
R-1	Copy of informal observation log for October 1992
R-2	Copy of teacher observation report, dated October 2, 1992
R-3	Copy of informal observation log for the month of October 1992
R-4	Copy of memorandum to Mr. Ibrahim from Bruce Bennett, dated October 6, 1992
R-5	Copy of memorandum to Fathy Ibrahim from B. Bennett, dated January 27, 1993
R-6	Copy of memorandum to Fathy Ibrahim from Bruce Bennett, dated January 29, 1993
R-7 Id.	Copy of memorandum addressed to Whom it May Concern from Cherrine Thomas, dated December 5, 1990
R-8	Copy of teacher observation report, dated March 25, 1993

R-9 Copy of memorandum to Richard Williams from Fathy Ibrahim, dated April 19, 1993

R-10 Copy of teacher annual evaluation report, dated June 1, 1993

R-11 Copy of mid-term results and teacher analysis for Weequahic High School, dated February 25, 1993

R-13 Copy of hand-written memorandum to Fathy Ibrahim from B. Bennett, dated May 25, 1993

R-14 Copy of teacher observation report, dated December 3, 1992

R-15 Copy of a memorandum from Fathy Ibrahim from Jill A. Watkins, dated January 29, 1993

R-16 Copy of a memorandum to Fathy Ibrahim from Jill A. Watkins, dated February 16, 1993 (redacted)

R-17 Copy of a hand-written memorandum to Mr. Bennett from F. Ibrahim, dated February 11, 1993 (redacted)

R-18 Id. Copy of teacher annual evaluation report, dated June 19, 1990

OAL DKT. NO. EDU 6836-93

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge that the Board's excercise of its statutory authority to withhold petitioner's salary increment was not arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons articulated in the initial decision, and the within Petition of Appeal is hereby dismissed.

MARCH 21, 1994

DATE OF MAILING - MARCH 21, 1994

COMMISSIONER OF EDUCATION

64-94

64-94

EDWARD A. JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT A. PEDDLE, BOARD SECRETARY, BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, AND MARLYN L. NEWCOMER, SALEM COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning citizen appealed Board Secretary's determination not to seek removal from ballot of candidate for Board membership whose nominating petition included signatures of persons who were not registered to vote on the last day for submission of petitions but who registered prior to the last date for remediation of defective petitions.

Commissioner found that N.J.S.A. 18A:14-12, remediation of defective nominating petitions, does not permit corrections that would have the effect, by validating otherwise deficient signatures, of adding signatures contrary to the express language of that statute. (Sokolosky, Brodsky, Buono)

Commissioner directed removal of candidate's name from ballot.

MARCH 25, 1994

EDWARD A. JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT A. PEDDLE, BOARD SECRETARY, BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, AND MARLYN L. NEWCOMER, SALEM COUNTY,	:	DECISION
RESPONDENTS.	:	

For Petitioner, Edward A. Jones, Pro Se

For Respondent Board of Education and Board Secretary, Gary D. Wodlinger, Esq. (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson)

For Individual Respondent, Marlyn L. Newcomer, Pro Se

This matter came before the Commissioner of Education on March 4, 1994, by way of a petition filed by a resident of the Pennsville school district who sought to compel the Board Secretary not to place the name of a candidate for Board membership on the ballot at the 1994 annual school election on grounds that the candidate's nominating petitions were invalid. Specifically, it was alleged that three signers of the candidate's petition were not registered to vote, thereby bringing the number of valid signatures below the required statutory minimum for nomination to Board candidacy.

In accordance with an expedited schedule established to permit a prompt ruling on this matter, answers and statements of position were duly filed by respondents and, no facts being in dispute, the record was closed on March 16, 1994.

The facts of this matter as stated by petitioner, with respondents' concurrence, are as follows:

> 1. On Thursday, February 24, 1994, petitioner requested copies of the petitions filed by candidates for the Pennsville Board of Education from Robert A. Peddle, Board Secretary. Jones made this request for the purpose of verifying that petitions had the required number of signatures (10) as prescribed by N.J.S.A. 18A:14-9. Copies of all petitions were duly provided to petitioner.
>
> 2. After inspecting all petitions for signatures of registered voters, Jones found the petition of candidate Marlyn L. Newcomer to contain, among its twelve signatories, the signatures of three people (Diane Sheriff, Benjamin Sheriff and Linda Shinn) who were not registered to vote.
>
> 3. On March 1, 1994, 49 days prior to the election, petitioner submitted a letter to the Board Secretary formally contesting Newcomer's petition. Included therewith was a letter from the Registrar of the Salem County Board of Elections certifying that the Sheriffs and Shinn were not registered to vote. On that same date, the Board Secretary notified Newcomer that his petition had been contested and why.
>
> 4. Newcomer then registered the Sheriffs at the Board of Elections, and later on March 1, notified the Board Secretary of such registration. (The Sheriffs' March 1 registration was further confirmed by letter from the Registrar dated March 3, 1994.) After consultation with the Board Attorney, the Board Secretary determined that Newcomer's petition was valid as its defects had been timely remedied pursuant to N.J.S.A. 18A:14-12.
>
> 5. Petitioner was apprised of the ruling and advised of his right to appeal to the Commissioner. The within proceedings then ensued.

Petitioner argues that Newcomer's nominating petition cannot be accepted as valid because N.J.S.A. 18A:14-9 and 18A:14-10 plainly require the signatures of ten qualified voters, and in order for voters to be qualified, they must be registered. Petitioner further argues that, once the submission date for

nominating petitions has passed, insufficient signatures cannot be remedied by subsequent registration of the signers, as N.J.S.A. 18A:14-12 expressly excludes from the purview of remediable defects anything that would work to add signatures to a petition.

Respondents argue that there is no statutory requirement that the signer of a nominating petition be registered to vote prior to the deadline for submission of petitions; rather, the law requires them to sign a statement that they are qualified to vote in the district. When it was determined that the contested signatories in this matter were in fact not registered to vote, that defect was cured prior to the end of the 49th day before the election, consistent with the requirements of N.J.S.A. 18A:14-12. Respondents contend that the benchmark case in matters of this type, Kumpa v. Page, infra, can be distinguished from the situation herein in that the defect in that case (disenfranchisement) could not be remedied. Respondents further contend that registration of the Sheriffs did not work to add signatures to an otherwise deficient nominating petition, as the Sheriffs were among the twelve original signatories.

Upon review of this matter, the Commissioner finds that the question of law posed by petitioner, i.e., can defects in nominating signatures be remedied once the deadline for submission of such petitions has passed, has been specifically addressed in prior decisional law which is directly applicable to the facts herein.

In the matter of William D. Sokolosky v. Helen Cheloc, Board of Education of the City of Elizabeth, et al., Union County, 1989 S.L.D. 1434, among other issues, the Commissioner expressly considered whether defects of the type raised herein (voter registration status of nominating petition signatories) could be remedied under the terms of N.J.S.A. 18A:14-12. Reversing the findings and conclusions of the ALJ on this issue, which were similar to the position taken by respondents herein, the Commissioner held that "none of the defects on [the disputed] nominating petitions could have been cured without adding names, which would thereby constitute a violation of N.J.S.A. 18A:14-12." Id., at 1449-50. The same question was addressed by inference in Stephen Brodsky v. Board of Education of the Borough of Florham Park, et al., Morris County, 1991 S.L.D. 648, and directly in Frank L. Buono, Board of Education of the Township of Commercial, Cumberland County, v. Terence Coursey, Sr., 1991 S.L.D. 672. In both cases, the Commissioner found the prohibition of N.J.S.A. 18A:14-12 to be applicable regardless of whether the remedy sought was to add new signatures or to correct defects in signatures already obtained. Finally, respondents' attempt to rely on the distinction between this matter and Kumpa v. Page, 178 N.J. Super. 589 (App. Div. 1981), i.e., on the distinction between a disenfranchised voter and a merely unregistered one, cannot succeed in that the remedy sought in Kumpa was to add signatures, not remedy deficient ones; therefore, the court's analysis never reached to the question of remediation under N.J.S.A. 18A:14-12 and its silence cannot be construed as meaningful in the present context.

Accordingly, in that N.J.S.A. 18A:14-12 does not permit corrections that would have the effect, by validating otherwise deficient signatures, of adding signatures contrary to the express language of that statute, petitioner has prevailed in his appeal and the Secretary of the Pennsville Board of Education is directed to remove the name of respondent Marlyn L. Newcomer from the ballot of duly nominated candidates for the 1994 annual school election.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1994

DATE OF MAILING - MARCH 25, 1994

65-94E

65-94E

P.R. McK. AND C.M. McK., on behalf of their minor child D.P. McK.,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION ON MOTION
V.	:	
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	
RESPONDENT.	:	

MARCH 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION FOR TEMPORARY RESTRAINTS
OAL DKT. NO. EDU 2589-94
AGENCY DKT. NO. 39-3/94

DPMcK, PRMcK AND CMMcK,
Petitioners,
v.
TOMS RIVER BOARD OF EDUCATION,
Respondent.

PRMcK, pro se for petitioners

Thomas E. Monahan, Esq., for respondent (Gilmore and Monahan, attorneys)

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner, DPMcK, is the daughter of PRMcK and CMMcK and an 11th grade student in respondent Toms River Board of Education's ("BOE's") Toms River High School East ("TRHSE").

After DPMcK wrote a fictitious "obituary" describing the killing of a fellow student and cruelly ridiculing the fellow student, the BOE determined that she should serve an "in-school" suspension of three days.

DPMcK contends that (1) the suspension began without written notification and, therefore, violates the TRHSE "Student-Parent Handbook"; (2) the suspension is "based upon [a] personality conflict between [DPMcK] and [the] applying administrator" and constitutes wrongfully disparate treatment, compared to "other

students involved [in the fictitious obituary incident who] were not punished at all"; (3) the suspension applies punishment "based upon the handicapped condition of [PRMcK]" (he is in a wheelchair) and, therefore, violates the petitioners' civil rights; and (4) the school system has changed DPMcK's class schedule without cause and it has refused to respond to her parents' request to explain why the change was made.

The BOE denies any wrongdoing and alleges that the obituary constituted a good cause for suspension. The BOE also alleges (1) it did offer written notice of the suspension, but DPMcK refused it; (2) DPMcK received discipline appropriate for her wrongful conduct; (3) the discipline has nothing to do with PRMcK's "handicap"; and (4) any change in DPMcK's schedule was reasonable and necessary. Finally, the BOE submits that DPMcK has failed to meet her burden of persuasion necessary for restraint of the BOE's decision to impose the suspension.

FACTUAL DISCUSSION AND PROCEDURAL HISTORY

The TRHSE 1993-94 "Student-Parent Handbook," relative to "Suspension and Expulsion/Pupil Due Process, Board of Education Policy" states:

> While the Board believes that positive approaches to acceptable behaviors are usually more effective, it is sometimes necessary to penalize pupils for violations of school regulations to ensure the good order of the school and to teach them the consequences of inappropriate behavior.
>
> Pupils who indulge in inappropriate behavior may be suspended or expelled. Inappropriate behavior includes, but is not limited to:
>
> A. Continued and willful disobedience;
>
> B. Open defiance of the authority of any teacher or person having authority over a pupil;
>
> C. Actions that constitute a continuing danger to the physical well-being of other pupils; . . .
>
> * * *
>
> **In-School Suspension**
>
> The Board directs the administration to arrange facilities for in-school suspension whenever possible. Pupils will be required to abide by all the rules and regulations set down by the faculty members who are responsible for in-school suspension.
>
> * * *

Procedures

Administration has established, and the Board has approved, specific procedures for dealing with suspension cases. Regulations ensuring due process to all pupils before a suspension is imposed have been developed with the advise of the Board attorney and include:

1. Oral or written notice of the school rules, violation of which will result in punishment.

2. Oral or written notice of the nature of the specific violation and the intended punishment **shall be given the student and parent.**

3. The opportunity for the student to state his position to the appropriate administrator.

4. If the student denies the charge, an explanation of the evidence of the violation upon which the school authority is relying will be offered.

5. **Written notification shall be given to the student and mailed to the parent when a suspension is invoked.**

6. An avenue of appeal is provided through the principal to the Superintendent's Office and the Board of Education in the form of hearings. Written notice regarding the availability of the hearing process shall be given to the pupil and his/her parents.

7. A student may appeal a suspension or expulsion decision of the Board of Education to the Commissioner of Education. Appeal from a decision of the Commissioner is to the State Board of Education. Decision of the State Board are reviewable by the courts.

* * *

Each pupil shall be afforded an informal hearing before the suspension or, if circumstances prohibit, as soon as possible after the suspension except that, when extraordinary circumstances involving the health and safety of the pupil or others in the school require immediate exclusion, the hearing may be delayed to such time as circumstances permit. **An informal hearing consists of a conference between an administrator and the pupil, with or without the parent. During the conference, the specific charges will be discussed, as well as any evidence which supports these charges. The pupil has the right to discuss these with the administrator and offer his/her version of the incident.** Pupils suspended for a period of time longer than a short-term suspension (less than ten school days) shall be afforded a formal hearing (see Due Process Procedures) before the Board of Education which shall take place not later than 21 days after the suspension begins.

[P-1]

During the school week of December 6 through 10, 1994, DPMcK wrote a ficitious "obituary" of PB, a classmate. It stated the following:

> OBITUARIES
>
> OCEAN
>
> [P.B.] dies at the age of 16. She was shot in the head and slaughter like a cow. (moo, moo!) Her schoolmates did this to her. (schoomate sayings:) "I hope she rots in hell." "She was known for her big nose." (oink!, oink!) "Thank god she is gone now we can have a pig free school." "My dog was cuter then her." The people she left behind was people that she payed to be her friend. "She cannot sing on key either." "She sings like Naomi Rosen, through her nose."
>
> Editor: D.P.J.M.
>
> Have a nice time in Hell!
>
> [P-3]

A classmate delivered the "obituary" to PB and PB and her parents were sufficiently distressed by it to contact TRHSE administrators.

On December 9, 1994, in school, Thomas Azzolini, Assistant Principal of TRHSE spoke to DPMcK about the "obituary"; determined that it constituted "threatening/degrading remarks written about another student"; determined that DPMcK should be "suspended"; and determined that DPMcK could "not return [to school] until [there was a] parent conference after December 14th." Mr. Azzolini's record shows he telephone the McKs' home (about the suspension), however, there was "no answer." See P-4. DRMcK disputes that.

On December 10, 1994, DPMcK appeared at TRHSE and, consistent with his earlier determination, Mr. Azzolini "asked [her] to leave" and added a day to the earlier suspension. Also on December 10, 1994, DPMcK's parents learned of the suspension.

On December 13, 1993 DPMcK's parents met with Mr. Azzolini and John R. Garrabrant, the Senior Assistant Superintendent of the Toms River Regional School System; and copies of the "Student Discipline Referral" forms, describing the "infraction" and discipline, were served upon the McKs. See P-4, P-4 and P-7. (Mr. Azzolini contends that, because, on December 9, 1993, DPMcK "walked out of [his] office" he could not serve her with a Student Discipline Referral form prepared that day. See P-8).

During this period, the McKs also challenged the amendment of DPMcK's class schedule, which had occurred earlier in the 1993-94 school year. See P-9.

On December 13 or 15, 1994, the McKs appealed to the BOE to reverse the administrators' determination that DPMcK should serve a three day suspension for writing the "obituary." However, during the BOE's December 18, 1994 meeting, the matter was heard and the BOE affirmed the administrators.

The BOE, by its attorney, advised the McKs that, if there were an appeal to the Commissioner of Education, the BOE would refrain from imposing the suspension until the Commissioner's decision on the matter and, by petition dated February 28, 1994, the McKs appealed the matter. See N.J.S.A. 18A:6-9, P-10 and P-10a. However, by letter dated March 10, 1994, the Department notified the McK's that their petition was deficient (i.e., that it failed to clearly state any claim). See P-12.

On March 18, 1994, the McKs' "Amended Petition" and "Motion for Emergent Relief" were filed with the Department. See P-13 and P-14.

In the meanwhile, TRHSE has forwarded to the McK's copies of DPMcK's French tests, on which she has written, among other things" I hate this class" and "Boring." See P-15.

To date, DPMcK has served only one day of the suspension and the TRHSE administrators have provided that the remaining days may be "in school" suspension, meaning the following: DPMcK will be transported to and from a BOE facility other than TRHSE, where certified teachers will have her regular teachers' course assignments and will work with her on them.

On March 18, 1994, the Department of Education transmitted the matter to the Office of Administrative Law ("OAL") where it was filed as a contested case. See N.J.S.A. 52:14B-2(b).

On March 21, 1994, the McKs' motion for emergent relief was argued in the OAL, with some testimony being taken.

EXHIBITS

Petitioners' Exhibits:

P-1	(Portion of) 1993-94 Student Parent Handbook
P-2	(Portion of) "Hello Dolly" playbill
P-3	"OBITUARIES"
P-4	Student Discipline Referral, December 9, 1993
P-5	Student Discipline Referral, December 10, 1993
P-6	Memorandum from Novak to McK, December 15, 1993
P-7	Letter from McK. to Azzolini (Toms River School East), December 16, 1993
P-8	Letter from Azzolini (Toms River High School East) tom McK, December 20, 1993
P-9	Letter from McK to Novak, December 21, 1993
P-10	Petition, February 28, 1994
P-10a	Petition, February 28, 1994
P-11	French test, March 9, 1994
P-12	Letter from New Jersey Department of Education to McK, March 10, 1994
P-13	Amended Petition, dated March 17, 1994
P-14	Motion for Emergent Relief, "served upon [BOE] March 17, 1994"
P-15	DPMcK's French tests

Respondent's BOE Exhibits:

None

OAL DKT. NO. EDU 2589-94

P.R. McK. AND C.M. McK., on behalf of their minor child, D.P. McK.,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION ON MOTION
V.	:	
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter and the initial decision on motion of the Office of Administrative Law have been reviewed. Petitioners excepted to the ALJ's determination by telefaxed letter March 22, 1994.

Upon review of the record and consideration of petitioners' arguments on exception, which reach to potential damage to D.P. McK.'s standing and reputation and to the Board's alleged failure to demonstrate that she posed a continuing danger to the physical well-being of other pupils, the Commissioner affirms the determination of the ALJ for the reasons stated by him in the initial decision and order. Under the factual circumstances and controlling law and policies herein, and given that petitioners can be vindicated and D.P. McK.'s record expunged should they prevail on the merits, petitioners have clearly failed to meet the burden required of them under Crowe v. DeGioia, 90 N.J. 126 (1982) so as to warrant stay of the Board's actions while plenary appeal of this matter is pending.

Accordingly, the order of the Office of Administrative Law denying emergent relief is affirmed for the reasons expressed therein. The remainder of D.P. McK.'s suspension is to be served as indicated and this matter is to proceed to hearing consistent with the directives of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 29, 1994

DATE OF MAILING - MARCH 29, 1994

65-94

209-94
(65-94E)

P.R. McK. and C.M. McK., on behalf of their minor child, D.P. McK.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JULY 29, 1994

OAL DKT. NO. EDU 2589-94

P.R. McK. and C.M. McK., on behalf of their minor child, D.P. McK.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

JULY 29, 1994

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JULY 29, 1994

66-94E

66-94E

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

MARCH 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 2527-94
AGENCY DKT. NO. 52-3/94

MITCH GEIER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,
Respondent.

Eli Schneider, Esq., for the petitioner

Harold G. Smith, Esq., for the respondent (Wilentz, Goldman and Spitzer, attorneys)

Record Closed: March 23, 1994 Decided: March 23, 1994

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

This matter concerns the petition of Mitch Geier, dated March 16, 1994, filed with the Office of the Commissioner of the State Department of Education. In this petition, the petitioner asked for emergency relief, specifically access to the minutes of certain executive/caucus meetings of the respondent. The matter was transmitted to the Office of Administrative Law on March 17, 1994, for a hearing pursuant to N.J.S.A. 52:15B-1 to -15 and N.J.S.A. 52:14F-1 to -15.

The hearing was scheduled for March 23, 1994. On that date, the parties conferred and agreed to a settlement. This settlement is set forth in the attached signed consent order, which is fully incorporated herein.

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

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

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

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

As set forth in the consent order, the parties have waived their rights to file exceptions and since this matter involves a request for emergent relief, it is requested that the Commissioner of the Department of Education expedite his review of the matter.

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

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

March 23, 1994
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

March 23, 1994
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NO. EDU 2527-94
AGENCY DKT. NO. 52-3/94

CONSENT ORDER

Prior to an adjudication, the parties agree to settle this matter in accordance with the following terms:

1) Within two weeks, Board shall supply minutes for any Executive\Caucus sessions of the Board of Education through March 23, 1994 for any meeting during 1994.

2) Within two weeks, Board shall supply minutes for any Executive/Caucus sessions of the Board of Education for any meetings heretofore taken place in 1993 which have not been provided to petitioner.

3) Upon request of petitioner, setting forth specific dates or time periods for Executive/Caucus meeting during calendar year 1992, the Board shall submit said minutes to Petitioner within 2 weeks (if the request consists of not more than 6 meetings) and if request is for more than 6 meetings then the Board shall supply the minutes within 30 days of request.

4) Minutes of Executive/Caucus meetings shall be made available at the Board Administrative offices rather than the Library, and the Board shall continue to make the appropriate portions available to the public upon request.

5) The parties agree to waive their rights to file exceptions as to the initial decision to be issued in this matter.

Petitioner, Mitch Geier

Dated: March 23, 1994

By: _____

Respondent, Old Bridge Township School District

By: _____

OAL DKT. NO. EDU 2527-94

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

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

The Commissioner approves the settlement terms, notes that they fully resolve the controversy at issue and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MARCH 29, 1994

DATE OF MAILING - MARCH 29, 1994

67-94

EAST ORANGE EDUCATION ASSOCIATION ON BEHALF OF PERMANENT SCHOOL BASED SUBSTITUTES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Association, on behalf of permanent building-based substitutes (PBBS), alleged that all full-time substitutes employed by respondent Board should receive both sick leave and health benefits.

ALJ concluded that the statutory benefits sought in this case were not functionally related or subjectively linked to employment as PBBS. Thus, the 90-day rule did not bar this action. Moreover, the ALJ concluded that the PBBS are "steadily employed" as required under the sick leave statute and as defined by prior cases, and are "employees" under the State Health Benefits Program Act and entitled to participate in the Program. The ALJ granted relief propsectively, as well as retroactively to 90 days prior to the filing of the petition.

Commissioner adopted findings and determination in the initial decision.

MARCH 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2823-93
AGENCY DKT. NO. 10-1/93

EAST ORANGE EDUCATION ASSOCIATION ON BEHALF OF PERMANENT SCHOOL BASED SUBSTITUTES,
Petitioner,
v.
EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Melvin C. Randall, Esq., for respondent
(Love & Randall, attorneys)

Record Closed: January 5, 1994 Decided: February 16, 1994

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

On January 20, 1993, petitioner, East Orange Education Association on behalf of Permanent School Based Substitutes, filed a petition of appeal with the Commissioner of Education, alleging that all full-time substitutes employed by respondent receive both sick leave and health benefits. On March 24, 1993, respondent, East Orange Board of Education (Board), filed an answer setting forth

certain affirmative defenses and alleging that the petition of appeal should be dismissed. On March 29, 1993, this matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone prehearing conference was held on May 27, 1993, at which time the issues were isolated and a hearing scheduled for October 18, 1993, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. The hearing was adjourned to November 3, 1993, at which time the parties filed a joint stipulation of facts and determined that no hearing was necessary. The parties filed briefs in this matter, and the record closed on January 5, 1994, after the last submission in this matter.

ISSUES

The parties indicated that the following are the issues in this matter[1]:

1. Are building based substitute teachers entitled to sick leave and/or participation in the State Health Benefits Plan?

2. Is petitioner barred from relief by virtue of the 90-day rule and/or *laches*?

3. If petitioner prevails, to what relief are the permanent school based substitutes entitled?

STIPULATED FACTS

The relevant facts have been stipulated. The East Orange Public School System has employed permanent building-based substitute teachers for at least the last five

---

1 The issue, as stated in the prehearing order, as to whether this matter is to be determined through the collective bargaining process and not within the jurisdiction of the Commissioner of Education, was determined by the parties not to be an issue in this case.

school years. In June, 1992, PERC certified the East Orange Education Association as the majority representative for those permanent building-based substitutes (PBBS). Prior to this, the daily pay rates and other conditions of employment were unilaterally determined by the Board. (From the time the Board recognized the employee organization, the Board has changed no terms or conditions of employment for the PBBS). The PBBS began their assignments for the 1992-93 school year on or before September 21, 1992. Following their appointments, the PBBS were expected to report for work each school day for the remainder of the school year.

The East Orange Board of Education has never provided PBBS with health benefits or sick leave. The district participates in the State Health Benefits Program. PBBS are employed for one year at a time, as the district's requirements dictate, and are paid only for the days they actually work. They are per diem employees and make less money than regular teachers on a per diem basis. Once designated a PBBS, the individual may, but need not, report for work every school day. The PBBS either replace a regular teacher or receive such other assignment, including being assigned to another building, as directed by the district administration. They are required to possess a county substitute certificate.

Petitioner asserts that respondent's failure to afford the PBBS sick leave and participation in the State Health Benefits Program is in violation of the statutes providing therefor. Respondent contends that this action is barred by the 90-day rule.

DISCUSSION

I. 90-DAY RULE:

The regulation upon which respondent relies, *N.J.A.C.* 6:24-1.2, provides, in pertinent part:

> (a) To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall serve a copy of a petition upon each respondent. The petitioner then shall file proof of service and the original and two copies of the petition with the Commissioner

> (c) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing.

The Commissioner of Education, the State Board of Education and the courts have previously addressed the applicability of the 90-day rule and other limitation periods as they relate to statutory benefits. In *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145, 150 (1982), the Supreme Court held that the six-year statute of limitations for contract actions was inapplicable to the statutory entitlement of military service credit, because:

> where the benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such.

The issue arose again in *North Plainfield Educ. Ass'n. v. Board of Educ. of North Plainfield*, 96 *N.J.* 587 (1984), in which the petitioner sought credit on the salary scale for the time spent on sabbatical. The Court distinguishing *Lavin,* noted the difference between the military credit statute's mandatory nature and the sabbatical statute's subjectivity based upon an annual evaluation of teacher performance, and it found that the analogy urged by the appellant between the two statutes was invalid. The Court's reasoning is of particular note here:

> The Appellate Division's misperception of the annual increment is relevant to determining the timeliness of the filing of the teachers' petition. If the annual increment were a statutory entitlement, as the Appellate Division concluded, the ninety-day period of limitations contained in *N.J.A.C.* 6:24-1.2 would not apply, and the petition for prospective relief would have been timely. Because the award of the annual increment is not a matter of statutory right, but is subject to "denial for inefficiency or other good cause," *N.J.S.A.* 18A:29-14, it is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute.
>
> [*Id.* at 594 (emphasis added).]

Another statutory benefit, because of its subjectivity, was rejected from exemption from the 90-day rule in *Polaha v. Buena Regional Sch. Dist.*, 212 *N.J. Super.* 628 (App. Div. 1986). There, the Appellate Division found that a teacher's

claim to tenure was similar to the claim in *North Plainfield* and distinguishable from that in *Lavin*, because: "[t]he rehiring decision necessary to confer tenure is undoubtedly carried out based on evaluation of teacher performance, behavior and efficiency." *Id.* at 634. *See also, Nissman v. Board of Educ. of Tp. of Long Beach Island*, 92 *N.J.A.R.*2d. (Vol. 4) 621 (Dept. of Education) in which the State Board rejected the exemption argument for tenure claim.

The most recent case involving statutory benefits and the 90-day rule is *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993), in which the Supreme Court discussed the applicability of the 90-day rule to RIF reinstatement rights in light of *Lavin, North Plainfield* and *Polaha.* The Court held:

> That there exists a statutory basis for rights on the reduction in the school's work force is not enough to establish a statutory entitlement. Rather, the critical inquiry focuses on whether a "functional relationship" exists between the statutory benefit, the RIF right, and Kaprow's employment as a tenured assistant superintendent in the school district.
>
> [*Id.* at 585 (citing *Lavin*).]

The Court went on to find, similar to the "subjectivity" analysis of the prior cases, that Kaprow's RIF rights were so related to the services he rendered in his employment that the 90-day rule applied:

> Because RIF rights are inextricably tied to employment in a school system and to tenure rights, a "functional relationship" exists between Kaprow's RIF right to preference in reemployment and his service in the school district. Rights resulting from RIFs in local school districts do not constitute a statutory entitlement. The limitations period of N.J.A.C. 6:24-1.2(c), therefore, applied to Kaprow's petition.
>
> [*Id.* at 586. *See* also, *Sasse v. Board of Educ. of Pt. Pleasant,* 92 *N.J.A.R.* 2d (Vol. 4) 339, 344 (Dept. of Education), (reaching same conclusion).]

This "functional relationship" or "subjectivity" analysis is, then, the key to determining whether or not the 90-day rule should be applied in the instant case. Petitioner asserts that sick leave and health benefits are more closely analogous to *Lavin* than the other cases cited above, whereas respondent relies heavily upon *North Plainfield.*

I am persuaded by petitioner's position. Sick leave and health benefits are not tied to teacher status or performance at all. The only requirement for sick leave eligibility is "steady" employment. *See, N.J.S.A.* 18A:30-2. Participation in the State Health Benefits Program requires "employee" status as defined at *N.J.S.A.* 52:14-17.26. Clearly, these are not subjective criteria. According to these definitions, janitors and secretaries employed by respondent could well be eligible for these benefits. Thus, there is no "functional relationship" between employment as a PBBS and eligibility for statutory sick leave and health benefits that would cause the 90-day rule to bar this claim. Under the line of Supreme Court cases discussed above, respondent's untimeliness argument must fail.

II. ELIGIBILITY:

At issue is the eligibility of PBBS for sick leave and participation in the State Health Benefits Plan.

N.J.S.A. 18A:30-2, sick leave allowable statute, provides:

> 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. (emphasis added).

The key phrase, "steadily employed," has been considered. *See, e.g., Sacharoff v. Board of Educ. of Glen Ridge*, 1988 *S.L.D.* 780, *aff'd* Comm'r at 785 in which the teacher on one year leave without pay was not "steadily employed;" *South Orange-Maplewood Educ. Ass'n v. South Orange-Maplewood BOE,* OAL Dkt. No. EDU 5941-84 (April 15, 1985) *aff'd* Comm'r (June 4, 1985) in which it was determined that lunchroom aides and supervisors were "steadily employed" despite working only 1.5 to 3 hours per day and only 167 of 183 days of the school year; *Woodbridge Tp. Federation of Teachers v. Board of Educ of Woodbridge*, ("Woodbridge I") 1974 *S.L.D.* 1201 wherein the intent and definition of phrase was discussed and

Woodbridge Tp. Federation of Teachers v. Board of Educ. of Woodbridge, ("Woodbridge II") OAL Dkt. No. EDU 3810-80 (Dec. 16, 1980) *aff'd* Comm'r (Feb. 2, 1981) in which part-time flexible-hour supplemental teachers were not "steadily employed."

The discussions in *South Orange* and *Woodbridge II* are instructive here. It is to be observed that *Woodbridge II* followed prior Commissioner decisions very closely, including *Woodbridge I*, in holding that "steadily employed" could only mean employment for the entire school year:

> Petitioners are paid on an hourly basis and employed at least one week less than regular classroom teachers in both September and June. For this reason, they do not meet the criteria for being steadily employed as enunciated by the Commissioner in *Woodbridge, supra,* and in *Kearny Education Association, et al. v. Board of Education of the Town of Kearny, Hudson County,* 1980 *S.L.D.* (decided August 27, 1980).
>
> [*Woodbridge II, supra*, OAL Dkt. No. EDU 3810-10 at 5.]

The ALJ's initial decision in *South Orange,* however, called such reasoning into question, emphasizing that "duration is not synonymous with constancy." *South Orange, supra*, OAL Dkt. No. EDU 5941-84 at 7. The ALJ found that the *Woodbridge I* decision, followed in *Kearny* and *Woodbridge II,* "grafted an illogical and unjustifiable addition onto the clear and plain language of the statute" by requiring employment for the entire school year. *Id.* at 8. The Commissioner affirmed, holding,

> The record shows that the lunchroom aides and lunchroom supervisors are employed during the academic year when lunch is served in the elementary schools. Notwithstanding the fact that their work year varies somewhat, approximating two to four weeks less than the number of school days during the academic year, the Commissioner determines that these lunchroom aides and lunchroom supervisors are steadily employed by contract with the Board for a fixed work year pursuant to the statute, *N.J.S.A.* 18A:30-2.
>
> [*Id.* at 14.]

The *South Orange* decision, is not only more recent than *Woodbridge II* and therefore controlling, but also more accurately reflects the statutory purpose. The purpose behind the statute, as the ALJ noted in *South Orange*, is unambiguous: to

grant sick leave benefits to all regular, constant employees, not merely those who happen to work the longest "year." *Id.* at 8-9. The PBBS in the instant case must be found to be "steadily employed," and thus, entitled to sick leave benefits.

Similarly, the State Health Benefits Program Act , *N.J.S.A.* 52:14-17.25 to -17.45, defines "employees" as full-time employees subject to the following exemptions:

> the term "employee" shall not include persons employed on a short-term, seasonal, intermittent or emergency basis, persons compensated on a fee basis, persons having less than 2 months of continuous service or persons whose compensation from the State is limited to reimbursement of necessary expenses actually incurred in the discharge of their official duties.
>
> [*N.J.S.A.* 52:14-17.26(c).]

Because PBBS are employed more than 20 hours per week, they are considered "full time" employees, by regulation. *N.J.A.C.* 17:9-4.6(a)1. Since they are full-time employees, and not subject to any of the listed exceptions, they are "employees" under the Act. *N.J.S.A.* 52:14-17.26(c). The PBBS are, therefore, eligible to enroll in the State Health Benefits Program without charge. *N.J.A.C.* 17:9-2.1.

III. RELIEF:

The relief granted in cases analogous to the instant matter has been inconsistent. Clearly, full retroactive relief has been granted. *See, e.g., Butler v. Board of Educ. of Jersey City,* 1974 *S.L.D.* 890,895; *Noorigian v. Board of Educ. of Jersey City,* 1972 *S.L.D.* 266, 272; *Fischer v. Board of Educ. of Woodbridge,* 1965 *S.L.D.* 40, 43. However, in the seminal case of *Lavin,* supra, 90 *N.J.* at 153-55, laches was found to bar any and all retroactive relief against a local school board. Of interest, in *South Orange, supra,* OAL Dkt. No. EDU 5941-84 at 10, the ALJ ordered that petitioners be credited with accumulated sick days retroactive to 90 days prior to the filing of the petition.

In the instant case, petitioners, contend that the only retroactivity they seek is 90 days prior to the filing of the petition, consistent with *South Orange.*

In *Lavin*, the Court noted the pay-as-you go principle of municipal financing, the estimated $4,500,000 in similar claims, and the desirability of a bright line

treatment of all cases. *Lavin, supra,* 90 *N.J.* at 154. The Court determined that allowing retroactive relief in such cases would cripple local boards of education that were already financially strapped. *Ibid.*

Here, however, petitioner's suggested relief does not carry with it the crushing weight of years of retroactive liability with which the Court in *Lavin* was so concerned. Furthermore, the relief suggested comports with that concern as embodied in the 90-day rule, which, although inapplicable here, may still be noticed as an indication of the regulatory body's intent in framing remedies. *See also, South Orange, supra,* OAL Dkt. No. EDU 5941-84 at 10. Finally, the suggested relief fully complies with the Commissioner's affirmance of the ALJ's recommended order in *South Orange.* Respondent has not argued against the suggested relief. For these reasons, the relief proffered by petitioner is found to be reasonable and acceptable.

It is to be noted that sick days cannot be retroactively compensated, but must be accumulated. *Id. at 9.* The calculation of accumulated sick days, in the case of persons who work less than the "full school year," is often prorated. *Ibid.* However, in the similar situation of lunchroom aides and supervisors who worked only slightly fewer days than the academic year, the Commissioner found the difference to be *de minimis* and ordered the full complement of sick leave days. *Id.* at 14.

Health benefits, however, must be granted retroactively in the form of compensation for legitimate costs incurred. *See, e.g., Fischer, supra,* 1965 *S.L.D.* at 43.

Both sick leave and health benefits are, of course, granted prospectively as well.

CONCLUSION

I **CONCLUDE** that the statutory benefits sought in the instant case are not functionally related or subjectively linked to employment as PBBS. The 90-day rule, therefore, does not bar this action. I further **CONCLUDE** that the PBBS are "steadily employed," as required under the sick leave statute, and as defined by prior cases. They are, thus, entitled to sick leave benefits. These teachers are also "employees"

under the State Health Benefits Program Act, and as such, are entitled to participate in the Program.

I further **CONCLUDE** that the relief is prospective, as well as retroactive to 90-days prior to the filing of the petition.

ORDER

It is hereby **ORDERED** that petitioner's appeal is granted. The PBBS are entitled to sick leave benefits and participation in the State Health Benefits Program, prospectively and retroactive to 90 days prior to the filing of the petition.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 11, 1994
Date

ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/18/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1994
Date

OFFICE OF ADMINISTRATIVE LAW

dgi/e

APPENDIX

LIST OF EXHIBITS

J-1 Joint Stipulation of Fact dated November 3, 1993

OAL DKT. NO. EDU 2823-93

EAST ORANGE EDUCATION ASSOCIATION ON BEHALF OF PERMANENT SCHOOL BASED SUBSTITUTES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons articulated by her in the initial decision.

Accordingly, the Commissioner adopts the recommended initial decision of the Office of Administrative Law as the final decision in this matter.

MARCH 29, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 29, 1994

69-94

ENVIRONMENTAL CONCEPTS AND TESTING, INC. AND PATRICIA LEE RALSTON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF RUMSON, MONMOUTH COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners sought a determination that the awarding of contracts for the providing of asbestos safety control monitoring services should be subject to competitive bidding. Respondents contended such services were exempt from competitive bidding as professional services.

ALJ found asbestos safety control monitors and asbestos control technicians are regulated by law; however, ALJ found that these positions are not recognized professions in the traditional sense as there is no requirement of prolonged formal course of specialized instruction and study. Therefore, ALJ concluded contracts for asbestos safety control monitoring were not exempt from competitive bidding as professional services.

Commissioner concurred with ALJ's findings and conclusion that asbestos safety control monitoring services were not exempt from competitive bidding requirements under the professional services exemption set forth in the Public Schools Contracts Law. The Commissioner, however, noted the paucity of the record with respect to procedural agreements preceding the motion and cross-motion for summary decision and the opposing representations by the parties with respect to the necessity for adjudication of the issues left unaddressed by this decision. Thus, the Commissioner remanded the matter for the purpose of either setting forth on the record the reasons why these issues were properly left unaddressed by the initial decision, which would then remain as the final resolution of this matter, or ascertaining whether the services at issue were exempt from bidding under the "extraordinary unspecifiable services" exception of N.J.S.A. 18A:18A-1 et seq. and the applicability of the affirmative defenses advanced by respondents.

MARCH 31, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9072-92
AGENCY DKT. NO. 372-7/92

ENVIRONMENTAL CONCEPTS AND TESTING, INC. AND PATRICIA LEE RALSTON,
Petitioners,
v.
RUMSON FAIR HAVEN REGIONAL HIGH SCHOOL, COLLINGSWOOD SCHOOL DISTRICT, RED BANK BOROUGH BOARD OF EDUCATION, MANASQUAN BOARD OF EDUCATION, LONG BEACH ISLAND BOARD OF EDUCATION, BOARD OF EDUCATION OF CITY OF LONG BRANCH, AND ENVIRONMENTAL CONNECTION, INC.,
Respondents.

Jack Gilman, Esq., for petitioner (Hanley and Ryglicki, attorneys)

Mark S. Hochman, Esq., for Rumson Fair Haven Regional High School and the Boards of Education of Red Bank Borough, Manasquan and Long Beach Island (Gertler and Hannah, attorneys)

Martin F. Pfleger, Esq., for the Board of Education of the City of Long Branch, (McOmber and McOmber, attorneys)

Robert A. Goldschlag, Esq., for respondent Environmental Connection, Inc.

Record Closed: January 5, 1994 Decided: February 17, 1994

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition on July 29, 1992, alleging that respondent school districts employed respondent Environmental Connection, Inc. to survey school buildings for the purpose of locating and identifying asbestos containing materials and alleging that following this respondent school districts thereafter awarded to respondent Environmental Connection, Inc. the contracts to provide asbestos safety control monitoring for the removal of asbestos without competitive bidding, claiming them to be either a professional service or an extraordinary unspecifiable service. Petitioner seeks a determination that the awarding of contracts for the providing of asbestos safety control monitoring services shall be subject to competitive bidding.

The respondents filed answers and on November 18, 1992, the Director of the Bureau of Controversies and Disputes indicated that the Commissioner of Education had determined not to consider this matter for declaratory judgment pursuant to *N.J.A.C.* 6:24-2.1 but rather transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Thereafter, the matter was transmitted to the OAL on November 19, 1992, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge on December 18, 1992. Following this, an in-person prehearing conference was scheduled for February 17, 1993. This conference was converted to a status conference at the suggestion and request of the attorneys for the respective parties, and at the conference all parties agreed that a hearing could be dispensed with and the matter could properly be disposed of by motion for summary decision. Following this, the parties submitted the motions and supporting documentation set forth in the Appendix.

FACTUAL DISCUSSION

The essential issue to be resolved in this matter is whether contracts for asbestos safety control monitoring are required to be awarded by means of

competitive bidding or whether they are exempt from such competitive bidding as a professional service.

The essential facts in this matter are not disputed. The certification of Terry Schulze, President of respondent Environmental Connection, Inc. (Exhibit R-EC-3) indicates that in 1986, the Federal Asbestos Hazard Emergency Response Act (AHERA) was adopted, and implementing regulations were promulgated the following year. Under these regulations, all school districts are required to designate an individual responsible for compliance with the regulations and all school buildings are required to be inspected for asbestos containing material. In the event that asbestos containing material is found, an AHERA management plan is required to be prepared for submission to the State setting forth the details concerning the inspections, the locations of asbestos or suspected asbestos containing materials, details of response actions or preventive measurers which are recommended, and plans for reinspection. The AHERA regulations also require each school district to establish response actions which must be designed by an Accredited Project Abatement Designer and to begin to implement the management plan by July 1989. Every six months after the management plan is in effect, the school district is required to conduct visual inspections at buildings at which asbestos or suspected asbestos containing material was found for changes in its status and to update is management plan accordingly. At least once every three years, all buildings are to be reinspected and new reports are required to be prepared.

The certification of Dr. Schulze indicates the various services provided by Environmental Connection to school districts in performing these functions. It further indicates that various State and Federal rules and regulations apply when a decision has been reached by a client to initiate asbestos abatement. The regulations require that Environmental Protection Agency certified abatement program designer design the project and that specific air tests, based on the size of the project be utilized for clearance of the work area upon completion.

The Asbestos Hazard Abatement Subcode, *N.J.A.C.* 5:23-8.1 to -8.24 sets forth the standards and procedures for all work involving asbestos containing material. Dr. Schulze indicated that it requires that an authorized asbestos safety control monitor prepare detailed plans and specifications to insure that the work area is prepared correctly, the asbestos containing material is removed properly by qualified personnel, engineering controls are in place to insure that adjacent areas

of the building are not contaminated by the removal process, and the project is completed safely and efficiently.

Respondent Environmental Connection, Inc. asserts in the affidavit of Dr. Schulze, and petitioner agrees, that the services which are the subject of this proceeding is described by Dr. Schulze beginning at paragraph 26 of his certification (Exhibit R-EC-3). It is asserted that the asbestos safety technician supervises the preparation of the job, including setting up barriers, containment, etc. Once a job is underway, the asbestos safety technician monitors air, continually supervises the asbestos removal contractors, and take daily air samples. These samples are read by accredited laboratory personnel in accordance with the subcode. At the conclusion of the project, the monitor supervises a breakdown of the abatement project once air samples are determined to be acceptable. At that point, the monitor must file a final report with the Department of Community Affairs in which it certifies to the Department completion of the project, that the project has been completed in accordance with the subcode, that a final inspection has been completed by the asbestos safety technician which revealed no visible signs of asbestos containing material, that air monitoring disclosed acceptable levels. The monitor also request a certificate of occupancy.

LEGAL DISCUSSION AND ANALYSIS

In deciding whether or not the monitoring of asbestos removal is a professional service, it must be determined whether it fits within the definition of "professional service" as set forth in *N.J.S.A.* 18A:18A-2 of the Public School Contracts Law. This provides:

> "Professional services" means services rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services also means services rendered in the performance of work that is original and creative in character in a recognized field of artistic endeavor.

The Asbestos Hazard Abatement Subcode, *N.J.A.C.* 5:23-8.1 to -8.22 sets forth the procedures as well as licensing and other requirements for asbestos hazard abatement. *N.J.A.C.* 5:23-8.11(b) authorizes the establishment of an asbestos safety

control monitor. It requires that such a monitor apply for authorization by submitting an application with the required fee and other additional required information to the Department. *N.J.A.C.* 5:23-8.11(b)4 requires, among other items, a statement of the policies and procedures of the applicant for the hiring, training, education and supervision of all technical personnel, the prior experience of the applicant in performing similar or related functions and the capability of the applicant to review the plans and specifications and to inspect asbestos abatement work to insure that the completed work is in compliance with the subcode.

N.J.A.C. 5:23-8.11(c)3 provides that each asbestos safety control monitor shall have the following responsibilities:

i. To maintain an adequate number of certified staff to enforce the Asbestos Hazard Abatement Subcode for the projects contracted;
ii. To review and approve the plans and specifications, release them in writing, and forward them to the enforcing agency for issuance of a permit.
iii. To be subject to the department's rulings, directives and orders;
iv. To provide adequate supervision to its employees to ensure conformance to the provisions of this subchapter;
v. To carry liability insurance equal to that required of private enforcing agencies pursuant to *N.J.A.C.* 5:23-4.14(a)5;
vi. To process and return all documents, plans, specifications, and applications within the time frame specified by this subchapter;
vii. To provide technical assistance to the building owner in the preparation of a construction permit application;
viii. To provide written notification of the start of a project to the department a minimum of 10 days prior to the start of the project and telephone notification to the department by the asbestos safety technician on the first day of the start of the project.
ix. To perform all required inspections and reinspections pursuant to this subchapter.
x. To perform all tests required by this subchapter;
xi. To give testimony o at a hearing or in court, as required by the construction official or the Department;
xii. To prepare all reports required by this subchapter or as may be required by the Department from time to time;
xiii. To meet its obligations under its contract with the building owner;
xiv. To issue and maintain documentation and certification, including, but not limited to, plan release, permit application and permit issued by the enforcing agency (if a firm is the duly authorized agent of the owner), variations submitted, written notices, daily logs, inspection records, observations, calculations, backup records, air monitoring results and a separate listing of any contractor deficiencies observed during the course of the work;

xv. To ensure the attendance of all technical and supervisory employees at required training and orientation programs; and

xvi. Upon completion of an asbestos hazard abatement project, the asbestos safety control monitor shall submit a final comprehensive report consisting of, but not limited to, plan release, permit application and permit issued by the enforcing agency (if a firm is the duly authorized agency of the owner), variations submitted, written notice to proceed, written notice to remove barriers, certificate or completion, violation notices, daily logs, inspection records, observations, calculations, backup records, air monitoring results and a separate listing of any contractor deficiencies observed during the course of the work. The final report shall be submitted to the building owner within 60 days of the issuance of the Certificate of Completion. A copy of the final report shall be made available to the Department within 10 days of written request.

As I understand it, the on-site reporting and record keeping functions of an asbestos safety control monitor are carried out by an asbestos safety technician. *N.J.A.C.* 5:23-8.10(a) sets forth the requirements for obtaining a certification as an asbestos safety technician. Generally stated, these requirements for certification are:

1. At least 24 college credits in academic sciences including biology, chemistry and other specified sciences or related fields, or one year of work experience which included performing environmental assessment activities which may be substituted for this education requirement;

2) Successful completion of a course in air monitoring methods consisting of a minimum of 30 contact hours that shall include hands-on experience with using and calibrating various types of air monitoring equipment; or six months of work experience performing air monitoring including at least 30 hours of on-the-job training which may be substituted for education.

3) Successful completion of asbestos worker/supervisors training course approved by the New Jersey Department of Health and one year of experience in monitoring asbestos abatement activities, or six months of experience monitoring asbestos abatement if the individual is an industrial hygienist.

4) Successful completion of a course for asbestos safety technicians approved by the New Jersey Department of Health.

5) Successful passing of an examination for asbestos safety technicians approved by the New Jersey Department of Health. An asbestos safety technician certificate is to be renewed every two years.

N.J.A.C. 5:23-8.10(d) sets forth the duties of the asbestos safety technician. These duties may be summarized as follows, and include:

1. Performance of all air sampling as delineated in *N.J.A.C.* 5:23-8.21, and compliance with the requirement to be on site from the initial preparation of the work area through the approved final visual inspection, and the performance of all inspections pursuant to *N.J.A.C.* 5:23-8.7.

2. Directing the actions of the contractor verbally and in writing to insure compliance with the subcode.

3. To calculate, based on the actual available output of the air filtering units the required number of the air filtration units for each work area and informing the enforcing agency in the event of the failure to correct.

4. Monitoring of pressure differential by digital manometers or other approved low pressure monitoring devices for each work area at the beginning of each work shift and every four hours thereafter and at the end of the contractor's work day. The pressure differential is required to meet the minimum requirement set forth in *N.J.A.C.* 5:23-8.15(b)9 or 8.17(d)6i or 8.19(c)4ii, as appropriate.

5. Ensuring that the contractor's smoke tests all the glovebags after they are attached and before the commencement of work.

6. Immediately directing corrective action and verbally reporting results within 24 hours to the contractor upon receipt of testing results indicating that concentrations above acceptance criteria have occurred during the abatement project.

7. Monitoring the removal of all asbestos contaminated waste from the work area to ensure that it takes place in conformance with *N.J.A.C.* 5:23-8.22.

8. Keeping an up-to-date and comprehensive daily log of on site activities to be updated continuously.

9. Preparing a comprehensive final report to include daily logs, required inspection reports, observations and air monitoring results. The report is to be made a part of the official record filed by the asbestos safety control monitor.

After reviewing the foregoing responsibilities and requirements applicable to the licensing of and the services provided by asbestos safety control monitor and technician, it is now necessary to analyze these requirements and determine whether they are professional services as that term is defined by *N.J.S.A.* 18A:18A-2h.

Petitioners point out that the providing of electrical inspections pursuant to the Electrical Subcode of the Uniform Construction Code, *N.J.A.C.* 5:23-3.16, has been held not to be exempt from bidding and are not professional services under the Local Public Contracts Law, citing *Burlington Tp. v. Middle Dep't Inspection Agency,* 175 *N.J. Super.* 624 (Law Div. 1980). In *Burlington Tp.*, the Court concluded that electrical subcode inspection services are not professional services. The Court applied the professional services definition contained in the Local Public Contracts Law, *N.J.S.A.* 40A:11-2(6). It indicated that a professional service involves specialized knowledge, labor or skill that is predominantly mental or intellectual, rather than physical or manual, and this simply does not apply to electrical subcode officials. The Court noted that its conclusion was reinforced by the fact that the licensing requirements for electrical inspectors do not require a prolonged formalized course of specialized instruction and study. *N.J.A.C.* 5:23-5.12.

Petitioners argue that an asbestos safety technician is not a recognized profession. They point out that the licensing requirements as set forth in *Burlington Tp.* for an electrical inspector are more extensive and restrictive than the requirements for licensing of asbestos safety technicians. Asbestos safety technicians need only one year of experience. Electrical subcode inspectors without a bachelor's degree in architecture or engineering needed ten years of experience at that time, *Burlington Tp.*, at 632. The monitoring of asbestos removal is primarily physical and manual and not predominantly mental or intellectual. Therefore, it is not a professional service as that term is defined by the governing statute. In addition, the fact that the licensing requirements do not require a prolonged formalized course of specialized instruction and study confirms this conclusion.

Respondent Environmental Connection argues that petitioner's attempt to limit the meaning of the term "professional services" was rejected by the Supreme Court in *Autotote Ltd. v. N.J. Sports & Expo. Auth,* 85 *N.J.* 363 (1981). In that case, the plaintiff sought to invalidate a contract awarded without bidding to one of its competitors for installation and service of betting machines at the Meadowlands race track. The statute at issue, *N.J.S.A.* 5:10-21, exempted from public bidding "services of a professional nature". In rejecting the effort to limit professional services to the traditional categories, the Supreme Court concluded that the contract in question involves the inextricable integration of a sophisticated computer system and services of such a technical and scientific nature as to constitute "professional services" within the statutory exception to the requirement of public bidding, set forth in *N.J.S.A.* .5:10-21. The Court went on to say that the term "professional

services" is no longer limited to the traditional professions such as law and medicine, and if the law is to keep pace with scientific developments in business and commerce, it must adapt statutory provisions, such as the one in question, to the realities of the day. *Id.* at 371.

Respondent also points out that in a somewhat different context, the definition of professional services was discussed in *Atlantic Mut. Ins. v. Continental Nat. Am. Ins.,* 123 *N.J. Super.* 241 (Law Div. 1973). In order to determine the meaning of ascertain clauses of an insurance policy, the court stated:

> A standard test as to what does fall within the meaning of a professional act is set forth in 7A Appleman Insurance Law and Practice, section 4504.3 (1972 Supp. at 77).
>
> > A "professional" act or service within a malpractice policy is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor or skill and the labor or skill is predominantly mental or intellectual, rather than physical or manual * * *.
> >
> > See also *Multnomah County v. Oregon Auto Ins. Co.*, 256 Ore. 24, 470 *P. 2d.* 147, 150 (Sup. Ct. 1970). 123 *N.J. Super.* at 246.

Applying that definition to the case before it, the court in *Atlantic Mut.* concluded that the services at issue were professional because they involved "supervision" which was "predominantly mental or intellectual. It required observation and constant evaluation of the work being done." 123 *N.J. Super.* at 247.

Respondent also relies on *Erlich v. First Nat'l Bank of Princeton,* 208 *N.J. Super* 264 (Law Div. 1984), holding that investment advisors could not contractually exculpate themselves from liability because, having held themselves out as "having specialized knowledge and skill," they fell within the public policy of the State that "professionals be held to the standards of their profession. . . ." 208 *N.J. Super.* at 287-288.

Based upon the foregoing, respondent argues that the nature of the services performed by Environmental Connection and its staff, and the licensing and training required to perform those services are of such a technical and scientific nature as to constitute professional service in keeping with the *Autotote, Atlantic Mutual Ins.* and the other referred decisions.

However, I am of the opinion that the *Autotote Ltd.* decision does not apply to the present matter. In that matter, the Court was interpreting and applying the New Jersey Sports and Exposition Authority Law, *N.J.S.A.* 5:10-21, and stated that the legislative definition of professional services in the Local Public Contracts Law was found not to be helpful in ascertaining the scope of the exception in the New Jersey Sports and Exposition Authority Law (85 *N.J.* at 371).

I find it to be of great significance that the New Jersey Sports and Exposition Authority Law exempts "services of a professional nature" from public bidding, *N.J.S.A.* 5:10-21, and does not define what is meant by that term. In the present matter, the statutory definition is stated and is relatively clear and explicit. It is virtually identical with the definition set forth in the Local Public Contracts Law, *N.J.S.A.* 40A:11-2(b).

In his certification in opposition to petitioners' Cross-Motion (Exhibit R-EC-8), Dr. Schulze alleges in paragraph 8 that the asbestos safety control monitor has a much wider range of responsibilities than an asbestos safety technician. He asserts that an asbestos safety control monitor is responsible for assessment of the area to be abated, preparation of plans and specifications, acquisition of permits and variances, assistance in the selection of abatement contractors, and acting as arbitrator in disputes between the contractor and client. However, I have been unable to locate any provisions of the Asbestos Hazard Abatement Subcode which imposes these responsibilities and duties on the monitor.

After considering all of the foregoing, I **FIND** that asbestos safety control monitors and asbestos control technicians are regulated by law. However, I **FIND** that these positions are not recognized professions in the traditional sense. I **FIND** that performance of the duties and responsibilities of an asbestos safety control monitor and an asbestos control technician requires specialized knowledge of an advanced type. However, I **FIND** that such performance does not require knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. There is no indication in the record that the performance of these position requires anything more than 24 college credits in specified academic sciences, successful completion of a course in air monitoring methods or six months of specified experience, successful completion of training courses for asbestos worker/supervisors or specified experience, and of training course for asbestos safety technicians, and passing the asbestos safety technician

examination. *N.J.A.C.* 5:23-8.10(a). There is no indication in the regulations that in order to receive an authorization as an asbestos safety control monitor there is a requirement for additional knowledge of an advanced type or a prolonged formal course of specialized instruction and study over and above that required for an asbestos safety technician. *N.J.A.C.* 5:23-8.11(b).

Based on the foregoing, I **CONCLUDE** that contracts for asbestos safety control monitoring are required to be awarded by means of competitive bidding and are not except for such bidding as professional services.

DECISION AND ORDER

It is hereby **ORDERED** that contracts for asbestos safety control monitoring shall be awarded by means of competitive bidding and are not exempt from such bidding as professional services. It is further **ORDERED** that respondent's motion for Summary Decision is **DENIED** and petitioners' Cross-Motion for Summary Decision is **GRANTED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 17, 1994
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

2/18/94
Date

Hope C. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 24 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF EXHIBITS

For petitioner:

P-1 Petitioners' Notice of Cross Motion
P-2 Certification of Daniel Parisi
P-3 Petitioners' Letter Memorandum of Law
P-4 Petitioners' Reply Letter Memorandum
P-5 Petitioners' Supplemental Letter Memorandum

For Respondent Board of Education of the City of Long Branch:

R-LB-1 Letter Memorandum of Law

For Respondent Environmental Connection, Inc.

R-EC-1 Notice of Motion
R-EC-2 Letter Brief
R-EC-3 Certification of Terry Schulze
R-EC-4 Compendium of Exhibits-Volume I:
A. Statement of Qualifications and Experience
B. AHERA Regulations
C. Sample of Documents for Procuring State Approval of Previously Rejected Management Plan
D. Sample System of Continuous Record Keeping Documentation Update Notebook
E. Sample Results of a Bi-annual Periodic Sureveillance Notebook
R-EC-5 Compendium of Exhibits-Volume II:
F. N.J. Asbestos Hazard Abatement Sub Code
G. Sample Plans and Specifications
H. DCA Final Report
R-EC-6 Compendium of Exhibits -Volume III:
I. Asbestos Project Designer's Three Day Course Outline
J. Asbestos Project Designer's
K. Building Inspector"s Three Day Course Outline
L. Management Planner's Two Day Training Course Outline
M. Management Planner's Annual Refresher Course Outline

N. DCA AFCM Application
O. Asbestos Worker's/Supervisor's Five Day Training Course Outline
P. AST Course Outline
Q. N.J. Department of Treasury Classification Document
R. Insurance Classification Documents
S. Freehold Borough Resolution
T. Trenton Professional Service Contract Award

R-EC-7 Certification of Kenneth Walls in opposition to cross-motion

R-EC-8 Certification of Terry Schulze in opposition to cross-motion

ENVIRONMENTAL CONCEPTS AND TESTING, INC. AND PATRICIA LEE RALSTON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF RUMSON, MONMOUTH COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions of respondent Environmental Connection, Inc. (hereinafter "ECI") and those of respondent Board of Education of the City of Long Branch (hereinafter "the Board") were timely filed in accordance with N.J.A.C. 1:1-18.4. Petitioners' counsel filed an affidavit stating that he did not receive respondent's exceptions until March 11, 1994, therefore, his reply exceptions filed on March 18, 1994 were deemed timely pursuant to N.J.A.C. 1:1-18.4.

ECI's exceptions contend that the initial decision purports to resolve the entire litigation in this matter while, in fact, a large number of other issues raised in the pleadings of the parties remain unaddressed. It argues that the parties, with the consent of the ALJ, agreed that discovery in this matter should be held in abeyance and a summary decision motion submitted on a singular key issue, i.e., whether asbestos safety control monitoring services were "professional services" as that term is used in education law

and, therefore, exempt from competitive bidding. Further, if the ALJ determined that such services were professional the case would be concluded; if not, discovery would proceed and the remaining issues would be adjudicated.

Specifically, ECI contends that issues yet unresolved include whether asbestos safety control monitoring services are exempt from bidding under the "extraordinary unspecifiable services" exception in education law, and certain affirmative defenses raised in respondents' pleadings, i.e., statute of limitations, standing, timeliness under N.J.A.C. 6:24-1.2(c), and the doctrine of equitable estoppel. ECI urges that even if the decision with respect to professional services is accepted, respondents must be given an opportunity to adduce evidence on these outstanding issues.

The Board's exceptions join in the arguments advanced by ECI above. Further, it calls attention to the fact that the initial decision fails to address the resultant status of all existing contracts which have been awarded under the professional services exception to the Public Schools Contracts Law and urges that if the Commissioner determines to accept the ALJ's decision, he provide that same is to operate prospectively from a date certain.

Petitioners' reply exceptions argue that it was recognized early in the litigation of this matter that use of the extraordinary unspecified services exemption was indefensible because the work is not extraordinary and is performed pursuant to written specifications so it is not unspecified.

Petitioners next contend that the procedural exceptions being raised by respondents after an unfavorable decision are frivolous. It avers that when the matter was submitted to the ALJ for resolution by summary decision, there was no reservation of

rights for respondents that would allow a subsequent nullification of an unfavorable decision on procedural grounds such as standing.

Upon a careful and independent review of the record in this matter, the Commissioner fully agrees with and adopts as his own the ALJ's findings and conclusion that asbestos safety control monitoring services are not exempt from competitive bidding requirements under the professional services exemption set forth in the Public Schools Contracts Law for the reasons well stated in the initial decision.

Notwithstanding the foregoing, the Commissioner also notes the paucity of the record with respect to the procedural agreements preceding the motion and cross-motion for summary decision in this matter and the opposing representations by the parties with respect to the necessity for adjudication of the issues left unaddressed by this decision. The Commissioner, therefore, finds and determines that it is necessary for this matter to be remanded for the purpose of either setting forth on the record the reasons why these issues were properly left unaddressed by the initial decision, which would then remain as the final resolution of this matter, or ascertaining whether the services at issue herein are exempt from bidding under the "extraordinary unspecifiable services" exception of N.J.S.A. 18A:18A-1 et seq. and the applicability of the affirmative defenses advanced by respondents.

Accordingly, the instant matter is hereby remanded to the Office of Administrative Law for further proceedings consistent with the decision herein.

IT IS SO ORDERED.

MARCH 31, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 31, 1994

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ENVIRONMENTAL CONCEPTS AND TESTING, INC., AND PATRICIA LEE RALSTON,	:	
PETITIONERS,	:	
V.	:	
RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, COLLINGSWOOD SCHOOL DISTRICT, RED BANK BOROUGH BOARD OF EDUCATION, MANASQUAN BOARD OF EDUCATION, LONG BEACH ISLAND BOARD OF EDUCATION, BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, AND ENVIRONMENTAL CONNECTION, INC.,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION ON REMAND

SYNOPSIS

Petitioners sought a determination that the awarding of contracts for the providing of asbestos safety control monitoring services should be subject to competitive bidding.

ALJ found asbestos safety control monitors and asbestos control technicians are regulated by law; however, ALJ found that these positions are not recognized professions in the traditional sense as there is no requirement of prolonged formal course of specialized instruction and study. Therefore, ALJ concluded contracts for asbestos safety control monitoring were not exempt from competitive bidding as professional services.

Commissioner concurred with ALJ's findings and conclusion that asbestos safety control monitoring services were not exempt from competitive bidding requirements under the professional services exemption set forth in the Public School Contracts Law. Commissioner, however, noting the paucity of the record with respect to the necessity for adjudication of the issues left unaddressed by the initial decision, remanded the matter for the purpose of either setting forth on the record the reasons why these issues were properly left unaddressed or ascertaining whether the services at issue were exempt from bidding under the "extraordinary unspecifiable services" exemption of N.J.S.A. 18A:18A-1 et seq.

On remand, the ALJ determined that petitioners had standing as interested parties in this matter; that respondents' request to dismiss the petition was appropriately denied; that the services were not exempt from public bidding requirements as extraordinary unspecifiable services; and that, as a matter of public interest, this action should not be barred by application of the doctrine of equitable estoppel.

Commissioner adopted findings and determination in the initial decision on remand as his own.

MARCH 23, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 3382-94 (ON REMAND EDU 9027-92)

AGENCY DKT. NO. 372-7/92

ENVIRONMENTAL CONCEPTS AND TESTING, INC., AND PATRICIA LEE RALSTON,

Petitioners,

v.

RUMSON FAIR HAVEN REGIONAL HIGH SCHOOL, COLLINGSWOOD SCHOOL DISTRICT, RED BANK BOROUGH BOARD OF EDUCATION, MANASQUAN BOARD OF EDUCATION, LONG BEACH ISLAND BOARD OF EDUCATION, BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, AND ENVIRONMENTAL CONNECTION, INC.,

Respondents.

Jack Gillman, Esq., for petitioner (Hanly and Ryglicki, attorneys)

Mark S. Hochman, Esq., for Rumson Fair Haven Regional High School and the Boards of Education of Red Bank Borough, Manasquan and Long Beach Island (Gertler & Hanna, attorneys)

Martin F. Pfleger, Esq., for the Board of Education of the City of Long Branch (McOmber McOmber, attorneys)

Robert L. Goldschlag, Esq., for Environmental Connection, Inc., respondent

Record Closed: December 30, 1994 Decided: February 14, 1995

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a petition alleging that the respondent school districts employed respondent Environmental Connection, Inc., to survey school buildings for the purpose of locating and identifying asbestos containing materials therein and alleging that following this, the respondent school districts awarded to respondent Environmental Connection, Inc., the contracts to provide asbestos safety control monitoring for the removal of asbestos without competitive bidding, claiming them to be either a professional service or an extraordinary unspecifiable service. Petitioner sought a determination that the awarding of contracts for the providing of asbestos safety control monitoring services is subject to competitive bidding.

The respondents filed answers and the Commissioner of the Department of Education originally transmitted that matter to the Office of Administrative Law (OAL) for hearing as a contested case. That matter was assigned OAL Dkt. No. EDU 9072-92.

By an Initial Decision dated February 17, 1994, summary decision was granted in favor of petitioners by the Administrative Law Judge (ALJ). In that decision the ALJ concluded that asbestos safety control monitoring services are not exempt from competitive bidding requirements under the professional services exemption set forth in the Public Schools Contracts Law, *N.J.S.A.* 18A:18A-2.

The Commissioner of the Department of Education, by decision dated March 31, 1994, fully agreed with and adopted the holding set forth in the Initial Decision of February 17, 1994, that these services are not exempt from competitive bidding as professional services. However,

the Commissioner also noted the paucity of the record with respect to the necessity for adjudication of the issues left unaddressed by the Initial Decision. Therefore, the Commissioner remanded the matter for the purpose of setting forth on the record the reasons why these issues were left unaddressed, or for the purpose of addressing these additional issues. The matter was remanded to the OAL on April 12, 1994 for hearing as a contested case. The matter was assigned to the undersigned ALJ on April 15, 1994. It was then scheduled for hearing on August 18 and 19, 1994, but these hearing dates were adjourned due to the unavailability of attorney for respondent. The matter was rescheduled for hearing on October 25 and November 1, 1994. In the meantime the attorneys for petitioners and for respondent Environmental Connection, Inc. filed cross-motions for summary decision. As a result, the parties requested that the hearing scheduled for October 25 and November 1, 1994 be adjourned pending a decision on the summary decision motions. When the respondents other than the Board of Education of the City of Long Branch and Environmental Connection, Inc. failed to respond to the motions, the ALJ closed the record as to the motions on December 30, 1994.

UNADDRESSED ISSUES

The issues which are listed herein were previously unaddressed in the Initial Decision of February 17, 1994, simply because the parties failed to address them in their moving papers or in their papers submitted in opposition to the prior motion for summary decision. It was the impression of the ALJ that the parties had waived the other issues and had agreed that the sole issue before the ALJ in this matter was whether asbestos safety control monitoring services are exempt from bidding as a professional service? Since the arguments of respondents before the Commissioner reveal that this was not the case, the additional unaddressed issues will be dealt with herein.

A review of the submissions of the parties including the petitioners' original petition and the respondents' answers to the petition, and of the Commissioner's decision reveals that the following issues remain outstanding:

1. Whether petitioners Environmental Concepts and Testing Inc. And Ralston are "interested persons" within the meaning of *N.J.A.C.* 6:24-1.1 so as to have standing in this matter?
2. Whether the petition should be dismissed as having been filed untimely pursuant to *N.J.A.C.* 6:24-1.2(c)?
3. Whether the providing of asbestos safety control monitoring services for the removal of asbestos is exempt from bidding under the extraordinary unspecifiable services exemption set forth in *N.J.S.A.* 18A:18A-5(a)(2)?
4. Whether the doctrine of equitable estoppel should be used to preclude petitioner Environmental Concepts and Testing, Inc., from challenging the contract award process?

It should be noted that by letter addressed to the attorneys for the parties to this matter dated April 20, 1994 (Exhibit C-1), the foregoing issues were set forth and the parties were requested to immediately advise the ALJ if they felt that there are any other outstanding factual and legal issues to be resolved. No additional issues were raised by the parties to this matter.

DISCUSSION

A motion for summary decision is a device for expeditiously reviewing the merits of a case to determine if the moving party is entitled to a favorable decision without the necessity of a hearing. *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954). Summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, which have been submitted clearly show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b); *Templeton v. Boro. of Glen Rock,* 11 *N.J.Super.* 1, 4 (App. Div. 1950). Thus, if there is no real dispute as to the facts, and the legal principles which are applicable to the matter are clear, it would appear to be an appropriate matter for disposition by an order for summary decision. In order to determine if a motion for summary decision should be granted or denied, the applicable law must be applied to the undisputed facts. As a result of the discussion which follows, I **FIND** that the essential facts are undisputed and this matter may be dealt with by means of a summary decision motion.

The issues of the timeliness of the filing of the petition of appeal pursuant to *N.J.A.C.* 6:24-1.2(c), and the standing of the petitioners as "interested persons" as defined by *N.J.A.C.* 6:24-1.1, are clearly threshold issues which should be addressed prior to dealing with the substantive issues. If a petition is not filed on a timely basis or if the petitioners have no standing to seek the relief they are requesting, it may be unnecessary to deal with the substantive issues in this matter.

1. Standing.

The issue whether petitioners are "interested persons" within the meaning of *N.J.A.C.* 6:24-1.1 will be dealt with first.

Neither the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to -15, nor the Uniform Administrative Procedural Rules, *N.J.A.C.* 1:1-1.1 to -21.6, establish criteria governing standing. Therefore, the regulations of the Department of Education are controlling with respect to this issue. *N.J.A.C.* 6:24-1.1 defines the term "interested person(s)" as meaning a person or persons who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner.

In their submission, petitioners argue that a favorable ruling will avail Environmental Concepts Inc., and others of the opportunity to bid for asbestos safety control monitoring services (Exhibit P-3, p.7). Bidding will also result in a benefit to petitioner Ralston and other taxpayers. In this regard, petitioners assert that if there is any dispute as to their standing, they seek leave to add as additional petitioners resident taxpayers of the various municipalities represented by respondents (Exhibit P-2).

In opposition to petitioners' motion and in support of its cross-motion, respondent Environmental Connection Inc., argues that petitioner Environmental Concepts' basis for claiming to be an interested person is speculative because it assumes that if school boards are forced to bid the contracts, Environmental Concepts will be awarded contracts (Exhibit R-3, pp. 2-3). It argues that there is no basis for that speculation, particularly since Environmental Concepts is not

licensed by the State of New Jersey to do this type of work (Exhibit R-2). Similarly, it argues that there is no basis for the assumption that taxpayers are interested persons because there is no basis to believe that future contracts will be for lesser sums, and even if there is some savings in tax dollars there is nothing to support the conclusion that the taxpayers involved will benefit substantially, specifically and directly as required by the regulation (Exhibit R-3, p.3).

The *N.J.A.C.* 6:24-1.1 definition of "interested persons" has been referred to as a broad standing criterion which has been liberally applied in the past. See *N.J.E.A., et al. v. Essex Cty. Ed. Services Comm.*, 5 *N.J.A.R.* 29 (EDU 1981). In that case, Judge Kestin indicated that it is also significant that petitioners, motivated as they may be by their special interest, also seek to vindicate the public interest. He observed that the petitioners raise serious issues of public administration and statutory interpretation which should always come as swiftly as possible to the attention of those administrative officials charged with regulating or overseeing an area of governmental concern. He indicated that the rules of law or procedure which develop to govern that area should make it easier rather than more difficult for a matter of public interest to come before a responsible public official, and that restrictive principles of standing developed for good reason to apply in law suits between private parties should be applied with greater flexibility in the field of administrative law where those who render final administrative adjudications are also policy makers in their roles of overseers and regulators. *Id.*, at p.37, citing *Hudson Bergen, etc., Assn. v. Hoboken,* 135 *N.J.L.* 503, 510 (E. & A. 1947).

The issue whether a particular type of service is exempt from public bidding has been and continues to be a matter of serious concern to all governmental entities. Certainly the public interest is served if this issue is examined and resolved one way or the other. Up to the present time, petitioner Environmental Concepts, had no opportunity to engage in competitive bidding in any way, whether it is qualified or not. Also, petitioner Ralston, as a taxpayer, certainly has a sufficient interest in the bidding process to have the right to challenge exemptions from public bidding. *Schnell v. Tp. of Millburn,* 127 *N.J.Super.* 155 (App. Div. 1974), affirmed, 66 *N.J.* 137 (1974); *Disposmatic Corp. v. Mayor & Council of Kearney*, 162 *N.J.Super.* 489 (Ch. Div. 1978). Under the circumstances, I **FIND** that the petitioners herein are "interested persons" and that they will be substantially, specifically and directly affected by the outcome of this matter.

2. Timeliness.

The next issue is whether the petition should be dismissed as having been filed untimely, pursuant to *N.J.A.C.* 6:24-1.2(c). This provision requires that the petitioner file a petition no later than the 90th day from the day of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

In their submission, petitioners argue that they are not time barred because the failure to follow the requirement for public bidding is a continuing violation (Exhibit P-3, pp. 5-7). Petitioners assert that respondent will not dispute that asbestos monitoring services have been performed by respondent Environmental Connection for a number of respondent school districts both prior and subsequent to the institution of this petition in November 1992. Petitioners further assert that such services were performed without an award after public bidding. Attached to petitioners' brief in support of their motion for summary decision (Exhibit P-3) as Exhibit A are records of the Department of Community Affairs which petitioners assert demonstrate that asbestos safety control monitoring services were performed by respondent Environmental Connection, Inc., for respondents Manasquan, Long Branch and Red Bank School Districts subsequent to the institution of the petition in this matter in November 1992. In addition, petitioners assert that there is a continuing violation of the Public School Contracts Law both before and after the filing of the petition.

The letter in lieu of brief of respondent Environmental Connection, Inc., does not address this issue (Exhibit R-3). The attorney representing respondent Board of Education of Long Branch, likewise does not address this issue (Exhibit R-LB-1). The remaining respondent's did not submit briefs or other papers supporting or opposing the motion.

In *D'Alessandro v. Bd. of Educ., Twp. of Middletown, Monmouth County*, 1986 *S.L.D.* 2496 (Comm'r of Ed., Oct. 20, 1986), the Commissioner held that where there was potentially a continuing violation of the spirit of certain affirmative action regulations which were adopted more than 90 days before the filing of an appeal, such circumstances warranted relaxation of the

90-day rule *N.J.A.C.* 6:24-1.15 provides that the rules shall be considered general rules of practice to govern, expedite and effectuate the procedure before and the actions of the petitioner and they may be relaxed or dispensed with by the Commissioner in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

There is no question that this matter involves a challenge to the validity and legality of a continuing course of conduct on the part of those respondents which are school districts, and that the public interest requires a determination, one way or the other, as to whether this continuing course of conduct complies with the law. Under these circumstances, I **FIND** that the strict application of the provisions of *N.J.A.C.* 6:24-1.2(c) would be inappropriate.

3. Extraordinary Unspecifiable Services Exemption.

After having dealt with these two threshold issues, the next issue to be resolved is whether asbestos safety control monitoring services are exempt from competitive bidding requirements under the "extraordinary unspecifiable services" exception of *N.J.S.A.* 18A:18A-5a(2)?

On this issue, respondent Environmental Connections, Inc., argues that extraordinary unspecifiable services are defined by *N.J.S.A.* 18A:18A-2g as services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor (Exhibit R-3, pp. 1-2). Respondent points out that the Initial Decision dated February 17, 1994, states that asbestos safety control monitors and asbestos control technicians are regulated by law, and that performance of the duties and responsibilities of an asbestos safety control monitor and an asbestos control technician requires specialized knowledge of an advanced type. Therefore, it argues that this should result in the conclusion that the services are extraordinary unspecifiable services. It also relies upon a letter from the Department of Community Affairs, the agency which regulates the asbestos abatement industry, that states the Department's position that asbestos safety control monitoring services qualify for the extraordinary unspecified services bidding exemption of the local public contracts law, *N.J.S.A.* 40A:11-5(1)(a)(ii), and this term, which is defined at *N.J.S.A.* 40A:11-2(7), is identical to the Education Law definition.

In response to respondent's argument, petitioners likewise indicate that the aforesaid Initial Decision spells out the services provided by an asbestos safety technician and an asbestos safety control monitor, and acknowledge the argument made by respondent Environmental Connection, Inc. However, they point out that *N.J.S.A.* 18A:18A-5a(2), requires that in order to be exempt, extraordinary unspecifiable services must additionally be such that they cannot reasonably be described by written specification (Exhibit P-3, pp. 3-5; Exhibit P-4). It asserts that all of the services provided by asbestos safety control monitors and asbestos control technicians can clearly be described by written specifications. Finally, it points out that the statute expressly states that this exemption shall be construed narrowly in favor or open competitive bidding where possible.

As was indicated in the Initial Decision of February 17, 1994, asbestos safety control monitors and asbestos control technicians are regulated by law. However, these positions are not recognized professions in the traditional sense The performance of the duties and responsibilities of an asbestos safety control monitor and asbestos control technician require specialized knowledge or skill of an advanced type. However, such performance does not require knowledge of an advance type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Based upon the findings set forth in the aforesaid Initial Decision, it may be accepted for purposes of discussion that the services provided by asbestos safety control monitors and asbestos control technicians fall within the definition of extraordinary unspecifiable services, meaning services which are specialized and qualitative in nature, requiring expertise, extensive training and proven reputation in the field of endeavor, as that term is defined by *N.J.S.A.* 18A:18A-2g. However, as properly indicated by petitioners herein, the fact that services may be extraordinary unspecifiable services does not mean that they are exempt from bidding unless they cannot reasonably be described by written specifications.

As indicated in the Initial Decision of February 17, 1994, the Asbestos Hazard Abatement Subcode, *N.J.A.C.* 5:23-8.1 to -8.22, sets forth the procedures as well as licensing and other requirements for asbestos hazard abatement. *N.J.A.C.* 5:23-8.11(b) authorizes the establishment of an asbestos safety control monitor. It requires that such monitor apply for authorization by

submitting an application with the required fee and other additional required information to the Department. *N.J.A.C.* 5:23-8.11(b)4, requires the submission of a statement of the policies and procedures of the applicant for the hiring, training, education and supervision of all technical personnel, the prior experience of the applicant in performing similar or related functions and the capability of the applicant to review the plans and specifications and to inspect asbestos abatement work to insure that the completed work is in compliance with the subcode. *N.J.A.C.* 5:23-8.11(c)3 fully and completely specifies the responsibilities of each asbestos safety control monitor. Likewise, *N.J.A.C.* 5:23-8.10(d) sets forth the duties and responsibilities of the asbestos safety technician.

I **FIND** it to be significant that the authors of the New Jersey Administrative Code had little difficulty specifying in full and complete detail the obligations, duties and responsibilities of asbestos safety control monitors and asbestos safety technicians. Under the circumstances, it clearly appears that such services can reasonably be described by written specifications. If that is not the case, it would seem that someone should have challenged the above referred to regulations.

In view of the fact that *N.J.S.A.* 18A:18A-5a(2) expressly states that this specific exemption shall be construed narrowly in favor of open competitive bidding where possible, and in view of the fact that the duties and responsibilities of these positions have been set forth in regulations I **CONCLUDE** that the services of an asbestos safety control monitor is not an extraordinary unspecifiable service so as to be exempt from public bidding.

4. Equitable Estoppel.

The final issue to be resolved is the assertion of respondent Environmental Connection, Inc. that petitioner Environmental Concepts should be equitably estopped from challenging the contract award process in this matter because it actively sought contracts utilizing the same procedures it now attacks (Exhibit R-3, pp. 3-4). Petitioner Environmental Concepts, Inc., acknowledges that it performed asbestos safety control monitoring work awarded without bidding for the Harrison Board of Education, the Sparta Board of Education, the Sussex Board of

Education, and the North Bergen School District (Exhibit P-3, pp. 8-10). Respondent Environmental Connections, Inc., relies on *Autotote Ltd. V. N.J. Sports and Expo. Auth.*, 85 *N.J.* 363 (1981). In that case, the plaintiff entered into a contract without "bidding" for the very same work it was challenging. The Supreme Court explained that the equitable doctrine of estoppel should be used to preclude a party from challenging the contract award process when "it actively sought the same procedures it now attacks." 85 *N.J.* at 369. In that case, only after the plaintiff lost the contract, did it claim that public bidding was necessary in an effort to invalidate the contract awarded to plaintiff's competitor. It is significant that in that case the Supreme Court dealt with the merits because it concluded that the issue is one of substantial public importance and resolution of the issue would serve the public interest.

In the present matter I **FIND** that the public interest requires a determination of the issue whether the providing of asbestos safety control monitoring services should be subject to competitive bidding. I **FIND** that this is so notwithstanding that the petitioner may have engaged in conduct which, in ordinary circumstances, would preclude it from pursuing a challenge to the award of contracts without competitive bidding. Therefore, I **CONCLUDE** that the application of principles of equitable estoppel to prevent the consideration of this matter on its merits would not be in the public interest and would be inappropriate. Since I have reached this conclusion as to this issue, it is not necessary to decide whether the application of the court-fashioned doctrine of equitable estoppel to an administrative proceeding is appropriate. *See, City of Hackensack v. Winner,* 82 *N.J* 1, 29 (1980).

DECISION AND ORDER

Based on the foregoing, it is hereby **CONCLUDED** and **ORDERED** that petitioners are interested persons within the meaning of *N.J.A.C.* 6:24-1.1 so as to have standing in this matter. It is further **ORDERED** that respondents' request to dismiss the petition as untimely pursuant to *N.J.A.C.* 6:24-1.2(c) is hereby **DENIED.** It is further **CONCLUDED** and **ORDERED** that the providing of asbestos safety control monitoring services for the removal of asbestos is not exempt from bidding under the extraordinary unspecifiable services exemption set forth in *N.J.S.A.* 18A:18A-5(a)2. It is further **ORDERED** that the application of the doctrine of equitable

estoppel to preclude petitioner from challenging the awarding of asbestos safety control monitoring without bidding is **DENIED** as inappropriate and is not in the public interest. Therefore, it is **ORDERED** that Summary Decision is hereby **GRANTED** in favor of petitioners and against respondents in this matter.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 14, 1995
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

2/14/95
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 1995
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

None

LIST OF EXHIBITS

C-1	Administrative Law Judge letter of April 20, 1994
P-1	Petitioners' Notice of Motion, dated September 9, 1994
P-2	Certification of Patricia Ralston
P-3	Petitioners' Brief
P-4	Petitioners' reply letter memorandum
R-1	Respondent, Environmental Connection Inc., Notice of Cross-Motion
R-2	Certification of Kenneth J. Walls
R-3	Respondent, Environmental Connection, Inc., Letter-brief
R-LB-1	Letter of Attorney for respondent City of Long Branch Board of Education

ENVIRONMENTAL CONCEPTS AND TESTING, INC., AND PATRICIA LEE RALSTON,	:	
PETITIONERS,	:	
V.	:	
RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, COLLINGSWOOD SCHOOL DISTRICT, RED BANK BOROUGH BOARD OF EDUCATION, MANASQUAN BOARD OF EDUCATION, LONG BEACH ISLAND BOARD OF EDUCATION, BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, AND ENVIRONMENTAL CONNECTION, INC.,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION ON REMAND

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record, the Commissioner concurs with, and adopts as his own, the findings and conclusions of the Office of Administrative Law (OAL) with respect to the following issues summarily determined on remand, namely: 1) that petitioners have standing in this matter as "interested persons" under N.J.A.C. 6:24-1.1; 2) that respondents' request to dismiss the petition herein as untimely is appropriately denied; 3) that, while the services "***are specialized and qualitative in nature, requiring expertise, extensive training and proven reputation in the field of endeavor***" (Initial Decision, at

p. 9), these services are not exempt from public bidding requirements since they are not services "***which cannot reasonably be described by written specifications***" (N.J.S.A. 18A:18A-5a(2)); and 4) that, as a matter of public interest, this action should not be barred by application of the doctrine of equitable estoppel.

Accordingly, the Commissioner adopts the initial decision of the OAL for the reasons expressed therein, and declares that asbestos safety control monitoring services, such as those in the instant matter, are not exempt from competitive bidding requirements under either the professional services exemption (see Commissioner of Education decision dated March 31, 1994) or the extraordinary unspecifiable services exemption set forth in the Public School Contracts Law. In that petitioners sought declaratory relief, pursuant to N.J.A.C. 6:24-2.1, as granted herein, the Commissioner provides no other relief with respect to contracts already awarded.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 23, 1995

DATE OF MAILING MARCH 23, 1995

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EDWARD MERCER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN PAREDES, PRESIDENT, LOUIS ARAGONA, SUPERINTENDENT AND BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

APRIL 5, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6832-93
AGENCY REF. NO. 123-4/93

EDWARD MERCER,
Petitioner,

v.

JOHN PAREDES, PRESIDENT, AND LOUIS ARAGONA, SUPERINTENDENT AND BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,
Respondents.

Edward Mercer, petitioner, *pro se*

Nicholas C. Montenegro, Esq., for respondents, John Paredes and Board of Education, (Wilbert & Montenegro, attorneys)

Jay C. Sendzik, Esq., for respondent Louis Aragona

Record Closed: January 12, 1994 Decided: February 25, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about April 12, 1993, petitioner Edward Mercer filed a Petition of Appeal with an Affidavit before the Commissioner of Education (Commissioner) alleging certain improprieties committed by the Superintendent of Schools and the President of the Board of Education of the Township of Brick (Board) concerning the Board's

proposed 1993-94 school budget. Petitioner did not, however, name the Board as a respondent in his Petition.

The Commissioner's representative, on April 30, 1993, found petitioner's Petition of Appeal to be "...both defective as initially filed and received too late to render a decision on the merits prior to the 1993 annual school election on April 20." (Maureen R. Keller, Director of Controversies and Disputes, letter to Edward Mercer, April 30, 1993.) The Commissioner's representatives noted that petitioner had failed to name the Board, the responsible corporate entity, in addition to the agents whose action petitioner protests.

On June 11, 1993, petitioner filed an Amended Petition of Appeal before the Commissioner, together with his Affidavit.

On July 21, 1993, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On August 23, 1993, petitioner addressed a letter to the Deputy Clerk of the OAL requesting a delay in scheduling a hearing in the matter.

On August 27, 1993, counsel for respondent Board propounded a Motion to Dismiss the Complaint for Failure to Answer Interrogatories. On September 16, 1993, the undersigned conducted a telephone prehearing conference with petitioner, and Mr. Montenegro, counsel for respondent Board. The Prehearing Order provided, among other things, that "Petitioner shall respond to the Board's Notice of Motion to Dismiss for Failure to Answer Interrogatories." (See, paragraph 13. *Motions,* Prehearing Order dated September 17, 1993). On September 20, 1993, petitioner propounded a Motion to Extend the Deadline to Answer Respondents' Interrogatories.

On November 19, 1993, counsel for respondents propounded a Motion for Summary Decision, pursuant to *N.J.A.C.* 1:1-12.5, with a Brief in Support of Motion and Exhibits. On November 24, 1993, the undersigned acknowledged receipt of respondents' Motion and granted petitioner twenty (20) days in which to file and serve his responsive papers.

On December 13, 1993, the undersigned was in receipt of petitioner's Brief and Exhibits in Opposition to Respondents' Motion for Summary Decision. On December 22, 1993, the Board submitted its reply to petitioner's opposition.

By way of letter, dated December 27, 1993, the undersigned advised all parties that the Board's Motion did not meet the criteria as expressed by our Supreme Court in *Judson v. Peoples Bank & Trust of Westfield,* 17 *N.J.* 67 (1954) and, therefore, summary decision was inappropriate. Accordingly, the hearing set down for January 11, 1994, would convene as scheduled.

On January 4, 1994, counsel for the Board and other respondents, sought from the undersigned the basis for the denial of its Motion for Summary Decision. By letter, dated January 6, 1994, this tribunal advised the parties that the number one issue to be resolved pursuant to the Prehearing Order was not addressed in either brief. Therefore, the issue remained in controversy and needed to be resolved.

The issue, as stated in the Prehearing Order and as agreed upon by the parties, is this:

> Whether the Board was in violation of *N.J.S.A.* 18A:42-4 with regard to the 1993-94 annual school budget.

The hearing convened on January 11, 1994, at the Point Pleasant Beach, New Jersey, Municipal Court. Mr. Sendzik advised the Court of his appearance on behalf of respondent Aragona. The hearing record closed on January 11, 1994.

This concludes the recital of the procedural history of this matter.

FACTS

Based upon the pleadings, affidavits and briefs of law submitted by the parties, the following are undisputed facts in this matter.

In and during the months of March and April 1993, the Board, its members, employees and administrative staff made certain presentations to the citizens of the Township of Brick to promote and inform them concerning its 1993-94 annual school budget. The Board and/or members of its administrative staff made presentations at certain schools at the invitation of Parent-Teachers organizations, on the dates set forth as follows:

Midstreams School	-	March 16, 1993
Veterans School	-	March 26, 1993
Drum Point School	-	March 29, 1993

Lanes Mill School	-	March 30, 1993
Emma Havens School	-	April 2, 1993
Lake Riviera School	-	April 5, 1993
Osbornville School	-	April 6, 1993

In addition, the Board caused to have produced newsletters and pamphlets and allowed the use of its equipment and facilities for the presentation of such educational, program and financial information concerning the 1993-94 annual school budget.

Petitioner, an unsuccessful candidate for the Board brought the herein action against the Board alleging, among other things, that:

1. That the preparation of booklets and the use of school facilities to conduct presentations, were performed by public employees without proper approval by the Board;

2. The Administration, under the direction of the Superintendent, acted beyond the scope of their office with proper authority in the expenditure of taxpayer funds contrary to the law;

3. The Board, Superintendent and President of the Board violated the law by promoting a singular point of view, without allowing a forum for an opposing opinion, and utilized taxpayers funds, to promote the budget without a formal vote by the Board.

4. That certain Board members promoted the 1993-94 budget at various presentations and in doing so, endorsed incumbent candidates seeking reelection to the Board.

The Board, on June 30, 1993, adopted a Resolution which authorized the activities complained of by petitioner and which, the Board asserts, it is permitted to do.

Petitioner seeks the following, by way of injunctive relief:

1. Expending public funds without authorization;

2. Immediately cease and desist from further communications and presentations of budget related electorate votes matter without Board of Education approval.

3. Withdraw the name of John Paredes as a candidate due to the endorsement and promotion of him and running mate Frank Pannucci.

4. Withdraw the name of Frank Pannucci as a candidate due to the endorsement and promotion of him and running mate John Paredes.

5. Censure the superintendent for jeopardizing the intent of voter selection in school election for board members.

6. Censure the superintendent for interference in promoting a singular point of view.

7. Censure the superintendent Louis Aragona for allowing candidate endorsement and support, at school PTA gatherings called for the purpose of budget discussions. (Petitioner's Affidavit, April 12, 1993).

ISSUE

The sole issue to be determined by this tribunal and to which the parties agreed, is whether the Board was in violation of *N.J.S.A.* 18:42-4 with regard to the 1993-94 annual school budget?

DISCUSSION AND CONCLUSIONS

At the hearing, petitioner conceded that the relief he sought was now moot. It is well established that the Commissioner does not decide moot issues. *See, Pinkham v. Bd. of Ed. of Boro of South River, et al,* 1974 *S.L.D.* 1103; *Tedesco v. Bd. of Ed. of Lodi,* 1955-56 *S.L.D.* 69; *Oxfeld v. Bd. of Ed. of Twp. of South Orange-Maplewood,* 1975 *S.L.D.* 574. As the Court said in *Moss Estate, Inc. v. Metal and Thermit Corp.,* 73 *N.J.* Super. 56, 67 (Chan. Div. 1962):

> ....It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and "to decide only concrete contested issues conclusively affecting adversary parties in interest." *Borchard Declaratory Judgments (2d. ed.* 1941), pp. 34-35.

In addition, the respondents address the single issue to be determined by this tribunal and asserts that the law permits it to provide information to its citizens concerning its annual school budget. The Board denies any impropriety with respect

to its written material provided to the electorate. In *Citizens, & c., Public Funds v. Bd. of Ed. of Parsippany-Troy Hills,* 13 *N.J.* 172 (1953), Justice Brennan, Jr., writing for the Court said:

> ...that the actions under attack, if improper, would not suffice to invalidate the election already held. *Id.* at 178.

Justice Brennan determined, under the circumstances of the cases, that the matter was moot.

Justice Brennan also found that the Board of Education had implied power to make reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting on a school election proposal. *Id. 179-180.*

I **CONCLUDE,** therefore, that the instant matter is now moot and there is no justifiable issue before this tribunal

ORDER

Accordingly, for all of the reasons expressed herein before, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 25, 1994
Date

Lillard E. Law by BLS
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/28/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:
EDWARD MERCER

FOR RESPONDENT:
NONE

DOCUMENTS IN EVIDENCE

NONE

OAL DKT. NO. EDU 6832-93

EDWARD MERCER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN PAREDES, PRESIDENT, LOUIS ARAGONA, SUPERINTENDENT AND BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, and in light of the fact that petitioner has not excepted to the ALJ's determination that the reliefs sought in this matter pertained to an election which has now passed, the Commissioner adopts the findings and conclusions of the ALJ that this matter is moot and no justifiable issue remains before this tribunal. Accordingly, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

APRIL 5, 1994

DATE OF MAILING - APRIL 5, 1994

71-94

71-94

PETER MURPHY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 5, 1994

OAL DKT. NO. EDU 8197-91

PETER MURPHY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 5, 1994

DATE OF MAILING - APRIL 5, 1994

72-94

72-94

ROBERT TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, unsuccessful candidate for head varsity football coaching position, alleged Board appointed out-of-district coach contrary to N.J.A.C. 6:29-3.3.

ALJ found petitioner's rejection as head coach was properly based upon a duly promulgated written job description and was not arbitrary, capricious or unreasonable. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

APRIL 6, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1321-93
AGENCY DKT. NO. 405-8/92

ROBERT TAYLOR,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,
Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

Rodney T. Hara, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: January 10, 1994 Decided: February 18, 1994

BEFORE **STEPHEN G. WEISS**, ALJ

PROCEDURAL HISTORY

This contested matter was transmitted by the Department of Education to the Office of Administrative Law on February 19, 1993, as a result of the filing by petitioner of a verified petition of appeal alleging that the respondent Board of Education of Waldwick, his employer, reappointed as head varsity football coach for the 1992-1993 school year one Terrence Byrne who, contrary to *N.J.A.C.* 6:29-3.3, was neither employed as a teaching staff member in the district nor properly certificated. Thus, petitioner maintained Byrne's appointment should be set aside

and that he be determined to be the only qualified candidate for the position. Since the 1992 season had ended, Taylor sought damages for his nonappointment.

A telephone prehearing conference was conducted on April 22, 1993, at which time the following issues were identified:

(1) Was the Board's determination not to offer petitioner either the head varsity football or assistant varsity football coaching position for 1992 a violation of any of his statutory rights, or otherwise in violation of any rule or regulation?;[1]

(2) Was the Board's determination not to offer the petitioner either of the aforesaid coaching positions for 1992 arbitrary, capricious or unreasonable?; and

(3) If petitioner prevails, to what relief is he entitled?

Hearings were held by the undersigned on June 20, 1993, July 1, 1993 and September 27, 1993, and the record closed on January 10, 1994 when the last brief was filed.

TESTIMONY FOR PETITIONER

Since petitioner has the burden of proof he presented his case first. Taylor described his employment history in the district noting that he began teaching in Waldwick in 1965. In 1965, and between 1970 and 1988, he said he was the "head" freshmen football coach.[2] In 1989 and 1990 he served as an assistant varsity football coach. In both 1991 and 1992 Taylor applied for the head varsity football coach's position but on each occasion the Board reappointed Terrence Byrne. Byrne, who is

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[1]So much of Taylor's claim as related to the assistant's position has since been withdrawn.

[2]The designation "head" freshmen football coach used by Taylor is disputed by respondent, as will be discussed infra.

not employed as a teacher by the Board, also served as head varsity football coach in 1989, 1990 and 1991. His reappointment for the 1992 season is the one challenged in this action. The 1991 reappointment was also challenged, but that case was settled.

The position of head varsity football coach for the 1992 season was posted in May 1992 and petitioner applied for it (Exhibit R-1). The deadline for submission of applications was June 10, 1992. However, according to Taylor, on June 5, 1992, before he was even interviewed, a meeting was held for students interested in football at which the athletic director allegedly introduced Byrne as head football coach for the upcoming season.

After Byrne was formally appointed by the Board in late June 1992, petitioner protested and he was then offered an assistant coach's position. However, petitioner said he declined the offer when he was informed that he would be given that position only if he agreed to withdraw his pending suit against the Board. Sometime during the first half of September 1992, petitioner was advised that the Board was dropping that condition. However, Taylor claimed he never saw any written confirmation of that change in position.

According to Taylor he never received a written statement from the Board as to why he was not selected as head varsity football coach for the 1992 season. Taylor believed Byrne was not certified at the time of his appointment and he has never held a teaching position in Waldwick. Simply put, it is Taylor's contention that the Board's determination in June 1992 to reappoint Byrne clearly violates *N.J.A.C.* 6:29-3.3 and he, therefore, should be paid the head varsity coach stipend which he would have received had he properly been appointed to the position.

Taylor did not attend the meeting held at Waldwick High School on June 5, 1992, for students interested in playing football. However, he explained that a few days later he was told by some students who were present that Byrne was introduced to the group as the head coach for 1992 even though the deadline for filing applications had not expired. The students who gave that information to Taylor knew he was interested in the job and petitioner had no reason to disbelieve their version of what happened at the meeting. Taylor eventually was interviewed later in June for the position by the high school principal and the athletic director,

both of whom knew of his qualifications from his application and from his prior lengthy coaching experience in the district.

TESTIMONY FOR RESPONDENT

The Board's first witness, Dolores C. Torralbas, is principal of Waldwick High School. She has been employed in the school district for 30 years and as part of her duties she interviews applicants for coaching positions. Torralbas and the athletic director (Anthony Caiazzo) then make a recommendation to the superintendent of schools who thereafter makes his own recommendation to the Board. Torralbas recalled that during the June 1992 interview with Taylor she questioned him as to what clinics and courses he had attended to maintain his skills, and about his knowledge regarding safety generally. She was not aware that he considered himself to have been the "head" freshmen coach, and she did not believe he ever held such a title. Ultimately, she concluded that despite his experience Taylor was not qualified to be head varsity football coach since he did not maintain current information concerning new developments, did not appear to display leadership qualities, and because she was told by other coaches that they would resign if Taylor was appointed. Moreover, as far as she was concerned he had no head coaching experience, or three years of equivalent experience as required by the newly revised job description. Indeed, even if Taylor had been a "head" coach or its equivalent, Torralbas insisted she still would not have recommended him over Byrne in view of his other qualitative deficiencies.

On cross-examination Torralbas continued to maintain there is no recognized position of "head" freshmen coach since that person works under the head varsity coach at all times. She also said that the interview with Byrne revealed to her that unlike Taylor he always maintained a good relationship with his players, commanded the respect of his staff and knew the safety regulations. While she conceded Taylor competently could serve as a freshmen or assistant varsity coach, she reiterated she did not think he has the necessary leadership ability to command the respect of staff and students as the head varsity coach. In fact, the witness said she also was told that sophomores who moved up to the varsity team after playing under Taylor while he was the freshmen football coach were not as prepared as they should have been and one of the assistant varsity football coaches, James Drechsel,

expressly commented that he would resign if Taylor was appointed head coach even though Drechsel played for Taylor on the freshmen squad in the 1970's.

Finally, Torralbas insisted that the May 1992 change made by the Board in the job description for head varsity football coach, which expressly added a prior three-year experience criterion (Attach. A to Exhibit J-1), was the result of an effort to overhaul many job descriptions, not only that of coaches. She vehemently denied that inclusion of the head coach or three-year equivalent requirement was in retaliation against Taylor for his having filed a prior suit in 1991.

The Board's next witness, Anthony Caiazzo, is Waldwick's athletic director and has been employed in the district since 1970. He had been head varsity football coach between 1974 and 1987 and for one year also served as an assistant football coach at Montclair State College. Between 1974 and 1987, when Caiazzo was head varsity football coach, Taylor was a freshmen football coach. According to Caiazzo, he often became "frustrated" with Taylor because petitioner did not follow directions very well. As the district's "football philosophy" changed over time, it was Taylor's job primarily to prepare the freshmen players for transition into the varsity program. Nevertheless, even though Caiazzo asked Taylor to use the varsity's offensive and defensive formations, petitioner often was unable or unwilling to do so. The witness also found Taylor to be "lacking" in the ability to teach basic football skills, such as stance, formation and rotation of defense. As the witness put it, some of Taylor's players "did not have a clue" with respect to how to do those things. Simply put, in Caiazzo's view Taylor did not provide the freshmen with an adequate foundation upon which to build as they moved up to the varsity level.

Caiazzo, like Torralbas, also insisted that the freshmen coach is directly responsible to the head varsity coach and he, too, maintained that there has never been any position as "head" freshmen coach in Waldwick. When Caiazzo interviewed Taylor in June 1992 for the head football coaching position, he found Taylor lacked up to date knowledge of safety practices. Indeed, Caiazzo recalled that Taylor was never able to fit helmets properly even when he was the freshmen coach. Caiazzo also said he told Taylor during the interview that assistant coaches did not want to coach under petitioner and that not one of them gave Caiazzo a positive reaction to the possibility that Taylor would become head coach.

Caiazzo also spoke to students concerning the possibility that Taylor would become the head coach and said he received responses ranging from "laughter" to statements such as, "you've got to be kidding me."

The athletic director also had concerns about Taylor's ability to deal with possible substance abuse by players. In response to a question posed to Taylor at the interview as to what he would do if a player came to him with such a problem, petitioner said he would refer the student to a substance abuse counselor. Caiazzo was disappointed by that simplistic response because he knew from personal experience that in such a situation an immediate plan often had to be implemented to deal with the problem.

Thus, Caiazzo concluded from the interview, as well as from his prior knowledge of Taylor's performance as freshmen coach, that petitioner was not qualified to be a head varsity football coach. As the athletic director put it, he was looking for "a ray of hope" but never found it. Essentially, in Caiazzo's opinion, Taylor was not capable of organizing and running a team on the varsity level since he does not have the necessary leadership abilities to carry out all those responsibilities and lacks the ability to command the respect of the staff and the players. As the witness put it, although he has, "a lot of respect for Bob [as a person], . . . coaching is not his forte."

Caiazzo also recalled that in June 1991 Taylor actually had been appointed as freshmen football coach after he had expressed an interest in that position. However, after the Board appointed Taylor in late June there was difficulty in reaching him over the summer. Then, in early September, when petitioner returned to school, he told the athletic director that he was not going to take the job after all because his lawyer said it would adversely affect the case he then was pursuing in connection with Byrne's reappointment to the head varsity football coach position in 1991 (Exhibits R-2, R-3). That case, as noted, later settled.

With respect to the events which occurred at the meeting held on June 5, 1992, Caiazzo noted that even though there was no head coach in place for 1992, it was necessary for someone to organize potential players with respect to arranging for their physicals and determining who would be coming out for the team. Thus, Caiazzo asked one of the assistants, Drechsel, to be there. Caiazzo also attended the

session and gave out forms. Although Caiazzo did not see Byrne at the meeting itself, he did observe Taylor and Byrne shaking hands outside the meeting room later that day.

On cross-examination Caiazzo maintained that unlike petitioner, Byrne's coaching skills were satisfactory in all appropriate areas. Specifically, he criticized Taylor's use of the "I" formation with the freshmen team, whereas the high school varsity used a "pro-set." Also, the varsity used a "split back" and the freshmen did not seem to be familiar with that formation when they came up to the varsity. Basically, in the opinion of the witness, Taylor simply did not understand the consequences of using various types of plays and did not do an adequate job teaching basic skills. In short, Taylor's many years as freshmen football coach did not, in Caiazzo's view, equal even one year as an assistant varsity coach.

Insofar as the need exists for a head coach to handle potential drug abuse problems, Caiazzo repeated he lacked confidence that Taylor could handle such situations in a prompt or effective fashion. Finally, the witness noted that when Taylor was assigned to "scout" future opponents often he "missed" the other team's basic style, or the "game plan" it used--the very reason for the scouting assignment in the first place.

The Board's next witness was its Superintendent of Schools, Dr. Patrick Piegari, who has held that position since 1989. Piegari had recommended the reappointment of Byrne as head varsity football coach for 1992 following his discussions with Caiazzo and Torralbas (Exhibit R-4). According to Piegari, the May 1992 revision of the job description for varsity head football coach was undertaken as part of an overall update of job descriptions for several positions, and the introduction of the requirement of three years of prior assistant coaching experience was intended to assure that a head varsity football coach had adequate experience dealing with varsity players--something substantially more than mere "tangential"contact.

According to Piegari, both Caiazzo and Torralbas told him that in their judgment Taylor seemed to lack necessary leadership qualities and knowledge of football skills fundamentals. They also expressed concern that other coaches would quit if Taylor was appointed to the head coach position and the team might even

disintegrate because players would not want to play for Taylor. Piegari gave great weight to his senior administrators' recommendations, especially that of Caiazzo who had been the head varsity football coach for many years and who knew Taylor well. Piegari also spoke to other persons who worked with Taylor in order to obtain additional "feedback" as to petitioner's suitability to be the head coach. Essentially, all of their comments were negative.

The superintendent also spoke to former students and they, too, related negative feedback about Taylor. One person described his experience as a member of a freshmen team coached by Taylor as "horrible" and opined that the appointment of Taylor as head varsity coach would be "devastating" to the varsity program.

Piegari, too, insisted that at no time was there any formally recognized position as "head" freshmen coach, and that except for an inadvertent, mistaken reference to such a position in Taylor's 1987 contract, none of the contracts between Taylor and the Board in 1965 or between 1970 and 1989 contained that designation (Exhibits R-8 and R-9).[3]

On cross-examination Piegari stressed that the position of "freshmen football coach" had no separate job description. Essentially, that coach is an assistant who works only with the freshmen. Piegari, also insisted that the scope of a freshmen coach's responsibilities were quite different from that of an assistant varsity coach and, like Caiazzo, he too observed that in his view the eighteen years that Taylor coached freshmen football is not the equivalent of even one year of assistant varsity coaching.

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[3]Exhibit R-9 consists of all the coaching contracts signed by Taylor. All those related to his freshmen coaching position and refer to the position without the "head" designation, except for the 1987 contract. Also, the 1986-88 collective negotiations agreement with the Waldwick Education Association (Exhibit R-10) omits any "head" designation for the freshmen football coach.

Finally, with respect to Taylor's qualifications to be head football coach generally, it was Piegari's view that such an appointment potentially would have destroyed Waldwick's entire football program because assistant coaches indicated they would not work under Taylor, and players said they would quit the team. The superintendent conceded that he did not talk to any players directly, but had received information about their views from the assistant coaches and others.

The Board's next witness was James Drechsel who presently teaches industrial arts at Waldwick High School. He was an assistant freshmen coach in 1986 and 1987 and an assistant varsity coach from 1989 through 1992. Drechsel also played under Taylor while he was a student at Waldwick High School in the 1970s.

According to the witness, the freshmen football activities constituted a "separate program in itself"--more or less "doing our own thing." Taylor, he said, would design offensive plays which did not appear to Drechsel to be "characteristic" of the plays the varsity was using. Thus, according to the witness, Taylor's methods made it difficult for freshmen to make a smooth transition to the varsity level since it was hard for them to adjust to different formations, etc. In essence it became necessary practically to "reteach" the freshmen when they moved up to the varsity level since Taylor appeared to have "his own agenda."

Drechsel also recalled that during 1983, while he was an assistant football coach at Ramsey High School, the Ramsey freshmen played Waldwick's freshmen and Taylor was using the same plays with which Drechsel was familiar from his own playing days under Taylor. The witness also characterized many of Taylor's designed plays as "Walt Disney plays," *i.e.*, tricky maneuvers such as "button hooks" and "double reverse passes." These were not the sort of plays which Drechsel considered to be the "foundation plays" one would need to know at the varsity level.

Although according to the witness Taylor has a fine sense of humor, this trait tended to create laxness and distraction at practice. Drechsel also stated that the petitioner did not appear to understand that the freshmen were not in the sort of physical shape they should have been in, and Taylor did not require enough "run sprints" to build up their mental and their physical conditioning.

Finally, when Drechsel learned that Taylor again had applied for the head varsity coaching position for 1992, he told the administration that he would not be interested in serving as an assistant under Taylor since he does not believe he could learn anything from Taylor and from past experience in working with petitioner Drechsel simply did not want to "put up with it."

TESTIMONY FOR PETITIONER IN REBUTTAL

Taylor and one other witness testified in rebuttal to the Board's case. That other witness, Robert Straut, was head varsity football coach in Waldwick for the 1971-72 and 72-73 school years. Taylor, he said, was the "head" freshmen coach who worked under him in addition to one other assistant coach. Straut explained that he outlined his football philosophy and directed the assistants to carry it out. He recalled that Taylor essentially maintained a separate freshmen football program and was responsible for opening up the locker room, getting the players onto the field, selecting players for games, conducting drills and practices and doing all those sorts of things that coaches do. Straut established the "general scheme" and Taylor then chose whatever plays he wished within that framework.

According to Straut, the petitioner did teach his players proper offense and defense stances and formations, and the freshmen made orderly progress with respect to their skills development. In the witness's opinion Taylor was a competent, capable and dependable coach, Straut was satisfied with his performance at all times and he never observed any problems that petitioner had with the safety of his players.

Taylor also testified in rebuttal. He reiterated that he meets all of the newly established qualifications for the head varsity football coach position, particularly prior experience for three years as an assistant since he was, in fact, the "head" freshmen football coach for so many years. As far as Taylor could recall, at no time did he ever have a problem either with other assistant coaches, the head coach or with any student athletes.

With respect to complaints regarding his alleged lack of concern for safety and lack of knowledge of new equipment, Taylor insisted he is knowledgeable on those subjects. Indeed, during his many years as a coach there was a minimum of injuries

to his players. Taylor conceded he could not name any particular safety equipment clearing house, but pointed out it was not up to him to order equipment in any case. He is familiar with state law regarding pupil safety and doctors and nurses are available at games, if needed.

Taylor also denied that he is unfamiliar with the defensive stances needed to compete at the varsity level. He starts out his freshmen players with the "Oklahoma defense" because it permits quicker action by the player. He also noted that he has been complimented on the way his players maintain their stance on defense and commented that, "we never beat ourselves with offsides."

With respect to offensive formations Taylor said he uses the "I" because it is a common one and easier to teach to freshmen. He noted that in the 1988 season the "I" formation carried the team to the state championship level and it predominates in the high school and college leagues.

Insofar as complaints about his attention to physical conditioning is concerned, petitioner explained that he had his players perform the Marine Corps "daily dozen" and the lack of serious injuries to his players over the years attest to his abilities in that area. Often he had only thirteen or fourteen players available and he would never ask any one of them to do what he, a much older person, could not do himself.

With respect to the confusion surrounding whether or not he agreed to take an assistant varsity football coach position for 1992, Taylor explained he did not agree to take it since the Board wanted him to drop his lawsuit as a condition. He also insisted that he did not learn that the Board had dropped this condition until mid-September during a telephone conference with the Board's attorney. However, since he had not received any written confirmation from the Board, by then it was too late.

STIPULATION OF FACTS

At the outset of the hearing, counsel entered into a joint stipulation of facts which form a substantial part of the record. (Exhibit J-1) Those undisputed facts are as follows:

1. Petitioner, Robert Taylor, has been employed as a social studies teacher ("Taylor") by Respondent, Waldwick Board of Education ("Board"), from the 1965-1966 school year to the present.

2. Taylor has previously held the position of freshmen football coach and assistant football coach in the Waldwick School District ("District"). He held the position of freshmen football coach from the 1970-1971 school year through the 1988-1989 school year. For the 1989-1990 school year, Taylor was appointed assistant football coach. Taylor has never held the position of head football coach.

3. Taylor applied for the position of head football coach for the first time for the 1991-1992 school year. Based on the recommendation of Dr. Patrick Piegari, superintendent of schools ("superintendent"), the Board appointed Terrence Byrne ("Byrne") head football coach. Byrne had been the head football coach for the 1989-1990 and 1990-1991 school years.

4. The job description for head football coach and assistant coach was revised by the Board on May 26, 1992 (Exhibit A).

5. Notice of the vacancy in the head football coach position was advertised. Taylor submitted an application for the position of head football coach, together with attachments, to the superintendent (Exhibit B).

6. Ms. Delores Torralbas, high school principal ("principal"), and Mr. Anthony Caiazzo, athletic director ("athletic director"), interviewed Taylor for the position of head football coach.

7. The superintendent concluded that Taylor "did not satisfy the qualifications for head coach, as set forth in the Board of Education's job description" (Exhibit C).

8. On June 29, 1992, the Board appointed Byrne the head football coach for the 1992-1993 school year (Exhibit D).

9. Byrne is not employed as a teaching staff member by the Board. He possesses a county substitute certificate. Approval to employ Byrne as head football coach was obtained from the Bergen County Superintendent of Schools (Exhibit E).

10. In July 1992, Taylor sent the superintendent a letter applying for the position of assistant varsity football coach for the 1992-1993 school year (Exhibit F).

11. The superintendent requested that Taylor forward a signed contract to the Board prior to the board acting on his appointment to the position of assistant varsity football coach (Exhibit G).

12. Taylor subsequently withdrew his application for the position of assistant varsity football coach by letter (Exhibit H).

ADDITIONAL FINDINGS OF FACT

In addition to these undisputed facts, and as a result of my review of the testimony offered at the hearing, I herewith make the following additional findings of fact:

13. The job descriptions for head coach and assistant coach were adopted by the Board on May 26, 1992, as part of an overall reorganization of the school district. The previously existing job descriptions contained in the Waldwick High School Interscholastic Athletics Rules and Regulations and Coaches Handbook had never formally been adopted by the Board.

14. The qualifications for head varsity football coach contained in the Board's May 26, 1992 revised job description documents were as follows:

    (a) A valid New Jersey teaching certificate or county substitute certificate;

    (b) Prior head coaching experience or at least three years' experience as an assistant varsity or junior varsity coach;

(c) Demonstration of leadership and organizational ability and the ability to effectively communicate with students/athletes, other coaches, teaching staff members, the media and the public;

(d) Possession of a basic knowledge of the particular sport, including its rules and regulations, through actual playing or alternative experience;

(e) Possession of a basic knowledge of the appropriate athletic equipment, athletic training and conditioning and first aid.

15. During June 1992, and as a result of their personal interview of Taylor, Ms. Torralbas, the high school principal, and Mr. Caiazzo, the athletic director, assessed petitioner's qualifications for the position of head varsity football coach. Based upon the written standards set forth in the job description, a review of his prior coaching experience, his answers to their questions and negative feedback from other coaches in the district, they determined Taylor was not qualified for the position.

16. Torralbas had been familiar with Taylor's performance as a freshmen football coach and as an assistant varsity football coach based upon her years in the district. Caiazzo's familiarity with Taylor's performance as a coach was based on his own many years of experience in the district, together with his specialized experience as the head football coach and as a junior varsity football coach. For many years Taylor had been freshmen football coach while Caiazzo was the head football coach, and in that context, Caiazzo directly supervised Taylor.

17. Torralbas and Caiazzo determined not to recommend Taylor for the position of head varsity football coach for 1992 for the following cited reasons:

(a) Taylor does not possess the leadership capabilities that are required of the head football coach. Other coaches indicated that they would not coach football with Taylor if he was appointed head

football coach since his appointment would have a deleterious effect on the football program. Students indicated that they would quit the football team if Taylor was appointed head football coach. Taylor did not command the respect of other coaches and students and his leadership skills were questioned by other coaches and students.

(b) Taylor has not demonstrated an ability to effectively organize and maintain a football program. As freshmen football coach he did not prepare his players adequately for the varsity program. Moreover, a lack of organization existed during practice sessions with players talking too much. Also, Taylor did not effectively communicate with his players and satisfactory answers were not provided when he was asked what he would do with the existing football program.

(c) Taylor did not possess the sort of updated knowledge of the game that is required of a head football coach. When he was freshmen coach Taylor often called plays which was predictable to opponents. Furthermore, at the interview, Taylor indicated that he did not attend classes or courses to improve his coaching skills.

(d) Taylor did not possess the requisite knowledge of the appropriate athletic equipment and first aid and he demonstrated a lack of familiarity with safety equipment and substance abuse procedures.

18. Based upon their consideration of the respective qualifications of Taylor and Byrne, Torralbas and Caiazzo unanimously recommended to Dr. Piegari that Byrne, not Taylor, be appointed to the head football coach position for 1992.

19. Thereafter, and based upon discussions he had with Torralbas, Caiazzo and other coaches, Piegari determined to concur in the recommendation from Torralbas and Caiazzo that Taylor did not satisfy the qualifications for the head varsity football coaching position. Thus, he recommended that the Board reappoint Byrne to the position.

20. Although Byrne is not employed as a teaching staff member in Waldwick, he does possess a county substitute certificate and approval to employ him as head varsity football coach was obtained from the Office of the Bergen County Superintendent of Schools.

21. During the summer of 1992, after Taylor applied for the position of assistant varsity football coach, Dr. Piegari indicated to him that he would be recommended for the position. However, he requested that Taylor forward a signed contract to the Board prior to the Board's acting on the appointment.

22. Thereafter, by mid-September 1992, Taylor withdrew his application for the position of assistant varsity football coach since he had not received written assurance that the Board had dropped its demand that he dismiss his lawsuit.

DISCUSSION

The State Board regulation pertaining to selection of coaches may be found at *N.J.A.C.* 6:29-3.3(a) through (c). The genesis of that regulation was reviewed by the undersigned administrative law judge in the case of *Krupp v. Union County Regional High School District Board of Education*, OAL Dkt. No. EDU 9182-91, decided by the Commissioner July 30, 1993, aff'd by the State Board of Education, January 7, 1994. In my initial decision in that case I observed that the clear thrust of the regulation was to require boards in the first instance to appoint to their coaching staffs qualified persons employed in the school district. *See, Norcross v. Hunterdon Regional High School District*, 92 *N.J.A.R.* 2d (Vol. 4) 176 (Dept of Educ.), affirmed State Board 92 *N.J.A.R.* 2d (Vol. 4) 181; *Capraro v. Woodbridge Board of Education,* 91 *N.J.A.R.* 2d (Vol. 4) 17 (Dept. of Educ.); *Chambers v. Neptune Board of Ed.*, 1985 *S.L.D.* 1363. *See also, Daniel and Moxley v. Board of Education of Irvington*, 93 *N.J.A.R.* 2d (Vol 4A) 613 (Dept. of Educ.). The clear message emanating from all the pertinent decisions seems to me to place a very substantial burden upon a board of education to justify its action whenever applicants employed in the school district are rejected for a coaching position in favor of an "outsider" and as I pointed out in *Krupp, supra,* it is particularly important that local boards promulgate written

qualifications under which candidates can be judged so that there can be no question as to why a decision not to employ an in-district person was made.

Nevertheless, despite the preference for in-district appointments, I agree with the Board that although the State Board regulation clearly poses a hurdle to out-of-district candidate selection, the barrier is not insurmountable and boards are free to promulgate reasonable written rules with respect to the qualifications they believe are important for such positions. Thus, whether or not the Board's action in Taylor's case meets the requirements of *N.J.A.C.* 6:29-3.3, and the case law interpreting it, must be determined by matching the qualifications contained in its revised job description against the reasons upon which the Board relied in appointing Byrne rather than petitioner as its head varsity football coach for the 1992 season.

The first area of inquiry is whether Taylor met qualification "B"; i.e., that he had prior "head" coach experience or at least three (3) years experience as an assistant varsity or junior varsity coach. In respect to this qualification petitioner strenuously argued, of course, that his eighteen years' experience as a freshmen coach certainly has to be considered the equivalent of one year as an assistant varsity or junior varsity coach. If there is any doubt about that, he claims that his designation as the "head" freshmen football coach in the 1987 contract eliminates that doubt. Beyond that, of course, petitioner maintains that the three years prior experience criterion was deliberately inserted into the revised job description in order specifically to retaliate against Taylor for his previous suit against the Board and to give the Board an ostensibly legitimate basis to turn him down.

While, at first blush, Taylor's argument is an appealing one, I must reject it. Clearly, the designation in the 1987 contract of Taylor as "head" freshmen football coach was inadvertent, as demonstrated not only by the sixteen or seventeen other contracts which did not contain that designation, but in addition, the failure to include the "head" designation in the 1986-88 collective negotiations agreement. Moreover, the testimony at the hearing convincingly established that the freshmen football coach was always acting under the jurisdiction, control and supervision of the only "head" coach in the district--the head <u>varsity</u> football coach. Also, while one can argue that seventeen or eighteen years' experience as freshmen football coach ("head" coach or not) <u>ought to be considered</u> the equivalent of at least one year's experience as an assistant or junior varsity coach, that is a determination for

the local officials to make. Thus, while I personally might disagree with the Board that petitioner failed to meet the qualification set forth in subparagraph B, that was a decision which the Board in the exercise of its discretion was entitled to make.

Moreover, even if I determined that Taylor meets the prior experience requirement, he still would not prevail since the Board's evidence convincingly demonstrated that he failed to meet some of the remaining requirements as well. The weight of the testimony from Torralbas, Caiazzo and Piegari more than overcame the testimony of Taylor and Straut with respect to petitioner's lack of leadership ability and communications effectiveness. When the testimony of Drechsel is added to that testimony the conclusion to be reached with respect to Taylor's failure to meet requirement "C" is reinforced. I also have no reason to doubt the veracity of the Board's witnesses to the effect that other, albeit unidentified, coaches and students expressed dismay with respect to the notion that Taylor might become the head varsity football coach and I am sure some of the derisive comments described by Caiazzo occurred. While the decision to appoint an individual to a coaching position is made by the Board, not by assistant coaches or students, the Board and its senior administrative staff must have the discretion to consider input received from the persons who, after all, would be in closest contact with the coach. The serious problems that these others had with Taylor came out during the course of the interview with Torralbas and Caiazzo; namely, his lack of familiarity with fundamental football matters and his deficiencies in the area of leadership and effective communication. I was particularly impressed by the testimony of Caiazzo who had the most experience with respect to knowledge of the varsity football program and the type of person the Board would need as head coach. Caiazzo, as head varsity football coach, directly supervised Taylor for many years when petitioner was the freshmen football coach and his conclusions with respect to whether Taylor deserves the head coaching position are entitled to particularly substantial weight. As Board counsel pointed out in his post-hearing brief, both Torralbas and Caiazzo, as well as Piegari, had every right to be concerned over Taylor's deficiencies with respect to the following areas: (a) absence of leadership and the possibility that others would not work under Taylor; (b) absence of an ability properly to prepare freshmen players for the varsity program; (c) an absence of effective communication with players; (d) lack of knowledge of the game, and in particular, not preparing freshmen players for the formations and plays used at the varsity level; (e) absence of knowledge with respect to new

developments in the field of athletic equipment and safety; (f) a simplistic response to what could be a major problem--a player who confesses to a substance abuse; and (g) the general derision and ridicule expressed by persons when told Taylor might become the head football coach position.

I also agree with Board counsel, as I noted earlier, that neither the administrative law judge nor, for that matter the Commissioner of Education, ought to interfere with the discretionary decision-making of the local school authorities where there has been an absence of any demonstration that the local decision was marked by arbitrary, capricious or unreasonable characteristics. In my view there is no competent evidence to indicate that malevolent motives tainted the decision-making process here. In short, pursuant to *N.J.A.C.* 6:29-3.3 the Board's determination to reappoint Terrence Byrne as head varsity football coach for the 1992 football season, and its determination to reject the petitioner as not qualified for the position, properly was based upon a duly promulgated written job description, was neither arbitrary, capricious nor unreasonable and therefore should be sustained.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth above, I **CONCLUDE** that the determination by respondent to appoint Terrence Byrne as head varsity football coach for the 1992 football season was proper and I therefore **ORDER** that Taylor's verified petition of appeal be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

FEBRUARY 18, 1994
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

2/23/94
Date

Hope R. Blackwell, Acting Director
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 1 1994
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr/e

WITNESS LIST

For Petitioner:

Robert W. Taylor
Robert Straut

For Respondent:

Delores C. Torralbas
Anthony Caiazzo
Dr. Patrick Piegari
James Drechsel

EXHIBIT LIST

J-1 Joint stipulation of facts and attached Exhibits A to H

P-1, P-2 and P-3 (For identification) Newspaper articles from *The Record*, August 22, 1993, August 23, 1993 and June 21, 1993

R-1 Announcement of vacancies for 1992-93

R-2 Letter of July 2, 1991 from Superintendent Piegari to Mr. Taylor

R-3 Letter of September 20, 1991 from Superintendent Piegari to Mr. Taylor

R-4 Memorandum from Ms. Torralbas and Mr. Caiazzo to Dr. Piegari, June 25, 1992

R-5 Previous job description for head coach and assistant coach positions

R-6 Waldwick High School Interscholastic Athletic Rules and Regulations and Coaches Handbook, September 1984

R-7 Copy of county substitute teacher certificate for Terrence J. Byrne, July 12, 1989 through July 1, 1992

R-8 Collective negotiations agreement between Waldwick Education Association and Waldwick Board of Education, July 1, 1990 through June 30, 1993

R-9 Copies of coaches' contracts between Taylor and Waldwick Board of Education

R-10 Collective negotiations agreement between Waldwick Education Association and Waldwick Board of Education, July 1, 1986 through June 30, 1988

R-11 (For identification) Letter of September 15, 1992 from Mr. Hara to Mr. Maurice

OAL DKT. NO. EDU 1321-93

ROBERT TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions submitted by petitioner were untimely pursuant to N.J.A.C. 1:1-18.4, having been filed on March 17, 1994 in response to an initial decision mailed on March 1, 1994. Consequently, those and the Board's reply thereto are not considered herein.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that, pursuant to N.J.A.C. 6:29-3.3, the Board's determination to reappoint Terrence Byrne as head varsity football coach for the 1992 season, and its determination to reject petitioner as not qualified for the position, properly was based upon a duly promulgated written job description, was not arbitrary, capricious or unreasonable, and, therefore, should be sustained.

Accordingly, the Commissioner adopts the initial decision of the Office of Administrative Law for the reasons well articulated in such decision and hereby dismisses the instant Petition of Appeal.

APRIL 6, 1994

DATE OF MAILING - APRIL 6, 1994

COMMISSIONER OF EDUCATION

72-94

EDU #1321-93
C # 72-94
SB # 23-94

ROBERT TAYLOR,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 6, 1994

For the Petitioner-Appellant, Springstead and Maurice
(Alfred F. Maurice, Esq., of Counsel)

For the Respondent-Respondent, Fogarty & Hara
(Rodney T. Hara, Esq., of Counsel)

Robert Taylor (hereinafter "petitioner"), a teaching staff member in the employ of the Board of Education of the Borough of Waldwick (hereinafter "Board") filed a petition with the Commissioner of Education alleging that the Board had improperly denied him appointment as head varsity football coach in the district for the 1992-93 school year. Petitioner alleged that the assignment had been given improperly to Terrence Byrne (hereinafter "Byrne"), who held only a county substitute certificate, in violation of N.J.A.C. 6:29-3.3.

On February 18, 1994, an administrative law judge ("ALJ") recommended dismissing the petition, finding that the Board's actions had not been arbitrary, capricious or unreasonable. The ALJ concluded that, pursuant to N.J.A.C. 6:29-3.3, the Board's determination to appoint an individual with only a county substitute certificate and to reject petitioner as not qualified for the controverted coaching assignment was properly based upon a written

Oct. 5, 1994

job description therefor. The ALJ concluded that the Board's evidence convincingly demonstrated that petitioner did not meet the requirements for the coaching assignment as set forth in the job description.

The ALJ concluded that petitioner did not have the coaching experience required by the job description and that he lacked leadership ability and communications effectiveness. In so doing, the ALJ found "no reason to doubt the veracity of the Board's witnesses to the effect that other, albeit unidentified, coaches and students expressed dismay with respect to the notion that Taylor might become the head varsity football coach..." Initial Decision, slip op. at 18. The ALJ found that school officials "had every right to be concerned over Taylor's deficiencies with respect to the following areas: (a) absence of leadership and the possibility that others would not work under Taylor; (b) absence of an ability properly to prepare freshmen players for the varsity program; (c) an absence of effective communication with players; (d) lack of knowledge of the game, and in particular, not preparing freshmen players for the formations and plays used at the varsity level; (e) absence of knowledge with respect to new developments in the field of athletic equipment and safety; (f) a simplistic response to what could be a major problem--a player who confesses to a substance abuse; and (g) the general derision and ridicule expressed by persons when told Taylor might become the head football coach position [sic]." Id. at 18-19.

On April 6, 1994, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition.

Petitioner filed the instant appeal to the State Board from the decision of the Commissioner.

After a thorough review of the record, we affirm the ultimate determination of the Commissioner to dismiss the petition. However, we modify and clarify the ALJ's analysis, which was adopted by the Commissioner.

N.J.A.C. 6:29-3.3 provides, in pertinent part:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.
>
> (b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.
>
> (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:
>
> i. The vacant coaching position had been advertised; and
>
> ii. There was no qualified applicant based on the written standards of the district board of education;...

The holder of a substandard county substitute certificate is authorized to serve as an athletic coach only in the event there is no "qualified and certified applicant." N.J.A.C. 6:29-3.3(c). Union City Education Association v. Board of Education of the City of Union City, decided by the State Board, June 1, 1994, appeal pending, Docket #A-6152-93T3 (App. Div.). It is undisputed that Byrne held only a county substitute certificate. Petitioner, on the other hand, held a standard instructional certificate. In that

petitioner was the only "certified" applicant for the coaching assignment, the narrow issue presented by this case is whether he was also "qualified" for such assignment based on the written standards of the district. N.J.A.C. 6:29-3.3(c)(1)(ii). If so, the Board abused its discretion in appointing the holder of a substandard county substitute certificate.[1] See Norcross v. Board of Education of the North Hunterdon Regional High School District, decided by the Commissioner, August 8, 1991, aff'd by the State Board, February 5, 1992, aff'd, Docket #A-3533-91T1 (App. Div. 1993).

It was petitioner's burden in this matter to demonstrate that the Board's action was arbitrary, capricious or unreasonable. Based on the record before us,[2] we agree with the Commissioner that he has failed to do so. However, we also find that the ALJ's analysis, which was adopted by the Commissioner, went beyond the express written standards required of head coaches in the district.

The job description adopted by the Board included the following qualifications for a head coach:

> A. Valid New Jersey teaching certificate or county substitute certificate.
>
> B. Prior head coach experience or at least three (3) years experience as an assistant varsity or junior varsity coach.
>
> C. Must demonstrate leadership and organizational ability and be able to effectively

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1 We note that while there is no right to employment as a coach, Koslick v. Board of Education of the Township of Edison, decided by the State Board of Education, April 1, 1987, aff'd, Docket #4358-86T1 (App. Div. 1987), a district board must adhere to the prescriptions of N.J.A.C. 6:29-3.3 in selecting coaches. Union City, supra, at 6.

2 We note that the parties have not provided us with the transcripts of the hearings held in this matter in the Office of Administrative Law.

communicate with students/athletes, other coaches, teaching staff members, the media and public.

D. Possess a basic knowledge of the sport, including its rules and regulations, through actual playing or alternative experience.

E. Possess a basic knowledge of the appropriate athletic equipment, athletic training and conditioning, and first aid.

Stipulation of Facts, at Exhibit A.

We emphasize that the specific issue to be addressed in this case is not whether petitioner would have made a better coach than Byrne or even whether there was a preference in the district for Byrne. Rather, the limited issued presented herein under N.J.A.C. 6:29-3-3 is whether petitioner, a certified teacher in the employ of the Board, satisfied the express written standards promulgated by the Board for head coaches. In light of those standards, we find it improper and inequitable to conclude that any "general ridicule and derision" expressed by unidentified sources when told that petitioner might become the head football coach rendered him "unqualified" for such assignment, initial decision, slip op. at 19, in the absence of the specific underlying basis for such reaction. We therefore reject the Board's argument in its exceptions to the report of our Legal Committee that such evidence in and of itself substantiated its contention that petitioner lacked leadership skills.

Nor do we attach any particular relevance to the ALJ's finding that school officials, in determining not to employ petitioner as head coach, were rightly concerned about his "deficiency" in giving a "simplistic response" to the problem of a player who confesses to substance abuse. While the Board's concern with substance abuse is understandable, its job description does not

call for head coaches to possess special skills in dealing with such matters. And, indeed, we do not find petitioner's response -- to refer the player to a substance abuse counselor -- to be inappropriate.

Nonetheless, based on the record before us,[3] we are unable to conclude that petitioner has satisfied his burden of establishing that the Board's action were arbitrary, capricious or unreasonable. The only evidence before us supporting petitioner's satisfaction of the written standards is the testimony recounted in the Initial Decision of petitioner and one witness, the head varisity football coach in the district in 1971-72 and 1972-73, whose testimony was based upon his recollection of petitioner's work as the freshman coach at that time. In particular, we cannot conclude on the basis of this record that petitioner has established that he had the prior coaching experience required by the job description. Nor can we find on the basis of the record before us that the Board acted in bad faith in adopting this job description, as petitioner contends.

Consequently, as modified herein, we agree that the petitioner has not demonstrated that the Board's action in failing to appoint him as head football coach was arbitrary, capricious or unreasonable, and we affirm the ultimate determination of the Commissioner to dismiss his petition.

Attorney exceptions are noted.

October 5, 1994

Date of mailing OCT 07 1994

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3 See, supra, n.2.

73-94

73-94

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF SPECIAL EDUCATION,	:	DECISION
RESPONDENT.	:	

APRIL 6, 1994

OAL DKT. NO. EDU 1588-93

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF SPECIAL EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 6, 1994

DATE OF MAILING - APRIL 6, 1994

74-94

74-94

PHILIP O. SHERIDAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 6, 1994

OAL DKT. NO. EDU 6146-93

PHILIP O. SHERIDAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed without prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 6, 1994

DATE OF MAILING - APRIL 6, 1994

75-94

75-94

JONATHAN STEVENSON, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY, RESPONDENT.	:	DECISION

APRIL 6, 1994

OAL DKT. NO. EDU 1954-93

JONATHAN STEVENSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 6, 1994

DATE OF MAILING - APRIL 6, 1994

76-94E

76-94E

BARBARA ANNE BARRETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAINESPORT, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

APRIL 6, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 2480-94
AGENCY DKT. NO. 49-3/94

BARBARA ANNE BARRETT,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAINESPORT,
Respondent.

Barbara Anne Barrett, petitioner, pro se

Steven J. Mushinski, Esq., for respondent

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

Barbara Anne Barrett, petitioner, seeks interim relief and a stay of Board action pursuant to N.J.A.C. 6:24-1.5. The petitioner is a candidate for a seat on the Hainesport Board of Education in the election to be held on April 19, 1994. She states she mistakenly filed to run for a three-year seat on the Board, commonly known as a full term, but intended to file and run for a two-year, unexpired term.

Barrett filed a certified petition of appeal, including a request for emergent relief, before the Commissioner of Education on or about March 15, 1994. The Department of Education on March 16, 1994 transmitted the matter to the

Office of Administrative Law for determination as a contested case, including the request for emergent relief, pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13.

The Office of Administrative Law noticed the parties that oral argument on the emergent relief portion of the petition would be heard at 9 a.m. on March 21, 1994 at the Office of Administrative Law facility in Mercerville (Trenton). The parties appeared and were heard at that time.

THE PARTIES' ARGUMENTS

The parties stipulate that the 1994 election will be held, barring unforeseen events, on April 19. The parties further stipulate that the 48th day before April 19 is March 2; the 49th day before April 19 is March 1, and the 54th day before April 19 is February 24.

Petitioner's Arguments

The petitioner generally argues a mistake of fact. She filed her petition on February 22, 1994. Part A of the petition is, by her own statement, in her handwriting. She secured the signatures on the petition, went to Board offices and filled in some remaining information while there.

The next day, the petitioner gave birth to a son. While in hospital, the petitioner received a telephone call from the person who had signed and verified her petition. He advised the petitioner she had filed for a three-year term. The petitioner states she intended to file for a two-year, unexpired term.

As soon as she was able, on or about Monday, February 28, she called Board offices and the State Department of Education. She could not reach a Ms. Hoffman at the Department, but left a message. On the same day the petitioner went to Board offices. She believed the last day for amendment would be March 1. She also believed "a form could be sent from Trenton" that she could use to rectify her error.

On the next day, March 1, she spoke to Board secretary Myers. The Secretary stated she would speak to persons at the State Department of Education. The secretary called the petitioner later in the day and advised petitioner that a form

was coming in the mail. Also on March 1, Barrett filed a handwritten petition of appeal asking amendment of her nominating petition. She delivered a copy to Board offices. The secretary advised the petitioner that a decision would be made whether amendment would be allowed or not. The secretary was awaiting advice of counsel. The petitioner asked to receive the decision in writing.

On March 9, having heard nothing, the petitioner called the Board secretary and asked what had happened. The secretary advised that a letter was in the mail to Barrett and "the ball" was in her court.

Barrett stated she did not realize the procedure she spoke about with the State Department representative, that is, the petition of appeal process, was the same that Myers meant.

Barrett again worked on her petition of appeal immediately. She spoke with nominating petition signers and secured written statements from them. She went to Board offices to serve a copy of the petition of appeal. Later, she received a letter from the Board secretary stating that she could not amend her nominating petition.

Board's Arguments

The Board states that the facts do not appear to be in dispute. The petitioner met the deadline for filing a nominating petition. She did not, however, file an apparently defective petition.

The petitioner had to make any change she wished to make on or before March 1. In The Matter of the School Board Candidacy of Janice I. Leenhouts, OAL DKT. EDU 1491-88 (Mar. 14, 1988), adopted Comm'r of Ed. (Apr. 5, 1988), the Commissioner listed examples of petition defects under N.J.S.A. 18A:14-12 as follows:

1. One of the names on the petition was printed, not signed, therefore in violation of N.J.S.A. 18A:14-9 and N.J.S.A. 18A:13-5;

2. The nominating petition in question was signed by five persons who are not legally qualified voters . . . in violation of N.J.S.A. 19:13-5;

> 3. One such petitioner, Carolyn Fay, who is registered to vote under the name of Carolyn Gunn and who has voted under the name Gunn in 1984 and 1985, was in violation of N.J.S.A. 19:31-13 . . . .

Leenhouts, above, at 691.

This is not a defective petition case. The petition is valid on its face. The fact that the petitioner wants to run for a two-year term does not constitute a defect in the petition. In Lepre v. Caputo, 131 N.J. Super. 118 (Law Div. 1974), the court stated

> A request to amend a petition for office, as allegedly defective, after the deadline for filing of the petition must be denied when the proposed amendment changes the office being sought. Changing the office designation to which one seeks election on an otherwise nondefective petition is not remedying a defect. If such an amendment were allowed, the opportunity for fraud would prevail. While N.J.S.A. 19:13-13 allows amendments to the nominating petition, it does so only to let a defective petition be corrected. The petition submitted by plaintiff was not defective and thus, N.J.S.A. 19:13-13 is inapplicable. [Emphasis added.]

Lepre, above at 122.

As submitted, Barrett's petition showed no defect. Only defective petitions can be corrected and, even then, if the defect does not concern signatures. Inasmuch as February 24 had passed, the Board secretary did the proper thing. She had a petition valid on its face.

Lepre stands for the proposition that a movant must offer clear and convincing proof that the petition did not identify the office sought. In the present case, the petitioner filled in the top, Part A, of the petition after signers had affixed their signatures. There is insufficient evidence presented by the petitioner to cause a delay in printing ballots, the temporary relief sought, or to require that the petitioner's name be moved from the three-year full term position to the two-year expired term position.

The Board secretary could not accommodate Barrett's request. The secretary received a valid petition and the secretary had no authority to change that petition.

DETERMINATION

As the Board correctly points out, Lepre controls, notwithstanding that it deals with a councilmanic election. The principles are identical.

Even more telling is what would be required to effect the change the petitioner desires. There are only two possibilities. First, Part A of the existing petition could be changed so that it reads " . . . for the unexpired term of two years, . . .". However, the signers have already signed, one of the signers has verified the petition under oath, and the petition has been notarized. Further, the petitioner signed her acceptance as a "candidate for membership on the Board of Education, named in the foregoing petition," and certified that she is not disqualified as a voter and is qualified to be elected a member of the Board. This, obviously, is not a satisfactory solution.

Second, Barrett could circulate a new petition, being sure to correctly identify an unexpired, two-year term. However, at least ten signatures would have to be collected. Under the clear requirements of N.J.S.A. 18A:14-12, she cannot do so because the 49th day preceding the date of the election (March 1) has passed. Thus, this option is an impossibility.

There being no way the petitioner can correct her nominating petition, and the nominating petition that did she submit being valid on its face, I **DETERMINE** that there is no relief that may be afforded the petitioner in these circumstances. Assuming, arguendo, that the petitioner will be immediately and irreparably harmed, it remains that she has little chance of prevailing on the merits and that the Board, on balance, would suffer relatively more hardship. It would be put to efforts not required of the petitioner. Crowe v. DeGioia, 90 N.J. 126 (1982).

Accordingly, I **ORDER** the motion for emergent relief **DENIED**. The matter will proceed to plenary hearing on the merits.

This order on application for emergent relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days folowing the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10. .

22 MARCH 1994
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

km

EVID P-1 B4

NOMINATING PETITION FOR ANNUAL SCHOOL ELECTION

To Dorothea M. Myers, Secretary of the Haverspot Board of Education

A. NOMINATING STATEMENT

We, the undersigned, are qualified voters of the Haverspot (Name of School District) School District of Haverspot (Name of Municipality) in Burlington (Name of County) County, New Jersey. We hereby endorse Barbara Anne Barrett (Name of Candidate), whose address is 8 Delaware Ave Rd 16 Mt Holly (Street and Number, Post Office) as candidate for member of the Board of Education representing Haverspot (Name of Municipality to be Represented) for the Full (Full or Unexpired) term of 3 (Number of Years) years, and we hereby request that the name of said candidate be printed on the official ballot to be used at the ensuing election for the Board of Education to be held 19 April (Election Date) 1994.

B. SIGNATORIES (TEN SIGNATURES ARE REQUIRED TO NOMINATE A CANDIDATE)

We, the undersigned petitioners, hereby certify that the said Barbara Anne Barrett (Name of Candidate) is legally qualified under the laws of this State to be elected a member of the Haverspot (Name of School District)

Name	Address	Name	Address
1. William Hartbaugh	2507 Spruce Ave.	7. Jim Chamberlin	2203 Marne Hwy
2. Margaret Mary Hartbaugh	2507 Spruce Ave	8. Joseph Gill	303 Broad St
3. Virgil DeFenbach	2405 CREEK RD	9. Irene J. Barry	2311 Marne Hwy.
4. Kathleen Holden	2601 CREEK RD	10. L. Rodger Schneider	1601 Albert St
5. Donald J. Holden	2601 Creek RD	11. Debra Fahs	2306 Walnut Ave
6. Judith M. Nolan	2311 Clay Dr.	12. Donald Newbold	2203 Marne Hwy

C. VERIFICATION

L. RODGER SCHNEIDER

L Rodger Schneider (Print Name of the Petitioner Swearing/Affirming) being duly sworn or affirmed according to the law on his/her oath deposes and says: That the above petition is signed by each of the signers thereof in his/her own proper handwriting; that the said signers are, to deponent's best knowledge and belief, legally qualified to vote at the election at which the candidate shall be voted for, and that the said petition is prepared and filed in absolute good faith for the sole purpose of endorsing the candidate therein named in order to secure his/her election as a member of the Board of Education.

SWORN OR AFFIRMED AND SUBSCRIBED BEFORE ME THIS 22 day of Feb. 19 94

Dorothea M. Myers (NOTARY'S SIGNATURE)

L Rodger Schneider (SIGNATURE OF THE SAME PETITIONER LISTED ON THE LINE ABOVE IN THIS SECTION. THIS PETITIONER MUST BE ONE OF THE SIGNATORIES NAMED IN SECTION B.)

D. CANDIDATE'S ACCEPTANCE

Barbara Anne Barrett (Name of Candidate), the candidate for membership on the Board of Education, named in the foregoing petition, does hereby certify that he/she is not disqualified as a voter pursuant to R.S. 19:4-1 and is qualified to be elected a member of the Haverspot (Name of School District) Board of Education: that he/she consents to accept and qualify as a member of the said body.

Barbara Anne Barrett (Signature of the Candidate)

Note: See Reverse Side for List of Qualifications.

OAL DKT. NO. EDU 2480-94

BARBARA ANNE BARRETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAINESPORT, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter and the initial decision on motion of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the conclusion of the Administrative Law Judge denying emergent relief for the reasons stated by him in the initial decision on motion. Further, in view of the determinations made by the ALJ in reaching his conclusion, i.e., that there is no way petitioner can correct her nominating petition and that the petition which was submitted is now presumed to be valid, the Commissioner finds and determines that there is no further relief which can be accorded petitioner in this matter and, consequently, there is no necessity for further proceedings in this regard.

Accordingly, the order of the Office of Administrative Law denying emergent relief is affirmed and the within matter is hereby dismissed as moot. OAL is, therefore, requested to return the file to the Commissioner pursuant to N.J.A.C. 1:1-3.3.

APRIL 6, 1994

DATE OF MAILING - APRIL 6, 1994

COMMISSIONER OF EDUCATION

77-94

77-94

E.P. REID, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

APRIL 6, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 2539-94
AGENCY DKT. NO. 50-3/94

E. P. REID, INC.,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Edward P. Reid, president, petitioner corporation, appearing pursuant to *N.J.A.C.* 1:1-5.4(a)5

Charlotte Kitler, Esq., for respondent

Record Closed: March 22, 1994 Decided: March 29, 1994

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

E. P. Reid, Inc., prequalified by the Department of Treasury to bid on public school electrical contracting, provided bids to the State-operated School District of the City of Jersey City, Hudson County, for contracts involving fire alarm improvements. At opening of bids on December 2, 1993, bids on contracts E-1 and E-2 were rejected by the district, which advised petitioner on February 22, 1994 it was ineligible to submit future bids because the district said "it cannot be considered responsible and reliable to complete any project in the district in a timely manner." Alleging it was lowest responsible bidder on December 2, 1993, petitioner filed a petition with the Commissioner of the Department of Education on March 15, 1994 asserting the district had no authority to disqualify it from contracting, any such

disqualification having been assigned to the Department of Treasury under *N.J.A.C.* 6:20-7.2, 7.3. Petitioner sought judgment that it be awarded contracts E-1 and E-2 forthwith and that district advertisement for new bids for contracts E-1 and E-2 be immediately canceled or stayed until final decision.

Before answer, deeming the petition one seeking emergent relief, the Commissioner transmitted it to the Office of Administrative Law on March 17, 1994 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq*. On short notice, the motion for emergent relief came on before the administrative law judge on March 22, 1994 when it was heard and concluded, on documentation submitted and argument.

DISCUSSION

At hearing background facts were undisputed but amplified. Petitioner was lowest bidder on contract E-1, one of three contracts for fire alarm replacement and improvements, as bids were opened on December 2, 1993. Petitioner's low bid on E-1 was rejected after a hearing before the district because of its failure to complete another fire alarm project in the district at P.S. 6 in a timely manner and lack of assurance it could complete the new project within specified time. Petitioner was not low bidder on the second contract, E-2. Another company submitted the lowest bid on E-2 but it had been accepted minutes after time of bid opening and was deemed procedurally improper. The district determined to reject all bids on E-2 and readvertise for bidding. Bids on contract E-1 were also readvertised, after rejection of petitioner's low bid for irresponsibility.

It is bidding on the two readvertised contracts that petitioner here seeks to enjoin.

In correspondence between the parties, petitioner was notified on January 6, 1994 (R-1) the district could not regard it as lowest responsible bidder on contract E-1. At its request, a responsibility hearing was conducted in the district on February 1, 1994 (R-2). A hearing officer filed his findings, conclusion and recommendation on February 4, 1994 (R-3). The state-operated district superintendent adopted the findings as a final decision on February 22, 1994, saying:

> . . . I cannot find any satisfactory explanation for the lengthy delays on P.S. 6 project after August 1993. The hearing officer found that the company repeatedly gave new completion dates . . . Having reviewed the report and comments, I agree with the hearing officer that the major delays on P.S. 6 project were due to the company's lack of attention to the project and its assignment of an inadequate number of workers. I further agree that E. P. Reid, Inc. cannot be considered responsible and reliable to complete any project in this district in a timely manner.
>
> Therefore, I hereby adopt the hearing officer's report as a final decision. The bid of E. P. Reid, Inc. on contract E-1, fire alarm replacement and improvements, is hereby rejected. In addition, as recommended by the hearing officer, E. P. Reid, Inc. is ineligible to submit a bid on contract E-2, which is being readvertised for bids in the near future [scheduled for March 31, 1994].
>
> This is the final decision of the district. Any appeal may be taken to the Commissioner of Education in the manner prescribed by *N.J.A.C.* 6:24-1.2 [R-4].

It is not disputed by the parties that the district reserved the right to reject all bids, nor that bids on contracts E-1 and E-2 were formally rejected, nor that new bids were advertised for receipt and opening on March 31, 1994.

Nor is it disputed that E. P. Reid, Inc. has been preclassified as an electrical contractor proposing to bid on public school electrical work as to character and particular amount of such public work on which it is qualified to submit bids. Boards of education, as provided in *N.J.S.A.* 18A:18A-26, shall accept such bids only from persons qualified in accordance with classification. See, P-1. The State Board of Education may establish reasonable regulations controlling qualifications of prospective bidders for public school work and may fix qualifications required according to financial ability and experience of the bidders, as provided in *N.J.S.A.* 18A:18A-27. In turn, the State Board has delegated authority to qualify bidders to the Department of Treasury. Specifically, debarment, suspension and disqualification of would-be bidders is so delegated. *N.J.A.C.* 6:20-7.1, 7.2 and 7.3.

But the process by which petitioner here was found not to be a responsible bidder on contracts E-1 and E-2 yet to be let was not a statutory debarment, suspension or disqualification from state-wide district contracting in general. To that extent, it seems to me, petitioner has misconceived its legal position. Although

the Public School Contracts Law in *N.J.S.A.* 18A:18A-37 provides that all contracts that require public advertisement for bids shall be awarded to the lowest responsible bidder, and although petitioner's bid on E-1 may have been lowest, its bid was rejected along with all others and neither contract E-1 or E-2 was awarded on December 2, 1993. Rejection for irresponsibilty cannot be done without a hearing. In *Venneri Company v. Paterson Housing Authority*, 29 *N.J.* 392, 402 (1959), the Supreme Court said:

> It is settled doctrine that following advertisement [for bids] the low bidder for a municipal contract be afforded a hearing on the issue on responsibility prior to an award of a contract to a higher bidder. . . To reject the lowest bid there must be evidence of such character concerning the irresponsibility of the bidder as would cause fair-minded and reasonable men to believe it was not in the best interest of the municipality to award the contract to the lowest bidder. . . The requirement of a hearing derives from basic policy of the bidding laws, *i.e.*, the encouragement of competition, which in turn works to protect the public coffers and prevent chicanery and fraud in public office. . . Arbitrary rejection of favorable bids results in the stifling of competition and undermines the policy of the act--hence the requirement of a hearing before a bid can be rejected on grounds of irresponsibility. . . Although responsibility may involve experience, financial ability, and facilities necessary to perform the contract, . . . it may also involve the moral integrity of the bidder. . . The principle is firm in public school bidding law. *Cf., Rose v. Board of Ed., East Orange*, 39 *N.J. Super.* 565, 568-9 (Law 1956); *Case Box Lunch, Inc. v. Board of Ed., City of Trenton*, 1972 *S.L.D.* 479, 483. It follows that a bidder like petitioner, who is "prequalified" and classified by a state agency as to the character and amount of work on which it may bid, as required by *N.J.S.A.* 18A:18A-27, is not automatically a "responsible" bidder under *N.J.S.A.* 18A:18A-37. In *Trap Rock Industries, Inc. v. Kohl*, 59 *N.J.* 471, 481 (1971), the Supreme Court said:
>
> . . . We find no purpose to vest in a preclassified bidder any "right" that derogates the primary right of the state through its department of transportation to do business . . . with "the lowest responsible bidder.
>
> Thus, the bidder's "rights" remain subordinate to the primary interest of the state as a consumer. We must give ultimate regard to the state's welfare. [Bidders] cannot be accorded any "right" that would subvert the primary objective of the statute, that the state do business with a "responsible" bidder. . .

Applying those principles here, it can be sensed petitioner mistakes prequalification and licensure as precluding the district from considering it an irresponsible bidder. If petitioner has a right to a responsibility hearing before its bids are rejected, petitioner quite obviously has had such pre-bid responsibility hearing in advance of opening of new bids on March 31, 1994. Thus, though the conclusion of the district as to irresponsibility may be questioned, what may scarcely be questioned is the process here by which the conclusion developed. That last goes to the essence of petitioner's motion for emergent relief.

N.J.A.C. 1:1-12.5, governing applications for emergent relief, and *N.J.A.C.* 6:24-1.5(b), require application of equitable principles of the Supreme Court of New Jersey in *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1982). Immediate emergent preliminary injunctive relief may not issue except when necessary to prevent irreparable harm and when a petitioner has shown reasonable probability of ultimate success on the merits of its case. It should not issue where the legal right underlying a claim is unsettled or where material facts are in dispute. The court must assess relative harm to the parties and the public interest. My view is that petitioner has shown no right to remedy derived from bidding prequalification as such, nor has it shown a preponderant likelihood of success on a challenge to results of a responsibility hearing. In any plenary proceeding hereafter, certainly, petitioner faces a presumption the state-operated district superintendent's conclusion of irresponsibility was correct and valid. Odds against petitioner's showing the conclusion was arbitrary, capricious and unreasonable are not favorable.

CONCLUSION

The motion for emergent relief in the form of stay of proceedings scheduled by the district for opening bids and awarding contracts on E-1 and E-2, scheduled presently for March 31, 1994, is **DENIED**. The matter is **ORDERED** to proceed to plenary hearing in usual course unless earlier withdrawn.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

March 29, 1994
Date

JAMES A. OSPENSON, ALJ

amr

EXHIBIT LIST

P-1 New Jersey Department of Treasury notice of classification to E. P. Reid, Inc., for electrical energy management systems (effective August 1, 1993, expiration date February 28, 1994), electrical license no. EI04065

R-1 Letter of district acting business administrator to petitioner, dated January 6, 1994, giving notice petitioner not regarded as lowest responsible bidder on contract E-1

R-2 Letter of district acting business administrator to petitioner, dated January 14, 1994, scheduling hearing on proposed rejection of bid on contract E-1 for February 3, 1994 (later advanced to February 1, 1994)

R-3 Letter of district assistant business administrator to petitioner, dated February 4, 1994, enclosing hearing examiner's report on proposed rejection of bid by petitioner; together with report of hearing officer

R-4 Letter of State-operated district superintendent to petitioner, dated February 22, 1994 adopting hearing officer's report as final decision and concluding petitioner's bid on contract E-1 is rejected and, further, that petitioner is ineligible to submit a bid on contract E-2, which was being readvertised for bids, together with notice petitioner could appeal to Commissioner of Education under *N.J.A.C.* 6:24-1.2

OAL DKT. NO. EDU 2539-94

E.P. REID, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this emergent matter and the initial decision of the Office of Administrative Law on motion for emergent relief have been reviewed. Exceptions were filed by petitioner on March 30, 1994, urging the Commissioner to reject the initial decision on grounds that a school district may not lawfully set its own terms for bidder responsibility, and even assuming it could, petitioner can prevail on the facts at plenary hearing.

Upon review, the Commissioner concurs with the ALJ that petitioner herein has not met the standards for grant of extraordinary restraints pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982), in that the legal grounds for its claim are unsettled and no demonstration of likelihood of success on the merits was made at preliminary hearing sufficient to overcome the evidence provided by respondent.

Accordingly, the initial decision of the Office of Administrative Law denying emergent relief and recommending that

this matter proceed to plenary hearing unless earlier withdrawn by petitioner is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 6, 1994

DATE OF MAILING - APRIL 6, 1994

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IN THE MATTER OF THE TENURE	:	
HEARING OF SALLY PONDER, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF NORTH HUNTERDON-	:	DECISION
VOORHEES REGIONAL HIGH,	:	
HUNTERDON COUNTY.	:	
	:	

APRIL 8, 1994

IN THE MATTER OF THE TENURE	:	
HEARING OF SALLY PONDER, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF NORTH HUNTERDON-	:	DECISION
VOORHEES REGIONAL HIGH,	:	
HUNTERDON COUNTY.	:	
	:	

For the Board, David B. Rand, Esq. (Rand, Algeier, Tosti & Woodruff)

For the Respondent, James M. Weinberg, Esq. (Weinberg & Kaplow)

This matter having been opened before the Commissioner of Education on December 17, 1993 through certification of tenure charges of unbecoming conduct against respondent, a tenured teacher of the Board of Education of the North Hunterdon-Voorhees Regional High School District; and

The Commissioner having directed respondent on December 21, 1993 and February 10, 1994, and again by letter sent both regular and certified mail on March 4, 1994, to file an answer to the tenure charges against her; and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against her is deemed to be admitted; now therefore

IT IS ORDERED this 8TH day of April that summary judgment shall be granted to the Board and Sally Ponder shall be dismissed from her tenured position as a teaching staff member in the district's employ as of the date of this order.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.6, this matter shall be referred to the State Board of Examiners for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

APRIL 8, 1994

DATE OF MAILING - APRIL 8, 1994

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ELIZABETH HARRITY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured music teacher, appealed Board's withholding of her employment and adjustment increments for the 1991-92 school year due to alleged unsatisfactory classroom management. Petitioner contended Board's action was illegal, arbitrary, capricious, unfounded, in bad faith and in contravention of N.J.S.A. 18A:29-14.

ALJ concluded petitioner failed to meet her burden of demonstrating that the Board's action was improper. ALJ found Board had reasonable factual basis for its determination and accorded petitioner fundamental due process in that she received advance notice of her unsatisfactory performance and the opportunity to "rectify her deficiencies***." (Kopera; Fitzpatrick) ALJ affirmed Board's withholding of petitioner's increments. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

APRIL 14, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8622-91

AGENCY REF. NO. 307-8/91

ELIZABETH HARRITY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,

Respondent.

Brian M. Cige, Esquire, for petitioner (Klausner, Hunter, Cige & Seid, attorneys)
Joseph H. Orlando, Esquire, for respondent (Ansell, Zaro, Bennett, Kenny & Grimm, attorneys)

Record Closed: January 11, 1994 Decided: February 23, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Elizabeth Harrity, appeals from an action by the Board of Education of the Borough of Keansburg (Board) to withhold her employment and adjustment increments for the 1991-92 school year alleging such action was illegal, arbitrary, capricious, unfounded, in bad faith, and in contravention of N.J.S.A. 18A:29-14. On September 11, 1991, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

BACKGROUND FACTS

On November 12, 1991, a prehearing conference was held where, among other things, the date for the hearing was established for April 29, 30, 1992 and May 1,

1992. It was also ordered that all discovery was to be completed 30 days prior to the hearing date.

On April 23, 1992, the parties requested an adjournment of the scheduled hearing for the purposes of settlement. The requested adjournment was granted.

On June 4, 1992, counsel for the Board, Joseph H. Orlando, Esquire, advised petitioner's attorney, Stephen B. Hunter, Esquire, that the Board rejected petitioner's settlement proposal. Mr. Orlando advised Mr. Hunter that it would be necessary to proceed with an administrative hearing. The undersigned was so advised and set down November 6, 1992 as the hearing date. The parties were also reminded by letter dated June 29, 1992, that all discovery was to be completed no later than thirty (30) days prior to the hearing date.

The November 6, 1992 hearing was adjourned due to attorney conflict. The instant matter was rescheduled for May 10, 1993.

On May 4, 1993, the Board propounded and served upon petitioner a Notice of Motion to Dismiss for Failure to Provide Discovery. The return date, May 10, 1993, was established for oral argument on the motion. This administrative tribunal, having heard arguments of the parties, granted the Board's Motion to Dismiss on the hearing record. Subsequently, before the undersigned had executed its initial decision granting the Board's motion to dismiss the herein matter, it was advised of the Appellate Court's determination in Zimmerman v. United Services Auto., 260 N.J. Super 368 (App Div. 1992). In Zimmerman, the Honorable Sylvia B. Pressler, P.J.A.D., held, among other things, that the dismissal of the compliant with prejudice for failure to timely serve fully responsive answers to interrogatories was inappropriate. Based upon the Zimmerman decision, this tribunal, sua sponte, reopened the record and so advised the parties.

A telephone prehearing conference was scheduled on June 11, 1993. Due to attorney conflict, the prehearing conference was adjourned until September 15, 1993. The hearing was held on January 10, 1994, at the Shrewsbury Township, New Jersey Municipal Court. The hearing record closed on January 10, 1994.

TESTIMONIAL EVIDENCE

Petitioner, Elizabeth Ann Harrity, testified, among other things, that she had been employed by the Board since 1984 as a Vocal Music Teacher for grades kindergarten through eight. From the school year 1985-86 through 1989-90, petitioner was assigned to teach music to grades kindergarten through the fourth from September until February of each school year. From February until June of each of the school years petitioner was assigned to teach vocal music to grades five through eight. During the 1990-91 school year petitioner began a maternity leave on or about October 5, 1990, which continued until February, 1991. Prior to her maternity leave, petitioner was assigned to grades kindergarten through four. Upon her return to the school district in February, 1991, petitioner was assigned to teach vocal music to grades five through eight. consistent with her prior assignments. Petitioner's son was born on October 5, 1990.

During petitioner's teaching experience with the Board, she was supervised and evaluated by three principals; i.e., Jane Pukstas, Walter Coleman, both elementary principals, and middle school principal Annie P. Miele. Petitioner testified that a classroom observation of her music class conducted on December 17, 1985, by Principal Coleman, mentioned nothing about her classroom management (P-1, Exhibit A). Petitioner admitted that the Annual Summary Evaluation of her performance, dated June 8, 1987, stated that an area in need of improvement consisted of petitioner maintaining a classroom atmosphere conducive to learning. Part of petitioner's Professional Improvement Plan (PIP) stated that petitioner was to participate in workshops on assertive discipline to be offered by the school district in the fall of 1987. (P-1, Exhibit D). Petitioner asserted that a classroom observation conducted on February 11, 1988, did not mention her classroom management. (P-1, Exhibit E). Petitioner's Annual Summary Evaluation dated June 7, 1988, stated in part, that petitioner had met her PIP by attending the assertive discipline workshops and implemented the procedures into her program. Principal Coleman stated in petitioner's Annual Summary Evaluation that the PIP objective has been completed. (P-1, Exhibit F). Petitioner testified that a classroom observation of her music class on May 11, 1989, mentioned her classroom management. The observer stated:

> I recommend that for the two classes that have been difficult for you to manage, a more structured, traditional methodology be employed.... (P-1, Exhibit H)

The observer continued to state:

> As discussed in our previous conferences, the seating arrangement is not conducive to good classroom management. Please arrange seating for the 12:00 class and your 2:00 class. They seemed to be the classes with the most problems. I recommend a semi-circle consisting of three rows. All students should be in your line of sight when you are instructing or directing. (P-1, Exhibit H).

Petitioner further testified that in her Annual Summary Evaluation, dated June 12, 1989, there was no mention concerning her classroom management, nor did the Annual Summary Evaluation comment about a follow up of the seating arrangement in her music classes. An observation of petitioner's vocal music class on February 15, 1990, the observer complimented petitioner on her lesson which demonstrated that petitioner had done a lot of planning and preparation. Petitioner had provided a variety of activities for the pupils and petitioner let the pupils know how she planned to spend the period. However, the observer went on to state:

> Discipline is an outstanding problem in this class, and needs to be remediated immediately. You are not being assertive when you threaten to put names on the board. You are not being consistent when you tell students not to call out, but accept their answers anyway.
>
> Please avail yourself of Lee Canter's Assertive Discipline from the school library and read it as soon as possible. Also, watch the video tapes of Assertive Discipline, Phase II. (P-1, Exhibit J).

In a subsequent observation of petitioner's classroom conducted on February 22, 1990, the observer complimented petitioner on the classroom organization and the participation of the students throughout the lesson. The observer continued to state:

> Mrs. Harrity referred to points being awarded to the class for good behavior. This appeared to be part of an overall plan to improve behavior. During informal observations, especially in the upper grades, some behavior problems have been observed.
>
> Students returning equipment following the class were talking and making noise with instruments outside of the next class. I

> recommend positioning yourself to observe the hallway, as well as the the classroom to insure appropriate behavior. (P-1, Exhibit K).

Petitioner testified that on April 20, 1990, she was in receipt of a letter from Superintendent Joseph C. Caruso, which stated:

> A review of this year's teaching performance indicates you are having difficulty with classroom management in the upper grades. Please refer to your classroom observations and evaluations for specifics.
>
> Continuation of this poor management performance at any time in the future, will necessitate the recommendation to withhold your increment. (P-1, Exhibit L).

Petitioner testified that prior to receipt of the April 20, 1990, letter, Superintendent Caruso observed petitioner prior to the award of her tenure. This observation occurred at the end of the 1987-88 school year. However, there was no discussion with the Superintendent in 1990. Petitioner asserted that Superintendent Caruso neither visited nor observed her classroom during the 1989-90 school year. Petitioner further testified that there were no discussions with her school Principal with regard to classroom management in or about April 1990. Petitioner could not understand why Superintendent Caruso criticized her classroom management at that time. Subsequently, on June 11, 1990, petitioner was in receipt of her Annual Summary Evaluation which stated, among other things, that an area of weakness was her classroom management in the upper grades. (P-1, Exhibit M). Petitioner asserted, however, that the evaluator did not specify what the classroom management weakness included.

Petitioner was on maternity leave from October 5, 1990 until early February 1991. Shortly after her return to the district, on February 7, 1991, an unannounced observation of her classroom performance was conducted by Barbara Trzeszkowski, the Curriculum Coordinator. Petitioner asserted that she was not advised that she would be observed. The Curriculum Coordinator's comments stated, among other things, that:

> As we have discussed, this lesson was not successful and that students were not able to achieve the objective as stated in the lesson. . . . (P-1, Exhibit N).

Petitioner contended that the equipment, a tape recorder, was broken and that petitioner was not able to continue with the lesson. In addition, this class was composed of special education pupils and that petitioner needed the tape in order to successfully complete the lesson. On February 11, 1991, petitioner issued her handwritten comments objecting to the observation and comments made by the Curriculum Coordinator. (P-1, Exhibit N). Petitioner testified that six days later, on February 13, 1991, she was again observed by Thomas Lindia, Vice Principal. In his observation report, Mr. Lindia discussed his observation of petitioner's performance at great length and concluded by making four recommendations for petitioner to follow. (P-1, Exhibit O). On February 15, 1991, petitioner again set forth her written comments concerning the Vice Principal's observation and addressed those concerns stated by him. (P-1, Exhibit O). On February 26, 1991, fourteen days after the February 7, 1991, observation and eight days subsequent to the February 13, 1991, observation, petitioner was observed by Principal Robert Seidel. In his comments concerning the observation, Principal Seidel observed that petitioner had used a check off system presented in the Lee Cantor's Assertive Discipline Program. However, he was critical of petitioner because time was taken from the lesson to tell the pupils that their names were being placed on the chalk board. Mr. Seidel suggested in his observation report that petitioner review the application of this technique in the Assertive Discipline tapes, and petitioner would then see that the use of this technique is designed to reduce the breaks in her lesson. He asserted that the name goes up on the board, but petitioner is to keep on working. Principal Seidel had other critical remarks concerning his observation of petitioner's performance. Petitioner did not respond, in writing, to the Principal's observation. This was the third unannounced observation of petitioner's classroom performance since February 13, 1991.

On March 14, 1991, petitioner was again observed, unannounced, by a Supervisor. The Supervisor's comments were complimentary to petitioner where it was stated that her lesson appeared to be organized and consisted of planned multi-activities. The Supervisor observed that petitioner used the chalk board to emphasize the topics, however, the lesson was presented at a very fast pace. The Supervisor then made five suggestions for petitioner to follow, one of which involved petitioner's use of assertive discipline. The Supervisor suggested:

> When following the assertive discipline program, list names on the chalk board, without disruption to your instructional time. If you wish to admonish those students, do so after class. Several times classroom instruction was disrupted due to student misbehavior. (P-1, Exhibit Q).

Petitioner testified that never before in her professional experience had she been observed in her classroom on four occasions in less than a six week period.

Petitioner testified that on or about June 10, 1991, she received a letter from Superintendent Caruso who advised petitioner that the Superintendent would recommend to the Board the withholding of petitioner's employment increment and adjustment increment on a permanent basis for "inefficiency and/or other just cause." Superintendent Caruso stated that he would make such a recommendation to the Board on June 13, 1991, at its workshop meeting. Petitioner was further advised by Mr. Caruso that petitioner had the right to an informal appearance before the Board if she chose to do so. On June 11, 1991, one day after receipt of the Superintendent's letter, petitioner received her Annual Summary Evaluation. In Section D, Overall Evaluation, the report states:

> Your overall evaluation is unsatisfactory. For the second consecutive year you have been cited for deficiencies in classroom management skills. The District has provided you with ITIP training (Instructional Theory Into Practice) and will provide you with Class Management Training this summer at the Academy for the Advancement of Teaching and Management. You have also been furnished with Assertive Discipline video tapes, resource books and materials in addition to post observation conferences and written comments. Your professional goals for the 1991-92 school years are to improve your class management and to implement effective instructional techniques. (P-1, Exhibit S).

Petitioner testified that she discussed the classroom management criticism with her Principal. The Annual Summary Evaluation asserted that petitioner's performance was unsatisfactory wherein her lessons needed better planning and preparation to insure success for all pupils. The report further mentioned that the Assertive Discipline tapes were being used by petitioner, however, not fully. Petitioner contended that this statement was not explained to her.

Petitioner testified that she had a difference of opinion with Principal Seidel concerning the vocal music program. Petitioner opined that the music program

should be elective, however, Principal Seidel believed that it should continue to be a mandatory part of the program. Further, Principal Seidel wanted singing in the classroom while petitioner wanted a survey course; i.e. identification of notes on the scales, harmony, among other things. Petitioner contended that Mr. Seidel would not listen to her, moreover, she understood that Mr. Seidel was the Administrator of the building.

With regard to the disciplinary structure in the school, petitioner asserted that each teacher had his or her own set of rules. Petitioner did not believe that she had received any support from the school administration because when she sent a pupil out of the classroom the pupil would be returned to the classroom immediately. Petitioner asserted that she had no disciplinary problems with the pupils in the lower grades.

Petitioner testified that Susan Mebane replaced petitioner while petitioner was on maternity leave. Upon petitioner's return to the school district in February 1991, Ms. Mebane was retained as petitioner's assistant. Ms. Mebane would teach the general music pupils, who were the better pupils in the school chorus. However, when Ms. Mebane did not appear for duty, because she was pursuing a career in opera, her pupils would be assigned to petitioner's classroom. Petitioner asserted that Ms. Mebane's pupils knew that petitioner was not evaluating them and, therefore, they would become disruptive while in petitioner's classroom. Petitioner was instructed by the Principal to take over Mebane's pupils when Ms. Mebane was absent.

On cross examination, petitioner asserted that she did not feel that she had a problem teaching the upper grade pupils and that she had no problems teaching in the lower grades. She recognized, however, that her evaluations reflected problems she experienced with the pupils in grades seven and eight.

The record demonstrates that petitioner's observations and evaluations were satisfactory prior to her achieving a tenure status in the school district. The record demonstrates that by 1987, petitioner recognized that she had problems maintaining classroom discipline. In fact, as early as 1986, petitioner's Supervisor recommended petitioner's attendance at the Assertive Discipline program (R-2). This recommendation occurred while petitioner was still not tenured. Petitioner's

attendance at the Assertive Discipline program became a part of petitioner's PIP prior to her achieving tenure.

Petitioner asserted that she had no personality conflict with Principal Anne Miele. Petitioner considered Ms. Miele an objective observer. Ms. Miele had complimented petitioner on a music program for the eighth grade graduation and sent petitioner a memorandum to that effect dated June 24, 1986 (P-1, Exhibit C).

Petitioner believed that Principal Seidel was the observer of P-1, Exhibit H, because it detailed how petitioner was to correct discipline. In Exhibit J it is noted that petitioner was having disciplinary problems. Petitioner recognized that a classroom teacher could be dismissed because of disciplinary problems.

The February 7, 1991, observation (P-1, Exhibit N) was the first time petitioner disputed there was a problem with her classroom management. She admitted, however, that the Supervisor was critical of her performance because there was no back up plan, no contingency plan. Petitioner conceded that classroom planning is class management.

Petitioner further admitted that Exhibits H, I, J, and K dealt with classroom management problems petitioner exhibited a year prior to the increment withholding. She further admitted that the classroom observers and evaluators offered suggestions on how to improve her classroom performance and class management.

While petitioner also believed that Barbara Trzeszkowski was an objective observer, she opined that Principal Seidel was not objective. Petitioner disagreed with Seidel on policy grounds that the music program was mandatory rather than elective, as petitioner would have preferred. Petitioner admitted that Principal Miele had identified disciplinary problems as early as September 1986 and recommended that petitioner attend the Assertive Discipline workshops. Petitioner further admitted that she has a duty to supervise pupils while the pupils are in her classroom.

Petitioner asserted that Ms. Mebane's pupils were unruly and that the rules for dealing with the pupils differed between the two teachers. Petitioner continued to

assert that most of the gifted and talented pupils were assigned to Mebane's music classroom.

Petitioner testified that subsequent to receipt of the Superintendent's letter dated June 10, 1991, advising petitioner of the Superintendent's recommendation to the Board to withhold her increment, petitioner testified that she elected not to appear before the Board on the advice of a representative of the New Jersey Education Association (NJEA).

FINDING OF FACT

Based upon a total review of the evidence before me, and having given fair weight thereto; I **FIND** the following **FACTS**:

1. As early as September 12, 1986, Principal Annie P. Miele recommended that petitioner participate in the program of Assertive Discipline. Workshops in the program were being conducted at Frances Place School under the Board's direction.

2. Petitioner's Annual Summary Evaluation for the 1986-87 school year reported on June 8, 1987, that petitioner needed improvement in maintaining classroom atmosphere conducive to learning. As a part of petitioner's annual PIP petitioner was to participate in workshops given by the Board on Assertive Discipline beginning in the Fall of 1987.

3. Petitioner's Annual Summary Evaluation for the year 1987-88 indicated that petitioner had attended the Assertive Discipline workshops and implemented the procedures into her program. The evaluation indicates that petitioner's objective under her PIP had been completed.

4. Petitioner's Annual Summary Evaluation for the academic year 1988-89 mentioned nothing about petitioner's classroom management.

5. An unannounced classroom observation of petitioner conducted on February 15, 1990, noted that discipline was an outstanding problem in that particular class and needed to be remediated immediately. Petitioner was reminded to avail herself of the Assertive Discipline from the school library and to read it as

soon as possible. Petitioner was also advised to view the video tapes of Assertive Discipline, Phase II.

6. In an unannounced observation of petitioner's classroom performance conducted on February 22, 1990, the observer complimented petitioner on the class organization and that the pupils were actively participating throughout the lesson. The observer also indicated that petitioner appeared to improve classroom behavior by awarding points to pupils for good behavior.

7. On April 20, 1990, Superintendent Joseph C. Caruso advised petitioner that a review of the 1989-90 school year's teaching performance indicated that petitioner was having difficulty with classroom management in the upper grades. The Superintendent suggested that petitioner refer to her classroom evaluations and observations. He also stated that a continuation of this poor management performance, at any time in the future, would result in a recommendation to withhold her increment. Petitioner did not discuss the Superintendent's letter with Superintendent Caruso.

8. Petitioner's Annual Summary Evaluation for the 1989-90 school year indicated in a report, dated June 11, 1990, that petitioner demonstrated an area of weakness in class management in the upper grades. Petitioner did not discuss the alleged weakness of classroom management with her Principal or Superintendent in April 1990 or thereafter.

9. Between the period of October 5, 1990 and early February 1991, petitioner was on maternity leave. Subsequent to her return to duty, petitioner was observed on four different occasions from February 7, 1991 through and including March 14, 1991.

10. On February 7, 1991, petitioner was observed by Barbara Trzeszkowski, the Board's Curriculum Coordinator. Ms. Trzeszkowski observed that petitioner's lesson was not successful and that the pupils were not able to achieve the objective as stated in the lesson. Petitioner was criticized for not having a contingency or back up plan when her original plan went awry. Petitioner considered Barbara Trzeszkowski to be an objective observer and evaluator. Nonetheless, petitioner, for the first time, submitted a written response to a classroom observation.

11. Petitioner was observed on February 13, 1991, by Vice Principal Thomas Lindia who observed, among other things, that petitioner had incorporated a "point system" which provided a "behavior-modification" model to serve as an incentive to the pupils. (P-1, Exhibit O). Mr. Lindia observed that petitioner's plan book was reviewed and appeared to be confusing. Vice Principal Lindia made four recommendations for petitioner to follow in order to improve her classroom performance.

12. On February 26, 1991, petitioner was observed by Principal Robert Seidel who observed several pupils not participating in the classroom activity. He further observed that the flow of the lesson was broken on several occasions where petitioner admonished pupils to raise their hands before calling out. Petitioner was again reminded to review the application of assertive discipline by listening to the Assertive Discipline tapes.

13. Petitioner was observed on March 14, 1991, where the observer noted that petitioner's lesson appeared to be organized and consisted of planned multi-activities. The observer noted, however, that the lesson was presented to the pupils at a very fast pace.

The observer again reminded petitioner about the Assertive Discipline program and that petitioner should admonish pupils after class. The observer also noted that several times the classroom instruction was disrupted due to pupil misbehavior.

14. On June 10, 1991, Superintendent Caruso advised petitioner that he would recommend to the Board, at its June 13, 1991 workshop session, the withholding of petitioner's employment increment and adjustment increment on a permanent basis for "inefficiency and/or other just cause." (P-1, Exhibit R). Petitioner was advised of her right to appear at an informal hearing before the board.

15. Petitioner's Annual Summary Evaluation for the 1990-91 school year, dated June 11, 1991, indicated that petitioner's job performance had not been satisfactory. The evaluation report indicated that petitioner's lessons needed better

planning and preparation to insure success for all pupils. The report continued to state that petitioner's PIP goal, to implement assertive discipline to improve class management, was not successfully achieved. Petitioner's overall evaluation was declared to be unsatisfactory and for the second consecutive year she had been cited for deficiencies in classroom management skills.

16. Petitioner concedes that she had a difference of opinion with Principal Seidel concerning the music curriculum. Petitioner would have preferred that the vocal music program be an elective, however, Principal Seidel insisted that it be an integral mandatory program.

DISCUSSION AND CONCLUSIONS

The law is clear that a Board of Education may withhold a teacher's increment where it has a reasonable factual basis for its conclusion. Neither this administrative tribunal, nor the Commissioner, may substitute their judgment for that of the Board. However, it must be ascertained whether the Board had such a reasonable factual basis for its determination. See Kopera v. West Orange Board of Education, 60 N.J. Super 288 (App. Div. 1960). Where, as here, the petitioner alleges that the Board's action is unreasonable, the burden of proving such unreasonableness rests with petitioner. Kopera at 297. And, as a matter of fundamental due process, petitioner is entitled to receive advance notice of her unsatisfactory performance in order that she has a meaningful opportunity to "rectify her deficiencies or to convince the superior that her judgment is erroneous." Fitzpatrick v. Montville Board of Ed., 1969 SLD 4, 7. The facts in this matter indicate that as early as 1986, Principal Annie P. Miele identified a weakness in petitioner's classroom management. As a consequence, petitioner was required to engage and participate in a program offered by the Board in Assertive Discipline. Subsequently, petitioner was required to further engage in the Assertive Discipline program as a condition of her annual PIP for the 1987-88 school year. Notwithstanding that petitioner had successfully completed this PIP, classroom management continued to be a concern among the Board's administrators, particularly in the upper grades which petitioner taught.

Petitioner was given notice at the end of the 1989-90 school year that the Superintendent was concerned with her classroom management and if no improvement was evidenced, he would recommend the withholding of her

increment. During the 1990-91 school year, while some observations of her classroom behavior demonstrated some improvement, there remained a concern of petitioner's overall performance. Petitioner admits that she did not discuss her alleged weakness in classroom management with her Principal or the Superintendent subsequent to the Superintendent's letters dated April 20, 1990 and June 10, 1991. Nevertheless, petitioner asserts that the increment withholding came as a surprise to her.

I **CONCLUDE** that petitioner has failed to meet her burden to demonstrate that the Board's action was arbitrary, capricious, unfounded, illegal, in bad faith or in contravention of N.J.S.A. 18A:29-14. Fitzpatrick, supra.

I **CONCLUDE**, therefore, that the determination of the Board to withhold petitioner's 1991-92 employment and adjustment increments should be **AFFIRMED**.

ORDER

Accordingly, for the foregoing reasons, it is **ORDERED** that the determination of the Board of Education of the Borough of Keansburg to withhold petitioner's 1991-92 employment and adjustment increments is hereby **AFFIRMED**.

It is further **ORDERED** that the herein petition of appeal of Elizabeth Harrity is **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

23 February 1994
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/28/94
Date

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

psa

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 PETITIONER'S ANSWERS TO INTERROGATORIES

P-2 NOT ADMITTED

FOR RESPONDENT:

R-1 MEMO DATED SEPTEMBER 3, 1986 TO JANE PUKSTAS FROM ANNIE P. MIELE

R-2 MEMO DATED SEPTEMBER 12, 1986 TO BETTY HARRITY FROM ANNIE P. MIELE

R-3 CLASSROOM OBSERVATION

R-4 NOT ADMITTED

R-5 NOT ADMITTED

R-6 PROFESSIONAL IMPROVEMENT PLAN DATED MAY 10, 1990

WITNESSES

FOR PETITIONER:

ELIZABETH HARRITY

FOR RESPONDENT:

NONE

OAL DKT. NO. EDU 8622-91

ELIZABETH HARRITY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the ALJ, for the reasons stated in the initial decision, that petitioner has failed to demonstrate that the Board's action withholding her 1991-92 employment and adjustment increments was arbitrary, capricious, unreasonable, in bad faith or in contravention of N.J.S.A. 18A:29-14 and, therefore, such action must be affirmed.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

APRIL 14, 1994

DATE OF MAILING - APRIL 14, 1994

COMMISSIONER OF EDUCATION

80-94

80-94

JOHN PORTEE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning nontenured chemistry teacher appealed the Board's termination of his teaching contract, contending that such termination was a violation of N.J.S.A. 18A:27-3.1, discriminatory and a violation of his constitutional rights. Board contended petition was untimely filed.

ALJ granted summary decision to the Board and dismissed petition as untimely filed. ALJ concluded that petitioner's argument claiming a lack of finality of decision, causing a tolling of the 90-day limitation, had to fail. ALJ found combination of the expiration of petitioner's contract, its nonrenewal, the Board's notice to petitioner and his unsatisfactory evaluations constituted actual notice to him that the Board had taken a final action as to his nonreemployment. Therefore, petitioner had filed well beyond the 90-day limit and the ALJ did not relax the rule, as such relaxation is reserved for limited situations wherein a compelling reason can be demonstrated for expanding the time limitation.

Commissioner concurred with findings and determination of the ALJ and dismissed petition as untimely filed pursuant to N.J.A.C. 6:24-1.2(c).

APRIL 14, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER ON MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 5855-93

JOHN PORTEE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Eldridge Hawkins, Esq., for petitioner

Samuel M. Manigault, Associate Counsel, for respondent
(Marvin L. Comick, General Counsel, Newark Board of Education)

Record Closed: February 7, 1994 Decided: February 24, 1994

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, John Portee, a contract teacher (nontenured) in the respondent's school district, contests and appeals from the respondent's termination of his teaching contract in December 1989.

PROCEDURAL HISTORY

The petitioner filed a five count complaint against the respondent in the Superior Court of New Jersey on August 20, 1990. On September 30, 1992 the court ordered that count I of the complaint be remanded for determination by the Commissioner of Education and Office of Administrative Law, to decide issues within the jurisdiction of the Commissioner of Education.

In Count I of his complaint, the petitioner alleged that his termination from employment was contrary to the New Jersey Education Law, *N.J.S.A.* 18A:1-1 to-:59., more particularly *N.J.S.A.* 18A:27-3.1, relating to the evaluation of nontenured teaching staff. This count also generally claims that the petitioner's termination of employment was based on a conspiracy arising from racial discrimination, in addition to violations of constitutional rights and public policy.

All issues contained in the other four counts of the complaint were retained by the Superior Court but stayed, pending determination of the first count by the Office of Administrative Law and Commissioner of Education.

On June 17, 1993, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The answer filed by the respondent (Board) in the Superior Court action was accepted by the Commissioner of Education as a sufficient pleading for transmittal to the OAL, along with a copy of the complaint in that action, which contains the single count for administrative determination.

A prehearing conference was held on September 21, 1993, and a prehearing order was filed, defining the issues to be decided, fixing hearing dates, providing for discovery, and regulating other procedural aspects of the forthcoming hearing.

On December 2, 1993, the Board filed a Motion for Summary Decision, alleging that the petitioner's claim is barred by the ninety-day filing limitation in *N.J.A.C.* 6:24-1.2(c).

A brief and other papers in opposition to the application was filed by petitioner.

ISSUES

The sole issue to be decided is whether the petition should be dismissed because of untimely filing pursuant to *N.J.A.C.* 6:24-1.2, which requires filing of a petition before the Commissioner within ninety days after receipt of notice by the petitioner of the action concerning which the hearing is requested.

This decision does not consider the substantive issue contained in the petition, or any remedies available to the petitioner, if applicable. However, two other questions collateral to the untimely filing issue were set forth in the prehearing order, as follows:

If the ninety-day filing limitation does operate to bar the petition, can the parties proceed with the matter if they both agree to waive the limitation, or is it a jurisdictional defect that cannot be waived? This question is now moot, since the Board did not agree to waive the limitation, but proceeded to seek dismissal of the petition instead.

Should the Commissioner of Education and Office of Administrative Law relax the ninety-day time limitation under appropriate circumstances? If so, what standards are involved in any such relaxation?

This last question will be dealt with as part of the decision relating to the applicability of the filing limitation.

FACTS

The respondent submitted a statement of facts, none of which were contested or disagreed with by the petitioner, who also filed a counter statement of facts.

The facts, extracted from the parties' submissions, are as follows:

1. John Portee was employed by the Board of Education of the City of Newark, as a teacher of chemistry at Arts High School.

2. On June 22, 1988, Mr. Portee received an overall satisfactory job performance rating with concerns expressed about his ability to be assertive with disruptive students.

3. On April 25, 1989, Mr. Portee received an overall unsatisfactory job performance rating.

4. On June 15, 1989, Mr. Portee received an overall satisfactory job performance rating with concerns expressed about his ability to "maintain effective classroom discipline and management procedure."

5. On September 14, 1989, Mr. Portee received an overall unsatisfactory job performance rating.

6. On October 18, 1989, Mr. Portee received an overall unsatisfactory job performance rating.

7. On November 30, 1989, the Assistant Executive Superintendent, Secondary School Programs James Moore, Jr., recommended that based on Mr. Portee's unsatisfactory evaluations his employment with the Newark Board of Education should be terminated.

8. On December 12, 1989, Dr. Gene A. Foti, Deputy Executive Superintendent, concurred with Mr. Moore's recommendation of the termination of Mr. Portee.

9. On December 14, 1989, the Newark Board of Education, via its Division of Human Resources Services, issued Mr. Portee a thirty-day notice of termination of his services as a nontenured teacher of chemistry. The notice stated the following:

> Based upon your unsatisfactory evaluations and the recommendation of your Assistant Executive Superintendent, your services will be terminated at the

> end of the work day on January 15, 1990. This date complies with the employment contract you signed on December 9, 1987, which grants thirty (30) days written notice prior to termination.
>
> If you desire additional information regarding this matter, please make your request, in writing, fifteen (15) days of the date of this letter.

On December 22, 1989, Mr. Portee responded to the notice of termination and addressed a letter to the Assistant Personnel Director, Division of Human Resources Services of the Newark Board of Education, stating as follows:

> Please send me additional information regarding the attached letter of December 14, 1989.

10 The Board of Education never responded to Mr. Portee's request.

11. The papers on file indicate that the petitioner's complaint in the Superior Court of New Jersey, containing the count involved in this matter, within the jurisdiction of Commissioner of Education, was filed on August 20, 1990, approximately 248 days after the December 14, 1989 notice of termination.

LEGAL DISCUSSION

It is clear that there are no genuine issues of material fact challenged, and this matter is therefore ripe for summary decision. *N.J.A.C.* 1:1-12.5(b), *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954).

N.J.A.C. 6:24-1.2(c) provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

No argument has been presented by the parties relating to the earliest date on which the petition might be considered as having been filed. A Superior Court

complaint is not ordinarily the petition that is contemplated by the above regulation, and it was not until September 30, 1992, more than two years later, that the Superior Court ordered the transfer to the Commissioner of Education. Almost five more months elapsed before the Superior Court order of transfer (considered by the Commissioner of Education to be the petition of appeal) was filed with the Commissioner, on February 19, 1993. However, since there has been no argument by the parties about the actual date of filing, the petitioner should be given the benefit of the doubt, and the earliest filing date, August 20, 1990, the Superior Court filing date,.is used for purposes of this opinion.

The main thrust of the petitioner's argument is that the ninety-day filing limitation never began to run, because a "final order" was never sent to him. The reason for this statement by Mr. Portee is that he never received and still awaits a response from the Board to his letter of December 22, 1989 asking for additional information.

Therefore, it must first be determined if the December 14, 1989 notice of termination constituted the "final order, ruling, or other action by the district board of education, from which the ninety-day period of limitation began to run."

In *Kaprow v. Board of Education of Berkeley Twp.* 131 *N.J.* 572, (1993), the New Jersey Supreme Court held that an unofficial and informal notice from a secretary, employed by the local board of education, to the plaintiff, stating that two positions have been created and filled by other persons, suffices to trigger the ninety-day period to begin to run against his assertion of tenure rights. That conduct by the local board, combined with the actual, although unofficial notice, was in fact considered to be the type of "other action" that provides adequate notice to the aggrieved party that legal action should be taken within the prescribed period.

N.J.S.A. 18A:27-3.2 requires the Board to comply with a request by a terminated teacher for a statement of reasons for nonrenewal of the employment. According to the petitioner, the Board did not comply, and he therefore did not have sufficient notice of the reasons for his termination. He asserts that such reasons, when given, would have enabled him to prepare for a hearing before the Board pursuant to *N.J.A.C.* 6 3-1.20, if requested.

N.J.A.C. 6:3-1.20 details the procedure to be followed for an appearance before a Board of Education, when a nontenured teaching staff member receives a notice of nonrenewal of employment.

> Whenever a nontenured teaching staff member has requested in writing and has received a written statement of reasons for nonreemployment pursuant to *N.J.S.A.* 18A:27-3.3, he or she may request in writing an informal appearance before the district board of education. Such written request must be submitted to the board within 10 calendar days of receipt of the board's statement of reasons.
>
> (b) Such an informal appearance shall be scheduled within 30 calendar days from receipt of the board's statement of reasons.
>
> (c) Under the circumstances described herein, a non-tenured teaching staff member's appearance before the board shall not be an adversary proceeding. The purpose of such an appearance shall be to permit the staff member to convince the members of the board to offer reemployment. *N.J.A.C.* 6:3-1.20. [Current version in *N.J.A.C.* 6:3-4.2 revised in 1993]

The petitioner argues that some ambiguity existed as to his status, in the absence of his requested statement of reasons. However, when his contract expired and was not renewed, the petitioner had adequate notice of the circumstances that triggered the running of the ninety-day period of limitations. Furthermore, the December 14, 1989 notice of termination stated that the petitioner's contract would not be renewed based upon his unsatisfactory evaluations. The petitioner does not argue that he did not receive these evaluations, although the certification in his brief argues that he only received two unsatisfactory evaluations, rather than three.

Therefore, on January 15, 1990 when the petitioner's contract expired and was not renewed, in accordance with the unequivocal notice of termination, he had adequate notice of the circumstances that triggered the running of the ninety-day limitation period in *N.J.A.C.* 6:24-1.2(c). The combination of the expiration of his contract, its nonrenewal, the respondent's notice to the petitioner and the unsatisfactory evaluations, constituted actual notice to him that the Board had taken a final action which adversely impacted on his employment

Therefore, the ninety-day period of limitation began to run immediately after December 14, 1989. The petitioner's claim in the Superior Court was filed on August 20, 1990, approximately 248 days after the notice of termination, far beyond expiration of the ninety-days. The petition was filed out of time.

Should the ninety-day time limitation be relaxed?

The ninety-day requirement has been strictly construed by the Commissioner of Education, the State Board of Education and the Courts. In *Riely v. Bd. of Ed. of Hunterdon Central Regional High School District* 173 *N.J. Super.* 109, 113 (*App. Div.* 1980), the courts cited *Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assn.,*79 *N.J.* 311, 326-327, (1979) and observed that a teacher who proceeds to arbitration over a grievance caused by board action is not relieved of the requirement to file a petition with the Commissioner within ninety-days of receipt of notice of the board's action. The Appellate Division ruled that the board's motion to dismiss should properly have been granted because the matter was filed out of time, notwithstanding the fact that *Riely* attempted to resolve her grievance in another manner by seeking binding arbitration on the issue of the procedural propriety of the Board's refusal to renew her employment contract.

See also *Baley v. Bd. of Ed. of Tp. of Mansfield* OAL DKT. EDU 4997-79 (Feb. 6, 1980), rejected by Comm'r of Ed. (June 20, 1980), aff'd State Bd. (Feb. 4, 1981), where the ninety-day limitation was asserted and its use affirmed when petitioner filed her complaint approximately six months after being informed of the board's decision not to reemploy her as a nurse.

In *Kallimanis v. Bd. of Ed. of Carlstaldt* OAL DKT. EDU 868-80, (August 8, 1980), aff'd Comm'r of Ed. (September 26, 1980) aff'd State Bd. (March 4, 1981) a petitioner argued that *N.J.A.C.* 6:24-1.2 was inapplicable because a continuing violation of his rights was alleged. The argument was rejected in favor of a strict application of the regulation.

The Commissioner of Education is broadly authorized to relax the rules:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the Commissioner in

> connection with the determination of controversies and disputes under the school laws. They may be relaxed or dispensed with by the Commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. *N.J.A.C.* 6:24-1.15.

This rule gives the Commissioner broad discretion. Even so, since the holding in *Riely*, the Commissioner, the State Board of Education, and the courts have read *N.J.A.C.* 6:24-1.2 very strictly and have applied it almost without exception. The Commissioner has indicated that the relaxation authorized in *N.J.A.C.* 6:24-1.15 is reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitation period. Such possible reasons have been described as follows:

> Where a substantial constitutional issue was presented, where judicial review was sought of an informal administrative determination, and where a matter of significant public interest is involved. [citations omitted] *Miller v. Morris School District* 1980 *S.L.D.* (February 25, 1980). [this is not in the 1979, 1980 or 1981 S.L.D it is mentioned in the Bogart case and it is cited in *Pacio v. Bd. of Ed. of Lakeland Regional High School District* 1989 *S.L.D 2063*]

The above criteria were further explained in *Bogart v. East Orange Bd. Ed.* OAL DKT. EDU 6245-82 (January 26, 1983), aff'd *Comm'r. of Ed.* (March 14, 1983). In that case a letter indicating an intent to appeal a board action was received within the ninety-days after petitioner's receipt of notice of denial of a salary increment. However, the petition was not filed until a little more than a year after petitioner received notice of the Board's final action. Rejecting a request for relaxation of the ninety-day rule, the A.L.J. held:

> It will be relaxed only where there is some compelling reason for the same, such as the presence of substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves. [citation omitted] *Bogart*, at 4."

It was also noted that relaxation was "appropriate which strict adherence would possibly result in injustice." Neither a compelling reason nor an injustice was

apparent in *Bogart*, even thought the petitioner informally signified her intent to file a petition.

In *Dreher v. Jersey City Bd. of Ed.*, OAL DKT. EDU 2777-87, (Dec. 18, 1987), aff'd. (Feb. 2, 1988), aff'd St. Bd. (Jul. 8, 1988), filing of the petition was delayed while petitioner investigated an appropriate grievance procedure. The ninety-day rule was not relaxed, even though the petition was filed only two days after the time expired. *See also, Cwierko v. Jersey City Bd. of Ed.*, OAL DKT. EDU 4795-87 (Jan. 6, 1988), aff'd. Comm'r. of Ed. (Feb. 10, 1988); *Weir v. Bd. of Ed. of Northern Valley Regional High School District*, OAL DKT. EDU 8609-83 (June 7, 1984), aff'd. Comm'r. of Ed. (July 20, 1984), aff'd. State Bd. of Ed. (March 6, 1985), aff'd. A-3520-84T6 (App. Div., Apr. 9, 1986).

The petitioner's opposition to the request for summary decision in this matter is based on the argument stated above: his asserted belief that the Board's action, as contained in its letter of December 14, 1989 was not final or would not become final until his request for more information was received. As stated above, the petitioner had adequate notice when he received the notice of termination, coupled with the reference to unsatisfactory evaluations. This, plus the subsequent expiration and nonrenewal of his contact clearly indicated that the termination of employment was final.

Aside from the foregoing, the petitioner has not claimed or attempted to show any circumstances that might warrant a relaxation of the ninety-day rule, in accordance with *N.J.A.C.* 6:24-1.15. No compelling reason was asserted, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties; nor did he demonstrate that strict adherence to the time limitation would possibly result in an injustice, except for the loss of his claim.

As set forth above, relaxation has been reserved for limited situations wherein a compelling reason can be demonstrated for expanding the time limitation. The petitioner's argument contains no reference to the involvement of a genuine constitutional issue in this segment (count 1) of his claim; and no matter of significant public interest is involved other than the issue of the Board's decision not

to renew the nontenured teacher's contract. See *Maria Pacio v. Bd. of Ed. of Lakeland Reg. High School Dist.*, 1989, *S.L.D.* 2060.

CONCLUSIONS

It is therefore **CONCLUDED** that the petitioner's argument claiming a lack of finality, causing a tolling of the ninety-day limitation, must fail. The period of limitations had expired long before the petitioner's claim was filed. It is further **CONCLUDED** that no reason has been shown why the Commissioner should exercise his discretion to relax application of the time bar in accordance with *N.J.A.C.* 6:24-1.15.

ORDER

It is therefore **ORDERED** that the respondent's application for summary decision be **GRANTED**, and this matter is **DISMISSED** because of untimely filing, pursuant to *N.J.A.C.* 6:24-1.2(c).

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 24, 1994
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

2/25/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 1 1994
Date

OFFICE OF ADMINISTRATIVE LAW

sej

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions recast and reargue his assertion presented to the ALJ in this matter, i.e., that his petition was not filed out of time because the Board never responded to his December 22, 1989 request for clarification of the reasons for his dismissal and, therefore, the Board did not issue a final decision in this matter.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that petitioner's argument claiming a lack of finality, thereby causing a tolling of the 90-day limitation for filing, must fail. As noted by the ALJ

> ***[O]n January 15, 1990 when the petitioner's contract expired and was not renewed, in accordance with the unequivocal notice of termination, he had adequate notice of the circumstances that triggered the running of the

> ninety-day limitation period in N.J.A.C. 6:24-1.2(c). The combination of the expiration of his contract, its nonrenewal, the respondent's notice to the petitioner and the unsatisfactory evaluations, constituted actual notice to him that the Board had taken a final action which adversely impacted on his employment.
> (Initial Decision, at p. 7)

The Commissioner further agrees with the ALJ that petitioner has not presented a cognizable reason for relaxation of the application of the time bar under N.J.A.C. 6:24-1.15.

Accordingly, the recommended decision of the Office of Administrative Law is adopted for the reasons stated therein. Summary decision is hereby granted to the Board and the within matter is dismissed as untimely filed pursuant to N.J.A.C. 6:24-1.2(c).

COMMISSIONER OF EDUCATION

APRIL 14, 1994

DATE OF MAILING - APRIL 14, 1994

81-94

81-94

JANICE LANEVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 15, 1994

OAL DKT. NO. EDU 6837-93N

JANICE LANEVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 15, 1994

DATE OF MAILING - APRIL 15, 1994

84-94

84-94

JANE R. FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 18, 1994

OAL DKT. NO. EDU 9747-92

JANE R. FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1994

DATE OF MAILING - APRIL 18, 1994

82-94

82-94

IN THE MATTER OF THE TENURE	:	
HEARING OF DERRICK EXUM, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

SYNOPSIS

Board certified charges of excessive absenteeism and tardiness against respondent tenured custodian. Parties had signed a settlement agreement as a consequence of a grievance procedure prior to initiation of the tenure charges which called for automatic termination if respondent had any further unauthorized absences and/or lateness.

ALJ concluded that the automatic termination clause of the prior agreement was invalid because only the Commissioner can make a determination on the termination of a tenured employee after a hearing. However, the ALJ concluded that the Board had proved by a preponderance of the credible evidence that respondent was guilty of the tenure charges and that the penalty of dismissal was justified.

Commissioner adopted findings and determination in initial decision, noting that the authority of the Commissioner cannot be replaced by a grievance procedure. Commissioner ordered respondent dismissed and directed Board to pay him compensation due him for the period beginning on the 121st day of the Certification of Determination to the date of this decision.

APRIL 18, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7264-93
AGENCY DKT. NO. 258-7/93

IN THE MATTER OF THE TENURE HEARING OF DERRICK EXUM, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

Shelly A. Dean, Esq., attorney for the School District of the City of Elizabeth (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Randi Doner, Esq., attorney for Derrick Exum (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: January 12, 1994 Decided: February 28, 1994

BEFORE **MARIE P. SIMONELLI,** ALJ:

STATEMENT OF THE CASE

Petitioner, School District of the City of Elizabeth (the District), filed tenure charges against Derrick Exum (Mr. Exum), a tenured custodian with the District, for his termination for excessive absenteeism and/or lateness.

PROCEDURAL HISTORY

On April 9, 1992, the District notified Mr. Exum that it was withholding his salary increment as of July 1992 due to Mr. Exum's excessive absenteeism and/or lateness. Pursuant to a Collective Bargaining Agreement between the District and the Elizabeth Education Association (the EEA), the EEA filed a grievance on Mr. Exum's behalf. Prior to arbitration of the grievance, the District, the EEA and Mr. Exum executed a Settlement Agreement (the Agreement) (P-7). The Agreement was effective as of February 1, 1993 and it provided for Mr. Exum's automatic termination if he had any further unauthorized absences and/or lateness.

After February 1, 1993, Mr. Exum had unauthorized absences and he was late. As a result, on May 11, 1993, the District filed a Statement of Charge seeking Mr. Exum's termination. The District also suspended Mr. Exum without pay.

On July 6, 1993, the District determined that there was probable cause to credit the evidence in support of the charge against Mr. Exum and that the charge was sufficient to warrant his dismissal or a reduction in his salary. On July 7, 1993, the District issued a Certification of Determination to certify the charge to the Commissioner of Education (the Commissioner).

On August 3, 1993, the matter was transmitted to the Office of Administrative Law (the OAL) as a contested proceeding. A pre-hearing conference was held on October 18, 1993 and the matter was scheduled for a plenary hearing on January 12, 1994.

Prior to the OAL hearing, the parties filed a motion concerning the validity of the Agreement. A determination of that motion was reserved. The plenary hearing occurred and the record closed on January 12, 1994.

DISCUSSION OF TESTIMONY AND EVIDENCE

Mr. Exum was a Custodian with the District from 1978 until his suspension without pay on May 11, 1993. Pursuant to a Collective Bargaining Agreement, Mr. Exum was entitled to 20 vacation days, 20 to 23 holidays (depending on the school year), 15 sick days and 2 personal days, for a total of 57 to 60 authorized absences per school year.

Mr. Exum's excessive absences and/or lateness began in 1985. Mr. Exum's supervisor, Robert J. Delaney (Mr. Delaney), gave Mr. Exum written and verbal warnings and he advised Mr. Exum that his attendance must improve. (See: P-11: Mr. Delaney's letter to Mr. Exum, dated February 1, 1991; P-13: Mr. Delaney's letter to Mr. Exum, dated December 13, 1985; and P-14: Mr. Delaney's letter to Mr. Exum, dated March 19, 1985). Despite those warnings, Mr. Exum's attendance did not improve.

In particular, Mr. Exum's attendance record was as follows:

SCHOOL YEAR	UNAUTHORIZED ABSENCES	LATENESS
1990-91	15.5	16
1991-92	16	11
1992-93	17	3
TOTAL	48.5	30

(See: P-4: 1990-91 Employee Attendance Record; P-5: 1991-92 Employee Attendance Record; P-6: 1992-93 Employee Attendance Record).

On April 9, 1992, the District notified Mr. Exum that it would withhold his salary increment as of July 1992 because of his excessive absences and/or lateness. Despite this notice, Mr. Exum's attendance did not improve after April 9, 1992. In fact, he was late 5 times and he had 17 unauthorized absences after that date.

The EEA filed a grievance on Mr. Exum's behalf regarding the withholding of his salary increment. Prior to arbitration of the grievance, the District, the EEA and Mr. Exum executed the Agreement (P-7). Under the Agreement, Mr. Exum was permitted to keep his job. He also received his salary increment subject to having no further unauthorized absences and/or lateness. The Agreement, however, also provided, in pertinent part, that :

> Should employee engage in any further unauthorized absenteeism or tardiness between February 1, 1993 and June 30, 1993, employee's employment shall be terminated effective immediately . . .

At the time Mr. Exum signed the Agreement, he knew that he had used all of his vacation, sick and personal days and that he had to have perfect attendance to June 30, 1993.

After February 1, 1993, the effective date of the Agreement, and before June 30, 1993, Mr. Exum had 7 more unauthorized absences and he was late once. As a result, the District filed a Statement of Charge seeking Mr. Exum's termination pursuant to the terms of the Agreement. Mr. Exum did not deny that he was absent and/or late after he had signed the Agreement. He explained that his absences were caused by a chronic back problem for which he was receiving medical treatment.

Mr. Exum's unauthorized absences and/or lateness had a negative impact on the cleanliness, maintenance and condition of the District's buildings. His conduct also seriously interfered with the work that had to be done, it placed additional burdens on other custodians and it hurt their morale and it jeopardized custodial services provided to students and staff.

MOTION REGARDING THE VALIDITY OF THE AGREEMENT

The Agreement provides for Mr. Exum's automatic termination in the event that he had any unauthorized absences or was late during the period February 1, 1993 to June 30, 1993. Mr. Exum argues that the automatic termination provision of the Agreement is invalid because it violates *N.J.S.A.* 18A:6-10 which provides that only the Commissioner can terminate a tenured employee after a hearing.

The District argues that the automatic termination provision is valid because it resulted from a grievance procedure that was resolved pursuant to a Collective Bargaining Agreement, that the grievance procedure was not before the Commissioner, that the District entered into the Agreement in good faith and that Mr. Exum knew what he was signing and he had obtained the advice of the EEA President prior to signing the Agreement.

Pursuant to *N.J.S.A.* 18A:6-9, the Commissioner has the exclusive power to hear and decide all controversies and disputes arising under the school laws. *Theodore v. Dover Board of Education*, 183 *N.J. Super.* 407 (App. Div. 1982). The termination of a tenured employee, such as Mr. Exum, is a controversy or dispute arising under the school laws which must be heard by the Commissioner under *N.J.S.A.* 18A:6-10 which provides, in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint . . .

The power of the Commissioner to hear and determine a dispute involving the termination of a tenured employee cannot be replaced by a grievance procedure. *Dunellen Board of Education v. Dunellen Education Association*, 64 *N.J.* 17 (1973).

Based upon the foregoing, I **CONCLUDE** that the automatic termination provision of the Agreement is invalid because only the Commissioner can make a determination on the termination of a tenured employee after a hearing. I further **CONCLUDE** that the remaining provisions of the Agreement are valid.

FINDINGS OF FACT RELATING TO MR. EXUM'S EXCESSIVE ABSENCES AND/OR LATENESS

Having heard the testimony and observed the witnesses, and having reviewed the Exhibits, I **FIND** the following **FACTS,** by a preponderance of the credible evidence:

1. In 1978, Mr. Exum began employment with the District as a custodian.

2. Mr. Exum was suspended from his position without pay on May 11, 1993.

3. Mr. Exum's excessive absences and/or lateness began in 1985.

4. Beginning in 1985, Mr. Exum received verbal and written warnings about his excessive absences and/or lateness and he was advised that his attendance must improve.

5. In 1992, the District withheld Mr. Exum's salary increment because of his excessive absences and/or latenesses.

6. Despite the above disciplinary actions, Mr. Exum's attendance did not improve.

7. On May 11, 1993, the District filed a Statement of Charge seeking Mr. Exum's termination.

8. From July 1, 1990 to May 11, 1993, Mr. Exum had 48.5 unauthorized absences and he was late 30 times.

9. Mr. Exum's absences and/or lateness were excessive.

10. Mr. Exum's excessive absences and/or lateness had a negative impact on the cleanliness, maintenance and condition of the District's buildings. His conduct also seriously interfered with the work that had to be done, it placed additional burdens on other custodians and hurt their morale and it jeopardized custodial services provided to students and staff.

LEGAL DISCUSSION

Excessive absenteeism by a custodian is not sufficient grounds for dismissal on its own. There must also be evidence of the extent of harm and negative impact the custodian's excessive absences have on the District's ability to provide a thorough and efficient education in having adequately equipped, sanitary and secure facilities. *Passaic Board of Education v. Viani*, 92 *N.J.A.R.* 2d (EDU) 76.

In this case, Mr. Exum's excessive absences and/or lateness harmed and had a negative impact on the District's ability to provide a thorough and efficient education in having adequately equipped, sanitary and secure facilities. Except for the unauthorized absences and/or lateness Mr. Exum had after he signed the Agreement, Mr. Exum provided no explanation whatsoever for his conduct.

Based upon the foregoing, I **CONCLUDE** that the District has proved by a preponderance of the credible evidence that Mr. Exum is guilty of the charge against him and that the penalty of dismissal is justified.

I further **CONCLUDE** that, pursuant to *N.J.S.A.* 18A:6-14, Mr. Exum shall be paid his salary, minus the biweekly salary increment of $29.67, beginning on the one hundred twenty-first day of the Certification of Determination.

ORDER

I therefore **ORDER** that Mr. Exum be dismissed from his employment with the District. I further **ORDER** that the District shall pay Mr. Exum his salary as aforesaid.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 28, 1994
DATE

MARIE P. SIMONELLI, ALJ

Receipt Acknowledged:

March 3, 1994
DATE

Hazel A. Blackburn,
DEPARTMENT OF EDUCATION
Acting Director

Mailed to Parties:

MAR 10 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

ro

APPENDIX

Witnesses

For the District:

Theodore E. Farra, Director of Plant Property and Equipment
Robert J. Delaney, Supervisor of Custodians

For Mr. Exum:

Derrick Exum

Exhibits

P-1	Collective Bargaining Agreement
P-2	Letter, dated December 27, 1985, from Theodore E. Farra to Mr. Exum
P-3	Memo, dated May 26, 1987, from Robert J. Delaney to Mr. Exum
P-4	1990-91 Employee Attendance Record
P-5	1991-92 Employee Attendance Record
P-6	1992-93 Employee Attendance Record
P-7	Settlement Agreement
P-8	Memo to Mr. Exum re: 12/17/92 sick day
P-9	Memo to Mr. Exum re: 1/28/91 sick day
P-10	Memo to Mr. Exum re: 5/2/90 sick day
P-11	Letter, dated February 1, 1991, from Robert J. Delaney to Mr. Exum
P-12	Memo, dated December 4, 1991, from Robert J. Delaney to Theodore E. Farra
P-13	Letter, dated December 13, 1985, from Robert J. Delaney to Mr. Exum
P-14	Letter, dated March 19, 1985 from Robert J. Delaney to Mr. Exum
P-15	Memo, dated March 4, 1992 from Mr. Richardson to Robert J. Delaney
P-16	Certificate to return to work, dated 3/12/93
R-1	Note, dated 5/12/93, from William J. McHugh, M.D.
R-2	Note, dated 5/12/93, from William J. McHugh, M.D.
R-3	Note, dated 5/12/93, from William J. McHugh, M.D.
R-4	Letter, dated May 12, 1993, from Michael R. Zaboski, M.D.

IN THE MATTER OF THE TENURE	:	
HEARING OF DERRICK EXUM, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

The record of this matter and the initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner initially concurs with the ALJ that the automatic termination clause of the settlement agreement effectuated between respondent and the Board as a consequence of a grievance procedure prior to the initiation of the within charges is invalid. Pursuant to N.J.S.A. 18A:6-10, the Commissioner is empowered to make a determination on the termination of a tenured employee after a hearing. Such authority of the Commissioner cannot be replaced by a grievance procedure. The Commissioner likewise agrees with the ALJ that the Board has proven its charges of excessive absenteeism and tardiness against respondent and that the penalty of dismissal is justified.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons articulated therein. Respondent is hereby dismissed

from his tenured custodian position with the School District of the City of Elizabeth. The Board is directed to pay respondent compensation due him for the period beginning on the 121st day of the Certification of Determination to the date of this decision.

COMMISSIONER OF EDUCATION

APRIL 18, 1994

DATE OF MAILING - APRIL 18, 1994

83-94

83-94

DANIEL WICKENHEISSER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, department head for physical education assigned to teaching duties for 1992-93, alleged Board's employment of a nontenured supervisor in the newly created position of head of social studies, English, foreign language and physical education was a violation of his tenure rights. The Board contended that petitioner voluntarily waived his right to the position of department head or, alternatively, that he was barred by the doctrine of equitable estoppel from asserting a claim. Petitioner had requested early retirement at the end of the 1992-93 school year, allegedly in exchange for agreeing not to claim a department head position in that year.

ALJ concluded that absent abolition of petitioner's position, a transfer to the separately tenurable position of teacher, or proceedings under the Tenure Employees Hearing Law, petitioner remained entitled to the salary due him as department head. ALJ ordered Board to pay petitioner the sum of $1,400, representing the stipend for the 1992-93 school year as department head of physical education, with pre-judgment and post-judgment interest. Moreover, the ALJ found that petitioner was not barred by the doctrine of equitable estoppel from assertion of his tenure rights as he could not be found to have decisively acted to waive a specifically known right. Petitioner was found to have no entitlement to the larger stipend paid of the newly created multiple department head position.

Commissioner concurred with ALJ's findings and determination.

APRIL 18, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8917-92

AGENCY DKT. NO. 438-9/92

DANIEL WICKENHEISSER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON,

Respondent.

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

Glenn T. Leonard, Esq., for respondent

Record Closed: January 14, 1994 **Decided: February 28, 1994**

BEFORE **RICHARD McGILL,** ALJ:

This matter involves a petition by Daniel Wickenheisser (petitioner) in which he seeks a determination that the Board of Education of the Borough of North Arlington (respondent) violated his tenure rights in the position of department chairperson for physical education, health, family life and driver education by appointing a non-tenured employee, Howard Whidden, as supervisor for social studies, English, foreign languages and physical education, while assigning petitioner to a classroom teaching position. As additional relief, petitioner requests reinstatement as a supervisor, back pay and benefits, and prejudgment and postjudgment interest. Respondent contends that petitioner waived his right to the position of department chairperson or, alternatively, that he is barred by the doctrine of equitable estopel from assertion of his right to that position.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on September 18, 1992, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on November 4, 1992, and the matter was transmitted to the Office of Administrative Law on November 16, 1992 for determination as a contested case.

The hearing in this matter was conducted on December 6 and 7, 1993 at the Office of Administrative Law in Newark, New Jersey. The record closed on January 14, 1994, upon receipt of simultaneous post-hearing submissions.

ISSUES

The main issue in this proceeding is whether respondent violated petitioner's tenure rights by assigning him to classroom teaching in place of his duties as department chairperson, while appointing a non-tenured employee as supervisor for social studies, English, foreign languages and physical education. Respondent maintains that petitioner in effect consented to the change. The issues are whether petitioner waived his tenure right to the position of department chairperson for physical education, health, family life and driver education, and whether petitioner is barred by the doctrine of equitable estoppel from asserting his right to that position.

The key factual issues in this proceeding concern a conversation in March 1992 between petitioner and William Mancuso, Superintendent of Schools, and a meeting on September 17, 1992, attended by Superintendent Mancuso, petitioner and several other individuals. Respondent maintains that during the conversation in March 1992 petitioner agreed to accept a teaching assignment in exchange for a favorable recommendation from the Superintendent in regard to a retirement incentive program and that petitioner acknowledged said agreement during the meeting in September 1992. Petitioner denies that he ever entered into this agreement with the Superintendent, and he also denies that he acknowledged any such agreement during the meeting in September 1992.

FACTS

a Background and Undisputed Facts

Petitioner began his employment with respondent in 1964 as a teacher of physical education and health. In 1976, petitioner became the department chairperson for physical education, health, family life and driver education, and he continued in that position through the 1991-1992 school year. Petitioner received written notice each year that he would be the department head. The stipend as department head was $1,400 during the 1991-1992 school year. As the department head, petitioner supervised the teachers, reported to the principal and taught one class per day. Petitioner was tenured in the position of department chairperson for physical education and health.

On October 28, 1991, Superintendent Mancuso called a meeting of all department chairpersons at the request of three department heads who had heard rumors about consolidation of departments. During the meeting, Superintendent Mancuso stated that he was considering consolidation of departments and specifically that he was considering elimination of the chairmanship for physical education. Superintendent Mancuso also mentioned an early retirement plan, and petitioner said that he would consider early retirement.

Under the early retirement plan, any qualifying employee could take early retirement during the first year. An employee who chose to take early retirement during the second year of the plan needed respondent's approval. The plan would be in effect for school years 1991-1992 and 1992-1993.

Initially, respondent wanted an indication of the number of individuals who would opt for early retirement. In a letter dated November 1, 1991, prepared by the president of the teachers' association, petitioner stated: "I plan to retire on July 1, 1992 contingent upon the North Arlington Board of Education's adoption by affirmative resolution of the early retirement incentive legislation." Petitioner viewed this letter as an expression of interest as opposed to a commitment, while Superintendent Mancuso took the letter to mean that petitioner planned to retire.

Thereafter, Superintendent Mancuso asked petitioner for a definitive statement that he intended to retire. In a letter dated December 2, 1991 to Superintendent Mancuso, petitioner referred to his prior letter concerning retirement and stated that the "commitment takes into consideration several factors, the most important of which is my wife's ability to obtain a teaching position in south Jersey." Since his wife had not found a teaching position, petitioner was in effect saying that he wanted to keep his options open. Superintendent Mancuso took this letter to mean that petitioner was withdrawing his intent to retire.

Petitioner sent a letter dated March 26, 1992 to Superintendent Mancuso. In the letter, petitioner requested "that the Board of Education consider my resignation at the end of the next school year, June 30, 1993, allowing me to participate in the Early Retirement Incentive Program. If approved by the Board of Education, you may consider this as my letter of resignation." Shortly thereafter, petitioner and Superintendent Mancuso had a conversation. The substance of that conversation is in dispute. Thereafter, Superintendent Mancuso gave a favorable recommendation concerning petitioner's request, and the Board of Education approved petitioner's request for an early retirement at the end of the 1992-1993 school year.

By letter dated May 8, 1992, Superintendent Mancuso advised petitioner that the Board of Education was allowing him to participate in the early retirement incentive program with a resignation date of June 30, 1993. Thereafter, in a memo to petitioner dated June 23, 1992, Principal David Roden stated: "As per conversation with Mr. William A. Mancuso, Superintendent of Schools, next year you will not be Chairperson of the Physical Education Department and will have a full teaching schedule."

In September 1992, petitioner received a full teaching schedule which included five or six teaching periods per day. Petitioner was never informed that the position of chairperson of the department of physical education was abolished, and in fact, respondent did not abolish that position. Petitioner did not receive a stipend as chairperson in the 1992-1993 school year. Howard Whidden, a non-tenured employee, was named supervisor for social studies, English, foreign languages and physical education. Whidden achieved tenure effective March 1, 1992. Based upon those circumstances, petitioner decided to file a petition with the Commissioner of Education, and he signed a certification on September 14, 1992.

Superintendent Mancuso became aware of the petition and called petitioner to his office for a meeting to discuss the situation. In addition to Superintendent Mancuso and petitioner, the meeting was attended by Principal David Roden, the Assistant Principal Robert B. Kinloch and School Business Administrator Charles Weigard. The substance of the discussion in that meeting is in dispute.

b. Summary of Evidence

The disputed facts in this matter concern the conversation between petitioner and Superintendent Mancuso in March 1992 and the discussions during the meeting on September 17, 1992.

Superintendent Mancuso testified that he had a discussion with petitioner in March 1992 concerning the early retirement plan. Superintendent Mancuso said that he would make a recommendation to the Board of Education to approve petitioner's early retirement at the end of the 1992-1993 school year, if petitioner would agree to return as a teacher. Petitioner responded that he had no problem with elimination of the chair of the physical education department, and he agreed to Superintendent Mancuso's terms. The agreement was not in writing, and Superintendent Mancuso assumed that petitioner realized that he would not get a stipend. Superintendent Mancuso would not have made the recommendation to allow petitioner to retire during the second year of the retirement incentive program, unless petitioner agreed that he would accept a teaching position. Superintendent Mancuso would not recommend approval of a request for early retirement without some benefit to respondent.

Superintendent Mancuso further testified that he was shocked when he learned that petitioner had filed a legal challenge to the loss of the department chairmanship and that as a result he called petitioner to his office for the meeting on September 17, 1992. Superintendent Mancuso offered petitioner the opportunity to have a union representative present, but petitioner declined the offer. Superintendent Mancuso questioned petitioner in the presence of David Roden, Robert B. Kinloch and Charles Weigard as to whether he and petitioner had discussed the situation and reached an agreement. At first, petitioner denied that they had an agreement, but then he acknowledged before the others present at the meeting that he had agreed not to challenge the loss of the department chairmanship.

Robert B. Kinloch, who is now the principal, testified that he was the assistant principal at the time he attended the meeting on September 17, 1992. During the meeting, Superintendent Mancuso stated to petitioner that they had an agreement about his non-appointment as department chairperson. Initially, petitioner would not admit that he even had a meeting with Superintendent Mancuso. Then, petitioner admitted that they had a meeting and that they reached an agreement.

Charles Weigard testified that he is the school business administrator and that he attended a meeting on September 17, 1992 in Superintendent Mancuso's office. Superintendent Mancuso asked petitioner if they had struck an agreement, and petitioner initially denied that they had an agreement. Then petitioner thought better of it and acknowledged that they had agreed that petitioner would waive his right to the position of department chairperson in exchange for approval of his early retirement.

Petitioner testified that during the conversation in March 1992, Superintendent Mancuso did not tell him that his continued employment would be without the position of department head. With respect to the meeting on September 17, 1992, petitioner denied that he acknowledged that his reemployment was conditioned on giving up the position of department head.

c. Findings

While all witnesses had difficulty remembering the exact words in their discussions, I am convinced that the testimony of respondent's three witnesses was substantially accurate. Therefore, I **FIND** that in March 1992, Superintendent Mancuso offered to make a recommendation to the Board of Education to approve petitioner's request for an early retirement, if petitioner would agree not to challenge the loss of the position of department head. Petitioner said that loss of the position of department head would not be a problem. Superintendent Mancuso interpreted petitioner's response to be an acceptance of his offer. The agreement was not memorialized in writing. During the meeting on September 17, 1992, petitioner acknowledged that he had an agreement with Superintendent Mancuso.

LAW AND ANALYSIS

An employee may receive tenure in a teaching position, *N.J.S.A.* 18A:28-5, and may not be dismissed therefrom or reduced in compensation except for just cause. *N.J.S.A.* 18A:6-10. An employee may also receive tenure in a supervisory position. *N.J.S.A.* 18A:28-6. An employee who achieved tenure "could not be removed from that position and transferred to the separately tenurable position of teacher without his consent, the abolishment of the position (*N.J.S.A.* 18A:28-9) or [proceedings under] the Tenure Employees Hearing Law (*N.J.S.A.* 18A:6-10 *et seq.*)." *Guerra v. Bd. of Ed., Hudson County Area Vocational and Technical Schools*, 1990 *S.L.D.* 340, 352. Here, it is clearly established that petitioner was tenured in the position of department head for physical education, that the position was not abolished, that petitioner was not the subject of proceedings under *N.J.S.A.* 18A:6-10 and that petitioner was not transferred by respondent to the position of teacher.

Respondent first argues that petitioner waived any entitlement which he had to the position of department head for physical education. In support of this position, respondent maintains that petitioner intentionally gave up his claim to tenure in the position of department head for physical education in exchange for a favorable recommendation in regard to early retirement.

"Waiver" is the intentional relinquishment of a known right. *West Jersey Title, &c., Co. v. Industrial Trust Co.*, 27 *N.J.* 144, 152 (1958). The relinquishment requires a clear, unequivocal and decisive act. *Id.* at 152. Having heard all the testimony and having reviewed the evidence in this matter, I do not believe that petitioner intentionally relinquished a known right. On the contrary, the essence of the agreement as described by Superintendent Mancuso was that petitioner would not assert his tenure right to the position of department head for physical education. Under the circumstances, I **CONCLUDE** that petitioner did not waive his tenure rights to the position of department head for physical education.

This conclusion is supported by the nature of tenure. Tenure is a status created by statute as opposed to agreement of the parties. *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65, 72 (1962). The purpose of tenure is to provide a measure of security to teachers and other employees who faithfully serve for the requisite period of time. *Barnes v. Bd. of Ed. of Jersey City*, 85 *N.J.Super.* 42, 45 (App. Div. 1964), *certif. denied*,

43 N.J. 450 (1964). The achievement or loss of tenure in a particular position is controlled by statute. In the context of this case, petitioner could have agreed to a transfer from a supervisory position to a teaching assignment pursuant to *N.J.S.A.* 18A:28-6. However, respondent never approved a transfer for petitioner. It follows that petitioner did not waive his rights to the position of department head for physical education.

Respondent next argues that petitioner is barred by the doctrine of equitable estoppel from asserting his tenure right to the position of department head for physical education. In support of this argument, respondent maintains that petitioner agreed to forego his entitlement to the position of department head and that Superintendent Mancuso relied on this agreement and recommended that the Board grant petitioner's request for a second-year early retirement. Respondent maintains that it relied to its detriment on petitioner's representation by giving petitioner the benefit of an early retirement.

In *Carlsen v. Masters, Mates & Pilots Pension Plan Trust*, 80 *N.J.* 334 (1979), the New Jersey Supreme Court set forth the following definition of equitable estoppel:

> [T]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse . . . . [*Id.*, at 339 (citations omitted).]

The Supreme Court further states as follows:

> Conduct amounting to a misrepresentation or concealment of material facts, known to the party allegedly estopped and unknown to the party claiming estoppel, done with the intention or expectation that it will be acted upon by the other party and on which the other party does in fact rely in such a manner as to change his posiiton for the worse gives rise to an equitable estoppel. It is a doctrine designed to prevent a party's disavowal of previous conduct if such repudiation "would not be responsive to the demands of justice and good conscience." [*Ibid.* (citations omitted).]

More recently, the Supreme Court stated that:

> The essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment. [*O'Malley v. Department of Energy*, 109 *N.J.* 309, 317 (1987).]

There are several difficulties with respondent's argument. First, while Superintendent Mancuso claims that in making his recommendation he relied on petitioner's agreement to forego his tenure rights, there is not proof that the Board members relied on petitioner's statement in making the determination to approve his request for early retirement. Since the Board as opposed to the Superintendent was the party in the matter, respondent has failed to prove reliance on petitioner's statement.

Second, respondent's proofs are not persuasive that approval of petitioner's request for early retirement was actually detrimental to respondent. Evidently, the purpose of the early retirement incentive program was to achieve savings by eliminating the salaries of employees who chose to retire. While respondent points to relatively minor costs such as the increase in the amount of petitioner's pension, the primary consideration is that respondent saved the expense of petitioner's salary commencing June 30, 1993. Thus, respondent achieved the purpose of the early retirement incentive program. It follows that any minor detriment is outweighed by the savings which resulted from petitioner's retirement.

A final consideration concerns whether the disavowal of petitioner's prior statement would frustrate the demands of justice and good conscience. It is evident in this case that Superintendent Mancuso wanted petitioner out of a tenured position. While respondent could have abolished petitioner's position pursuant to *N.J.S.A.* 18A:28-9, petitioner would in all likelihood have had rights to the new supervisory position. Thus, Superintendent Mancuso's efforts would tend to frustrate the purpose of the tenure laws. Therefore, petitioner's disavowal of his prior statement would not be offensive to the demands of justice and good conscience. Under the circumstances, petitioner is not barred by the doctrine of equitable estoppel from assertion of his tenure rights to the position of department head for physical education.

The key facts in this case are that petitioner was tenured in the position department head for physical education, that petitioner was informed that he would have a teaching assignment for the 1992-1993 school year as opposed to the position of department head, and that petitioner did not receive the stipend of $1,400 for the 1992-1993 school year. Under the circumstances, I **CONCLUDE** that respondent violated petitioner's tenure rights to the position of department head for physical education.

With respect to the relief in this matter, petitioner claims that he should receive the larger stipend that Howard Whidden received as supervisor of social studies, English, foreign languages and physical education. This type of relief might be appropriate in the context of an abolishment of petitioner's position pursuant to *N.J.S.A.* 18A:28-9, where petitioner could conceivably have rights to Whidden's position. In this case, however, there was no abolishment of petitioner's position. Under the circumstances, petitioner is not entitled to the stipend for the supervisory position held by Whidden. Rather, petitioner should be restored to the position which he held, and he should receive the stipend of $1,400. Since petitioner has retired, the relief granted to petitioner should be limited to the stipend of $1,400 for the 1992-1993 school year.

Accordingly, it is **ORDERED** that respondent pay to petitioner the sum of $1,400, representing the stipend for the 1992-1993 school year as department head of physical education, with prejudgment and postjudgment interest.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 28, 1994
Date

RICHARD McGILL, ALJ

Receipt Acknowledged:

March 3, 1994
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 09 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

WITNESS LIST

For petitioner:

Daniel J. Wickenheisser
Faust LaScala

For respondent:

William A. Mancuso
Robert B. Kinloch
Charles Weigard

EXHIBIT LIST

P-1	April 22, 1988 Policy re: Department Chairperson	Evidence
P-2	Job Description, Department Chairperson	Evidence
P-3	Job Description, Department Chairperson: History/ English/Foreign Language and Physical Education	Evidence
P-4	Teacher's Record - Daniel J. Wickenheisser	Evidence
P-5	Letter, dated April 27, 1976	Evidence
P-6	Letter, dated February 15, 1977	Evidence
P-7	Letter, dated April 27, 1977	Evidence
P-8	Letter, dated June 28, 1977	Evidence
P-9	Letter, dated July 19, 1977	Evidence
P-10	Letter, dated April 26, 1978	Evidence
P-11	Letter, dated June 27, 1978	Evidence
P-12	Letter, dated April 11, 1979	Evidence
P-13	Letter, dated May 15, 1979	Evidence
P-14	Letter, dated April 29, 1980	Evidence

P-15	Letter, dated June 10, 1980	Evidence
P-16	Letter, dated July 21, 1980	Evidence
P-17	Letter, dated April 28, 1981	Evidence
P-18	Letter, dated June 17, 1981	Evidence
P-19	Letter, dated April 26, 1982	Evidence
P-20	Letter, dated June 15, 1982	Evidence
P-21	Letter, dated May 17, 1983	Evidence
P-22	Letter, dated June 23, 1983	Evidence
P-23	Letter, dated April 30, 1984	Evidence
P-24	Letter, dated June 19, 1984	Evidence
P-25	Letter, dated April 19, 1985	Evidence
P-26	Letter, dated June 25, 1985	Evidence
P-27	Letter, dated July 15, 1986	Evidence
P-28	Letter, dated December 1, 1986	Evidence
P-29	Letter, dated February 5, 1987	Evidence
P-30	Letter, dated April 23, 1987	Evidence
P-31	Letter, dated June 16, 1987	Evidence
P-32	Letter, dated April 19, 1988	Evidence
P-33	Letter, dated June 22, 1988	Evidence
P-34	Letter, dated April 18, 1989	Evidence
P-35	Letter, dated June 27, 1989	Evidence
P-36	Letter, dated April 13, 1990	Evidence
P-37	Letter, dated June 19, 1990	Evidence
P-38	Letter, dated April 18, 1991	Evidence
P-39	Letter, dated April 28, 1992	Evidence
P-40	Letter, dated November 1, 1991	Evidence
P-41	Letter, dated December 2, 1991	Evidence

P-42	Letter, dated March 26, 1992	Evidence
P-43	Letter, dated May 8, 1992	Evidence
P-44	Memo, dated June 23, 1992	Evidence
P-45	Teacher's Record, Howard J. Whidden, Jr.	Evidence
P-46	Letter, undated	Evidence
P-47	Letter, dated May 21, 1991	Evidence
P-48	Letter, dated April 28, 1992	Evidence
P-49	Letter, dated February 23, 1993	Evidence
P-50	Letter dated April 22, 1993 from Robert B. Kinloch to whom it may concern (retained by counsel)	Identification
P-51	Letter dated April 21, 1993 from Charles Weigard (retained by counsel)	Identification
R-1	Excerpt from minutes of meeting of North Arlington Board of Education on April 27, 1992	Evidence
R-2	Excerpt from minutes of meeting of North Arlington Board of Education on September 21, 1992	Evidence
R-3	Excerpt (pp. 42-43) from contract for July 1, 1991 to June 30, 1994	Evidence
R-4	Agreement between North Arlington Board of Education and North Arlington Education Association (retained by counsel)	Identification
R-5	Letter dated September 30, 1992	Identification

OAL DKT. NO. EDU 8917-92

DANIEL WICKENHEISSER,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by both petitioner and respondent ("the Board") pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto.

In its exceptions, the Board argues that, given the findings of fact made by the ALJ as to the existence of an agreement between petitioner and the superintendent, the ALJ erred in failing to require petitioner to abide by that agreement, and in concluding that petitioner did not take the "clear, unequivocal and decisive act" necessary to effectuate a waiver of his tenure rights. The Board further argues that the ALJ erred in his application of equitable estoppel, first because the superintendent clearly testified that the Board had in fact relied upon petitioner's agreement not to claim tenure entitlement to a department head position in its decision to grant his request for early retirement, and, second, because the

ALJ appears to have concluded, without any basis in the record, that the Board acted deliberately to frustrate the tenure laws in failing to abolish petitioner's former position, when in reality this was nothing more than an inadvertent omission. In reply, petitioner relies on his prior brief, noting that the arguments underlying the Board's exceptions were made before, and were adequately addressed by, the ALJ.

In his exceptions, petitioner renews his argument that removal of his supervisory duties and their assignment to a nontenured employee is a violation of his tenure status, thereby entitling him to the higher stipend assigned to the newly created department head position, and that the Board should not be allowed to profit from its incompetence in failing to take the appropriate actions in effectuating its reorganization of supervisory staff. In reply, the Board endorses the conclusion of the ALJ that, absent abolition of his former position, no entitlement to a new position exists, so that petitioner cannot seek to claim more than the stipend due him under his previous position.

Upon review, the Commissioner concurs with the ALJ that, absent abolition of petitioner's position, a transfer to the separately tenurable position of teacher, or proceedings under the Tenure Employees Hearing Law, petitioner remains entitled to the salary due him in his position of department head for physical education. The Commissioner further concurs that, under the particular facts of his matter, including the circumstances of the underlying agreement and the chronology of

relevant events, petitioner cannot be deemed to have waived his entitlement to a specifically known right.* Finally, the Commissioner concurs with the ALJ's analysis of equitable estoppel and its application to this matter, even granting arguendo that the Board's failure to abolish the department head of physical education position or take other employment actions may have been inadvertent and there may not have been a deliberate attempt to circumvent petitioner's tenure rights. (The Commissioner notes that transcripts were not provided so as to permit verification of the Board's claim regarding the superintendent's testimony. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987)

With regard to the stipend owed petitioner, the Commissioner concurs with the ALJ that where no abolishment of petitioner's position occurred, petitioner can make no claim to the larger stipend of the position to which he would have been entitled had his position been abolished. With the ALJ's recommended relief, petitioner is restored to the position held at the time of his claim and is not reduced in salary contrary to his rights as a tenured supervisor.

*The Commissioner here notes that the agreement at issue was made during March 1992 and petitioner's notifications of salary and assignment occurred in late April through June 1992; however, the district did not adopt its actual reorganization of supervisory staff until August 1992 and the job descriptions for the reconfigured positions until September 1992.

Accordingly, the initial decision of the Office of Administrative Law directing payment to petitioner, with pre- and post-judgment interest, of the stipend he would have earned in 1992-93 as department head for physical education, is affirmed for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1994

DATE OF MAILING - APRIL 18, 1994

*Although no mention of it is made in the initial decision, the record shows a motion to have been made by the Board just prior to hearing seeking summary decision based on petitioner's alleged failure to timely file pursuant to N.J.A.C. 6:24-1.2(c). While the record does not expressly indicate the disposition of this motion, the Commissioner presumes it to have been denied given the subsequent conduct of a hearing and the framing of issues in the initial decision, and here notes his review of the related papers and his concurrence with the presumed denial.

83-94

EDU #8917-92
C # 83-94
SB # 26-94

DANIEL WICKENHEISSER, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY, : DECISION

RESPONDENT-CROSS/APPELLANT. :

Decided by the Commissioner of Education, April 18, 1994

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

For the Respondent-Cross/Appellant, Glenn Leonard, Esq.

Daniel Wickenheisser (hereinafter "petitioner") began his employment with the Board of Education of the Borough of North Arlington (hereinafter "Board") in 1964 as a teacher. In 1976, he was appointed the department chairperson for physical education, health, family life and driver education, a position he retained through the 1991-92 school year. In 1991-92, he received a stipend in the amount of $1,400 for such employment. On March 26, 1992, petitioner submitted a letter to the Board indicating his interest in participating in the district's early retirement program and requesting approval for his retirement effective June 30, 1993. The Board subsequently approved petitioner's request.

2/5/97

Thereafter, in a memorandum dated June 23, 1992, the school principal advised petitioner that: "As per conversation with Mr. William A. Mancuso, Superintendent of Schools, next year you will not be Chairperson of the Physical Education Department and will have a full teaching schedule." Exhibit P-44, in evidence. The Board reassigned petitioner to a full-time teaching position in 1992-93. The Board also appointed a staff member who was not tenured as a supervisor to the newly-consolidated position of Supervisor of History, English, Foreign Language and Physical Education, which included a yearly stipend in the amount of $4,400. Petitioner did not receive a stipend in 1992-93.

On September 18, 1992, petitioner filed a petition of appeal with the Commissioner of Education alleging that the Board had violated his tenure rights in reassigning him to a teaching position while employing a non-tenured individual in a supervisory position. The Board countered that petitioner had waived his right to the department chairperson position or, in the alternative, was barred by equitable estoppel from claiming that position. According to the Board, petitioner had agreed to relinquish his supervisory position and return to a teaching position in exchange for a favorable recommendation from the district superintendent on his request for early retirement. Petitioner denied that he had agreed to such an arrangement.

On February 28, 1994, an Administrative Law Judge ("ALJ") determined that the Board had violated petitioner's tenure rights. The ALJ found that petitioner had indicated to the district superintendent that the loss of his department chairmanship in 1992-93 "would not be a problem," initial decision, slip op. at 6, which the superintendent had interpreted as an acceptance of his offer to recommend that the

Board approve petitioner's request for early retirement if petitioner agreed not to challenge the loss of his department chairmanship in 1992-93. The ALJ concluded that petitioner, in so doing, had not waived his rights to that position since he had not intentionally relinquished a known right. The ALJ observed that "the essence of the agreement as described by Superintendent Mancuso was that petitioner would not assert his tenure right to the position of department head for physical education. Under the circumstances, I conclude that petitioner did not waive his tenure rights to the position of department head for physical education." Id. at 7.

The ALJ also determined that petitioner was not barred by the doctrine of equitable estoppel from asserting his tenure rights to such position, concluding that the Board had failed to demonstrate its detrimental reliance on petitioner's actions or that approval of petitioner's request for early retirement had been detrimental to the Board.

The ALJ concluded that petitioner "was tenured in the position of department head for physical education, that the position was not abolished, that petitioner was not the subject of proceedings under N.J.S.A. 18A:6-10 [the Tenure Employees Hearing Law] and that petitioner was not transferred by respondent to the position of teacher." Id. at 7. He found that "[p]etitioner was never informed that the position of chairperson of the department of physical education was abolished, and in fact, respondent did not abolish that position." Id. at 4. The ALJ therefore recommended that the Board pay petitioner a stipend in the amount of $1,400 for the 1992-93 school year, along with pre- and post-judgment interest. Since he found that the Board had not abolished petitioner's position as department head for physical education, the ALJ concluded that

petitioner was not entitled to the larger stipend for the position of Supervisor of History, English, Foreign Language and Physical Education.

On April 18, 1994, the Commissioner adopted the ALJ's recommended decision and directed the Board to pay petitioner the stipend he would have received in 1992-93 as department chair of physical education, along with pre- and post-judgment interest. The Commissioner concurred with the ALJ that absent the abolishment of petitioner's position, a transfer to the separately tenurable position of teacher, or proceedings under the Tenure Employees Hearing Law, petitioner was entitled to his stipend as department head for physical education. The Commissioner also agreed that petitioner had not waived his entitlement to a specifically known right, and that petitioner had no entitlement to the larger stipend since his position had not been abolished by the Board.

Petitioner filed the instant appeal to the State Board, arguing that he was entitled, by virtue of the tenure status he achieved during his employment as the department head for physical education, to the $4,400 stipend attendant to the position of Supervisor of History, English, Foreign Language and Physical Education. Petitioner alleges that, notwithstanding the Board's failure to take formal action to abolish his department chairmanship, that position ceased to exist for all intents and purposes after the Board reorganized its supervisory staff in 1992-93. As a result, petitioner maintains that he was entitled to any other supervisory assignments within the scope of his tenure as against non-tenured individuals.

The Board filed a cross-appeal, contending that it had not violated petitioner's tenure rights. The Board renews its argument that petitioner waived his right to his

department chairmanship in physical education and that his claim was barred by equitable estoppel.

After a thorough review of the record,[1] we affirm in part, as clarified herein, and reverse in part the decision of the Commissioner.

We agree with the Commissioner's determination that petitioner did not make a knowing and voluntary waiver of his rights to a supervisory position. Indeed, the newly-consolidated supervisory assignment in History, English, Foreign Language and Physical Education, with its increased stipend, did not even exist at the time petitioner allegedly waived his rights thereto. Nor is there is any indication that petitioner was informed or aware at the time of such alleged waiver that he was relinquishing his tenure rights to any supervisory assignment within the scope of his certification.

We also agree that petitioner was not barred by the doctrine of equitable estoppel from asserting his tenure rights to a supervisory position. Based upon the record before us, including the testimony of the district superintendent,[2] we concur with the Commissioner that the Board has failed to demonstrate that it relied on petitioner's actions to its detriment.

Consequently, we turn to the issue of the remedy to which petitioner is entitled by virtue of the Board's action. There is no indication in the record that the Board took any formal action to abolish petitioner's position. See Guerra v. Board of Education of Hudson County Area Vocational and Technical Schools, decided by the Commissioner,

[1] We note that the hearing transcripts requested by the parties, which provide the testimony of the district superintendent on December 6 and 7, 1993, were not transmitted to the Commissioner by the Office of Administrative Law until after the Commissioner had rendered his decision in this matter. Consequently, we have carefully reviewed these transcripts in determining this matter.

[2] See n.1, supra.

1990 S.L.D. 340, 352, aff'd by the State Board, 1990 S.L.D. 354, aff'd, Docket #A-6638-89T1 (App. Div. 1991). Nor did the Board take formal action to transfer petitioner to a teaching position with his consent. And, indeed, the record reveals that the job description for the newly-consolidated supervisory assignment in History, English, Foreign Language and Physical Education was not even adopted by the Board until September 21, 1992, subsequent to the commencement of the 1992-93 school year and petitioner's return to a full-time teaching position. Exhibits P-3 and R-2, in evidence. Under these circumstances, we agree with the Commissioner that petitioner was entitled to the stipend he would have received in 1992-93 as the department head for physical education, but not to the larger stipend for the newly-consolidated supervisory assignment in History, English, Foreign Language and Physical Education.

However, we reverse the Commissioner's adoption of the ALJ's recommendation to grant pre- and post-judgment interest to petitioner. The criteria to be applied when awarding pre- and post-judgment interest are set forth in N.J.A.C. 6:24-1.16(c), which provides that:

> 1. Pre-judgment interest shall be awarded by the Commissioner when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.
>
> 2. Post-judgment interest shall be awarded when a respondent has been determined through adjudication to be responsible for such payment, the precise amount of such claim has been established or could have been established and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of the decision but has failed to satisfy the claim within 60 days of its award.

Petitioner herein has failed to establish his entitlement to either pre-judgment or post-judgment interest. There has been no showing that the Board acted in bad faith when it denied petitioner's claim so as to entitle him to pre-judgment interest. Nor was it appropriate for the Commissioner to award post-judgment interest before 60 days had passed from the date of his award, and petitioner has not alleged that the Board failed to satisfy that claim within 60 days of the Commissioner's decision.

Consequently, we affirm, as clarified herein, that portion of the Commissioner's decision finding that petitioner was entitled to the stipend he would have received in 1992-93 as the department head for physical education, but reverse that part of the Commissioner's decision awarding pre- and post-judgment interest to petitioner.

February 5, 1997

Date of mailing FEB 0 7 1997

85-94

85-94

RICHARD C. WERNER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JAMES CATALANO, Candidate for Board of Education of the Borough of Kinnelon, Morris County,	:	
RESPONDENT.	:	

MARCH 18, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 2950-94
AGENCY REF. #44-3/94

RICHARD C. WERNER,
Petitioner,
v.
JAMES CATALANO,
(Kinnelon School District - Morris County),
Respondent.

Richard C. Werner, pro se

Robert L. Garibaldi, Esq., for respondent
(Garibaldi & Mundt, P.C., attorneys)

Record Closed: April 7, 1994 Decided: April 8, 1994

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 29, 1994 for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 et seq. and *N.J.S.A.* 52:14F-1 et seq.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the provisions of the attached Stipulation of Settlement, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meet the requirements of *N.J.A.C. 1:1-19.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED.**

I hereby **FILE** my Initial Decision Settlement with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/8/94
Date

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

4/11/94
Date

Receipt Acknowledged:
Roger K. Stoothoff
DEPARTMENT OF EDUCATION

Date

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

/g

STIPULATION
OF
SETTLEMENT
(EDU 2950-94)

The parties to the above referenced matter having settled their differences, do hereby agree as follows:

(1) The names of Richard C. Werner and James Catalano shall remain on the printed ballot as eligible candidates for election to the Kinnelon Board of Education on 4/19/94;

(2) Petitioner, Richard C. Werner hereby withdraws his request for a hearing in this case; and

(3) Respondent James Catalano hereby withdraws all claims for relief contained in his cross-petition dated 3/18/94.

Richard C Werner 4/7/94
Richard C. Werner, Pet.

James Catalano 4/7/94
James Catalano, Resp.

4/7/94
Robert L. Garibaldi Esq.
Atty for Respondent

4/7/94
WITNESS:

Thomas E. Clancy
THOMAS E. CLANCY
Administrative Law Judge

OAL DKT. NO. EDU 2950-94

RICHARD C. WERNER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JAMES CATALANO, Candidate for Board of Education of the Borough of Kinnelon, Morris County,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law in the form of a joint withdrawal of the parties' respective claims and cross-claims have been reviewed.

Upon review, the Commissioner concurs that this matter shall be deemed withdrawn as a controversy before him and that it shall be dismissed accordingly.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 18, 1994

DATE OF MAILING - MARCH 18, 1994

86-94

86-94

DAVID B. ROLLINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES P. CARDANEO, BOARD SECRETARY, BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, AND THOMAS D. DEL FRANCO,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning citizen challenged the validity of the nominating petition of respondent, candidate for Board membership, alleging insufficient number of valid signatures. Board Secretary rejected challenge at local level as untimely filed.

Citing Brodsky, ALJ concluded that the nominating petition was presumptively valid by operation of N.J.S.A. 18A:14-12 as the challenge to the petition was not made prior to the 48th day before the election and relaxation of the statutory mandate was not warranted. ALJ ordered the petition dismissed.

Commissioner adopted findings and determination in initial decision.

MAY 18, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2740-94
AGENCY DKT. NO. 54-3/94

DAVID B. ROLLINS,
Petitioner,
v.
JAMES P. CARDANEO, BOARD SECRETARY; BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT; and THOMAS D. DEL FRANCO,
Respondents.

David B. Rollins, petitioner, pro se

Daniel C. Soriano, Jr., Esq., for respondents James P. Cardaneo and Board of Education of the Bridgewater-Raritan Regional School District

Thomas D. Del Franco, respondent: no appearance

Record Closed: March 30, 1994 Decided: March 31, 1994

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, David B. Rollins (petitioner) challenged the validity of the nominating petition of respondent Thomas D. Del Franco to be a candidate for election to the Board of Education of the Bridgewater-Raritan Township School District. He appeals from the rejection of his challenge by the Board of Education.

On March 22, 1994, petitioner filed his petition of appeal with the Commissioner of Education. The following day, March 23, 1994, the matter was filed in the Office of Administrative Law for determination as a contested case under the New Jersey Administrative Procedure Act.

A hearing was held on March 30, 1994, on which date the record closed.

The essential facts in this case are not in dispute, having been stipulated by the parties at the outset of the hearing. They are as follows.

FACTS

1. An election for membership on the Bridgewater-Raritan School District Board of Education is scheduled to be held on Tuesday, April 19, 1994, on which date three members from Bridgewater Township will be elected.

2. On February 24, 1994, a nominating petition for annual school election was filed by Thomas D. Del Franco.

3. This petition, bearing 12 signatures of persons purportedly qualified as voters of the Bridgewater-Raritan Regional School District in Somerset County, was filed in the Office of the Secretary of the Board of Education.

4. On March 18, 1994, petitioner became aware for the first time that the challenge to Del Franco's nominating petition, previously made on March 3, 1994 by Sandra Calandrillo-Campbell, had been rejected by the Board Secretary on March 7, 1994 as having been filed on an untimely basis.

5. On the afternoon of March 18, 1994, petitioner placed several phone calls to Ms. D. Antonaitis of the New Jersey Department of Education, Bureau of Controversies and Disputes, in Trenton, in order to determine how he could effectively pursue the challenge to the Del Franco nominating petition.

6. On March 22, 1994 at 10:20 a.m., petitioner filed the petition which initiated the instant matter and which alleges that the Del Franco nominating petition is "fatally defective" because of an insufficient number of valid signatures.

7. During the period from February 24, 1994 (the date of filing of the Del Franco nominating petition) to March 7, 1994 (the date of rejection of the challenge of Sandra Calandrillo-Campbell), the office of the Board Secretary was closed on account of weather on March 3, 1994 and did not open until 10:00 a.m. on February 24, 1994.

8. The 49th day preceding the date of the school election was March 1, 1994.

ISSUE AND ANALYSIS

This case is controlled by N.J.S.A. 18A:14-12 (hereafter "section 12"), which reads as follows:

> N.J.S.A. 18A:14-12 reads:
>
> If, on or before the 49th day preceding the date of the election, the secretary of the board finds a nominating petition to be defective excepting as to the number of signatures, the secretary of the board shall forthwith notify the candidate of the defect and of the candidate's right to remedy the defect not later than the 49th day preceding the date of the election, and the candidate endorsing the petition may amend the same in form or substance, but not to add signatures, so as to remedy the defect at any time prior to said date. A nominating petition not so found to be defective shall be, as of the 48th day preceding the election, conclusively valid for the purposes of this chapter. (emphasis supplied)

The critical threshold issue in this matter is whether, under the factual circumstances noted above, the Board of Education (or the Commissioner) can waive or relax the statutory mandate that a nominating petition "shall be . . . conclusively valid" if it is not found to be defective 49 (or more) days prior to the election.

For the reasons to be expressed hereafter, I am of the opinion that this question must be answered in the negative.

First, it is clear that the Legislature's use of the word "shall" in section 12 was purposeful. When used in a statute, that word is ordinarily mandatory, as compared to the word "may," which is permissive or directory. Harvey v. Board of Chosen Freeholders, 30 N.J. 381, 391 (1959).

Second, when the language and meaning of a statute are clear and unambiguous, as I believe section 12 to be, it must be enforced as written and is not subject to a different construction. In re Jamesburg High School Closing, 83 N.J. 540, 547 (1980). An administrative agency is a creature of the Legislature and can act only within the bounds of the authority delegated to it. Elizabeth Federal Saving and Loan Association v. Howell, 24 N.J. 488, 499 (1957). It has long been held that an administrative regulation or policy which attempts to add to the statute something which is not there can furnish no sustenance to that statute. Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 529 (1964). An administrative agency cannot modify or circumvent the legislative direction under the guise of statutory interpretation; it cannot deviate from the principle and policy of the statute. Abelson's Inc. v. State Board of Optometrists, 5 N.J. 412, 424 (1950).

Third, the recent case of Brodsky v. Board of Education of Florham Park, 1991 S.L.D. 648 (Comm.), which is factually similar to the instant matter, is precedent contrary to petitioner's position. In Brodsky, the Commissioner of Education rejected an appeal by a petitioning citizen challenging a nominating petition on the basis of an insufficient number of signatures because the challenge to the petition was not made prior to the 48th day before the election. The Commissioner declared (1991 S.L.D. at 651-2):

> The Commissioner, in reviewing this matter, finds that when 18A:14-12 is read in context with its companion statutes in 18A:14 rather than as an isolated enactment, it is clear that its primary purpose is to establish a date certain beyond which election officials, candidates and the public may presume the technical validity of the nominations which will be before them in the upcoming election. Such a terminus post quem is essential if conduct of the election is to proceed in an orderly, efficient manner, for to hold otherwise would allow challenges of the type raised by petitioner - - which as noted reach not to the qualification of candidates, but to the correctness of their nominating petitions - - to be made at virtually any time prior to the election, wreaking potential havoc on the district's preparation process and thwarting the entitlement of the public to knowledge of candidates for office reasonably in advance of the election at which they must choose among such candidates.

Petitioner notes that central New Jersey experienced unusually severe winter weather during February and March and that he was unaware until too late that another and prior challenge to the Del Franco petition - - the challenge of Sandra Calandrillo-Campbell - - had been rejected by the Board of Education, and he contends that these factors warrant a relaxation of the 48-day rule. In my opinion this argument is without merit, primarily because he had no legal right to rely upon the challenge of any other person. Moreover, the factors cited by the petitioner do not constitute the kind of unusual circumstances which might warrant a relaxation of the statutory mandate so as to serve the overall purpose of the election law. Cf., In re Application of Cucci, 92 N.J. Super. 223 (L. Div. 1966) (nominating petition accepted even though filed 20 minutes late).

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that the nominating petition of Thomas D. Del Franco is presumptively valid by operation of N.J.S.A. 18A:14-12 and that the petition of appeal in this matter should be **DISMISSED.** It is so **ORDERED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 31, 1994
Date

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

April 6, 1994
Date

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 2740-94

DAVID B. ROLLINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES P. CARDANEO, BOARD SECRETARY, BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, AND THOMAS D. DEL FRANCO,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by the Respondent Board and Board Secretary.

In his exceptions, petitioner argues that the central issue of this matter is the veracity and legality of respondent Del Franco's nominating petition, and that a time bar intended to apply to previously unnoticed technical defects should not prevent a substantive challenge such as he is raising, which implicates the candidate's good faith, as well as the legal sufficiency of his nominating papers. He further argues that the need for certainty and stability in the election process cannot be invoked in this case as it was in Brodsky, supra, in that the final ballot for the Bridgewater-Raritan district is in flux even as of the time of the exceptions due to delays in budget figures.

In reply, the Board contends that petitioner's exceptions fail to address the threshold issue of relaxing a statutory time bar, reaching instead to substantive allegations based on purported facts that were neither addressed at hearing nor stipulated by the parties. The Board further asserts the correctness of the ALJ's determination and urges its adoption by the Commissioner.

Upon review, the Commissioner concurs with the ALJ that, notwithstanding the persistence of petitioner's belief that Respondent Del Franco's candidacy is tainted by defective nominating papers, petitioner's challenge was raised too late to effectuate Del Franco's removal from the ballot, assuming such removal were ultimately warranted. Regardless of petitioner's view of their fairness and wisdom, the fact remains that technical bars to certain types of election challenges have been enacted by the Legislature in the interest of procedural order and stability, and one such bar has already been held to apply to challenges of the type brought by petitioner herein.

Accordingly, for the reasons well expressed by the ALJ, the Commissioner affirms the initial decision of the Office of Administrative Law, dismissing the Petition of Appeal and finding the nominating petition of Respondent Thomas D. Del Franco presumptively valid by operation of N.J.S.A. 18A:14-12.

IT IS SO ORDERED.

MAY 18, 1994

DATE OF MAILING - MAY 18, 1994

COMMISSIONER OF EDUCATION

86-94

EDU #2740-94
C # 86-94
SB # 27-94

DAVID B. ROLLINS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
JAMES P. CARDANEO, BOARD SECRETARY, BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION ON MOTIONS
RESPONDENT-RESPONDENT,	:	
AND	:	
THOMAS D. DEL FRANCO,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 18, 1994

For the Petitioner-Appellant, David B. Rollins and Sandra Calandrillo-Campbell, pro se

For the Respondent-Respondent, Soriano & Soriano (Daniel Soriano, Esq., of Counsel)

For the Respondent-Respondent, Thomas D. Del Franco, pro se

On March 22, 1994, petitioner David B. Rollins filed a petition with the Commissioner of Education challenging the validity of the nominating petition of respondent Thomas D. Del Franco to be a candidate for election to the Board of Education of the Bridgewater-Raritan Regional School District (hereinafter "Board") in the annual school election scheduled for April 19, 1994.

On March 31, 1994, an administrative law judge ("ALJ") dismissed the petition, finding that the challenge was not filed "on

August 3, 1994

or before the 49th day preceding the date of the election," as required by N.J.S.A. 18A:14-12. The ALJ concluded that such time limitation was mandatory and that the factors cited by petitioner did not constitute circumstances which might warrant relaxation of the statutory mandate. Accordingly, he concluded that Del Franco's nominating petition was "presumptively valid by operation of N.J.S.A. 18A:14-12."[1]

On April 18, 1994,[2] the Commissioner adopted the Initial Decision and dismissed the petition, agreeing that the nominating petition was "presumptively valid."

On May 20, 1994, petitioner Rollins filed a notice of appeal to the State Board of Education from the decision of the Commissioner. Also joining in that appeal was Sandra Calandrillo-Campbell ("Calandrillo-Campbell"), who had not been a party to the proceedings below. Along with such notice, they also filed a motion to supplement the record.

On May 25, the parties were advised that petitioner Rollins was the appellant in this case "[i]n that nothing in the case file reflects participation by Sandra Calandrillo-Campbell in either the filing of the petition or the proceedings..."

On May 27, Calandrillo-Campbell faxed the State Board copies of a letter she had sent on March 3, 1994 to the Board Secretary challenging the validity of Del Franco's nominating

---

1 We note that the express language of N.J.S.A. 18A:14-12 provides that a nominating petition not found to be defective thereunder is "conclusively valid."

2 The Commissioner's decision incorrectly indicates the date of decision and mailing as March 18.

petition and of a reply letter dated March 7 from the Board Secretary ruling that her challenge was untimely.

On May 31, the Board filed a motion to dismiss the appeal filed by petitioner Rollins on the grounds of mootness.

On June 6, the Counsel to the State Board advised petitioner Rollins that the briefing schedule was being placed in abeyance pending decisions on the above motions. Also on that date, the Counsel to the Board advised Calandrillo-Campbell that "it has been determined that you are in fact a party to the above-titled matter. To the extent that you participate in this appeal, you must sign all documents that you submit."

Thereafter, on July 1, the Board filed a motion to dismiss Calandrillo-Campbell as a party.

Initially, we deny the Board's motion to dismiss the instant appeal as moot. The mere fact that the school election has already taken place does not render this challenge to the validity of respondent Del Franco's nominating petition an improper subject for our scrutiny, particularly in view of the fact that Del Franco was elected to membership on the Board.

We, however, grant the Board's motion to dismiss Calandrillo-Campbell as a party to this appeal. N.J.S.A. 18A:6-27 provides that "[a]ny party aggrieved by any determination of the commissioner may appeal from his determination to the state board." (Emphasis added.) Such language is reiterated in our regulations. N.J.A.C. 6:2-1.2. Notwithstanding Calandrillo-Campbell's letter dated March 3 to the Board Secretary challenging Del Franco's nominating petition, she did not file a petition of appeal with the Commissioner of Education and was not a party to the proceedings

before the Commissioner initiated by petitioner Rollins. Consequently, Calandrillo-Campbell was not a "party aggrieved" by the April 18 decision of the Commissioner and had no entitlement to file an appeal from such decision.

We note that the June 6 letter from the Counsel to the State Board to Calandrillo-Campbell did not address or determine whether she had the right pursuant to N.J.S.A. 18A:6-27 to file an appeal from the Commissioner's decision of April 18. Nor did it constitute a decision on her status in these proceedings by the State Board. Rather, it reflected only that she was being considered a "party" for purposes of establishing and administering this appeal.

Finally, we deny petitioner Rollins' motion to supplement the record on appeal inasmuch as we find the proposed exhibits to be neither necessary nor material to a determination of the issues on appeal. See N.J.A.C. 6:2-1.9.

The briefing schedule is hereby reestablished and we direct that petitioner Rollins' brief in support of his appeal be filed within twenty days after the date of this decision.

August 3, 1994
Date of mailing AUG 04 1994

86-94

EDU #2740-94
C # 86-94
SB # 27-94

DAVID B. ROLLINS,

PETITIONER-APPELLANT,

V.

JAMES P. CARDANEO, BOARD SECRETARY, BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

RESPONDENT-RESPONDENT,

AND

THOMAS D. DEL FRANCO,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 18, 1994

Decision on motions by the State Board of Education, August 3, 1994

For the Petitioner-Appellant, David B. Rollins, pro se

For the Respondent-Respondent, Soriano & Soriano (Daniel Soriano, Esq., of Counsel)

For the Respondent-Respondent, Thomas D. Del Franco, pro se

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. We correct, however, the Commissioner's characterization of the nominating petition of the respondent Del Franco as "presumptively valid." Commissioner's Decision, slip op. at 8 (emphasis added). N.J.S.A. 18A:14-12 expressly provides that a nominating petition not found to

DECEMBER 7, 1994

be defective thereunder "shall be, as of the 48th day preceding the election, conclusively valid for the purposes of this chapter." (Emphasis added.)

Daniel J.P. Moroney abstained.

December 7, 1994

Date of mailing DEC 09 1994

87-94

IN THE MATTER OF THE SPECIAL :
ELECTION HELD IN THE NORTHERN : COMMISSIONER OF EDUCATION
BURLINGTON COUNTY REGIONAL : DECISION
SCHOOL DISTRICT, BURLINGTON :
COUNTY. :
:

SYNOPSIS

Regional Board filed Petition for Declaratory Judgment as to application of N.J.S.A. 18A:13-23 to the results of a special election held pursuant to that statute to determine the district's method of apportioning costs among its constituent municipalities. Regional Board and constituent Townships of Chesterfield, Mansfield and Springfield took the position that the referendum question at issue had passed in that it received a majority of the votes cast in the regional district overall. Respondent Township of North Hanover opposed, holding that the question was defeated because it did not receive a majority of votes cast in each constituent municipality.

Upon careful review and consideration, the Commissioner found and determined that N.J.S.A. 18A:13-23 requires approval by the majority of voters in each constituent municipality in order to change the manner in which costs are apportioned in a regional school district, so that the referendum question at issue herein was not approved by the voters as required by controlling law. Commissioner determined this conclusion was mandated by both the clear language and structure of the law and its legislative history. Commissioner directed the Regional Board to certify and declare the results of the election accordingly.

APRIL 18, 1994

IN THE MATTER OF THE SPECIAL ELECTION HELD IN THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Regional Board, Stephen J. Mushinski, Esq.

For the Townships of Chesterfield, Mansfield and Springfield, William John Kearns, Jr., Esq. (Kearns, Vassallo & Kearns)

For the Township of North Hanover, John T. Barbour, Esq.

This matter came before the Commissioner of Education by way of a Petition for Declaratory Judgment filed by the regional Board of Education on January 26, 1994. Therein, the Board sought a declaration as to application of N.J.S.A. 18A:13-23 to the results of a special election held pursuant to that statute to determine the district's method of apportioning costs among its constituent municipalities. For purposes of its petition, as noted below, the Board took the position that the referendum question at issue had passed in that it received a majority of the votes cast in the regional district overall. This position is shared by respondent Townships of Chesterfield, Mansfield and Springfield, and opposed by respondent Township of North Hanover, which holds instead that the question was defeated because it did not receive a majority of votes cast in each constituent municipality.

Consistent with N.J.A.C. 6:24-2.1 et seq. and established briefing schedules, answers to the petition and papers setting forth the arguments of the parties were duly filed. Concurrent with the last submission of the parties on February 28, 1994, a Motion to Intervene was filed by two residents of Mansfield Township, to which replies were filed by all parties. By letter decision dated March 31, 1994, the Commissioner denied this motion on grounds that the proposed intervenors did not meet the standards for intervention or participation set forth in N.J.A.C. 1:1-16.3 and 1:16-6, respectively. Accordingly, on that date, the record was deemed closed and the within matter duly proceeded to summary decision.

The underlying facts of this matter are not in dispute and are as follows:

1. The Northern Burlington County Regional School District is a limited purpose (grades 7 through 12) regional district comprised of constituent members Chesterfield, Mansfield, North Hanover and Springfield Townships.

2. In March of 1993, N.J.S.A. 18A:13-23 was amended by P.L. 1993, c. 67 to permit appropriations for regional school districts, both new and existing, to be apportioned among constituent municipalities, as may be approved by the voters of each municipality, on the basis of equalized valuation, proportional pupil enrollment or a combination of both.

3. On or about May 17, 1993, representatives of Chesterfield, Mansfield and Springfield Townships presented petitions to the regional Board, requesting the conduct of a special election in accordance with N.J.S.A. 18A:14-3 to determine the manner in which costs of the regional district would henceforth be apportioned among constituent municipalities, specifically whether they would be allocated on a per pupil basis rather than on the existing basis of equalized valuation.

4. On July 19, 1993, the regional Board adopted a resolution calling for such election to be held on October 12, 1993. On October 12, 1993,* a resolution was adopted rescinding the July 19, 1993 resolution due to the fact that proper notice of the special election had not been provided pursuant to N.J.S.A. 18A:14-19.

5. On the date of the rescission, the Board also adopted a resolution calling for the previously planned election to be held on December 14, 1993. The question to be put to the voters was as follows:

> Shall the annual or special appropriations for the Northern Burlington County Regional School District be apportioned among the municipalities included within the regional school district upon the basis of the proportional number of pupils enrolled from each municipality on the 15th day of October of the pre-budget year in the same manner as would apply if each municipality comprised separate constituent school districts.

6. On December 14, 1993, the special election was duly conducted and the tabulation of votes was as follows:

	AT POLLS		ABSENTEE	
TOWNSHIP	YES	NO	YES	NO
Mansfield Township	1,137	32	50	0
Chesterfield Township	644	7	3	0
Springfield Township	669	4	4	0
North Hanover Township	7	921	0	4
	2,457	964	57	4

7. Thus, the votes cast in each of the three municipalities requesting the change were overwhelmingly in favor of the ballot question, while the votes cast in the municipality that did not request the change were overwhelmingly opposed. In the entire regional district, more votes were cast in favor of the ballot question than against it.

8. The Townships of Chesterfield, Mansfield and Springfield have publicly taken the position that the ballot question passed, in that the majority of votes in the regional district overall were cast in its favor.

*The record gives, in varying places, both October 12, 1993 and October 7, 1993 as the date of this resolution. The precise date is immaterial to the central issue herein.

9. The Township of North Hanover has publicly taken the position that the ballot question failed, in that the question was not approved by a majority of voters in each constituent municipality.

10. The regional Board has not yet certified or made a formal declaration of the outcome of the election, but has solely for purposes of the within petition adopted a resolution taking the position that the referendum question passed under the terms of N.J.S.A. 18A:13-23.

ARGUMENTS IN FAVOR OF APPROVAL BY OVERALL MAJORITY

The regional Board and the Townships of Chesterfield, Mansfield and Springfield ("proponents") argue that principles of statutory construction, legislative history and the legislative policy intent all work in favor of the position that a majority of votes in the regional district overall is sufficient for passage of a referendum question on cost apportionment.

Proponents contend that if the Legislature had intended for such referenda to be treated in a manner different from the general "overall majority" rule of N.J.S.A. 18A:13-5, it would have added a specific exception to the list provided in that statute or placed clearer amendatory language in the statute controlling apportionment elections (18A:13-23). Moreover, bill statements to the law (P.L. 1993, c. 67) which made the pertinent amendments to 18A:13-23 give no indication as to how the Legislature intended for election results to be determined, thus arguing in favor of applying the general majority rule rather than inferring an exception which the Legislature could have made explicit had it so wished. Further, proponents aver that cost apportionment is a purely financial issue, and should be decided in the manner of all other financial matters arising in a

regional district, i.e., by overall majority vote. In this regard, proponents observe that a budget can be defeated in three out of four constituent districts, but will be deemed approved if it obtains a majority of the number of votes cast in the regional overall, even if all of the votes in favor were cast in a single constituent district.

In terms of policy, proponents argue that to require approval of a cost apportionment referendum in each constituent municipality would effectively thwart the Legislature's entire purpose in enacting c. 67. That legislation, they aver, was expressly designed to provide an alternative allocation method to regional districts where apportionment based solely on equalized valuation has proven unworkable due to disproportionate distribution among constituents of either property values or number of pupils; to require each constituent to agree to a change in allocation would mean that no regional district could ever reasonably expect to effectuate such a change, as any municipality benefiting from the status quo could, and likely would, block the proposed change at referendum.

ARGUMENTS IN FAVOR OF APPROVAL BY EACH CONSTITUENT MUNICIPALITY

North Hanover Township, on the other hand, argues that statutory construction, legislative history and policy intent work to favor not proponents' position, but its own view that passage of a voter question to change regional cost apportionment requires majority approval in each constituent municipality.

In support of its position, North Hanover points to the express language of c. 67 that regional districts may adopt such

method of cost apportionment "as may be approved by the voters of each municipality" (emphasis supplied) and notes that "each municipality" is both plain language and a phrase used in N.J.S.A. 18A:13-34, 18A:13-35, 18A:13-37 and 18A:13-38 to denote separate action by individual constituent municipalities, so that these statutes should be read consistently, as well as in accord with their plain meaning. In Re Jamesburg High School Closing, 83 N.J. 540, 547 (1980) Moreover, by its own terms N.J.S.A. 18A:13-5 does not control herein, as that statute provides for determination by overall majority vote "unless otherwise provided in this title" (emphasis supplied), an exception clause that is given meaning by the existence of at least one situation (N.J.S.A. 18A:13-28, bond authorization) where constituent approval is required but not set forth in N.J.S.A. 18A:13-5's list of specific exemptions.

North Hanover also recounts the history of funding mechanisms for regional school districts, stressing that per pupil cost apportionment has already been found constitutionally suspect through the Supreme Court's decision in Robinson v. Cahill, 62 N.J. 473 (1973) and its related cases, with the result that such apportionment was expressly phased out by legislative action (P.L. 1976, c. 21, N.J.S.A. 18A:13-23.1) taken concurrently with effectuation of P.L. 1975, c. 212 (the "Thorough and Efficient" law), which moved all education funding statewide to an equalized valuation basis; nor did later reform (the Quality Education Act of 1990) alter this result. Viewed in this light, and given the restricted circumstances in which it

can be applied (codified in N.J.S.A. 18A:13-23.3), by its own terms P.L. 1993, c. 67 cannot have been intended by the Legislature to permit return to the previously rejected method of per pupil cost apportionment absent agreement of all the district's constituent municipalities.

Finally, North Hanover observes that in any instance where questions reaching to the fundamental nature of a regional district are at issue, approval by the voters of each constituent municipality is required prior to any change in the status quo.

COMMISSIONER'S DETERMINATION

In this matter, the Commissioner is asked to construe the provisions of N.J.S.A. 18A:13-23, specifically its requirement for voter approval of any change in the method of cost apportionment for an existing regional district. The statute in question reads as follows:

> **18A:13-23. Apportionment of appropriations, including debt service.** The annual or special appropriations for regional districts, including the amounts to be raised for interest upon, and the redemption of, bonds payable by the district, shall be apportioned among the municipalities included within the regional district, as may be approved by the voters of each municipality at the annual school election or a special school election, upon the basis of [equalized valuation, pupil enrollment or a combination of both].

Upon careful review and consideration, the Commissioner finds and determines that N.J.S.A. 18A:13-23 requires approval by the majority of voters in each constituent municipality in order to change the manner in which costs are apportioned in a regional school district, so that the referendum question at issue herein was not approved by the voters as required by controlling law.

This conclusion is mandated by both the clear language and structure of the law and its legislative history. In terms of statutory construction, N.J.S.A. 18A:13-5, which sets forth the general rule for conduct of elections in regional school districts, provides that:

> **18A:13-5. Conduct of elections; majority; exceptions.** Elections in regional districts shall be conducted as in other local districts except that there shall be at least one polling place in each of the constituent districts and in any such elections, unless otherwise provided by this Title, the total vote of the entire regional district, without regard to the territorial boundaries of the constituent districts, shall be counted in determining the result of the election.
>
> 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,
> b. In the consolidated district proposing to form the regional district without regard to the territorial boundaries of the constituent districts, or
> c. In the regional district to be enlarged, and in each district proposed to enlarge it,
>
> shall be cast in favor of the adoption of such proposal. (emphasis supplied)

Initially, the Commissioner notes that this statute plainly contains an "exception" clause, and that this clause is clearly not confined to the above-enumerated situations, i.e., to creation or enlargement of a regional district. To the contrary, specific requirements for voter approval mechanisms other than majority of the whole district are found in N.J.S.A. 18A:13-28

(bonding), 18A:13-33 (change from limited purpose to all purpose) and 18A:13-57 through 13-59 (withdrawal/dissolution), as well as in the separate statutes dealing with creation and enlargement (18A:13-34 and 18A:13-43/44), the two exceptions specifically incorporated into N.J.S.A. 18A:13-5 above. Thus, arguments that elections to make a change in a regional district's method of cost apportionment must have been listed as a specific exception within N.J.S.A. 18A:13-5 in order to conclude that the Legislature intended them to be such cannot be sustained in light of the overall statutory scheme governing regional districts.

Moreover, the language of the specific statute controlling herein, N.J.S.A. 18A:13-23, is both plain on its face

> **18A:13-23. Apportionment of appropriations, including debt service.** The annual or special appropriations for regional districts, including the amounts to be raised for interest upon, and the redemption of, bonds payable by the district, shall be apportioned among the municipalities included within the regional district, as may be approved by the voters of each municipality at the annual school election or a special school election, upon the basis of [equalized valuation, pupil enrollment or a combination of both]. (emphasis supplied)

and substantially similar, in its use of the term "each municipality," to the language of other statutes referring to distinct actions or approvals by constituent regional members, including but not limited to the statutes cited in conjunction with discussion of N.J.S.A. 18A:13-5 above.

Finally, notwithstanding that bill statements are silent on the question of how elections authorized by P.L. 1993, c. 67 are to be conducted, the history of its enactment evinces a

clear intent on the part of the Legislature to require each municipality to approve any changes in cost apportionment. Review of the bills (Assembly Bill Nos. 1822 and 1063, 1992 Session, and the statements thereto) that were ultimately enacted as this chapter plainly shows that the impetus behind them was, as claimed by proponents, to provide incentives to regionalize and to remove what the Legislature had identified as a major disincentive in districts with high property values but small student populations, namely the mandatory use of equalized valuation as the sole means of cost apportionment. Accordingly, the Legislature initially sought to provide that, upon formation, districts could choose among three methods of cost apportionment: equalized valuation, pupil enrollment or a combination of both. During the course of legislative deliberations, this option was extended to existing regional districts (Assembly Substitute for Assembly Bill Nos. 1822 and 1063, 1992 Session) provided that they met criteria added to the bill to ensure that districts would not continually be changing their ground rules for apportionment of costs among members.

Instructive as to the Legislature's intent on the question of how elections for this purpose were to be conducted is the fact that choice of cost apportionment was first tied to formation of a regional district and specifically to the election held pursuant to N.J.S.A. 18A:13-34, which requires approval by each municipality to be successful. Upon adding the option for existing districts, this reference remained ("as may be approved by the voters of each municipality at the annual school election

or a special school election pursuant to N.J.S.A. 18A:13-34"), being removed only when technical corrections were made to reflect the inapplicability of 18A:13-34 (dealing with formation only) to existing districts; however, the language "as may be approved by the voters of each municipality at the annual school election or a special school election" expressly remained in the version ultimately enacted as c. 67 (Assembly Substitute for Assembly Bill Nos. 1822 and 1063 AS).

Moreover, in a late provision added to the bill at the time of its technical amendment, the Department of Education was required to provide, at least 45 days prior to the election, to any board of education proposing to create or join a regional district or to any regional district proposing to modify its cost apportionment an impact assessment of the apportionment method to be proposed to voters. This serves as yet another indication of the Legislature's view that a change in cost apportionment reaches to the regional district's fundamental nature, a question akin to formation or enlargement rather than budget approval or other "purely financial" matters as argued by proponents herein. So, too, does the Legislature's strict limitation of the circumstances under which the question of a change in apportionment can even reach the point of being proposed to voters, a restriction adopted in the interest of stability and assurance to members who vote join or form a regional district in reliance on a particular method of cost apportionment.

Thus, in light of both the overall statutory scheme governing regional districts and the legislative history of the

specific controlling statute, it is simply not sustainable to conclude, as have proponents herein, that the results of elections held to change a regional district's method of apportioning costs among its members should be reckoned according to the "overall majority" standard established by N.J.S.A. 18A:13-5 for the general operation of a regional district.

Accordingly, for the reasons set forth above, the Commissioner finds and declares that N.J.S.A. 18A:13-23 requires, in order for an existing regional district to change its established method of cost apportionment, approval of the proposed new method by a majority of the voters in each constituent municipality. Therefore, the referendum at issue herein has failed and the Regional Board of Education is directed to certify and declare the results of the election accordingly. The Commissioner notes and rejects respondent North Hanover's request that such failure bars any future referendum proposing per pupil cost apportionment in the district, as nothing in N.J.S.A. 18A:13-23.3 precludes such referendum provided the criteria set forth in that statute are met.*

IT IS SO ORDERED.

APRIL 18, 1994

DATE OF MAILING - APRIL 20, 1994

COMMISSIONER OF EDUCATION

*The Commissioner also notes that North Hanover alludes to the constitutional validity of per pupil cost apportionment in regional districts as part of its discussion of the history of State education funding reform, and seeks as an alternative

relief in this matter a declaration that such apportionment is violative of the "Thorough and Efficient" clause of the New Jersey Constitution. Given that North Hanover has prevailed in its primary position, the Commissioner declines to entertain this request. However, it is noted that the Superior Court has previously found, in applying the thorough and efficient standard to funding of regional districts, that the central question of that inquiry is not unequal tax burden on constituent municipalities, but rather the per pupil expenditure level of the district as a whole, a question that is not at issue herein. Township of Princeton v. N.J. Department of Education, 163 N.J. Super. 389 (App. Div. 1978)

87-94

C # 87-94
SB # 90-95

IN THE MATTER OF THE SPECIAL	:	
ELECTION HELD IN THE NORTHERN	:	
BURLINGTON COUNTY REGIONAL	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT, BURLINGTON	:	DECISION
COUNTY.	:	

Decided by the Commissioner of Education, April 18, 1994

For the Petitioner-Respondent, Stephen J. Mushinski, Esq.

For the Respondents-Appellants, Kearns, Vassallo & Kearns (William John Kearns, Esq., of Counsel)

For the Respondent North Hanover, John T. Barbour, Esq.

By letter dated June 10, 1994, counsel for three of the boards of education included in the Northern Burlington County Regional School District attempted to appeal from a Commissioner's decision that had been rendered on April 18, 1994, and to challenge the certification of the results of a referendum made pursuant to that decision. Although received by the Bureau of Controversies and Disputes in June 1994, the correspondence was not transmitted to the State Board of Education until August 18, 1995.

Upon receiving the correspondence, the State Board Appeals Office notified counsel for the district boards that his Notice of Appeal to the State Board of

OCT. 5, 1995

Education had been deemed filed as of June 10, 1994, but that proof of service had not been provided as required by N.J.A.C. 6:2-1.7(b). Counsel was given until August 30, 1995, to correct this deficiency. Counsel did not provide proof of service by that date. Nor has counsel otherwise communicated with the State Board concerning the appeal.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990).

In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on April 18, 1994, and was mailed to the parties on April 20, 1994. Pursuant to N.J.A.C. 6:2-1.4, the decision was deemed filed on April 23. As mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(b), counsel was required to file his Notice of

Appeal to the State Board on or before May 23, 1994. As set forth above, Counsel's Notice of Appeal was dated June 10, 1994, and the State Board deemed it filed as of that date. Even so, it was not filed within the statutory period.

Even if N.J.S.A. 18A:6-28 could be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no basis to warrant doing so in this particular instance. Counsel's attempt to characterize the appeal as an appeal from the act of certifying the results of a referendum, as distinguished from the Commissioner's decision which directed that act, does not change the fact that the decision being appealed from was rendered on April 18, 1994. Counsel did not take advantage of the opportunity that we provided him to correct the deficiencies in the notice by providing us with proof of service or provide any explanation for his late filing.

Therefore, for the reasons stated, the State Board of Education dismisses the appeal in this matter.

October 5, 1995

Date of mailing OCT 10 1995

88-94

88-94

ALAN V. GROSSBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWORTH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 21,1994

OAL DKT. NO. EDU 9851-93

ALAN V. GROSSBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWORTH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 21, 1994

DATE OF MAILING - APRIL 21, 1994

89-94

IN THE MATTER OF THE TENURE :

HEARING OF CHARLES TALLEY, SCHOOL : COMMISSIONER OF EDUCATION

DISTRICT OF THE CITY OF NEWARK, : DECISION

ESSEX COUNTY. :

_____:

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause, including allegations of corporal punishment, against physical education teacher.

Having considered the evidence and testimony of witnesses, the ALJ concluded that the Board sustained its tenure charges against respondent. Moreover, citing In re Fulcomer, Redcay and In re Harrell, the ALJ concluded that the nature of the offense, the aggravating circumstances and the effect on the school system warranted dismissal of respondent from his tenured position. ALJ found respondent failed to properly supervise his students, failed to notify school administrators of incidents involving student misconduct and failed to exercise self-control.

Commissioner adopted findings and determination in initial decision and directed respondent be terminated from his position and matter transmitted to State Board of Examiners for further appropriate action.

APRIL 21, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1319-93
AGENCY DKT. NO. 20-2/93

IN THE MATTER OF THE TENURE HEARING OF CHARGES TALLEY, SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY

Robin T. McMahon, Associate Counsel, for petitioner School District of the City of Newark (Marvin L. Comick, General Counsel)

John L. Schettino, Esq., for respondent Charles Talley (Giblin & Giblin, attorneys)

Record Closed: January 14, 1994 Decided: March 1, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Board of Education of the School District of the City of Newark, Essex County (Board) filed tenure charges of conduct unbecoming a teacher and other just cause against respondent, Charles Talley, a tenured physical education teacher pursuant to *N.J.S.A.* 18A:6-10 to -18.1. The tenure charges are based on allegations of corporal punishment, inadequate supervision of pupils, making improper comments to students, and failure to follow school procedures. The Board seeks respondent's removal from employment. Respondent denies the allegations.

On February 18, 1993, the Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A telephone prehearing conference was held on May 11, 1993. Hearings were held on November 17, 18, 19, 22, and 24, 1993. On December 6, the parties filed a joint stipulation of facts. Also, petitioner submitted respondent's professional improvement plan for the 1992-93 school year(P-24). The parties filed post hearing briefs and the record closed on January 14, 1994.

ISSUES

The issues are whether respondent is guilty of conduct unbecoming a teacher and other just cause based on the following charges:

Charge One: During a physical education class on March 21, 1991, respondent hit four students with a whiffle ball bat covered in duct tape. As a result of the alleged conduct, one of the students, N.V. sustained a bruise approximately eight inches long across his back in the kidney area.

Charge Two: During a physical education class on April 7, 1992, respondent pushed a student to the gymnasium floor causing injuries to the boy's palms, forearms, and knees.

Charge Three: Respondent interacted inappropriately with several female students and made improper and offensive remarks to them.

Charge Four: Respondent failed to adequately supervise students, thereby placing them at risk.

Charge Five: Respondent disregarded proper procedure by failing to notify school administrators of incidents involving student misconduct.

JOINT STIPULATION OF FACTS

1 Some of respondent's physical education and health classes included pupils with educational disabilities within the meaning of *N.J.A.C.* 6:28-1.1 to - 11.13.

2 At Barringer Preparatory School, there were never more than eight pupils with disabilities in any one of the respondent's classes. Classified pupils at that school take physical education and other non-core subjects (music, art, home economics and industrial arts, etc.) along with pupils who are not educationally disabled.

3 The four boys mentioned in respondent's statement of March 25, 1991 had educational disabilities (P-2). N.V. and T. were perceptually impaired. E. and E. were classified as emotionally disturbed and neurologically impaired, respectively.

4 Respondent did not ask the Child Study Team at Barringer Preparatory or his department chairperson to remediate any perceived behavioral problems of the classified students.

5. None of the other pupils from Barringer Preparatory mentioned in the exhibits in evidence or during testimony at the tenure hearing--R.S., S.H., S.G., or T.G.--were educationally disabled.

6 At Eighteenth Avenue Elementary School, classified pupils are educated in classes consisting solely of pupils with disabilities.

7 None of the Eighteenth Avenue pupils mentioned in the exhibits or during testimony were educationally disabled except C.D. He is neurologically impaired.

8 C.D.s' physical education class had no more than eight students.

9 At the same time respondent received his annual evaluation report dated June 9, 1992 (exhibit R-10 on evidence; a clearer copy of which is attached hereto), Principal Young gave him a professional improvement plan (PIP) consisting of four pages. (The page dated June 9, 1993 should have been dated June 9, 1992.) The PIP is in evidence as Exhibit P-24.

SUMMARY OF EVIDENCE

Talley was hired by the Board on February 1, 1988, as a physical education teacher and acquired tenure after three years of employment. He is certified to teach physical education from kindergarten through twelfth grade. Throughout his career, he received

relatively satisfactory evaluations and he has not been charged with any prior disciplinary action.

Charge One

> The Board alleges that during a physical education class on March 21, 1991, Talley hit four students, E., E., N.V., and T., with a whiffle ball bat covered in duct tape. N.V. sustained a bruise approximately eight inches long across his back in the kidney area.

Alba Cordasco, Department Chairperson of Physical Education at Barringer Preparatory School (Barringer), testified for the Board. Barringer's students range from ages 13 to 17 years old. Cordasco, Talley's immediate supervisor, has observed him in the classroom and conducted several evaluations of his performance.

On March 22, 1991, N.V.'s parents complained that Talley hit their son during gym class with a whiffle ball bat (P-1). In the presence of school principal John Petrozzino, and several other school personnel, Cordasco examined N.V.'s back where he was allegedly struck by the bat. Cordasco observed several abrasions and red marks on N.V.'s back and reported the incident to the Division of Youth and Family Services (DYFS). The school nurse, Ms. Hannibal, also examined N.V.'s back and completed an accident report (P-4). Hannibal reported that ,"[N.'s] rt. lower back was observed. No laceration but a large pinkish purplish discoloration noted." *Ibid.* Cordasco retrieved Exhibit P-1, a duct taped covered bat, from the gym. According to Talley, this was the bat which he used to hit the student. Cordasco instructed Talley that it was never appropriate to use a bat on students.

John Petrozzino, employed by the Board for thirty-three years and Barringer's principal for seven years, testified about the procedure used by public school personnel to report allegations of child abuse (P-18). Incidents must be reported to the principal, assistant executive superintendent and to DYFS. *Ibid.*

Talley testified that when the boys failed to follow his directions to take their spots for class, he picked up a whiffle ball bat, caught each student and "tapped [the four students] on the right side of the butt" to get them under control. After the incident, N.V. was transferred from his class because the other kids threatened to beat N.V. for telling on the teacher. Talley's report of the incident states in part:

> . . .I told my class to get off the stage & get on their assigned spot. After waiting for all students to get dress, I told them again they are wasting to much time getting dressed & getting on their spots.
>
> The girls follow procedure and all the boys continue to talk & sit on mats against the back wall of the gym.
>
> . . . About 5 minutes later I got up & picked up one of the plastic bats & all the boys began to run to their spots. As I approach them I hit [E., E., N., & T.] once on their behind. As they sat down & everybody began to laugh as we always do in gym. . . .
> [P-2.]

Talley disputed that Cordasco observed his classes and that she had spoken to him about his alleged conduct. Also, Talley did not want to be assigned to Barringer because of its poor facilities. He made several requests for reassignment and believed that he would be transferred to West Kenney School. Instead, he was transferred to Eighteenth Avenue Elementary School.

Charge Two

> The Board alleges that during a physical education class at Eighteenth Avenue School on April 7, 1992, Talley pushed C.D. to the gymnasium floor causing injuries to the boy's palms, forearms, and knees.

C.D., a fourteen-year-old bilingual special education student classified as neurologically impaired, was thirteen years old on April 7, 1992. He testified that while wrestling and playing with another student, Talley told him to stop. C.D., has limited knowledge of English, and did not understand the teacher's directions. Thus, he continued to play with his classmate. Talley then pushed C.D. on the shoulder causing him to fall to the floor and scratch his hands and knees. The next day, C.D. reported the incident to his classroom teacher, Ms. Herrera but he does not remember speaking to the principal, Mr. Young about the matter.

Willie J. Young, principal of Eighteenth Avenue School reported the incident to DYFS after talking with C.D. and Ms. Herrera on April 7(P-14). Young also requested the school nurse Eloise Smith, R.N., to examine C.D. in his presence. Nurse Smith reported that:

> C.D. complained of pain in the left palm, right forearm and left knee. Small abrasions noted on left palm surface, left forearm. Skin scraped but not broken on both knees. No other injuries on body noted. [P-15.]

Although the student admitted that he was not following instructions, Young concluded that Talley made "inappropriate contact" with C.D. Young noted that teachers attend orientation on the first day of school and are instructed not to use corporal punishment against a student or employees. Also, teachers are given handbooks containing procedures on class management and student discipline.

Talley testified that he blew the whistle twice for the students to come to order, but C.D. and another student continued to wrestle and play around in gym. He then grabbed C.'s right arm from behind but did not push him. C., however, fell and bruised his hand. Talley sent him to the nurse with another student and then explained what happened to the classroom teacher. C.D. had a discipline problem in gym class. Talley believes that C.D.'s behavior problems were based on his poor English.

Charge Three

> The Board alleges that Talley acted inappropriately with several female students and made improper and offensive remarks to them.

Sandra Manshel, a social worker employed with the Board since 1970, is assigned to Barringer. Manshel counseled a student, R.S., who had confided in two teachers about Talley's conduct towards her. Manshel notes show what R.S. told her:

> Mr. Talley acting real close to me - calling me baby - asked for # and address - what doing over summer? What doing Saturday night . . . tossed keys between legs. [P-10.]

R.S. also stated that Talley tried to make dates with her and asked for her telephone number in Mississippi. The other students teased and called her "Mr. Talley's girl." Manshel described R.S. as quiet, immature, attractive and scared. She had recently moved to Newark from Mississippi to care for an elderly relative. A naive country girl, she felt uncomfortable about the sexual statements made to her. Manshel believed that the incident with the teacher could have detrimental impact on a young teenage girl

such as R.S. Manshel reported this information to the principal, Mr. Petrozzino. Petrozzino interviewed R.S. and then notified DYFS about Talley's comments (P-20).

Manshel also testified about several other complaints by students alleging that Talley would watch them from the gym when they were changing their clothes in the locker room. For example, Mrs. H. reported that Talley made sexual innuendoes and remarked to her daughter, S.H., "You don't have anything" (P-6). Manshel recalled that two other female students, S.G., and T.G., also complained about Talley.

After receiving several complaints from female students about the sexual comments Talley made, Petrozzino warned Talley about his inappropriate behavior towards female students. Further, he advised Talley to exercise better judgment in matters that could be perceived as sexual abuse. Petrozzino also directed Cordasco to monitor Talley's classroom conduct .After the three reported misconduct incidents and subsequent DYFS referrals, Petrozzino spoke with Talley about seeking professional help (P-20). When Talley appeared resentful of Petrozzino's advice, Petrozzino asked two of Talley's superiors, Mr. Meadows and Mr. Moore to speak to him.

Cordasco also spoke to R.S. about Talley's alleged comments about her breasts. Cordasco removed R.S. from Talley's class and reported the incident to the principal and DYFS.

Frank Lucas, a physical education teacher at Barringer, testified for respondent. Lucas and Talley share the gymnasium during two periods. Each teaches a class containing about thirty students. Lucas described the gymnasium as small, and therefore, he had the opportunity to see Talley during class. Lucas has never observed Talley make inappropriate comments to a student nor hit a student with a whiffle ball bat. In response to Talley's request, Lucas did speak to R.S. about being unprepared for gym and about her lack of class participation. However, no student ever complained to him about Talley.

Talley recalled that R.S. enrolled in school during the second semester. Because she had no money, he gave her extra time to purchase a gym outfit. However, when she refused to participate in class, Talley asked Lucas to speak to her. Thereafter, she purchased the proper attire and participated in a few classes. Talley denied asking R.S. for her address and making inappropriate comments to her.

With regard to the allegations of inappropriate conduct by student S.G., Talley stated that she could not read or write and was in danger of failing. Therefore, he taught her how to read.

Charges Four and Five

> The Board alleges that Talley failed to adequately supervise students, thereby placing them at risk. Also, it is alleged that Talley disregarded proper procedure by failing to notify school administrators of incidents involving student misconduct.

K.B., a twelve-year-old student attending Howard Wilson Middle School, testified about an incident at Eighteenth Avenue School on December 9, 1991, two years ago. K.B. was ten years old and enrolled in Talley's physical education class. At the end of gym class, she and three other girls, A.F., E., and T., were in the locker room changing their clothing when two boys, E.C. and M.T., entered the dressing area. A.F., unclothed, covered her chest with her shirt, as one of the boys, M.T., tried to remove her hand and pull down her shorts and panties. K.B. jumped on the boys to get them off A.F. and yelled for Talley. Talley did not respond. After the incident, A.F. went into the gymnasium and told Talley what had happened. Talley then called the two boys by name. The girls, believing that Talley did not reprimand the boys, reported the incident to their principal, Mr. Young (P-11). K.B. also stated that the dressing room had an open ventilator on the wall which allowed the boys on the other side of the wall to look into the locker room. Talley usually stood near the boys' locker room or his office at the other end of the gym.

E.M., an eleven-year-old student now attending school in Summit, also testified about the incident concerning A.F. E.M. was in Talley's gym class,and she, too, recalled that A.F. covered her chest when the boys entered the locker room. She and two other students yelled for Talley and then reported the incident to the principal, Mr. Young.

Young recalled that the girls were upset about the incident regarding A.F. They were also upset because their teacher failed to do anything about it. Young questioned Talley, but he denied not taking action. However, Talley said that nothing further needed to be done. Young then reported the incident to DYFS.

Talley recalled that after he finished teaching class, four girls remained in the locker room to change clothes while the rest of the students returned to their regular classroom. After he returned to his office, two girls came from the locker room and reported the incident between A.F. and the two boys. Talley found the boys in their classroom and then sent them to see the principal. Talley maintained that Young asked for an incident report but did not discuss the matter with him.

Cordasco testified that she spoke to Talley about taking appropriate action regarding male students entering the girls' locker room. Cordasco also received complaints from female students that Talley watched them undress in the locker room. Cordasco instructed Talley not to enter the girls' locker room but to stay close by in the event of an emergency which required his assistance. She also suggested that he appoint two female monitors to keep him informed of any incidents that might require the assistance of the teacher.

In another incident, T.B., six years old, talked about what happened in Talley's class on October 13, 1992. In October 1992, T.B. was five years old and in the first grade. As he was preparing for gym class, in the locker room, another boy, Q.M., also five years old, tried to pull his pants down and get on top of him. T.B. then told Talley what happened. Under cross-examination, T.B. was unclear on whether Talley did anything about the incident. However, Young documented the incident on October 13, stating that, "Both boys state that the other children spoke to Mr. Talley about what happened. However, no action or reporting was done to the administration" (P-12).

Talley recalled that T.B. was changing in the locker room with the other twelve to thirteen students and then lined up for class. Neither T.B. nor any other student reported an assault on T.B. Thus, he was unaware that an incident occurred until Mrs. B. came to school the next day and spoke directly to Talley. He sent Mrs. B. to the principal.

Talley usually stood outside the boys locker room while they changed for gym. The first and second graders had difficulty changing their clothes, *e.g.*, tying shoe laces, and thus took longer than the older students. Also, many of his students were from low income families, lived with grandparents and, generally, lived in a rough environment. He reported these problems to Mr. Moore. Often, he had problems controlling both the boys and the girls locker rooms. Because he could only go into the boys locker room, he asked for an assistant or teacher's aid to monitor the girls' locker room. If the students

misbehaved, they would lose their gym privileges, return to their regular class, and then were lectured on health. Usually, Lucas would cover the girls locker room and he would stand near the boys locker room while the students changed for gym class. When he was not teaching class, he could be found in his office at the end of the gym.

Talley also complained about the deplorable physical condition of the Eighteenth Avenue school gymnasium. The locker rooms had inadequate lighting, poor electrical fixtures, no toilet facilities and bare floors. Repeatedly, he padded the open grid in the girls locker room with plywood to prevent the boys from looking through. Felicia Howard, head custodian at Eighteenth Avenue School, testified about the poor condition of the gym. She too covered the open grid in the girls locker room to prevent the boys from looking inside.

T.S., nine years old, testified about an incident one year ago on October 22, 1992. While on the playground, an eight year old boy, A.H., patted her behind. The touching was unwelcome and made her feel uncomfortable. She reported the incident to Talley but he did nothing about it. She then reported the incident to her homeroom teacher and to Mr. Young. Young reported the incident to DYFS (P-13).

Talley recalled that the class played touch football in the school yard. However, T.S. never complained about A.H. touching her nor did he observe anything between them.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing are required under the law to protect tenured teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 73 (1982). Also, tenure is designed to aid in the establishment of "a competent and efficient school system" by providing teachers with a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). The burden of proof for establishing claims against a tenured teacher is a fair preponderance of the evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982).

I

Charges one and two involve acts of corporal punishment and unjustified physical contact with pupils. Regarding the charge that Talley hit E., E., N.V. and T. with a whiffle ball bat, the Board asserts that Talley's testimony that he only "tapped" the boys is inconsistent with his admission on P-2 that he "hit" the four students. Two additional inconsistencies between Talley's testimony and reported incident were whether the boys continued to sit on the mats or were they hitting the mats against the wall when Talley told them to get on their spots and whether the boys tried to run out of the gym or to their spots when Talley picked up the plastic bat and approached the boys.

Regarding the charge that Talley pushed C.D. to the floor causing injuries to the boy's body, the Board maintains that C.D. did not fall to the floor, but was pushed in anger by Talley. The Board relies on the testimonies of C.D., Cordasco and the report submitted by the school nurse. Thus, the Board submits that charges one and two should be sustained.

Respondent maintains that after he tapped the four boys on their behind with a bat to get their attention, they laughed and then participated in class. Further, it is maintained that C.D. fell to the floor when Talley reached out to him. Respondent argues that the in each incident, the students were misbehaving and posed a danger to themselves and to each other. Thus, when students failed to follow Talley's verbal instructions, he "was required to exert the amount of force necessary to control the situation". (Respondents brief at 3). It is submitted that under the circumstances, the force used by Talley to control the situation was appropriate and does not constitute unbecoming conduct.

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

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

> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
> (3) for the purpose of self-defense; and
> (4) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to constitute corporal punishment. . . .

The legislative purpose of the above statute prohibiting corporal punishment was clearly explained in the *Tenure Hearing of Lomakin*, 1971 *S.L.D.* 331, 334:

> While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) *an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. Tenure Hearing of Ostergren*, 1966 *S.L.D.* 185, 186. [Emphasis added.]

and

> [T]hat such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. *Ibid.*

and, also

> Thus, when teachers resort "to unnecessary and inappropriate physical contact with those in their charge [they] must expect to face dismissal or other severe penalty." *Ibid.*

It is undisputed that Talley struck four students with a plastic bat in order to get their attention. However, it is disputed whether Talley hit or tapped four students with a plastic bat while they were either sitting on or hitting the mats. It is the function of the trier of fact to determine credibility based on internal consistency or the improbability of the witnesses' testimony, using experience in everyday affairs to give additional guidance. Additional measures for assessing credibility include demeanor, prior statements shown to have been misstatements by additional testimony or other evidence.

Cordasco provided a clear and credibile description of the red marks she saw on N.V.'s back the day after the incident. Also, the school nurse reported findings of discoloration after examining N.V.'s back.

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. [citation omitted]
>
> [*In re Perrone Estate*, 5 *N.J.* 514, 521 (1950).]

I am persuaded by the evidence that in each of these incidents, the conduct of the students involved was not provocative nor were Talley's actions taken to protect the students.

Based upon the testimonial and documentary evidence, I **FIND** that on March 21, 1991, Talley hit four students, E., E., N.V. and T. with a whiffle ball bat. I also **FIND** that N.V. sustained a bruise approximately eight inches long across his back.

I have also considered carefully, the testimony of C.D. He understood the oath and gave forthright responses to questions asked by both counsel. Although he did not remember speaking to Young about the incident, he did remember that his teacher pushed him on the right shoulder causing him to fall to the floor scratching his hands and knees. An examination by the school nurse several hours later revealed abrasions and scrapes to C.D.'s arms and knees.

Based upon the testimonial and documentary evidence, I **FIND** that Talley pushed C.D. to the gymnasium floor causing injuries to the boy's palms, forearms, and knees.

III

Charge three involves alleged inappropriate behavior toward female students of a sexual nature. The Board contends that Manshel's testimony about R.S. is admissible as an excited utterance under *N.J.R.E.* 803(c)(2). Moreover, complaints of inappropriate behavior against Talley by other female students resulted in a warning by Cordasco to be more prudent. It is submitted that the unrelated separate complaints strongly suggest

that Talley did make comments of a sexual nature to them. Thus, the charge should be sustained.

Respondent argues that none of the students who were allegedly approached were produced at the trial to testify against Talley. Thus, the evidence is hearsay. Further, the Board failed to investigate the truth of the students' statements. Moreover, while employed with the Board, Talley has never been charged with inappropriate conduct towards female students. Therefore, the charge should be dismissed.

Excited utterances are admissible evidence if the statement was made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate. The declarant need not testify. *See N.J.R.E.* 803(c)(2). The out-of-court statement "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright*, __497__ *U.S.* 805, 823, 110 *S. Ct.* 3139, 3150, 111 *L. Ed. 2d* 638, 657 (1990). The factors to be considered include: (1) the amount of time between the initial observation of the event and the subsequent declaration of the statement; (2) the circumstances of the event; (3) the mental or physical condition of the declarant; (4) the shock produced; (5) the nature of the statement; and (6) whether the statement was made voluntarily or in response to a question. The statement need not be made contemporaneously with or even immediately after the event. *See State v. Ramos*, 203 *N.J. Super.* 197 (Law Div. 1985) (statements made two or more weeks after the sexual misconduct that they described allegedly took place were admissible). Also, reasonable proximity between the event and the statement may be spontaneous if the declarant's excited state was continuing. *See, State v. Williams*, 214 *N.J. Super.* 12 (App Div 1986). Additionally, an essential element for admissibility under the rule is that it was made under the stress of excitement. Testimony that the declarant was still in a "daze of shock" satisfied this requirement. *Id.* at 19. Also, a statement made in response to a question does not automatically deprive it of its spontaneity. *State v. Simmons*, 52 *N.J.* 538, 541-542 (1968), *cert. den.* 395 *U.S.* 924, 89 *S.Ct.* 1779, 23 *L. Ed.*2d 241 (1969). Further, the circumstances must warrant an inference that the statement was made before the declarant had time to plan a self-serving deliberated assertion.

Statements made by victims of child abuse incidents to third parties may also be admissible under *N.J.R. E.*803(c)(2) as a "fresh complaint" under the same standards of an excited utterance. See *State v. Simmons, supra.* Because there are rarely other

witnesses to acts of child sexual abuse and often there is no visible physical evidence that such acts of abuse occurred, the spontaneous out-of-court account of what happened by the victim may be found highly credible under *N.J.R.E.* 803(c)(2).

The record reflects that in May 1991, the school social worker Manshel counseled R.S. about comments of a sexual nature made to her by Talley. The alleged conduct began in March. (P-10). Manshel described R.S. as a naive country girl from Mississippi. R.S. was quiet and scared as she reported the incidents. During another counseling session, R.S. was soft spoken and nervous. The information was reported to Principal Petrozzino and to DYFS (P-18, P-20). Moreover, Cordasco questioned R.S. about Talley's behavior after R.S. "went to [Mr. Carpino, Head Guidance Counselor] because she was very upset by comments made to her by Mr. Talley, during class" (P-5).

Teachers, guidance counselors and school social workers are persons recognized under usual circumstances as natural confidantes. Moreover, pursuant to Board policy, school personnel made inquiries after receiving the reported incidents of child abuse and they also referred the matter of DYFS. *See* Exhibit P-18. Thus, there is a residuum of competent evidence to support a finding that Talley made inappropriate remarks of a sexual nature to R.S. *See M.J. Rudolph Corp. v. DEP* (NJ App. Div., A-1576-89T2, Nov. 15, 1990). I am persuaded by the totality of the circumstances that the statements reported to Manshel by R.S. concerning Talley's conduct were not contrived. Thus, I **FIND** that Talley interacted inappropriately with R.S. and made improper and offensive remarks to her.

With respect to Talley's alleged inappropriate conduct towards S.H., Mrs. H. complained to Cordasco that Talley said, "You don't have anything" (P-6). Cordasco understood the comment to refer to sexual parts. However, no evidence was provided describing the circumstances of the incident. Similarly, complaints by other female students about Talley's alleged inappropriate conduct lack the elements necessary to show that the declarants had no opportunity for misrepresentation before making the statements. Thus, no inference can be drawn that Talley acted inappropriately with other female students based on unrelated complaints made on separate occasions. Moreover, the alleged statements made by Talley are so vague and ambiguous that it is impossible to determine precisely to what they were referring. Consequently, their evidentiary value has no weight.

III

Charges four and five involve allegations that Talley failed to adequately supervise his pupils and to notify school administrators of student misconduct. The Board contends that the the incidents which occurred at the Eighteenth Avenue School in the girls' and boys' locker rooms and on the playground could have been avoided if instead of reading the newspaper in his office Talley would have been supervising the students. Further, he should have reprimanded the boys for looking into the girls' locker room and implemented proper classroom management techniques. Thus, his failure properly perform his duties presented a danger to students.

Respondent argues that prior to his assignment to Eighteenth Avenue School, students from the first through third grade did not have physical education, and thus were not required to change their clothes for gym class. Additionally, the physical condition of the gym was deplorable. Further, the girls' and boys' locker rooms were at opposite ends of the gym making it physically impossible to supervise both the girls and the boys while they changed their clothes.

Regarding the incident involving A.F. on December 9, 1991, it is argued that class had been dismissed, and thus, Talley believed that all the students had returned to their regular classrooms. However, when one of the girls informed Talley about the incident, respondent sent the boys to the principal to be disciplined.

Regarding the incident involving T.B. on October 13, 1992, it is argued that upon being told what was happening in the locker room, Talley entered the locker room and immediately brought the situation under control. Thereafter, when Mrs. B. inquired about the incident, Talley informed her that he was unaware that T.B. felt that he was sexually assaulted and directed her to the principal's office.

Regarding the incident involving T.S. on October 22, 1992, it is argued that no teacher could have prevented this type of situation from occurring. Moreover, at the time, Talley was supervising a football game with the other students.

I am mindful that the testimony of young students must be examined with great caution. Although one student was five years old, others were pre-teens and teenagers when the respective incidents occurred, and one was a student with disabilities, each

knew his or her obligation to speak the truth. Notwithstanding inconsistencies in the testimony of some students, the testimony was believable. Indeed, the existence of some inconsistencies in a witness' testimony does not warrant an automatic discounting of that testimony as incredible. *United Stations of N.J., et al. v. Getty Oil Co., et al.*, 102 *N.J. Super.* 459 (Ch. Div. 1968). Moreover, the variations in the testimony was the individuals' recollection of or failure to recall minute details of the respective incidents occurring two years ago, but not in the underlying actual occurrences of the incidents themselves. In all of these incidents, the students, K.B., E.M., T.B., and T.S. testified about what they saw or experienced regarding these charges. Other than Talley's denial, the students' testimony reflects that when they were assaulted in the locker room or on the playground, their teacher was not there to help them. Moreover, when the incidents were reported to him, he did not immediately respond to their call for help.

Based upon a review of the evidence, including a credibility assessment, I **FIND** that Talley failed to adequately supervise the students, particularly the girls' and boys' locker rooms, thereby placing them at risk. Also, I **FIND** that Talley did not notify school administrators of incidents involving student misconduct.

IV

With regard to the appropriate penalty, I have carefully considered the important role served by members of the teaching profession. Teachers hold a sacred position in our society. The teacher provides his students not only book knowledge, but also social and moral values that are expected from parents, law enforcement officials and the general public. Thus, teachers must be held to a high standard of conduct because they have direct contact with molding habits and nurturing young minds. Suffice it to say, children mimic what they see and they learn by example. Clearly, teachers play a direct role in influencing the opinions of their pupils, and indeed, teachers are role models. Also, teachers impart the goals students set for themselves and the direction they take in achieving those goals. Consequently, teachers are expected to exercise exemplary restraint and mature self-control.

Unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but it is best evidenced by a series of incidents. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967); *Redcay v. State Bd. of Ed.*, 130 *N.J.L.* 396, 371 (Sup. Ct. 1943), aff'd.

131 *N.J.L.* 326 (E. & A. 1944). Thus, *In the Matter of the Tenure Hearing of Eddie Lee Harrell*, 1979 *S.L.D.* 497, the Commissioner concluded that while Harrell's single act of slapping a student could not be condoned, it did not warrant dismissal. However, *In the Tenure Hearing of Harrell*, 93 *N.J.A.R. 2d* (Vol 4A) 397 (Dept of Education), the administrative law judge found a pattern of conduct by Harrell where "he deals with incidents of misconduct, either real or perceived, in a physically aggressive manner, at times causing injury to students...Indeed, his actions may unfortunately give a clear signal to his students that physical aggression is an appropriate and acceptable response." *Id.* at 405

Here, Talley acknowledged that most of his students come from a dysfunctional and broken homes where daily physical violence is the norm rather than the exception. Proofs established by a preponderance of the credible evidence that in each of the incidents involving physical contact with the students, Talley's actions demonstrated a lack of self-restraint and self-control necessary to become an effective and successful teacher. With regard to R.S., Talley abused his public trust and took advantage of his position as a teacher by making personal remarks to her of a sexual nature. Such conduct cannot be tolerated in a school setting where adolescents are entitled to greater protection. Talley has been entrusted with the care and custody of school children "with the hope that his trust will result in the maximum educational growth and development of each individual child." *In The Matter of The Tenure Hearing of Jacques L. Sammons*, 1972 *S.L.D.* 302, 321. His failure to properly supervise his students and his failure to notify school administrators of incidents involving student misconduct violated that trust.

These determinations are serious and warrant careful consideration in assessing the penalty. Thus, I have considered the nature and gravity of the offense, any extenuating or aggravating circumstances, and the affect on the maintenance of discipline and proper administration of the school system. *Fulcomer, supra.* Based on the whole of the record, I **CONCLUDE** that the aggravating circumstances outweigh Talley's past good service.

Based upon the foregoing facts and the applicable law, I **CONCLUDE** that the Board has sustained its tenure charge against Charles Talley. I further **CONCLUDE** that the appropriate penalty is **DISMISSAL**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 1, 1994
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

3/8/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 10 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:

Alba N. Cordasco
Sandra Manshel
Willie J. Young
John D. Petrozzino
C. D. (a minor)
E. M. (a minor)
T. B. (a minor)
T. S. (a minor)
K. A. (a minor)

For Respondent:

Charles Talley
Andrew Howard
Gregory Rochester
Walter Daniels
Carol Huff
Felicia Howard Sellars
Louise Newman
Frank K.Lucas
Leonard Moore
Willie Hutcherson

EXHIBITS

P-1 Plastic whiffleball bat with covered duct tape
P-2 Statement of Talley, March 25, 1991
P-3 Memorandum, Cordasco to Petrozzino re: student complaints, March 22, 1991
P-4 Report of Accident to Pupil (N.V.), March 21, 1991
P-5 Memorandum, Cordasco to Petrozzino re: student complaint, May 29, 1991
P-6 Handwritten note by Cordasco re: student complaint (November)
P-7 Memorandum, Cordasco to Petrozzino, September 28, 1990
P-8 Memorandum, Cordasco to Petrozzino re: Talley AWOL, April 12, 1990
P-9 Not in evidence
P-10 Notes of Manshel re: R.S.
P-11 Incident Report Form re: A.F., December 9, 1991
P-12 Incident Report Form re: T.B. and Q.M., October 13, 1992
P-13 Incident Report Form re: S.T. and A.H., October 22, 1992
P-14 Incident Report Form re: C.D., April 7, 1992
P-15 Health History and Appraisal - Nurse Report re: C.D., April 7, 1992

P-16 Teacher Observation Report re: Talley, November 13, 1992
P-17 Memorandum, Young to Adilifu re: Talley, December 7, 1992
P-18 Bd. of Ed. Regulation on Child Abuse and Neglect
P-19 Memorandum, Petrozzino to Moore, March 26, 1991
P-20 Memorandum, Petrozzino to Moore, May 31, 1991
P-21 Not in evidence
P-22 Letter, Adilifu to Talley, January 14, 1993
P-23 Memorandum, Request from Talley, April 10, 1991
P-24 Professional Improvement Plan for Evaluation Year 1992-93

R-1 Talley - Teacher Observation Report, March 29, 1988
R-2 Talley - Teacher Observation Report, April 25, 1988
R-3 Talley - Teacher Annual Evaluation Report, June 8, 1988
R-4 Talley - Teacher Observation Report, November 3, 1988
R-5 Talley - Teacher Observation Report, January 11, 1989
R-6 Talley - Teacher Observation Report, November 1, 1990
R-7 Talley - Teacher Observation Report, January 9, 1991
R-8 Talley - Teacher Annual Evaluation Report, June 6, 1991
R-9 Talley - Teacher Observation Report, February 27, 1992
R-10 Talley - Teacher Annual Evaluation Report, June 9, 1992

IN THE MATTER OF THE TENURE HEARING OF CHARLES TALLEY, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions essentially argue that the ALJ's conclusion that the Board had met its burden of proof on each of the charges is in error because in reaching her determinations on these charges, the ALJ's recollection of testimony was inaccurate, she disregarded evidence, and she failed to accord proper weight to his credible testimony and that of other individuals testifying in his behalf. Respondent presents a recitation of what he contends is relevant factual testimony with respect to each of the charges and the conclusions which he avers should be adduced from such testimony.

The Board's reply exceptions urge acceptance of the ALJ's findings regarding the incidents underlying the tenure charges. It highlights evidence and testimony presented in support of each of the charges which it avers fully support the ALJ's findings. It further contends that the ALJ, as factfinder and firsthand observer of witnesses, was entitled to discount testimony which she found to

be inconsistent and conflicting. Additionally, the Board asserts that if respondent seeks to challenge the ALJ's findings of fact, it was incumbent upon him to provide the Commissioner with transcripts. (In re Morrison, 216 N.J. Super. 143 (1987))

Upon a careful and independent review of the record of this matter, the Commissioner adopts the recommendation of the Administrative Law Judge for the reasons expressed by her in the initial decision. With respect to the exceptions of respondent, the Commissioner notes that without a review of the transcripts of this matter, which were not a part of the record before him, it is not possible to reconcile the conflicting claims made by respondent and the Board regarding findings of fact. Further, the existing record does not provide any cause to challenge the credibility assessments made by the ALJ.

The Commissioner finds and determines that the record substantiates the ALJ's findings that the incidents alleged by the Board did, in fact, occur and that they amply prove respondent's unfitness for teaching. Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein. Respondent is terminated from his tenured teaching position in the school district of the City of Newark as of the date of this decision. This matter shall be transmitted to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6 for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

APRIL 21, 1994

DATE OF MAILING - APRIL 21, 1994

COMMISSIONER OF EDUCATION

90-94

90-94

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

APRIL 18, 1994

OAL DKT. NO. EDU 6960-93

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1994

DATE OF MAILING - APRIL 18, 1994

91-940

91-940

IN THE MATTER OF THE APPLICATION OF THE ESSEX COUNTY SUPERINTENDENT OF ELECTIONS FOR A RECHECK OF THE VOTING MACHINES TO BE USED IN THE 1994 SCHOOL BOARD ELECTIONS IN THE COUNTY.	:	COMMISSIONER OF EDUCATION ORDER

APRIL 22, 1994

IN THE MATTER OF THE APPLICATION :
OF THE ESSEX COUNTY SUPERINTEN- :
DENT OF ELECTIONS FOR A RECHECK : COMMISSIONER OF EDUCATION
OF THE VOTING MACHINES TO BE : ORDER
USED IN THE 1994 SCHOOL BOARD :
ELECTIONS IN THE COUNTY. :
:

This matter having been opened to the Honorable Leo Klagholz, New Jersey Commissioner of Education, by Deborah T. Poritz, Attorney General of New Jersey, by Donna Kelly, Senior Deputy Attorney General, appearing, attorney for petitioner Essex County Superintendent of Elections, and the Commissioner having considered the petition submitted in support herein; and for good cause shown;

IT IS on this 22ND day of APRIL , 1994,

ORDERED that a recheck of the voting machines used in the April 19, 1994 school board elections in Essex County be conducted by the representatives of the Commissioner of Education, with the cooperation of the election officials, in accordance with N.J.S.A. 18A:14-63.5, such recheck to be conducted at the County's voting machine warehouse located at 64 Frelinghysen Avenue, Newark, New Jersey, according to the dates and times set forth in Schedule "A," which is attached and whose terms are incorporated herewith; and

IT IS FURTHER ORDERED that the recheck is limited to the voting machines and if any candidate or ten voters of a school

district want a recount of the absentee ballots pursuant to N.J.S.A. 18A:14-63.2 or 63.3, respectively, a separate application must be made to the Commissioner of Education; and

IT IS FURTHER ORDERED that the Essex County Superintendent of Elections provide a copy of the Order to the County Superintendent of Schools and the County Superintendent of Schools, if requested by the Superintendent of Elections, shall provide a copy of the Order to the affected school board secretaries; and

IT IS FURTHER ORDERED that the school board shall provide notice of the recheck to the affected school board candidates, by copy of this Order and by telephone notice, if necessary, in order to assure effective notice to the candidates; and

IT IS FURTHER ORDERED that the recheck shall be at no cost to the affected school board candidates.

Leo Klagholz
Commissioner of Education

APRIL 22, 1994

DATE OF MAILING - APRIL 22, 1994

RECHECK SCHEDULE

The recheck of the voting machines to be used on April 19, 1994 for the school districts set forth below, will be conducted on April 26, 1994 at 9:00 a.m. at the Essex County voting machine warehouse located at 640 Frelinghuysen Avenue, Newark.

Belleville
Bloomfield
Boro Caldwell/W. Caldwell
Cedar Grove
Essex Fells
boro Fairfield
Glen Ridge
Livingston
Millburn
Newark
No. Caldwell
Nutley
Roseland
So. Orange/Maplewood
Verona
West Orange

SCHEDULE (A)

92-940

92-940

IN THE MATTER OF THE APPLICATION :	
OF THE MIDDLESEX COUNTY BOARD :	
OF ELECTIONS FOR A RECHECK OF THE :	COMMISSIONER OF EDUCATION
VOTING MACHINES TO BE USED IN THE :	ORDER
1994 SCHOOL BOARD ELECTIONS IN :	
THE COUNTY. :	

APRIL 22, 1994

IN THE MATTER OF THE APPLICATION :
OF THE MIDDLESEX COUNTY BOARD :
OF ELECTIONS FOR A RECHECK OF THE : COMMISSIONER OF EDUCATION
VOTING MACHINES TO BE USED IN THE : ORDER
1994 SCHOOL BOARD ELECTIONS IN :
THE COUNTY. :

This matter having been opened to the Honorable Leo Klagholz, New Jersey Commissioner of Education, by Deborah T. Poritz, Attorney General of New Jersey, by Donna Kelly, Senior Deputy Attorney General, appearing, attorney for petitioner Middlesex County Board of Elections, and the Commissioner having considered the petition submitted in support herein; and for good cause shown;

IT IS on this 22ND day of APRIL , 1994,

ORDERED that a recheck of the voting machines used in the April 19, 1994 school board elections in Middlesex County be conducted by the representatives of the Commissioner of Education, with the cooperation of the election officials, in accordance with N.J.S.A. 18A:14-63.5, such recheck to be conducted at the County's voting machine warehouse located at Roosevelt Park, Edison, New Jersey, according to the dates and times set forth in Schedule "A," which is attached and whose terms are incorporated herewith; and

IT IS FURTHER ORDERED that the recheck is limited to the voting machines and if any candidate or ten voters of a school district want a recount of the absentee ballots pursuant to N.J.S.A. 18A:14-63.2 or 63.3, respectively, a separate application must be made to the Commissioner of Education; and

IT IS FURTHER ORDERED that the Middlesex County Board of Elections provide a copy of the Order to the County Superintendent of Schools and the County Superintendent of Schools, if requested by the Board of Elections, shall provide a copy of the Order to the affected school board secretaries; and

IT IS FURTHER ORDERED that the school board shall provide notice of the recheck to the affected school board candidates, by copy of this Order and by telephone notice, if necessary, in order to assure effective notice to the candidates; and

IT IS FURTHER ORDERED that the recheck shall be at no cost to the affected school board candidates.

Leo Klagholz
Commissioner of Education

APRIL 22, 1994

DATE OF MAILING - APRIL 22, 1994

Tuesday April 26, 1994 9:00 A.M.	7 Towns Number of Machines
Dunellen	4
East Brunswick	35
Highland Park	8
Metuchen	5
Piscataway	14
South Amboy	3
South Plainfield	7
	76

1:00 P.M.	7 Towns Number of Machines
Carteret	7
Middlesex	6
Milltown	6
Old Bridge	15
Sayreville	19
Spotswood	7
North Brunswick	10
	70

Wednesday, April 27, 1994 9:00 A.M.	5 Towns Number of Machines
West Windsor-Plainsboro Regional School Dist.	4
Cranbury	2
Jamesburg	2
Monroe	14
Edison	25
	47

1:00 P.M.	4 Towns Number of Machines
South Brunswick	18
South River	5
Woodbridge	35
Perth Amboy	16
	74

Schedule "A"

93-940

93-940

IN THE MATTER OF THE APPLICATION OF THE PASSAIC COUNTY SUPERINTENDENT OF ELECTIONS FOR A RECHECK OF THE VOTING MACHINES TO BE USED IN THE CLIFTON AND PASSAIC 1994 SCHOOL BOARD ELECTIONS.	:	COMMISSIONER OF EDUCATION ORDER

APRIL 22, 1994

IN THE MATTER OF THE APPLICATION :
OF THE PASSAIC COUNTY SUPERINTEN- :
DENT OF ELECTIONS FOR A RECHECK : COMMISSIONER OF EDUCATION
OF THE VOTING MACHINES TO BE USED : ORDER
IN THE CLIFTON AND PASSAIC 1994 :
SCHOOL BOARD ELECTIONS. :
:

This matter having been opened to the Honorable Leo Klagholz, New Jersey Commissioner of Education, by Deborah T. Poritz, Attorney General of New Jersey, by Donna Kelly, Senior Deputy Attorney General, appearing, attorney for petitioner Passaic County Superintendent of Elections, and the Commissioner having considered the petition submitted in support herein; and for good cause shown;

IT IS on this 22ND day of APRIL , 1994,

ORDERED that a recheck of the voting machines used in the April 19, 1994 Clifton and Passaic school board elections be conducted by the representatives of the Commissioner of Education, with the cooperation of the election officials, in accordance with N.J.S.A. 18A:14-63.5, such recheck to be conducted at the County's voting machine warehouse located at Wm. Jay-Vernay & Sons, 4143 Governor Street, Paterson, New Jersey, according to the dates and times set forth in Schedule "A," which is attached and whose terms are incorporated herewith; and

IT IS FURTHER ORDERED that the recheck is limited to the voting machines and if any candidate or ten voters of a school district want a recount of the absentee ballots pursuant to N.J.S.A. 18A:14-63.2 or 63.3, respectively, a separate application must be made to the Commissioner of Education; and

IT IS FURTHER ORDERED that the Passaic County Superintendent of Elections provide a copy of the Order to the County Superintendent of Schools and the County Superintendent of Schools, if requested by the Superintendent of Elections, shall provide a copy of the Order to the affected school board secretaries; and

IT IS FURTHER ORDERED that the school board shall provide notice of the recheck to the affected school board candidates, by copy of this Order and by telephone notice, if necessary, in order to assure effective notice to the candidates; and

IT IS FURTHER ORDERED that the recheck shall be at no cost to the affected school board candidates.

Leo Klagholz
Commissioner of Education

APRIL 22, 1994

DATE OF MAILING - APRIL 22, 1994

RECHECK SCHEDULE

The recheck of the voting machines to be used on April 19, 1994 for the school districts set forth below, will be conducted on April 26, 1994 at 10:00 a.m. at the Passaic County voting machine warehouse located at the Wm. Jay-Vernay & Sons Building, 4143 Governor Street, Paterson.

Clifton

Passaic

SCHEDULE "A"

94-940

94-940

IN THE MATTER OF THE APPLICATION OF THE CAMDEN COUNTY SUPERINTENDENT OF ELECTIONS FOR A RECHECK OF THE VOTING MACHINES TO BE USED IN THE 1994 SCHOOL BOARD ELECTIONS IN THE COUNTY.	:	COMMISSIONER OF EDUCATION ORDER

APRIL 22, 1994

IN THE MATTER OF THE APPLICATION OF THE CAMDEN COUNTY SUPERINTENDENT OF ELECTIONS FOR A RECHECK OF THE VOTING MACHINES TO BE USED IN THE 1994 SCHOOL BOARD ELECTIONS IN THE COUNTY.	:	COMMISSIONER OF EDUCATION ORDER

This matter having been opened to the Honorable Leo Klagholz, New Jersey Commissioner of Education, by Deborah T. Poritz, Attorney General of New Jersey, by Donna Kelly, Senior Deputy Attorney General, appearing, attorney for petitioner Camden County Superintendent of Elections, and the Commissioner having considered the petition submitted in support herein; and for good cause shown;

IT IS on this 22ND day of APRIL , 1994,

ORDERED that a recheck of the voting machines used in the April 19, 1994 school board elections in Camden County be conducted by the representatives of the Commissioner of Education, with the cooperation of the election officials, in accordance with N.J.S.A. 18A:14-63.5, such recheck to be conducted at the County's voting machine warehouse located at the Port Authority, Broadway, Camden, New Jersey, according to the dates and times set forth in Schedule "A," which is attached and whose terms are incorporated herewith; and

IT IS FURTHER ORDERED that the recheck is limited to the voting machines and if any candidate or ten voters of a school

district want a recount of the absentee ballots pursuant to N.J.S.A. 18A:14-63.2 or 63.3, respectively, a separate application must be made to the Commissioner of Education; and

IT IS FURTHER ORDERED that the Camden County Superintendent of Elections provide a copy of the Order to the County Superintendent of Schools and the County Superintendent of Schools, if requested by the Superintendent of Elections, shall provide a copy of the Order to the affected school board secretaries; and

IT IS FURTHER ORDERED that the school board shall provide notice of the recheck to the affected school board candidates, by copy of this Order and by telephone notice, if necessary, in order to assure effective notice to the candidates; and

IT IS FURTHER ORDERED that the recheck shall be at no cost to the affected school board candidates.

Leo Klagholz
Commissioner of Education

APRIL 22, 1994

DATE OF MAILING - APRIL 22, 1994

95-94

95-94

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
GAREY N. PHILLIPS, ANN M. PHILLIPS AND MARY J. BUTTERFIELD,	:	
RESPONDENTS.	:	

APRIL 25, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5856-93
AGENCY DKT. NO. 143-5/93

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT
Petitioners,
v.
GAREY N. PHILLIPS, ANN M. PHILLIPS AND MARY J. BUTTERFIELD,
Respondent.

Joanne L. Butler, Esq., for petitioners (Young, Tarshis, Dimiero & Sayovitz, attorneys)

Garey N. Philips, Ann M. Phillips and Mary Butterfield, *Pro se*

Record Closed: December 23, 1993 Decided: March 10, 1994

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

This matter was transmitted to the Office of Administrative Law on June 17, 1993, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled on December 29, 1993, at the Office of Administrative Law in Newark.

The parties settled the matter before the hearing date and on February 24, 1994, they submitted the attached Stipulation of Settlement dated December 23, 1993 indicating the terms of agreement which are fully incorporated herein.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 10, 1994
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

3/14/94
DATE

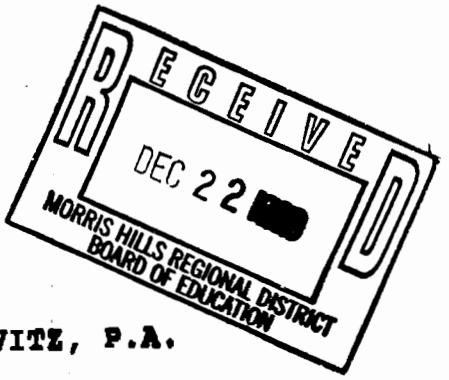
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 21 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

sej



YOUNG, TARSHIS, DIMIERO & SAYOVITZ, P.A.
Skyline Plaza
414 Eagle Rock Avenue
West Orange, New Jersey 07052
(201)736-5200
Attorneys for Petitioner

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT Petitioner, v. GAREY N. PHILLIPS, ANN M. PHILLIPS and MARY J. BUTTERFIELD Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU 05856-93 N **STIPULATION OF SETTLEMENT**

This matter having come before the court upon the petition of the Board of Education of the Morris Hills Regional High School District, and the parties, having amicably resolved all issues relative to said Petition, hereby stipulate the following:

1. Respondents agree to pay to the Petitioner, Board of Education of the Morris Hills Regional High School District, the amount of Twelve Thousand Two Hundred Sixty Five Dollars ($12,265);

2. Payment will be remitted to Board of Education of the Morris Hills Regional High School District pursuant to the payment schedule mutually agreed upon by the parties;

3. Initial payment of Ten Thousand Two Hundred Sixty Five Dollares ($10,265) shall be due not later than January 3, 1994;

4. The remaining Two Thousand Dollars ($2,000) shall be payable not later than January 3, 1995, which payment may be remitted in one lump sum payment or incremental payments, provided that said payment is received not later than January 3, 1995;

5. All payments remitted to the Board of Education of the Morris Hills Regional High School District shall be made by certified check, cashier's check or money order;

6. Respondents Garey N. Phillips and Ann M. Phillips will not enroll any children in the Morris Hills Regional High School District unless the Respondents Garey N. Phillips and Ann M. Phillips, as well as the pupil, are residing within the geographical boundaries of the school district or will pay tuition to the District for such attendance;

7. In consideration for the Respondents' payment to the Board in the amount of Twelve Thousand Two Hundred Sixty Five Dollars ($12,265), the Petitioner Board of Education of the Morris Hills Regional High School District will withdraw the pending Petition;

8. In the event the Respondents default on any of the provisions of this Stipulation, the Petitioner Board of Education of the Morris Hills Regional High School District will reinstate its original Petition before the Commissioner, as transmitted to the Office of Administrative Law, and/or will seek enforcement of the within Stipulation of Settlement before the Superior Court of the State of New Jersey.

9. Compliance with all terms of settlement set forth herein waives any rights any party may have against any other party with regard to this litigation or any claims related thereto.

MORRIS HILLS REGIONAL
HIGH SCHOOL DISTRICT

Garey N. Phillips

By: Manuel E. Deus
Manuel E. Deus
Business Administrator/
Board Secretary

Ann M. Phillips

Mary J. Butterfield

Carol A. Johnson, Board President

Dated: 12/23/93

bnn

OAL DKT. NO. EDU 5856-93

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
GAREY N. PHILLIPS, ANN M. PHILLIPS AND MARY J. BUTTERFIELD,	:	
RESPONDENTS.	:	

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

It is noted that a payment pursuant to this agreement was to be made on January 3, 1994. Parties are hereby reminded that effectuating settlement terms prior to their approval by the Commissioner is improper and done at the peril of the parties.

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

APRIL 25, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - APRIL 25, 1994

96-94

96-94

DONALD C. VAN HANDEL, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, RESPONDENT. AUDREY J. WARGO, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, RESPONDENT. WALTER H. TYLICKI, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

APRIL 25, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

DONALD C. VAN HANDEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent.

OAL DKT. NO. EDU 7614-92
AGENCY DKT. NO. 371-7/92

AUDREY WARGO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent.

OAL DKT. NO. EDU 7615-92
AGENCY DKT. NO. 364-7/92

WALTER H. TYLICKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent

and

JANE GOODE, ROBERTA SPECHT, AND FRANK TARANTO, JR.,
Intervenors-Respondents.

OAL DKT. NO. EDU 7616-92
AGENCY DKT. NO. 365-7/92

Theodosia A. Tamborlane, Esq., for petitioners

Howard Schwartz, Esq., for respondent Linden Board of Education
(Schwartz & Barkin, attorneys)

Jane Goode, *pro se*

Roberta Specht, *pro se*

Frank Taranto, Jr., *pro se*

Record Closed: March 4, 1994 Decided: March 7, 1994

BEFORE **STEPHEN G. WEISS,** ALJ:

These three consolidated matters were transmitted by the Department of Education to the Office of Administrative Law as contested cases on October 1, 1992. A prehearing conference was conducted by the undersigned administrative law judge on June 21, 1993 and hearings were scheduled to take place during January and February 1994. In the interim, orders permitting the intervention of Goode, Specht and Taranto, three individual respondents who potentially were affected by the school district administrative reorganization, were entered.

In advance of the scheduled hearing dates, counsel and the intervenors engaged in extended settlement discussions. As a result, a stipulation of settlement signed by the three individual petitioners and by a representative of the Board of Education was submitted to me. That stipulation provides for the salary increases of the three petitioners and addresses other matters of concern to each. In addition, and in light of the settlement, the three intervenors have submitted withdrawals, with prejudice, since the contents of the stipulation of settlement does not affect their interests. Copies of their withdrawals, as well as a copy of the stipulation of settlement, is attached hereto.

I have reviewed the record and the terms of the settlement as set forth in the settlement agreement, and I **FIND** as follows:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by the signatures of counsel which appear on the settlement agreement; and

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 7, 1994
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

3/9/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 1994
Date

OFFICE OF ADMINISTRATIVE LAW

amr

THEODOSIA A. TAMBORLANE, P.C.
Counselors at Law
1044 Route 22 West
Mountainside, New Jersey 07092
(908) 789-7977
Attorneys for Petitioners

DONALD C. VAN HANDEL Petitioner, vs. LINDEN BOARD OF EDUCATION Respondent.	OAL DOCKET NO. EDU 07614-92
AUDREY J. WARGO Petitioner, vs. LINDEN BOARD OF EDUCATION Respondent.	OAL DOCKET NO. EDU 07615-92
WALTER H. TYLICKI Petitioner, vs. LINDEN BOARD OF EDUCATION Respondent.	OAL DOCKET NO. EDU 07616-92 **STIPULATION OF SETTLEMENT**

Petitioners, Donald C. Van Handel, Audrey J. Wargo and Walter H. Tylicki (hereinafter referred to individually as "Mr. Van Handel", "Ms. Wargo" and "Dr. Tylicki", and collectively as "Petitioners"), and Respondent, Linden Board of Education (hereinafter referred to as the "Board" or "Respondent), have

agreed to settle this case in accordance with the following terms and conditions:

AS TO DONALD C. VAN HANDEL

1. Mr. Van Handel's salary will be increased to $78,310.00 retroactive to July 1, 1993 with a salary freeze at that level until such time as the maximum salary for the Supervisor of Assessment position he now holds exceeds that amount, at which point Mr. Van Handel will be entitled to any increases. Said increase will become effective and all retroactive pay based on said increase will be received by Mr. Van Handel within twenty (20) days of adoption of this settlement by the Commissioner of Education (hereinafter referred to as the "Commissioner") or within twenty (20) days following the expiration of time within which the Commissioner may adopt, modify or reject this settlement pursuant to N.J.S.A. 52:14B-10, whichever shall occur sooner.

2. Mr. Van Handel will be paid a lump sum of $5,000.00 (less appropriate state and federal taxes to be deducted from this amount by the Board) within the same time frame set forth in Paragraph 1 hereinabove.

3. If, after ongoing contract negotiations pertaining to salaries for administrators for the 1993-94 school year are concluded between the Board and the collective bargaining unit for the administrators in the Linden school system, Mr. Van Handel's salary exceeds $78,310.00 for the 1993-94 school year and if all administrators are to receive retroactive pay, Mr. Van Handel will receive the difference between $78,310.00 and the higher salary at the same time and in the same manner all other administrators

receive their respective retroactive pay for the 1993-94 school year.

AS TO AUDREY J. WARGO

4. Ms. Wargo's salary will be increased to $74,467.00 retroactive to September 1, 1993 with a salary freeze at that level until such time as the maximum salary for the ten (10) month Vice Principal position she now holds exceeds that amount, at which point Ms. Wargo will be entitled to any increases. Said increase will become effective and all retroactive pay based on said increase will be received by Ms. Wargo within twenty (20) days of adoption of this settlement by the Commissioner or within twenty (20) days following the expiration of time within which the Commissioner may adopt, modify or reject this settlement pursuant to N.J.S.A. 52:14B-10, whichever shall occur sooner.

5. Ms. Wargo will be paid a lump sum of $6,000.00 (less appropriate state and federal taxes to be deducted from this amount by the Board) within the same time frame set forth in Paragraph 4 hereinabove.

6. If, after ongoing contract negotiations pertaining to salaries for administrators for the 1993-94 school year are concluded between the Board and the collective bargaining unit for the administrators in the Linden school system, Ms. Wargo's salary exceeds $74,467.00 for the 1993-94 school year and if all administrators are to receive retroactive pay, Ms. Wargo will receive the difference between $74,467.00 and the higher salary at the same time and in the same manner all other administrators

receive their respective retroactive pay for the 1993-94 school year.

7. Although not enumerated in her present job description, Ms. Wargo hereby agrees that her job description is hereby amended to include responsibility for the master schedule, a responsibility she held as former Assistant Principal of Linden High School.

AS TO WALTER H. TYLICKI

8. Dr. Tylicki will be paid a lump sum of $4,000.00 (less appropriate state and federal taxes to be deducted from this amount by the Board) within twenty (20) days of adoption of this settlement by the Commissioner or within twenty (20) days following the expiration of time within which the Commissioner may adopt, modify or reject this settlement pursuant to N.J.S.A. 52:14B-10, whichever shall occur sooner.

9. If, after ongoing contract negotiations pertaining to salaries for administrators for the 1993-94 school year are concluded between the Board and the collective bargaining unit for the administrators in the Linden school system, Dr. Tylicki's salary exceeds $81,186.00 for the 1993-94 school year and if all administrators are to receive retroactive pay, Dr. Tylicki will receive the difference between $81,186.00 and the higher salary at the same time and in the same manner all other administrators receive their respective retroactive pay for the 1993-94 school year.

AS TO ALL PETITIONERS

10. Petitioners hereby waive their claims for attorney fees and costs incurred as a result of this litigation, as well as any other claims they could have brought in this proceeding.

11. Any salary information required to be reported to the Division of Pensions by the Board on behalf of the Petitioners for the purpose of calculating pension benefits shall include the actual salaries each Petitioner receives as a result of this settlement, including the lump sum payments set forth in Paragraphs 2, 5 and 8 hereinabove.

12. While Petitioners and Respondent recognize that this settlement is a matter of public record, it is mutually agreed that the parties hereto will continue to deal with each other on a professional level and in good faith, despite any adversity between the parties that may have arisen as a result of this litigation.

13. Pursuant to N.J.A.C. 1:1-19.1, all the terms and conditions of this Stipulation of Settlement shall be disclosed to the Honorable Stephen G. Weiss, A.L.J. for a determination that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy and a decision incorporating the full settlement terms and approving this settlement.

INTENDING TO BE BOUND, the Petitioners and Respondents have executed this Stipulation of Settlement this day of January, 1994.

Donald C. Van Handel

Audrey J. Wargo

Walter H. Tylicki

Linden Board of Education

By: ~~Stanley Baykowski, Pres.~~

Tylicki\stip.set\Rev.1-10-94\kmg

OAL DKT. NOS. EDU 7614-92, EDU 7615-92, EDU 7616-92 (CONSOLIDATED)

DONALD C. VAN HANDEL, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, RESPONDENT. AUDREY J. WARGO, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, RESPONDENT. WALTER H. TYLICKI, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

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

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

APRIL 25, 1994

DATE OF MAILING - APRIL 25, 1994

COMMISSIONER OF EDUCATION

98-94 E

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J.P. MC C., on behalf of his ward and grandson, S. MC C.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	
	:	
RESPONDENT.	:	

APRIL 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
CN 049
QUAKERBRIDGE PLAZA, BLDG. #9
TRENTON, NEW JERSEY 08625
(609) 588-6548

ROBERT S. MILLER
ADMINISTRATIVE LAW JUDGE

March 25, 1994

Lawrence S. Schwartz, Esquire
Schwartz Simon Edelstein Celso & Kessler
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039

Michael J. Rogers, Esquire
McDonald, Rogers & Rizzolo
181 West High Street
Somerville, New Jersey 08876

Re: McCarthy, et al. v. Bernardsville Board of Education
OAL DKT. NO. EDU 2528-94

Dear Counsel:

Enclosed please find a copy of the Order, signed by me, denying the emergent relief requested by the petitioner.

Very truly yours,

Robert S. Miller
Administrative Law Judge

tmp
encs.

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600
Attorneys for Respondent

	: COMMISSIONER OF EDUCATION
JOHN P. McCARTHY, on behalf of his ward and grandson, SEAN McCARTHY,	: AGENCY DOCKET NO. 51-3/94 OAL DOCKET NO. EDU-2528-94
Petitioner,	: CIVIL ACTION
vs.	:
BERNARDSVILLE BOARD OF EDUCATION (SOMERSET COUNTY),	: **ORDER**
Respondent.	:

THIS MATTER, having been opened to the Court by way of a Notice of Motion for Emergent Relief with Petition by the Petitioner, and upon notice to the Respondent, Bernardsville Board of Education, and upon consideration of the Answer with Affirmative Defenses, Certifications in opposition to Application for Emergent Relief and Letter Brief, filed on behalf of the Respondent, and upon Michael J. Rogers, Esq., attorney for Petitioner, and Lawrence S. Schwartz, Esq. and Nathanya G. Simon, Esq., attorneys for Respondent, appearing for oral argument on March 23, 1994,

IT IS on this 25 day of March, 1994;

ORDERED, that the emergent relief requested by the Petitioner be and is hereby denied for the reasons more

fully set forth in the oral opinion rendered on March 23, 1994 by Administrative Law Judge Robert S. Miller.

HONORABLE ROBERT S. MILLER
ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. EDU 2528-94

J.P. MC C., on behalf of his ward and grandson, S. MC C.,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, including the audio recording of proceedings before the ALJ, the Commissioner concurs that the district's suspension of S. McC., pending full hearing before the Board of Education, was undertaken in a manner that sufficiently met the standard for preliminary due process as appropriate at that point in the suspension proceedings. The Commissioner further concurs that petitioner has failed to meet the standards for appropriate grant of emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), in that, under the circumstances of this matter, S. McC.'s temporary confinement to home instruction does not constitute irreparable harm, and the balance of interests clearly lies with the Board's effort to ensure the safety of students and other children at the school facility.

Accordingly, the initial order of the Office of Administrative Law dismissing the Petition of Appeal, which, it is noted, reaches solely to the suspension imposed pending a plenary hearing undisputedly to occur within the time frame required by law, is affirmed for the reasons expressed by the ALJ in the tape recording of proceedings before him.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 29, 1994

DATE OF MAILING - APRIL 29, 1994

99-94

99-94

M.G.B. (guardian ad litem for minor children D.B. and C.B.), D.B. (mother of D.B. AND C.B.), AND F.B. (mother of K.B.),	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	

APRIL 29, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6835-93
AGENCY DKT. NO. 61-3/93

M.G.B. (GUARDIAN AD LITEM FOR MINOR CHILDREN D.B. AND C.B.), D.B. (MOTHER OF D.B.AND C.B.); AND F.B. (MOTHER OF K.B.),
Petitioner,
v.
CITY OF TRENTON BOARD OF EDUCATION,
Respondent.

M.G.B. and **F.B.**, petitioners, pro se

Charles W. Dortch, Jr., Esq. for respondent (Sumners Council George & Dortch, attorneys)

Record Closed: March 1, 1994 Decided: March 9, 1994

BEFORE **CAROL F. LASKIN**, ALJ, T/A:

On March 19, 1993, F.B., mother of K.B., D.B., mother of D.B. and C.B., and C.C.B., brother of F.B. and D.B. and uncle of their minor children, filed a petition of appeal with the Commissioner of the Department of Education in accordance with *N.J.A.C.* 6:24-1 et seq. The matter was transmitted to the Office of Administrative Law for determination as a contested case on July 21, 1993.

Petitioners' request for adjournment of the initial prehearing conference scheduled for October 1, 1993, was granted. At the initial in-person prehearing conference conducted on November 24, 1993, M.G.B. appeared and represented that she was the guardian ad litem for the minor children D.B., C.B. and K.B. and requested to intervene in this matter. Her request was granted.

An Initial Prehearing Order was issued on December 1, 1993, and all parties were given the opportunity to present their respective positions. After consideration of all the positions and papers submitted, the Final Prehearing Order was entered on December 28, 1993.

Respondent City of Trenton Board of Education (Board), pursuant to the motion calendar in the Prehearing Order, submitted a motion for summary decision requesting that the petition of appeal be dismissed for lack of jurisdiction and/or lack of merit. This motion was denied by Order dated February 25, 1994. Respondent Board also asserted, by motion, that C.C.B. had no legal standing in this matter and that he be dismissed. After consideration of all the papers presented and supporting documentation, brief and submissions, it was ordered on February 25, 1994 that C.C.B. be dismissed as a party for lack of standing.

The parties and C.C.B. appeared at the hearing on March 1, 1993. The parties engaged in extensive settlement discussions wherein C.C.B. was permitted to participate. These discussions were successful and the parties and C.C.B. agreed to settle this matter, executed the settlement agreement, incorporated herein, whose terms were set forth on the record:

After being placed under oath, the parties and C.C.B. stated that they fully understood and consented to all of the terms and conditions of this settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

I hereby **FILE** my initial decision with the Commissioner of the Department of Education for consideration.

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

March 9, 1994
Date

Carol F. Laskin by JS Mann Deputy Director
CAROL F. LASKIN, ALJ, T/A

Receipt Acknowledged:

3/15/94
Date

Hope Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

gjb

May G. Barlow (Guardian ad Litem for minor Children D.B and C.B, Dalphine Barlow (MOTHER of D.B and C.B), FELICIA BARLOW (MOTHER OF K.B),

Petitioners

v.

CITY OF TRENTON BOARD OF EDUCATION

RESPONDENT

OAL DKT NO EDU 6835-93

AGENCY DKT NO 61-3/93

Settlement Agreement

The parties agree to resolve all issues emanating from the above-captioned matter, in the best interest of all the parties and the minor children do hereby agree and state:

1. If there are any outstanding charges arising out of the Complaint(s) of Truancy prosecuted pursuant to NJSA 18A:38-31 against Felicia Barlow, Dalphine Barlow, May G. Barlow or Clinton Barlow during the School year 1992-1993, Respondent will request that the charges be dismissed.

2. Felicia Barlow, Dalphine Barlow and May G. Barlow as parents and guardian ad Litem of minor children attending schools administered by Respondent agree that they will abide by NJSH 18A:38-25 and cause said children to regularly attend the public schools of the district.

M.G.B. CWDB Attorney for Trenton BOE F.A.B

[redacted]

Hearing DKT NO 61-393

6. The signatories to this agreement understand the terms and have voluntarily agreed to the settlement and to place same on the record.

Charles W. Dorton, Jr.
Summers Council George and Dorton
Attorneys
For Respondent Bd of Education
City of Trenton

Mrs. May D. Barlow
For Petition May D Barlow
Guardian ad Litem and
signing for Dalphine Barlow

Felicia Barlow
FELICIA Barlow

Clinton Barlow
Clinton Barlow

3. Respondent agrees to arrange a meeting between Felicia Barlow, Dalphine Barlow, and May G. Barlow with Dr. H. Miyakawa, Assistant Superintendent / Planning Research and Evaluation and Mr. Harry F. Barber, Director of Attendance / Legal Hearings, Student Safety and Community Liaison in an effort to resolve any transportation attendance issues for the calendar year 1993-1994 and to explore other options of assistance for the minor children.

4. The parties ~~agree that~~ and Clinton Barlow agree they they are entering into this agreement in good faith and that there is no admission of liability or wrongdoing by any party.

5. The parties and Clinton Barlow recognize that ~~the~~ Petitioners and Clinton Barlow are not waiving any claims, rights or defenses that can be or have been raised in the following actions: Clinton C. Barlow, et al v Secretary of Department of Health & Human Services, et al 92-5277 (GEB) (NJD), Barlow v Davis et al 93-4381 (AET) (NJD), Barlow v Fauver, et al 91-1691 (MLP) (NJD). Barlow v HUD, et al ~~et~~ 89-2409 (AET) (NJD); State v Barlow Trenton Municipal Ct 92-03994 and State v Barlow & Trenton Municipal Ct 92-03930)

M. G. B.

CWD Jr.
Attorney for Trenton BOE

OAL DKT. NO. EDU 6835-93

M.G.B. (guardian ad litem for minor children D.B. and C.B.), D.B. (mother of D.B. AND C.B.), AND F.B. (mother of K.B.),	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

APRIL 29, 1994

DATE OF MAILING - APRIL 29, 1994

100-94

100-94

RITA M. EBERHARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, riffed Assistant Superintendent, alleged improper abolition of her position. Her first petition in this regard, was filed in 1990, and was appealed to the State Board. Alleging that a memorandum discovered in October 1991 supported her allegations that newly created positions were, in fact, assistant superintendencies, petitioner had filed a motion to supplement the record with the State Board in December 1991 to add this discovery to the record of her first petition. After such motion was denied in March 1993, she then filed a second petition with the Commissioner. Board contended this second petition was untimely since petitioner had "gambled" on a favorable State Board decision and, having lost, was now asking the Commissioner to relax the 90-day filing requirement.

ALJ concurred with Board that second petition was untimely filed pursuant to N.J.A.C. 6:24-1.2(c), noting petitioner relied solely upon State Board for new relief without simultaneously filing with the Commissioner. She waited more than two and a half years after the 1991 memorandum to appeal to the Commissioner. Thus, petition was dismissed as untimely.

Commissioner adopted findings and determination of the ALJ that the petition was untimely and that no sufficient reason was presented to require relaxation of the 90-day rule.

MAY 2, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5121-93

RITA M. EBERHARD,,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

Respondent.

Margaret C. Murphy, Esq., for petitioner

Sydney A. Sayovitz, Esq., for respondent
(Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: March 1, 1994 Decided: March 15, 1994

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

The position of Rita M. Eberhard, a tenured teaching staff member employed by the Board of Education of the Borough of Bergenfield, Bergen County, as assistant superintendent, administration/personnel, was abolished by action of the Board on May 8, 1990 in an administrative reorganization. On June 5, 1990, the Board reassigned her to the position of middle school principal.

In a petition of appeal filed with the Commissioner of the Department of Education on July 20, 1990, she alleged Board action in abolishing her former position was contrary to and in abridgment of her rights under *N.J.S.A.* 18A:28-9. She sought judgment reinstating her for 1990-91 to her former position. The Board admitted the position abolishment but contended it acted in good faith and furtherance of an administrative reorganization. The matter was transmitted to the Office of Administrative Law for hearing as a contested case. Under OAL DKT. No. EDU 6866-90, an administrative law judge upheld Board action as part of an open, deliberate and reasonable administrative reorganization involving a division and re-division of labor among duties of the abolished positions and duties of new positions of assistant to the superintendent and assistant to the school business administrator. The petition was dismissed. The Commissioner affirmed on July 16, 1991. The State Board of Education affirmed the Commissioner on March 3, 1993, noting in footnote its determination to deny plaintiff's motion to supplement the record with a letter from the county superintendent approving use of unrecognized position titles for 1991-92 (P-2) was "without prejudice to petitioner's right to pursue by petition to the Commissioner any separate cause of action arising in the 1991-1992 school year. " (*Slip op.* at 5.) Petitioner's appeal to Superior Court, Appellate Division, is pending.

On April 29, 1993 petitioner filed a new petition before the Commissioner alleging legal titles of the newly-created, unrecognized positions were in fact assistant superintendencies, as she had contended, and not supervisory positions. Noting the State Board's footnoted decision was without prejudice to her right to do so, she sought relief in the new petition from actions of the Board "as they relate to the 1991-1992 school year and forward." She sought judgment immediately reinstating her to her former position as assistant superintendent for administration/personnel, as well as reimbursement for salary lost and emoluments due to her change in positions for the 1991-1992 school year. The Board denied the allegations. The Commissioner transmitted the matter to the Office of Administrative Law on June 1, 1993 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 et seq, under OAL DKT. No. 5121-93.

The matter was submitted to pre-hearing conference of the parties on August 1, 1993 and an order entered. Argument on the Board's motion to dismiss the petition on its affirmative defense of the 90-day time bar of *N.J.A.C.* 6:24-1.2(c) was

set for March 1, 1994. The parties agreed there were no genuine material facts in dispute, the motion therefore being ripe for determination in accordance with *N.J.A.C.* 1:1-12.5. Memoranda of law having been filed, the record closed.

DISCUSSION

Petitioner argued her claim to be restored to the tenured position of assistant superintendent for 1991-92 "and forward" was properly filed and was compliant with the 90-day limiting rule of *N.J.A.C.* 6:24-1.3(c), which provides:

> The petitioner shall file a petition no later than the 90th day from date of receipt of notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The petition, she said, was filed within 90 days of the State Board's action on March 3, 1993 denying her motion to supplement the record of her first petition with a memorandum from the county superintendent of schools to the Bergenfield superintendent on October 29, 1991 (P-2) approving position titles and authorizing certificate endorsements of school administrator and not supervisor. She argued the State Board had "instructed" her to do so, in effect, by its March 3, 1993 footnote. Pm at 19. She said the cause of action was first pleaded in her petition of July 20, 1990, again on December 18, 1991 in her motion to the State Board to supplement the record, then finally, she said, in the instant petition. Finally, it was argued, circumstances require relaxation of 90-day limiting period under *N.J.A.C.* 6:24-1.15, since strict adherence to it is either inappropriate, unneccesary or unjust. Although job descriptions for the new positions were apparently evolving through 1990-91, it was not until the following year in late 1991 petitioner found access to information the Board was changing job duties so as to frustrate her tenure protection.

The Board urged that the present petition was untimely, that petitioner had gambled by resorting to a motion before the State Board to reopen an old petition and lost and that her failure to file a timely new petition was thus an inappropriate candidate for relaxation of the rule under *N.J.A.C.* 6:24-1.15.

What was the action, order or ruling by the Board petitioner is challenging? For answer, one finds it useful and necessary to analyze the cause of action. It seeks to establish the Board designated two new positions as assistants to the superintendent when, for 1991-92, the school year after that complained of in the previous petition, the positions were really assistant superintendencies and not supervisory positions as the Board had claimed. That being the case, said petitioner in the prayer for relief in the present petition, she is entitled to have the Board reinstate her to the former position as assistant superintendent for 1991-92. Although it seems clear from pleadings petitioner's theoretical cause of action supposes Board action was well in progress before and during the 1991-92 school year, and thus actionable, petitioner nonetheless became aware of its wrong only when the county superintendent's October 29, 1991 memorandum was made known to her. By paragraph 7 of her petition, she makes clear the memorandum was both her first notice as well as the smoking gun. It is keystone of her claim.

My view is that petitioner's failure to file her petition before the Commissioner within ninety days of her "receipt of . . . notice . . ., ruling or other action by the district board of education. . ." on October 29, 1991 violated *N.J.A.C.* 6:24-1.3(c). To have done so simultaneously with her motion before the State Board to supplement the old record would require small effort. Instead, she elected to rely for new relief solely upon the State Board. There appears, from this record, no rational reason to withhold the new appeal to the Commissioner for two and a half years. Nor does it appear, in my view, that petitioner's resort to the State Board without immediately filing a new petition warrants relaxation of the time bar. As argued by the Board, petitioner gambled on a favorable State Board decision and, having lost, asks this forum to reward the gamble. I reject the notion the State Board "directed" petitioner to file the present petition, which it said is a "separate cause of action." *Cf. Riley v. Hunterdon Central BOE*, 173 *N.J. Super* 109, 114 (*App. Div.* 1980); *North Plainfield Education Association* v. *North Plainfield BOE, 96 N.J.* 587 (1984). No competent reason has been presented for relaxation of rule. *Cf. Cwierko v. Bd. of Ed. Jersey City*, 1988 *S.L.D.* 318, 324-6.

CONCLUSION

Based upon the foregoing, I **CONCLUDE** (1) the petition of appeal is untimely for not having been filed within ninety days of notice of Board action complained of, under *N.J.A.C.* 6:24-1.3(c); and (2) no reason is presented sufficient to require relaxation of rule under *N.J.A.C.* 6:24-1.15. Summary decision in favor of the Board on its motion to that effect on its second affirmative defense is **GRANTED**. The petition of appeal is **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 15, 1994
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

3/18/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 1994
Date

OFFICE OF ADMINISTRATIVE LAW

sej

EXHIBITS:

P-1 Letter of Bergenfield superintendent to Bergen County superintendent dated June 19, 1991, with attachments.

P-2 Memorandum of Bergen County acting superintendent to Bergenfield superintendent dated October 29, 1991.

R-1 Affidavit of Richard Cirelli, assistant to Bergenfield superintendent dated January 31, 1994, with attachments.

Pm Petitioner's memorandum of law.

Rm Board's memorandum of law.

RITA M. EBERHARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions aver, inter alia, that in the interest of justice she should not be denied a hearing because her counsel, in good faith, may have chosen the wrong forum within the Department of Education in which to pursue her remedies. Petitioner argues

> ***The memorandum pointed to the strong possibility that the duties of the positions had been changed at some time during the 1990-91 school year, but almost certainly by October 29, 1991. Thus, this was seen not as a separate claim, but a continuation of the claim that had already been filed. (See Delk v. Bd. of Ed. of the Boro. of Pemberton, 1986 S.L.D. 2111, 2136; 90-day rule should be relaxed where it promotes judicial economy and eliminates the need for costly litigation.)
>
> Counsel, not the client, made the decision to file a Motion to supplement the record. If that decision was in error, it was not an attempt to get around the 90-day rule as the State Board

(which had juisdiction at that time) and the local Board received notice of the discovery of the new evidence almost immediately. See In the Matter of the Tenure Hearing of Pellagatti, S.B. #28-92 (October 8, 1992) at 2.***See also Krupp v. Bd. of Ed. of Union County Regional High School District, 1991 S.L.D. 2568.***

***Mrs. Eberhard has not delayed in asserting her claim; she has merely chosen the wrong forum (within the Department of Education) in good faith. Once the State Board decision was rendered, she promptly filed the instant petition. In addition, as the Board was immediately notified of her claim by way of the Motion to supplement the record, there can be no claim of prejudice to the Board.

(Petitioner's Exceptions, at pp. 4-5)

Petitioner further assets that she should not be deprived of her right to a hearing on her claim as a result of the State Board's excessive delay in rendering a decision on her motion. She contends that if the State Board had acted in a reasonably timely manner, for example within 45 days, she would have been able to file a second petition before the Commissioner within the 90-day timeframe.

The Board's reply exceptions urge that petitioner's argument that the 90-day limitation period should be relaxed, in the interest of justice, because her counsel chose the wrong forum with which to file is meritless. It avers

***Soon after October 29, 1991, Petitioner's counsel became aware of a memorandum from the County Superintendent of Schools. ***Petitioner filed a Notice of Motion to Supplement the Record on December 17, 1991. The Board of Education filed a Brief in opposition to the Motion on January 9, 1992. In its Brief, the Board argued that the Motion to Supplement the Record should be denied because the new evidence (i.e. the 10/29/91 memorandum) concerned a different school year from that in Eberhard I. This argument became the basis of the State Board of Education's decision on March 3, 1993 denying the Motion to Supplement the Record. Accordingly, although Petitioner learned on or about March 3,

> 1993 that the October 29, 1991 memorandum could not supplement the record in Eberhard I, counsel was on notice in January, 1992 that there were strong arguments mitigating against the Motion to Supplement the Record. Rather than file a second petition in January 1992, within the ninety day limitations period following the October 29, 1991 memorandum, Petitioner's counsel simply chose to wait. In fact, the wait continued until April 30, 1993, nearly sixteen months after Petitioner was put on notice that its Motion to Supplement the Record had potential deficiencies.***
>
> (Board's Reply Exceptions, at pp. 4-5)

The Board further urges that petitioner's assertion that it was not prejudiced by her filing a second petition more than 18 months after the October 29, 1991 memorandum is wholly erroneous.

> ***The Board of Education herewith is being asked to defend actions and events of the 1991-92 school year. Both the Superintendent of Schools and the School Business Administrator employed by the Board of Education during the 1991-92 school year have left the Bergenfield public school system. Memories of the events are now two and one half years old or longer. With the appeal of Bergenfield I still pending in the Appellate Division and a second petition filed herein, the Board of Education has been litigating this matter for years at a considerable expense to the public. The Board of Education is entitled to finality where appropriate. The ninety day limitations period grants such finality, and no sufficient justification has been presented by Petitioner to require that the Board of Education participate in additional hearings on a matter that has been litigated over and over.***
>
> (Board's Reply Exceptions, at pp. 5-6)

Upon a careful and independent review of the record in this matter, including the exceptions advanced by the parties, the Commissioner finds petitioner's exceptions unpersuasive and agrees with the findings and conclusions of the Administrative Law Judge that the instant Petition of Appeal is untimely pursuant to N.J.A.C. 6:24-1.2(c). The Commissioner further concurs with the ALJ that no

sufficient reason has been presented to require the relaxation of the rule under N.J.A.C. 6:24-1.15.

Petitioner's apparent belief that the Motion to Supplement the Record she filed before the State Board on December 18, 1991 preserved, or should have preserved, her right to file a second petition before the Commissioner some 16 months after her cause of action in October 1991 cannot be justified under the circumstances existing in this matter. The Commissioner further notes that given that the State Board is not bound by any statutory or regulatory timelines for the issuing of its decisions, parties cannot reasonably rely on, or claim prejudice as a result of, the issuance date of any State Board decision.

Accordingly, the recommended decision of the Office of Administrative Law is adopted for the reasons stated therein. Summary decision is hereby granted to the Board and the within Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

MAY 2, 1994

DATE OF MAILING - MAY 2, 1994

101-94

101-94

RALPH CUTRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured teacher, challenged Board's refusal to rescind its acceptance of his resignation rendered on December 1, 1991 and accepted by the Board on December 16, 1991 effective July 1, 1992. Petitioner attempted to take advantage of new retirement incentive effective July 1994 between retiring employees and the Association.

ALJ found petitioner's resignation was duly accepted by the Board. In the absence of a declaration of invalidity of the collective bargaining agreement which governed petitioner's retirement by a court of competent jurisdiction or, in the alternative, by an administrative agency having subject matter jurisdiction, no authority resides in the Commissioner of Education to determine the invalidity of such agreement between respondent and the Association. ALJ denied petitioner's request to rescind his resignation and other relief and ordered the petition dismissed.

Commissioner adopted findings and determination in initial decision.

MAY 2, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7806-92

AGENCY DKT. NO. 409-8/92

RALPH CUTRO,

Petitioner,

v.

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

Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Rosen, Cavanagh, and Uliano, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross & McDonough, attorneys)

Record Closed: February 1, 1994 Decided: March 18, 1994

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the refusal by respondent to rescind its acceptance of his resignation as a tenured teacher effective July 1, 1992, and he seeks a determination that he is entitled to the benefit of language in a certain collective bargaining

agreement, as amended, regarding retirement, and restoration of lost salary and benefits resulting from respondent's refusal to rescind the acceptance of his resignation. The matter was transmitted to the Office of Administrative Law (OAL) on October 7, 1992 for hearing as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned administrative law judge on December 7, 1992 and a telephone prehearing conference was scheduled for January 13, 1993. At the telephone prehearing conference, the attorneys requested that the matter be converted to a status conference, and they agreed to confer and prepare a stipulation of undisputed facts and further agreed to attempt to settle the matter. A telephone prehearing conference was scheduled for March 11, 1993.

On March 11, 1993, the telephone prehearing conference was again converted to a status conference and the parties agreed to submit a stipulation of undisputed facts within 30 days. The parties further agreed to submit affidavits as to additional relevant facts within 30 days thereafter with the opportunity to submit responding affidavits within a further additional period. A briefing schedule was agreed upon whereupon the record was closed. The record closed on February 1,1994.

FACTUAL DISCUSSION

The parties to this proceeding stipulated to the facts set forth in a Stipulation of Facts numbering 23 paragraphs (Exhibit J-1) and to the Exhibits annexed thereto. These stipulated facts may be summarized as follows:

Respondent, Hazlet Township Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 to -29. The Hazlet Township Teachers Association (Association) is the recognized majority representative for all non-supervisory certificated teaching staff members employed by respondent. Respondent and the Association are parties to a collective negotiations agreement which expires on June 30, 1994 (Exhibit A).

Petitioner was employed by the Board as a teaching staff member from September, 1969 through July 1, 1992. During the course of his employment by the Board, petitioner accumulated 160 days of sick leave.

On October 3, 1991, respondent and the Association signed a Memorandum of Agreement ("Memorandum") reflecting the current collective negotiations agreement. The Memorandum contained a retirement incentive which was included in the current collective negotiations agreement. Specifically, Article X, *Retirement Sick Leave*, provided in pertinent part:

> 2. Any teacher seeking an effective retirement date between October 3, 1991 and June 30, 1992, who notifies the Board of such retirement between October 3, 1991 and December 31, 1991, shall be entitled to be paid $150 per day for accumulated sick leave up to a maximum of fifty (50) percent of the employee's last annual salary. Teachers whose unused sick days exceed fifty percent of their annual salary will be compensated at a rate of $25 per day for each remaining day of accumulated sick leave. Payments under these terms shall be made by the Board of Education in two equal installments in July, 1992 and July, 1993.

On November 19, 1991, respondent's Secretary/School Business Administrator, Paul Sparta, circulated a memorandum to all members of the Hazlet Township Teacher's Association (Exhibit B). On December 1, 1991, petitioner submitted his resignation to the Board (Exhibit C). On December 16, 1992, the Board accepted petitioner's resignation by resolution (Exhibit D).

Thereafter, the Board received a memorandum dated December 12,1991 from Margaret McMahon, Director of the Division of Pensions concerning local early retirement incentive programs. On February 5, 1992, Malachi J. Kenney, Esq., wrote to Ms. McMahon seeking clarification of the December 12, 1991 memorandum. Mr. Kenney advised the Division of Pensions that the Board needed a determination as to the program's validity by March 13, 1992 because the Board and its employees had to

know whether the negotiated sick leave reimbursement program could be implemented in the 1991-92 school year. (Exhibit F).

On March 17, 1992, Mr. Kenney again wrote to Ms. McMahon advising her that as the Board had not received a response from the Division of Pensions by March 13, 1992 (Exhibit G), the Board and the Association would implement the negotiated contractual provisions pertaining to retirement sick leave.

In a letter dated March 15, 1992, Thomas P. Bryan, Executive Assistant at the Division of Pensions responded to the Board's inquiry and rendered an opinion of the Division (Exhibit H).

In response to the Division of Pensions letter, the Board and the Association met to negotiate a change to the previously agreed upon language. The following amendment to the Collective Bargaining Agreement was agreed upon:

> **WHEREAS**, as part of the Agreement, the parties had included a provision which reduced the payment for retirement/sick leave commencing July 1, 1992 (See Section E(2) & (3)); and
>
> **WHEREAS,** March 25, 1992, the parties were informed by the Executive Assistant to the Director of the Division of Pensions that paying higher benefits under a retirement sick leave program only to employees who retire within a specific time frame may not be valid; and
>
> **WHEREAS**, the parties which to validate these provisions concerning retirement/sick leave payments to employees, pursuant to the letter issued by the Division of Pensions,
>
> **NOW, THEREFORE, IT IS HEREBY AGREED**, subject to ratification by each side, as follows:
>
> The Hazlet Township Board of Education and the Hazlet Teachers association hereby agree to amend Article 10(E) to read as follows:

> 1. Any teacher seeking an effective retirement shall be entitled to be paid $150 per day for any accumulated sick leave up to a maximum of fifty (50) percent of the employee's last annual salary. Teachers whose unused sick days exceed fifty (50) percent of their annual salary will be compensated at a rate of 25.00 per day for each remaining day of accumulated sick leave. Payments under these terms shall be made by the Board of Education in two equal installments in July, 1992, July, 1993 or July, 1994. Notification for retirement must be submitted to the Board of Education on or before December 1 of the school year prior to the date of retirement, so the funds can be budgeted and paid during the school year of retirement, or payment shall be deferred until July of the following school year. . .
>
> **IT IS FURTHER AGREED** between the parties that individuals who have submitted letters of retirement to the Board of Education and which the Board has accepted for the 1991-92 school year shall not be permitted to rescind their retirements. Those employees shall be paid pursuant to the terms of the original agreement which is not altered by this amendment. (*See*, Exhibit I).

The foregoing amendment permitted the Board to maintain its original budgetary goals for 1992-93 and allowed additional employees to seek the sick leave pay out in future years.

During the April 13, 1992 meeting of the Board of Education, petitioner, through his attorney, Alicia Cutro, requested that he be allowed to rescind his retirement prior to the adopting of the amendment to the Collective Bargaining Agreement. (Exhibit J). In a letter dated April 17, 1992, Harry Camwell, Association President, informed Mr. Sparta that the Association, by a vote of the General Membership of the Executive Board, had ratified both the Amendment and the Side Bar Agreement (Exhibit K). The Board ratified the same amendment to the Memorandum of Agreement which was ratified by the Association at the Board's April 27, 1992 meeting (Exhibit L).

Upon retirement, petitioner received a check in excess of $8,000 after deductions representing compensation for his half of his accumulated sick days. On

July 28, 1992, petitioner deposited the check issued to him by the Board for his accumulated sick days in Corestates National Bank.

In a letter dated May 12, 1992, Alicia Cutro contacted Michael Cleffi, Superintendent of Schools, advising him that she represented petitioner and requesting that Mr. Cleffi contact her to discuss Mr. Cutro's retirement (Exhibit M). In a letter dated May 26, 1992 to petitioner's attorney, the Board's attorney stated that the district had no legal obligation to accept Mr. Cutro's request to rescind his retirement (Exhibit N). On August 19, 1992, petitioner filed a Verified Petition of Appeal with the Commissioner. The Board submitted its Answer to the Verified Petition on September 14, 1992.

In addition to the stipulated facts, petitioner submitted an affidavit (Exhibit P-2) in which he set forth the difference in his pension payments which resulted from the failure of respondent to allow him to withdraw his resignation and commence his retirement at the conclusion of the 1994 school year.

LEGAL DISCUSSION AND ANALYSIS

Summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, clearly show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.*. 1:1-12.5(b); *Templeton v. Glen Rock,* 11 *N.J.* Super. 1, 4 (App. Div. 1950).

As a general rule, acceptance of a resignation of an officer by the individual or body authorized to accept it terminates the officer's term of office, and a withdrawal of the resignation is ineffectual after its acceptance. *Andrews v. Lamb*, 136 *N.J.L.* 548 (Sup. Ct. 1948). Where the resignation of an officer has become complete by acceptance, it cannot then be withdrawn even with the consent of the person or body authorized to accept it. *Id.* at 550-551.

On the other hand, it is well established that a resignation maybe withdrawn before it is accepted. *Kozak v. Board of Education of the Township of Waterford*, 1976 *S.L.D.* 633.

In this matter, petitioner relies upon *Evaul v. Board of Ed. City of Camden*, 35 *N.J.* 244 (1961). In that matter, a teacher submitted her resignation at a time when she was shocked and emotionally distressed. Her written resignation was accepted at a special meeting of the Board of Education scheduled later that same day. The teacher was unaware of the scheduling of this special meeting. The court indicated that it was clear that the submission of this resignation was an impetuous act prompted by the teacher's distraught condition. Linked to this chain of events, was the fortuitous circumstance that a special meeting of the school board, unknown to the teacher, had been previously scheduled for the same day. But for this chain of events, the teacher's attempted rescission of her resignation two days later would have been effective. The court found that in the unusual circumstances of the matter, it is unduly harsh for appellant to lose her tenure and seniority rights and ordered the teacher to be reinstated.

In *Hall v. Board of Education of the Township of Jefferson*, 125 *N.J.* 299 (1991), the Board of Education refused to allow a tenured teacher who had submitted her resignation pursuant to a contractual retirement benefits program to rescind her resignation or to extend her date of retirement. In that case, the court applied principals of contract law in order to determine whether the teacher should be permitted to rescind her resignation. It found that the collective bargaining agreement between the teachers representative and the board provided for a teacher to submit a "notice of intent to retire". However, the court indicated that the agreement did not suggest the legal effect of such notice or whether it could be modified. It indicated that where contract terms are unspecified or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties. Since the past practice of the Board of Education had been to permit employees to rescind their notices of intent to retire, it

would not permit the Board of Education to impose new conditions without any justification and in conflict with past practice.

I find that the facts in *Evaul* and in *Hall* are not analogous to those in this matter. However, that is clear from the above statements of the law by the Supreme Court in these two cases is that, in the absence of statutory provisions dealing with the effect of resignations and their rescission, principals of contract law are applicable.

Rescission is an equitable remedy and is only available in limited circumstances; contracts may only be rescinded when there is original invalidity, fraud, failure of consideration or a material breach or default. *Hilton Hotels, Corp. v. Piper Co.,* 214 *N.J. Super.* 328, 336 (Ch. Div. 1986). In this matter, petitioner's resignation was submitted on December 1, 1991 and respondent formally accepted it on December 16, 1991. It was only when the amendment to the collective bargaining agreement was discussed in April 1982, and executed in May 1992, that petitioner sought to rescind his resignation. Essentially petitioner is seeking to rescind his resignation because an amendment to the collective bargaining agreement was subsequently negotiated for other members of his former bargaining unit, which specifically excluded him and any other employees who had previously resigned. The affidavit of petitioner (P-2) shows that if petitioner had been permitted to rescind his resignation and commence retirement at the conclusion of the 1994 school year, he would have been entitled to a substantial annual increase in his pension.

There has been no claim on the part of petitioner that the original collective bargaining agreement was somehow tainted by fraud, that there was a failure of consideration or that there has been any material breach or default. Petitioner's petition does allege in paragraph 4 that the respondent determined that the provision in question "was clearly identified as a retirement incentive [and] could well violate sailent law of the State of New Jersey". This assertion was denied by respondent in its Answer. In paragraph 6 of his petition, petitioner contends that "the original clause having been determined to be inappropriate or potentially voidable by the respondent entitled him to rescind his resignation and utilize the extended date contained in the

amended language." In its Answer, respondent indicated that it can neither admit nor deny this allegation since these are legal conclusions and not statements of fact, but denied that the original provision agreed upon by respondent and the Association was determined to be inappropriate or potential voidable.

In the present case, there is no question that the Board and the Association are authorized to negotiate and enter into a collective bargaining agreement which provides for a formula to pay a retiring employee for unused sick leave. However, the Supreme Court has indicated that local school boards are without power to authorize the payment of non-service related retirement benefits as an incentive for retirement. *Fairlawn Ed. Assn. v. Fairlawn Bd. of Education,* 79 *N.J.* 574 (1979).

Assuming for the purpose of argument that the provisions of the original collective bargaining agreement between respondent and the Association violates the dictates of the *Fairlawn* case, what impact does that have on this matter? As a general rule, administrative agencies may not, by reason of their administrative powers, exercise judicial powers or control or interfere with the courts in the exercise of their judicial functions. 73 *C.J.S., Public Administrative Law and Procedure* §48, pp. 490-492. Only the courts have the authority and power to determine that a contract is invalid. It has been established since early times that administrative agencies cannot exercise judicial power. *Weeks v. Forman*, 16 *N.J. L.* 237 (Sup. Ct. 1837). This is in conformity with the New Jersey Constitution. *N.J. Const. Art.* 3, ¶1; Art. 6, §1 ¶1. See *Caldwell Terrace v. Borough of Caldwell,* 224 *N.J. Super.* 588 (App. Div. 1988). In the absence of a declaration of invalidity by a court of competent jurisdiction, or, in the alternative, by an administrative agency having subject matter jurisdiction, no authority resides in the Commissioner of Education to determine the invalidity of the collective bargaining agreement between respondent and the Association. In the absence of such a determination, I **FIND** that petitioner is not entitled to the relief which he seeks, which is an order requiring respondent to rescind its acceptance of his resignation. Therefore I **CONCLUDE** that petitioner's petition should be **DISMISSED**.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that petitioner's request to be permitted to rescind his resignation and for the other relief sought in his petition, is hereby **DENIED** and petitioner's petition is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor, West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 18, 1994
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

3/21/94
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 25 1994
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF EXHIBITS

J-1 Stipulation of Facts with attached exhibits

P-1 Letter Memorandum on behalf of petitioner

P-2 Affidavit of Ralph Cutro

R-1 Respondent's brief in support of motion

R-2 Notice of Motion

R-3 Affidavit of Paul Sparta with attachments

OAL DKT. NO. EDU 7806-92

RALPH CUTRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record, the Commissioner finds petitioner's exceptions without merit and concurs with the findings and conclusions of the Administrative Law Judge in his initial decision for the reasons clearly articulated by him therein.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

MAY 2, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 2, 1994

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EDU #7806-92
C # 101-94
SB # 29-94

RALPH CUTRO, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, May 2, 1994

For the Petitioner-Appellant, Ralph Cutro, pro se

For the Respondent-Respondent, Kenney, Gross & McDonough
(Michael J. Gross, Esq., of Counsel)

As stipulated by the parties, Ralph Cutro (hereinafter "petitioner") was employed by the Board of Education of the Township of Hazlet (hereinafter "Board") as a teaching staff member from September 1969 through June 1992. During the course of his employment, petitioner accumulated 160 days of sick leave. On October 3, 1991, the Board and the Hazlet Township Teachers Association ("Association") signed a Memorandum of Agreement reflecting the terms of their collective bargaining agreement. That Memorandum contained a retirement incentive, included in the collective bargaining agreement, which allowed a teacher seeking to retire between October 3, 1991 and June 30, 1992 to be paid $150 per day for accumulated sick leave

7/2/97

up to a maximum of fifty percent of the employee's last annual salary. In order to participate in this sick leave payout program, teachers were required to give notice of their retirement to the Board by December 31, 1991.

On December 1, 1991, petitioner submitted notice to the Board that he planned to retire at the end of the 1991-92 school year. The Board accepted petitioner's retirement on December 16, 1991.

Thereafter, the Board received a memorandum dated December 12, 1991 from the Director of the State Division of Pensions cautioning local employers that they were not authorized to offer early retirement incentive programs to their employees unless the programs were specifically authorized by state law. The counsel for the Board wrote to the Division of Pensions seeking clarification of that memorandum. In a letter dated March 25, 1992, the Executive Assistant at the Division of Pensions responded that, in the opinion of the Division, sick leave payout programs upon retirement were generally valid, but that programs paying significantly higher benefits to employees retiring within a specific time frame were invalid.

In response to that letter, the Board and the Association agreed in April 1992 to amend their collective bargaining agreement so as to extend the sick leave payout program to any teacher retiring during the term of that agreement.[1] They further agreed that teachers who had submitted letters of retirement to the Board for the 1991-92 school year would not be permitted to rescind their retirements and would be paid according to the terms of the original agreement, which had not been altered by the amendment.

[1] The collective bargaining agreement at issue was in effect from July 1, 1991 through June 30, 1994.

On April 13, 1992, petitioner requested that he be permitted to rescind his retirement. In a letter dated May 26, 1992, the counsel for the Board responded that the Board had no legal obligation to accept petitioner's request. Upon retirement, petitioner received a check from the Board in excess of $8,000 after deductions representing compensation for his accumulated sick days.

Petitioner filed a petition of appeal with the Commissioner of Education, challenging the Board's refusal to allow him to rescind his retirement. Petitioner submitted an affidavit in which he averred that if he had been permitted to rescind his retirement and to retire instead at the conclusion of the 1993-94 school year, his pension payments would have increased by $2,725 per year as a result of an increase in his base salary between 1991-92 and 1993-94.

On March 18, 1994, the Administrative Law Judge ("ALJ") recommended dismissing the petition, stressing that rescission was an equitable remedy which was only available in limited circumstances. Citing Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Education, 79 N.J. 574 (1979), the ALJ observed that local school boards were without power to authorize the payment of non-service related retirement benefits as an incentive for retirement. He concluded that, "[i]n the absence of a declaration of invalidity by a court of competent jurisdiction, or, in the alternative, by an administrative agency having subject matter jurisdiction, no authority resides in the Commissioner of Education to determine the invalidity of the collective bargaining agreement...." Initial Decision, slip op. at 9. In the absence of such a determination, the ALJ concluded that petitioner had no entitlement to the relief sought. In so doing, the ALJ rejected petitioner's reliance on Hall v. Board of Educ., 125 N.J. 299 (1991) and Evaul v. Board

of Education of City of Camden, 35 N.J. 244 (1961), in which the Court had permitted teaching staff members to rescind their retirements, finding that the facts in those cases were not analogous to this matter.

On May 2, 1994, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition.

Petitioner, acting pro se, has filed the instant appeal to the State Board.

After a thorough review of the record, we affirm the ultimate determination of the Commissioner to dismiss the petition. However, we modify the Commissioner's analysis.

We reject the Commissioner's adoption of the ALJ's conclusion that, in the absence of a determination by a court or an administrative agency having subject matter jurisdiction that the sick leave payout program in effect at the time of his retirement had been "invalid," petitioner could have no entitlement to the relief sought. The issue herein is not whether the sick leave payout program in effect at the time petitioner exercised his rights thereunder would have been honored by the Division of Pensions, but, rather, whether the school laws provide petitioner with the entitlement to rescind his retirement under the particular circumstances in the record before us. While it is well settled that a tendered resignation is legally binding upon acceptance by a district board of education, and cannot thereafter be unilaterally rescinded or modified by the staff member, equitable circumstances may warrant rescission. Hall, supra; Evaul, supra.

In Hall, the Supreme Court, emphasizing the narrow scope of its decision, held that the district board therein was not entitled under the particular circumstances in that

case to deny the staff member's request to change her intended retirement date. The majority's decision was predicated on an "ambiguous contractual provision" in the collective bargaining agreement and "a consistent, longstanding practice [by the district board] of permitting modification of an intended retirement date." Hall, supra, at 306.

In Evaul, a tenured teacher with 25 years of service in the district tendered her resignation at the end of an emotional day in which she had a tumultuous confrontation with her principal, superintendent and board president. Unbeknownst to the petitioner therein, the board had scheduled a special meeting for that evening, at which time her resignation was accepted. After learning of the meeting, she sent telegrams to the board, superintendent and board president attempting to rescind her resignation. The Court, in reinstating petitioner on equitable principles, viewed her resignation as "an impetuous act prompted by her understandably distraught condition." Evaul, supra, at 249.

We find nothing in the circumstances of the case before us that would obligate the Board to accept petitioner's proposed rescission of his retirement. The record reveals a negotiated agreement between the Board and the Teachers Association, subsequent to the Board's acceptance of petitioner's retirement, to amend their collective bargaining agreement so as to extend the sick leave payout program to any teachers retiring during the term of that agreement. Such amendment, as previously noted, was predicated on a general "opinion" offered by the Division of Pensions that sick leave payout programs paying significantly higher benefits to employees retiring within a specific time frame were "invalid." There has been no determination that the particular sick leave payout program in effect at the time petitioner exercised his rights

thereunder would not have been honored by the Division of Pensions. Nor did the amendment to the collective bargaining agreement modify the substance of that program or alter the benefits to which petitioner was entitled under the agreement upon retirement. The amendment simply extended the program for the duration of the agreement.

In this respect, we stress that the Hazlet Township Teachers Association, which was the recognized majority representative for all non-supervisory certificated teaching staff members employed by the Board, Stipulation of Facts, at 1, agreed to amend the collective bargaining agreement so as to include a provision that staff members who had submitted letters of retirement for the 1991-92 school year would not be permitted to rescind their retirements.

Under these circumstances, we find no basis under the education laws for directing the Board to release petitioner from his bargain.

Accordingly, under the particular facts in the record before us, we affirm, as modified herein, the decision of the Commissioner to dismiss the petition.

Exceptions are noted.

July 2, 1997

Date of mailing JUL 08 1997

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TINA-JILL GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 2, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL WITH PREJUDICE
OAL DKT. NO.EDU 8085-93
AGENCY DKT. NO.277-7/93

TINA-JILL GORDON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE,
Respondent.

Tina-Jill Gordon, petitioner, pro se

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorney)

Record Closed: March 11, 1994 Decided: March 17, 1994

BEFORE **JAYNEE LaVECCHIA**, CHIEF ALJ,:

This matter was transmitted to the Office of Administrative Law on August 26, 1993 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was conducted on January 26, 1994 at which time the parties communicated that settlement discussions were ongoing. On March 1, 1994, the undersigned was informed that the parties have amicably resolved the matter and the hearing date of March 7, 1994 was adjourned. The attached Stipulation of Dismissal prepared by the parties was received on March 11, 1994 at which time the record in this matter closed.

I hereby **FILE** my initial decision with the Commissioner of the Department of Education for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the Commissioner of the Department of Education, 225 East State Street, CN 500, Trenton, New Jersey 08625 marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/17/94
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, Chief ALJ,

Receipt Acknowledged:

3/21/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMIN. LAW
MAR 11 10 34 AM '94

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600
Attorneys for Respondent

TINA-JILL GORDON,	: OFFICE OF ADMINISTRATIVE LAW
Petitioner,	: OAL DOCKET NO. EDU-08085-93 : AGENCY DKT. NO. 277-7/93
vs.	: CIVIL ACTION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE,	: **STIPULATION OF DISMISSAL**
Respondent.	:

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs against either party.

Dated: February 28, 1994

By: _____
Nathanya G. Simon, Esq.
Attorney for Respondent
3/8/94

By: _____
Tina-Jill Gordon
Pro Se

February 25, 1994
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Attorneys for Respondent

TINA-JILL GORDON,	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DOCKET NO. EDU-08085-93
vs.	AGENCY DKT. NO. 277-7/93
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE,	CIVIL ACTION
Respondent.	**STIPULATION OF DISMISSAL**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs against either party.

Dated: February 28, 1994

By: _____
Nathanya G. Simon, Esq.
Attorney for Respondent
3/8/94

By: Tina-Jill Gordon
Tina-Jill Gordon
Pro Se

February 25, 1994
MM:NGS\PLDS\GORDON.STP

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OAL DKT. NO. EDU 8085-93

TINA-JILL GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal based on a joint stipulation of dismissal of the parties transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before her and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 2, 1994

DATE OF MAILING - MAY 2, 1994

104-94

104-94

IN THE MATTER OF THE TENURE	:	
HEARING OF PHILIP STEIN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF LINDEN,	:	DECISION
UNION COUNTY.	:	
	:	
	:	

MAY 4, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT

OAL DKT. NO. EDU 6834-93

SCHOOL DISTRICT OF THE
CITY OF LINDEN, UNION COUNTY,,
Petitioner,
v.
PHILIP STEIN,
Respondent.

Howard Schwartz, Esq., for petitioner
(Schwartz & Barkin, attorneys)

Michael T. Barrett, Esq., for respondent
(Bergman & Barrett, attorneys)

Record Closed: March 8, 1994 Decided: March 25, 1994

BEFORE **ARNOLD SAMUELS**, ALJ:

On May 28, 1993 the petitioner, school district of the city of Linden, filed a certificate of determination and written charges against the respondent, pursuant to *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6:24-5.1 et seq., seeking his dismissal from his tenured position, because of alleged unbecoming conduct, incapacity or

other just cause. The petitioner filed an answer with the Commissioner of Education on July 19, 1993.

On July 21, 1993 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held at the OAL on October 27, 1993, and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was scheduled for April 18, 19, and 20, 1994.

On December 27, 1993 the respondent filed a motion for an order requiring the petitioner to reinstate payment of respondent's salary and benefits, pursuant to *N.J.S.A.* 18A:6-14. Papers in opposition to the motion were filed by the petitioner, and the Board moved for leave to take oral depositions of the respondent. Oral argument was heard on the parties' applications on January 21, 1994 at the OAL in Newark, New Jersey. After considering the papers filed and the argument of counsel, orders were rendered, orally, denying the petitioner's application to take oral depositions of the respondent, and ordering the resumption of salary payments and benefits by the petitioner to respondent in accordance with the requirements of *N.J.S.A.* 18A:6-14. A written order, confirming the above, was to have been prepared and submitted by counsel for signature.

Prior to the scheduled hearing dates counsel advised that the parties had agreed to a settlement. On March 8 , 1994 a written agreement, signed by the parties and counsel for the respondent was filed in the OAL. A copy of the document is attached hereto and made apart hereof.

Based on the foregoing, It is **CONCLUDED** that the dispute has been resolved. Since the settlement includes, as one its terms, a resignation by the respondent for purposes of retirement, the petitioner no longer needs or wishes to continue this action, directed against the respondent's employment on tenure charges. In addition, a further term of the agreement indicates that the settlement is expressly subject to approval by the Commissioner of Education.

Therefore, I **ORDER** that this matter be returned to the agency for appropriate disposition.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 25, 1994
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

March 28, 1994
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 31 1994
Date

OFFICE OF ADMINISTRATIVE LAW

sej

SCHWARTZ & BARKIN
Attorneys at Law
Ideal Professional Park
2333 Morris Avenue, Suite C-4
P.O. Box 1339
Union, New Jersey 07083-1339
(908) 688-1644 FAX: (908) 688-9530

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
MAR 22 11 12 AM '94

HOWARD SCHWARTZ
ALLEN J. BARKIN*
GAIL J. MITCHELL
KIMARIE RAHILL McDONALD
LORI A. ANDREOSKY+

*Also a member of the Alabama and Georgia Bars
+Also a member of the Pennsylvania Bar

March 18, 1994

File No. 3130-28

Honorable Arnold Samuels, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

RE: Stein v. Linden Board of Education
OAL Docket No. EDU 06834-93N

Dear Judge Samuels:

A short time ago, on or about March 4, 1994, we forwarded to you a proposed Settlement Agreement in the above matter.

It is requested that this matter be dealt with as expeditiously as possible so that in the event the Commissioner does approve the settlement, which we all request, it can be done prior to June 30, 1994. This would be beneficial to the Board of Education as well as to Mr. Stein.

Therefore, I am asking that an initial decision incorporating the terms of the settlement be issued as quickly as possible.

Thank you for your courtesies.

Respectfully yours,

HOWARD SCHWARTZ

HS:na
cc: Michael T. Barrett, Esq.

Mr. Anthony Del Sordi
Board Secretary

Schwartz & Barkin
2333 Morris Avenue
Suite C-4
P.O. Box 1339
Union, New Jersey 07083
(908) 688-1644
File No. 3130-28
Attorneys for Petitioner

Filed March 8, 1994
OAL

IN THE MATTER OF THE TENURE HEARING OF PHILIP STEIN, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION Docket No. EDU 06834-93 N SETTLEMENT AGREEMENT

WHEREAS, tenure charges were certified by the Petitioner against Respondent on or about May 28, 1993; and

WHEREAS, Respondent has not been receiving salary from Petitioner since on or about January 1, 1993; and

WHEREAS, A.L.J. Arnold Samuels has ruled in response to a motion by Respondent that he is entitled to salary for and after 120 days after the date of suspension pursuant to N.J.S.A. 18A:6-14; and

WHEREAS, the parties are now desirous of resolving their differences.

NOW THEREFORE, it is agreed as follows:

1. Petitioner agrees to compensate Respondent for 13 months, those months being April 1, 1993 through June 30, 1993 and September 1, 1993 and terminating on June 30, 1994.

2. Respondent shall be compensated, retroactively, 3 months salary for April 1, 1993 through June 30, 1993 at the annual rate of $61,408.00, and from September 1, 1993 through June 30, 1994 his salary shall be at the rate of $63,825.00.

3. Petitioner shall pay health insurance premiums for Respondent through June 30, 1994.

4. Respondent is not entitled to and is not accruing any other benefits from Petitioner.

5. Respondent shall execute a resignation for the purpose of retirement, effective June 30, 1994 and deposit same with his attorneys who are to deliver to Petitioner's attorney, so long as all payments provided for herein are paid. The form of resignation for the purpose of retirement is annexed hereto as Exhibit A.

6. All of the terms of this agreement are expressly made subject to approval by the Commissioner of Education.

WITNESS:

Michael T. Barrett, Esq.
An Attorney at Law of New Jersey

Philip Stein

ATTEST:

Anthony Del Sordi
Board Secretary

LINDEN BOARD OF EDUCATION

By: Stanley Baykowski
Stanley Baykowski
President

RESIGNATION FOR THE PURPOSE OF RETIRMENT

The undersigned, Philip Stein, hereby resigns for the purpose of retirement from his employment at the Board of Education of the City of Linden, effective July 1, 1994.

WITNESS:

Michael T. Barrett, Esq.
An Attorney at Law of
New Jersey

Philip Stein

EXHIBIT A

3d

IN THE MATTER OF THE TENURE HEARING OF PHILIP STEIN, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon review, although the Commissioner does not object to any of the terms currently comprising the settlement, he cannot be satisfied by the record so far established that the proposed settlement in this matter meets the Cardonick standard for settlement of tenure matters (In re Cardonick, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846). The present record contains no finding that respondent entered into the agreement with a full understanding of his rights or that the agreement is consistent with the public interest, nor does it provide any indication that respondent was advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

Accordingly, the initial decision of the Office of Administrative Law is remanded for either revision of the settlement document or supplementation of the record consistent with the intent of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 4, 1994

DATE OF MAILING - MAY 4, 1994

105-94

105-94

BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
REGINA LEINEN,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought suspension of the teaching certificate of respondent Learning Disabilities Teacher Consultant (LDTC) for a period of one year for unprofessional conduct. Respondent ceased to perform her duties before the expiration of the term of her employment and she did so without the consent of the Board and the requisite notice.

ALJ concluded that respondent was guilty of unprofessional conduct pursuant to N.J.S.A. 18A:26-10. ALJ found the facts existing in this matter did not justify an exception to the usual one-year suspension penalty imposed for such violation. ALJ ordered respondent's certificate suspended for one year.

Commissioner adopted findings and determination in initial decision and ordered respondent's certificate suspended for a period of one year beginning July 1, 1994.

MAY 4, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1320-93

AGENCY REF. NO. 2-1/93

BOARD OF EDUCATION OF
PENNS GROVE-CARNEYS POINT
REGIONAL SCHOOL DISTRICT,
SALEM COUNTY,
Petitioner,
v.
REGINA LEINEN,
Respondent.

John E. Bergh, Esquire, for petitioner

Charles I. Nathanson, Esquire, for respondent (Levenson, Vogdes, Nathanson, Cohen and Obringer, attorneys)

Record Closed: February 7, 1994 Decided: March 18, 1994

BEFORE **EDGAR R. HOLMES, ALJ:**

The petitioner moves the Commissioner of Education to suspend the teaching certificate of the respondent, Regina Leinen, for a period of one year because it alleges that she is guilty of unprofessional conduct. The conduct complained of is a failure to give the proper notice when she resigned from her position as a Learning Disabilities Teacher Consultant (LDTC) employed by the respondent Board. A statute controls the outcome of this dispute. N.J.S.A. 18A:26-10 reads as follows:

> Any teaching staff member employed by a Board of Education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the Commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

The respondent requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties stipulated that the respondent ceased to perform her duties before the expiration of the term of her employment and she did so without the consent of the Board. However, since the imposition of a suspension is within the discretion of the Commissioner, a hearing on that issue was conducted.

The respondent has a Master's Degree from the University of Delaware in the field of learning disabilities. She did a clinical internship in the summer of 1989. She was employed by the Southern Regional School District as an LDTC for two years and, effective July 1, 1992, she was employed by the petitioner as an LDTC. Her contract requires 60 days notice in writing.

On September 16, 1992, respondent notified the Board that she was resigning. On September 21, 1992 the Board accepted her resignation effective November 20, 1992 which was 60 days after the Board actually received respondent's notice. On October 15, 1992 the respondent left her employment with the petitioner. On October 19, 1992 the respondent began employment with the Glassboro School District as an LDTC.

The Board alleges that it accrued damages as a result of respondent's early departure because it employed a substitute and when it found a replacement LDTC it had to offer a contract for considerably more money than it paid to respondent. Respondent pointed out that her successor had considerably more experience. However, this is not a civil suit for damages but an administrative proceeding affecting teacher licensure. The issue presented in this matter is whether the respondent's teaching certificate should be suspended and if so, for how long. Respondent urged several reasons for withholding the imposition of any suspension.

First the respondent alleges that she assumed she would be paid commensurate with her 13 years of combined teaching experience rather than her two years of LDTC experience. She said that she only signed her contract for less money than she anticipated when she lost other opportunities due to the late date her contract was tendered.

Secondly, the respondent alleges that she was told by the Acting Superintendent who hired her that her case load would consist of approximately 80 to 90 students. She said she actually had as many as 158 students assigned to her.

Third, the respondent claimed that the physical working conditions were abhorrent to her and caused her medical problems. She said the office in which she worked was infested with fleas. She observed both cockroaches and a dead mouse in the building. She also had upper respiratory problems due to the spraying performed by the exterminators.

Finally, the respondent alleged that she was harassed by a Board member who criticized her clothing and said in the presence of others "we got you cheap!" She also said that Superintendent Bender confronted her at a football game. She said she was an emotional wreck by October of 1992.

Robert Hayes, Board Secretary, and Business Official testified that he was made aware of a problem with fleas on August 24, 1992 (he was bitten himself). That afternoon the carpets were sprayed. When it became apparent that spraying did not resolve the problem, on the 28th of August, four days later, the carpets were removed. This solved the flea problem. This was corroborated by Barbara DeMore, Assistant Superintendent.

DeMore also explained the incident concerning the Board member who allegedly harassed Leinen. She identified him as an elderly person who has suffered two mini strokes and whose comments concerning anything would not surprise her. Both DeMore and Bender indicated that all other employees of the child study team, and many students, were subjected to the same environment as the respondent. As Bender pointed out; it is an old building.

Superintendent Bender testified; the Acting Superintendent who hired respondent was not available. He did not know what was told to respondent to induce her to sign her contract but she did sign it and she was paid as provided in the contract. He confirmed that respondent's case load was as she represented. He said he recognized that she had a difficult case load. He said the area was "lower socio-economic and contained a number of needy children, that was why she was there."

He recalls that he did speak to respondent at a football game in October. He described the meeting as cordial. He said he did not know she was an "emotional wreck."

Superintendent Bender said that he knew about the fleas but the problem was corrected. He did not see a dead mouse but recalls seeing a squirrel. He said the building was very old.

The respondent's testimony was most convincing when she said she felt demeaned; that these conditions affected her motivation and that she did not feel very valuable, that the situation was "unbearable" and physically draining. She said she had "low morale" and was an "emotional wreck". She said it took a couple of months before she "felt like her old self."

However, the circumstances which she described, while unpleasant, were no different than the circumstance or conditions one may find in many work places and in older, deteriorating school houses everywhere. Bender described the work load as heavy; but identified the district as one in which there were many needy children. That is precisely the reason they needed an LDTC. The respondent however, ceased to perform her duties, apparently for reasons not articulated on the record, which made her incapable of performance. Her description of her emotional state was out of proportion to the conditions and circumstances she described. As a result, I cannot but **CONCLUDE** that she was guilty of unprofessional conduct.

N.J.S.A. 18A:26-10 says any teacher is ***deemed*** guilty of unprofessional conduct if she ceases to perform her duties without affording a sixty (60) day notice or obtaining consent from the school board. This statute has not changed for nearly a century. L.1900, § 109. The statute is explicit regarding what behavior constitutes unprofessional conduct. Its language is clear and concise. Regina Leinen is guilty of unprofessional conduct because she violated the provisions of N.J.S.A. 18A:26-10 when she breached her contract without the consent of the Board.

The obvious purpose of N.J.S.A. 18A:26-10 is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students. Board of Education of Black Horse Pike v. Mooney, 84 S.L.D. 810, 817. The Legislature provided a sixty (60) day notice to assure an orderly succession and to

avoid the disruption caused by changing teachers. East Amwell Township Board of Education v. Acken, 86 S.L.D. 2803, 2813. Leinen's resignation left Penns Grove-Carneys Point without a permanent teacher to fill her position from October 15, 1992, to November 30, 1992. Leinen's detrimental conduct forced Penns Grove-Carneys Point to hire a replacement on short notice at higher cost. Leinen's conduct is precisely the type which the statute was designed to punish. The Legislature's concern with the serious problem of terminating a contract without adequate notice is evidenced by the harsh penalty for a violation. Dumont Board of Education v. Zweig, 88 S.L.D. 904, 912.

Most cases have resulted in the suspension of any and all teaching certificates for the maximum, one year permitted if the Commissioner finds the teacher guilty of violating N.J.S.A. 18A:26-10. (See: In Re Russo, 33 C.D. 92; Collingswood Borough Board of Education v. Cashel, 88 S.L.D. 1898; In Re Matthews, 267 C.D. 88; Dunellen Borough Board of Education v. Drake, 87 S.L.D. 2016; In Re Evans 249, C.D. 87; In Re Horter, 170 C.D. 87; Acken, 86 S.L.D. 2803; In Re Langford, 142 C.D. 84; In Re Minnich, 218 C.D. 83; In Re Cohen, 27 C.D. 83; In Re Reehill, 66 S.L.D. 201; In Re Finkelstein, 60 S.L.D. 75.) However, the court has held that "the Legislature did not intend the suspension of a teacher's certificate to be automatic even if the board's consent is not obtained." Mooney, at 814. The word "may" in N.J.S.A. 18A:26-10 implies that the Legislature intended that the Commissioner of Education consider all the circumstances presented in an individual's case. Mooney at 814; see also, Board of Education of The Township of Clinton v. Burgess, 83 S.L.D. 183, 190, regarding similar provision for tenured staff under N.J.S.A. 18A:28-8.

However, circumstances which justify giving relief to a teacher when she has not given the required statutory notice are rare. In Mooney, the Commissioner held that Mooney should not be suspended because she had a compelling need to resign, she had given immediate notice to the Board in writing, and she had assisted the school by developing a program for the completion of the school year. She met with her replacement to review the program and provided final grades. The school was fortunate to be able to replace Mooney with the teacher who would have been chosen to fill her position regardless of whether or not Mooney had left a week later. Moreover, the Commissioner stressed that Mooney left her teaching position in New Jersey not to seek employment elsewhere in the state, but to be with her husband. He had been transferred unexpectedly to California. The Commissioner

concluded that Mooney's resignation was not wrongful and her conduct did not warrant punishment.

Similarly, in Burgess, the Commissioner found circumstances which justified exercising discretion. Although Burgess did not give the required sixty (60) day notice, the Board told Burgess that "they would do all in their power to try to replace him" by the date he had requested. During the transition, Burgess prepared lesson plans, offered to meet on Saturdays with his replacement, and left many of his personal items with his successor for use in the classroom. He discussed his plans with the principal and with other sixth grade teachers. The Commissioner emphasized that Burgess was not attempting to take employment at another school, but had acted in exemplary fashion under circumstances which required his immediate resignation. Although Burgess made every effort to effect a smooth transition, neither the Board nor its school administrator acted upon the promise made to Burgess to do all in their power to replace him. The Commissioner concluded that the Board was obligated to take action to honor the promise made to Burgess. A fully qualified teacher, who was later chosen to replace Burgess, was available a week prior to Burgess' intended resignation. Nevertheless, action to approve her employment was delayed. Since no attempt was made, the Commissioner found no grounds for imposing a penalty on Burgess.

The Commissioner exercised discretion in another case because mitigating factors were very strong. In Re Rogers, Jr., 89 S.L.D. 1962, the Commissioner did not suspend the teacher's certificate for the entire year. Three factors influenced his decision. First, the Board was fortunate to be able to replace the teacher within one week. Second, the teacher honestly believed he was not "under contract" because his prior employment with the State did not require notice of resignation until work had begun. Finally and most significantly, the teacher was not motivated by a desire "to feather his own nest." Id., at 1966. The teacher chose a position with less pay under very difficult conditions because he felt more fulfilled when working with the profoundly and multiply handicapped. Id., at 1966. Although the Commissioner felt suspension for a full year was inappropriate under these circumstances, the teacher was still suspended for a three-month period. Clearly none of the mitigating factors apply to the case at hand.

Leinen alleges that poor working conditions are a defense for giving less than 60 days notice before accepting employment at another district. She claimed a heavy work load and a flea infestation forced her to abandon her students. A tenured teacher alleged a similar defense saying he was "provoked" to resign without giving sixty (60) days written notice required under N.J.S.A. 18A:28-8, but the Commissioner rejected the defense. In Re Cronmiller, 70 S.L.D. 149. The Commissioner ordered the teacher's certificate revoked for one (1) year saying:

> The provocation under which he acted, whether fancied or real, is not relevant. Whatever feelings the teacher may have had cannot constitute a valid excuse for flouting the law and unilaterally abrogating the terms of his employment. Moreover, the teacher had avenues of appeal by which he could have sought a resolution of his grievances which he failed to employ. Nor did he attempt to arrange terms under which he could be relieved of his duties, obtain an early release, or in any other way reach an agreement. Cronmiller, at 148.

Like Cronmiller, Leinen did not contact the teacher's union regarding any grievance prior to giving her resignation and charges being filed against her. Only after the Board sought an order to revoke did she allege poor working conditions. Furthermore, Leinen did not regard the conditions as so severe that she couldn't remain for thirty (30) days after resigning. It would appear that her defense merely covers her desire to accept a position she wanted. Other staff members have continued to teach under the same circumstances Leinen claims are a defense for violating both her contract and New Jersey law. Students are also compelled by law to remain in the building.

Unlike cases which justified exceptions to this usual one (1) year suspension, the facts in Leinen's case are not unique in any way and do not warrant exercising discretion. Leinen did not cooperate with the Board or administration to ensure a smooth transition. She did not maintain communications with either the Board or Superintendent. She negotiated a contract with another New Jersey school district shortly after contracting with Penns Grove-Carneys Point School District. The mere act of seeking release from a contract to take employment in another school in New Jersey has been held sufficient to suspend a teaching license. Mooney, at 817 (citing Burgess, at 191). She then chose to assume the position she preferred, deciding arbitrarily how much notice was adequate.

The State of New Jersey has conferred a teaching certificate upon Regina Leinen. Holding that certificate is a privilege which can be exercised only under the restrictions which are imposed by the Legislature. 78 C.J.S. § 159. Leinen ignored the reasonable requirements imposed by statute and agreed upon in her contract. Because she terminated her contract without good cause, she has violated professional standards and her certificate should be **SUSPENDED** for the maximum one (1) year permitted under the law.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 18, 1994
Date

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

3/23/94
Date

Hope Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 28 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1	Employment Contract
P-2	Acceptance of Resignation
P-3	P O Pest Control
P-4	Hiring Resolution
P-5	Board Minutes
P-6	P O Substitute
P-7	P O Substitute
P-8	Salary Comparison
P-9	Replacement's Contract

FOR RESPONDENT:

None

WITNESSES

FOR PETITIONER:

Regina Leinen
Robert E. Tepfer

FOR RESPONDENT:

Robert L. Hayes
Robert W. Bender
Barbara DeMore

OAL DKT. NO. EDU 1320-93

BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
REGINA LEINEN,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions urge, inter alia, that if the Commissioner determines to accept the ALJ's recommended suspension of her teaching certificate, he make such suspension effective July 1, 1994 to allow her present employer time to find a suitable replacement without adversely impacting students of the district and to additionally permit her to complete her year-end evaluations of students and scheduled annual reviews, thereby minimizing the hardship upon the district, its students and their parents.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated in the initial decision. Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter. Respondent's New Jersey Teaching Certificate is hereby suspended for a period of one year beginning July 1, 1994.

MAY 4, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 4, 1994

106-94

106-94

J.C. and A.C., parents, on behalf of J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
JAY LAWRENCE,	:	
INTERVENOR-RESPONDENT.	:	
	:	

MAY 4, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7506-93
AGENCY DKT. NO. 265-7/93

J. C. AND A. C., PARENTS, ON BEHALF OF J. C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,
Respondent,
and
JAY LAWRENCE,
Intervenor-Respondent.

Joseph J. Ferrara, Esq., for petitioners
(Ferrara and Hantman, attorneys)

Dennis A. Maycher, Esq., for respondent
(Maycher & Molinelli, attorneys)

Gail S. Oxfeld, Esq., for intervenor-respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: March 15, 1994 Decided: March 23, 1994

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

J. C. and A. C., parents of J. C., a fifth grade student enrolled in public schools of the Town of Secaucus, Hudson County, filed a petition of appeal with the

Commissioner of the Department of Education on July 26, 1992, alleging the student, then in fifth grade, was arbitrarily and improperly assigned the grade Unsatisfactory in three categories of social attitudes, thereby disqualifying him for the honor roll, a grade teacher, administration and Board of Education refused to alter on petitioners' appeal. Their complaint sought judgment of the Commissioner requiring deletion of the Unsatisfactory grade, assignment of a Satisfactory grade, directing the school to acknowledge the student's academic achievement for the third marking period as qualifying him for honor roll status, directing the school to establish grade criteria in accordance with established educational principles, and seeking such other relief as under the circumstances is just. In an answer filed by the Board on August 2, 1993, allegations of the petition were denied. The Commissioner transmitted the matter to the Office of Administrative Law on August 10, 1993, for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

The matter came on for hearing on March 15, 1994, at which time the parties entered into settlement discussions and advised the administrative law judge that the matters at issue had been amicably resolved. Thereafter, a settlement agreement was submitted.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures contained in the agreement filed herewith.

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 23, 1994
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

3/25/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 29 1994
Date

OFFICE OF ADMINISTRATIVE LAW

amr

Agreement between

John D. J. Corbett and Andromiki Corbett on behalf of individually.

Jonathan Corbett and

Secaucus Board of Education and

Jay Laurence intervenor do

hereby agree as follows;

(1) Action under OAL Dkt No. EDU 7506-93 Agency DKT No 765/7/93 is hereby dismissed without prejudice and without costs.

(2) Petitioner and Respondent Board of Education agree as follows:

A.) Parties agree to conference with parents at such times that are mutually agreeable with current teacher

3rd Other staff as the case may be in mind

B.) Board of Education will communicate through staff and/or administration to parents as soon as any problems arise related to J.C. and give suggestions for remediation

C.) J.C. will not be singled out for actions arising out of this Petition by any staff and/or administration. Number

D.) All parties will cooperate in the best interest of J.C.'s educational development.

E) Respondent Board of Educ will make Dr. Gerard Babcz available at the request of the parents for consultations with evaluation, remediation, and/or consultation between the parties, but in no event shall circumvent BOE polic

F.) Neither party admits or denies the allegations contained in the Petition.

G.) Each party releases and holds harmless the other

Petition.

We the foregoing do hereby consent to the foregoing Stipulation of Settlement with dismissal with prejudice and without costs.

Ferrara & Hartman Esq.

by Joseph Ferrara Esq.
for Petitioners

DATED:

Mayclen & Molinelli

by Dennis Mayclen Esq.
for Respondent BOE

DATED:
3/15/94

3.6

Ball, Oxfeld, Mandell + Cohen.

Gail S. Oxfeld DATED'.

Gail S. Oxfeld. Esq.
for Jay Lawrence.

"We hereby agree to
the above terms + conditions.
this 15th day March 1994.

John D. S. Corbett

John D. Corbett. - Petitioner

Androniki Corbett. Petitioner

Constantino Scerbo

Constantino Scerbo. on behalf of BOE

Jay Lawrence. Intervenor..

Philip J. Passamante Esq. Pres BOE.

Attest

Ronald T. Temple Bd/Sec

OAL DKT. NO. EDU 7506-96

J.C. and A.C., parents, on behalf of J.C.,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	DECISION
RESPONDENT,	
AND	
JAY LAWRENCE,	
INTERVENOR-RESPONDENT.	

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

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

COMMISSIONER OF EDUCATION

MAY 4, 1994

DATE OF MAILING - MAY 4, 1994

107-94

107-94

SOUTH RIVER EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 4, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 6169-93
AGENCY DKT. NO. 151-5/93

SOUTH RIVER EDUCATION ASSOCIATION,
Petitioner,
v.
SOUTH RIVER BOARD OF EDUCATION,
Respondent.

Record Closed: March 28, 1994 Decided: March 28, 1994

BEFORE **STEVEN C. REBACK,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 29, 1993, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On March 28, 1993, counsel submitted a Stipulation of Dismissal (copy attached) withdrawing the request for a hearing. Pursuant to N.J.A.C. 1:1-19.2, the withdrawal is granted. Therefore, I **ORDER** the Clerk to return this matter to the agency for appropriate disposition.

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

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

3/28/94
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

3/30/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 05 1994
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

None

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

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

SOUTH RIVER EDUCATION ASSOCIATION, Petitioner,	OAL DOCKET NO. EDU-06169-93S AGENCY DOCKET NO. 151-5/93
v.	STIPULATION OF DISMISSAL WITH PREJUDICE
SOUTH RIVER BOARD OF EDUCATION, Respondent.	

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice.

DATED: FEBRUARY , 1994

BALK, OXFELD, MANDELL & COHEN
Attorneys for Petitioner

By: _____
ARNOLD S. COHEN

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Respondent

By: _____
GORDON J. GOLUM

327809 (041023.185)

SOUTH RIVER EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 4, 1994

DATE OF MAILING - MAY 4, 1994

108-94

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

MAY 4, 1994

OAL DKT. NO. EDU 9817-93

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed without prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 4, 1994

DATE OF MAILING - MAY 4, 1994

109-94

IN THE MATTER OF THE TENURE HEARING OF MARK STRATTON, SCHOOL DISTRICT OF THE BOROUGH OF SOMERDALE, CAMDEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

MAY 4, 1994

OAL DKT. NO. EDU 3693-93

IN THE MATTER OF THE TENURE	:	
HEARING OF MARK STRATTON, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
SOMERDALE, CAMDEN COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 4, 1994

DATE OF MAILING - MAY 4, 1994

110-94

110-94

ANDREE CAMPBELL, ON BEHALF OF MONTAGUE 2000,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning citizen group alleged Board's decision to continue sending students to out-of-state district (Port Jervis, New York) was an abuse of discretionary authority. Relationship had gone on since approximately 1930.

ALJ concluded actions of the Board in seeking and receiving consent of Commissioner to send its students outside the state pursuant to N.J.S.A. 18A:38-10 were reasonable. ALJ further found that the reasons for the Commissioner's original consent to the application of this statute to Montague have not been shown by the petitioners to have ceased to exist.

Commissioner dismissed petition, concurring with findings and determination of the ALJ.

MAY 4, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 790-93
AGENCY DKT. NO. 525-12/92

ANDREE CAMPBELL, ON BEHALF OF MONTAGUE 2000,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,
Respondent.

Robert P. Glickman, Esq., for petitioners

Craig U. Dana, Esq., for respondent
(Morris, Downing & Sherred, attorneys)

Record Closed: December 17, 1993 Decided: March 28, 1994

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

Petitioner, Andree Campbell, originally filed a petition on behalf of a citizens' group named Montague 2000 regarding the practice of sending students in the Montague school district out of state to the Port Jervis schools. The petition was initially filed on December 22, 1992 with the Department of Education (Department). The Montague Board of Education (Board) requested an extension of time in which to file an answer and this was granted by the Department until January 21, 1993. Subsequently , the petitioner Andree Campbell requested interim relief in the matter by way of letter, dated January 23, 1993. However the Department determined that the matter was not of an emergent nature. The issue was therefore transmitted to the Office of Administrative Law (OAL) for

determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 on January 29, 1993.

Subsequent to this an amended petition was filed on behalf of petitioners by an attorney representing the group. This was filed on March 24, 1993 and an answer to the amended petition was received from respondent dated May 14, 1993.

On June 8, 1993, a prehearing conference took place in the matter at which a hearing schedule was set up.

Hearings were held on October 6, 7, 8 and 14, 1993. At the conclusion of testimony the hearing record was left open for posthearing submissions by the parties until December 7, 1993 in order to permit them time to obtain the transcripts of the proceeding if necessary. On that date the record closed. The initial decision would have been due on January 21, 1994 however an extension of time to file was requested and granted giving a new date of March 7, 1994. A subsequent extension of 20 days was granted for good cause changing the date upon which the initial decision was due to March 27, 1994. Because March 27, 1994 falls on a Sunday the actual due date of this initial decision becomes March 28, 1994.

FACTS

While the ultimate outcome regarding the sending receiving relationship is hotly contested in this case, the underlying facts which are of relevance to this decision are not in dispute.

The Montague Board of Education and the Port Jervis, New York Board of Education have engaged in a sending-receiving relationship which has resulted in the sending of seventh grade through twelfth grade Montague students to the Port Jervis, New York middle school and high school. Montague is a community located in the northwest corner of Sussex County, New Jersey. It is bordered on the north by New York State.

The Montague Board of Education is a K-12 district with facilities and programs for only K-6. As of the date of the hearing the Montague Board of Education did not have any facilities available for either seventh and eighth graders or high school

students. The Montague Board of Education has had a sending receiving relationship with Port Jervis, New York, pursuant to *N.J.S.A.* 18A:38-10 since approximately 1930. This New York town is in close proximity to the Township of Montague.

In 1989 there was a referendum in Montague to expand the existing K -6 program. This referendum was defeated. There has never been unanimity amongst the Board or the citizenson the issue of expansion of facilities in Montague.

The Port Jervis, New York school system provides education to the Montague students. That school system has never been monitored by the New Jersey State Department of Education. Witnesses acknowledged, however, that it is probable that the Port Jervis school system is monitored by the state of New York. The Port Jervis school system gives three types of high school diplomas found in New York schools. These are Regents, General and IEP (Individual Educational Plan) diplomas. In the state of New Jersey every diploma is identical. Of those three possible diplomas given in New York a student may receive any one of those. For example, a special education student is not limited to the receipt only of an IEP diploma. A student could receive any type of New York diploma including but not limited to a Regent's diploma. Nothing was brought forth during the hearing to indicate that special education students from Montague were not receiving a free and appropriate education in Port Jervis, New York. The testimony referred to the times students need to be reclassified and receive a change in the program. The need to reclassify based on the individual student's needs is a circumstance which would be found even when the student is attending school within the district they reside in.

Three different schools were identified within the state of New Jersey as potential alternatives for Montague students who are attending school in New York State. For the students attending seventh and eighth grades the schools in Frankfurt Township, Lafayette Township and Kittatiny Regional were identified. However, these three schools were not amenable to taking students from Montague. With respect to high school students, grades nine to twelve, two schools were identified. They are High Point and Kittatinny Regional. Of the two schools only High Point has indicated a potential interest in taking Montague students; however, no commitment has yet been reached. Concerns existed with respect to tuition costs, transportation routes and safety, as well as the length of any contract that might be

entered into with High Point. High Point has never actually stated that it is willing to accept Montague students according to petitioners' witness Eleanor Haeny.

Ms. Haeny had checked into the makeup and number of courses offered by the schools. She was not qualified to testify as an expert witness but was able to indicate facts that she had determined. Port Jervis high school offered a total of 133 courses while High Point high school offered 183 courses. The only courses that she was able to identify as being offered at High Point and not offered in the Port Jervis school were:

1. Street Law
2. Changing Sex Roles
3. Contemporary Issues
4. Television Production 1 and 2

Port Jervis offers driver education in the classroom which is not offered at the High Point school. Both of these schools offer college courses. The Port Jervis high school offers courses through Syracuse University.

The Port Jervis middle school offers accelerated courses for which students may receive high school credit. No middle school facilities are potentially available at High Point for Montague students.

The class size at the Port Jervis middle school and the high school is between 20 and 32 students.

Port Jervis has entered into the sending-receiving relationship and receives a payment per student from Montague. Additionally, Port Jervis receives aid from New York State for all students who attend including those students from Montague. If all the Montague students were to be simultaneously withdrawn from the Port Jervis schools; they would lose approximately $500,000 in state aid. The impact to the Port Jervis school system would be greater than that amount if one considers the per student fee paid by Montague for the students it sends to Port Jervis. A request was made to High Point in August 1993, to provide a breakdown of tuition costs for a five-year period for sending students to the High Point high school. A review was planned subsequent to the hearing with the High Point board

of education. Up until the last day of testimony the High Point school system has not informed the Montague Board of Education of the cost in sending their students to High Point if they were to engage in a sending-receiving relationship. The feasibility of this arrangement has never been completely explored. There is no member on the board of education in Port Jervis, New York from Montague, New Jersey. Likewise, if High Point were to accept Montague students, there would be no voting member from Montague on the board of education of High Point.

Of particular interest are the routes that would have to be travelled by students from to Montague to either High Point or Port Jervis. A map was introduced with markings for the various routes to the different schools (P-3). Since High Point is the only school in New Jersey that had expressed a possible willingness to take Montague students, only High Point will be discussed in contrast with Port Jervis. The distance from Montague to Port Jervis high school is approximately 12 miles and it is 10 miles to the Port Jervis middle school. With respect to travel to the High Point schools there are two routes one is referred to as the "fair weather" route which is approximately 15 miles one way and the "bad weather" route which is 18 to 20 miles from Montague. The reason for the two different routes to High Point is because of High Point Mountain which is the highest elevation in New Jersey. The gradient is also the steepest in New Jersey. A retired state trooper, who had been assigned as road trooper to the Montague area, testified that there are many accidents on Route 23 which forms part of the route. He attributed many of the accidents to the grade as well as to blind spots on the road . In bad weather such as snow it is necessary to take the longer route to avoid the more dangerous areas.

As these facts are not in dispute I **FIND** them to be the operational relevant facts in this case.

LEGAL DISCUSSION

The petitioners raises two issues with respect to the sending-receiving relationship between Montague and Port Jervis, New York. The first is that the underlying statute in this case, *N.J.S.A.* 18A:38-10 is unconstitutional. That claim, however, does not fall within the framework of administrative review. Administrative agencies form part of the executive branch of government rather than the judicial. Although an agency may take into account constitutional

considerations, facial constitutional challenges of a statute should be judicially resolved. *Abbott v. Burke*, 100 *N.J.* 269 (1985). As a result that issue may not be determined in this forum.

The only issue in this case is whether the action of the Montague Board of Education in developing a sending-receiving relationship with Port Jervis, New York and continuing that relationship was arbitrary, capricious and unreasonable. It is well established that actions of local boards lie within their discretionary powers and may not be upset unless they are arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288 (App. Div. 1960). The standard for review at a hearing such as this requires a determination of whether the underlying facts were as those who made the evaluation claimed and also whether it was unreasonable for them to conclude as they did upon those facts bearing in mind that they were the experts. The burden of proving unreasonableness is on the petitioners. This is not a situation in which the Commissioner of Education will substitute his judgment for that of the board of education. *Massaro v. Board of Education of the Borough of Bergenfield*, 1965 *S.L.D.* 84. It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis. *Paddock v. Board of Education of the Borough of Demarest*, 1974 S.L.D. 435.

In this case the sending receiving relationship between New Jersey and New York is undertaken pursuant to *N.J.S.A.* 18A:38-10. That states as follows:

> Any board of education of a district may arrange for the attendance of any or all of the pupils of the district in the public school or schools of an adjacent school district outside of the state, if it shall determine that it is advisable to do so in order to secure better school facilities for the pupils or for reasons of economy or other good cause and that it is inadvisable for said pupils to attend public schools in another school district within the state because of the distance to be travelled, the topography of the intervening country, the condition of the roads or the likelihood of unusual hazardous travelling conditions during certain seasons of the year, and if the commissioner shall concur in the determination of the board and give his consent thereto, but the commissioner may withdraw such consent upon reasonable notice whenever the reason or reasons for giving his consent shall cease to exist. .

In this case the sending of Montague students to Port Jervis predates the statute. The relationship has gone on since approximately the 1930's.

The Montague Board of Education has, over the years, determined to send its students to Port Jervis, New York. The Commissioner of Education has consented to this arrangement. The factors involved in this case are the lack of appropriate schools within the district itself and the close proximity to Port Jervis, New York. Additionally, up until recently there has not been a possibility of another school district in the state of New Jersey accepting Montague students. It should be pointed out that even now the question of sending students to High Point remains only a possibility for the future and not an immediate answer to the question. Additionally, the topography and terrain to be travelled to High Point would have to be considered. There was clear testimony that there are two routes one which was designated the fair weather and the other the bad weather route. Because of the steep gradient and high elevation that a second or bad weather route had to be devised in order to arrive at High Point safely when conditions were bad. This is one consideration with respect to High Point and it is merely speculation on what would have to be done should a future arrangement be entered into by Montague and High Point. No final cost per pupil has been given by High Point to Montague and while transportation costs might not necessarily be an issue, the cost per student would be a relevant factor. With respect to Port Jervis the amount has been established for this school year as it has in prior years. There was also testimony that Port Jervis receives New York state aid for all students attending its schools including those who originate from New Jersey. It was never elucidated as to exactly how that occurs but it would appear that the New Jersey students are receiving an added benefit as far as financial resources toward their education coming from not only outside the district but from another state.

One factor which was brought out during the hearing is the difference in diplomas received by students who attend school in New York State. While New Jersey makes no designation with respect to its high school diploma New York gives student diplomas that fall into several different categories including a Regents diploma, a General diploma and an IEP diploma. What must be looked at is whether or not students are receiving a free and appropriate education. There is no

indication in this case that students are not receiving a free and appropriate education through the Port Jervis, New York schools.

The Individual with Disabilities Act (IDEA) 20 *U.S.C.A.* §1400 provides federal funds to states and local educational agencies who agree to comply with certain conditions set out in the IDEA and the regulations that implement the Act. The effect of federal law is to insure that disabled children receive a free and appropriate education and are not discriminated against by any agency furnishing special education services. A state is required to establish procedures to assure that, to the maximum extent possible, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled. Additionally, special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education and regular classes with the use of supplementing aids and services cannot be achieved satisfactorily. 20 *U.S.C.A.* §1412(5)(b).

The question of the difference in diplomas has been addressed in other jurisdictions. In *Seattle (WA) School District,* 1985 *E.H.L.R.* 507:45 (Complaint Letter) a school district issued certain special education students who had met all of the district's graduation requirements "modified" diplomas. It was concluded that the district had discriminated against the students based solely on disabled status, pursuant to 34 *C.F.R.* §104.4(a)(b)(i)(iv) and (b)(4). This was because there was no legitimate nondiscriminatory reason established for treating disabled students differently than other students. No clearly articulable and consistently applied standard, based on educational requirements existed for determining when special education students were entitled to regular diplomas based on 34 *C.F.R.* §104.4(b)(2)(iv).

A disabled student who has completed a course of study prescribed in his or her IEP, but who has not completed the necessary Carnegie units has been found to be entitled to a "special education diploma." *Lenfant, et al. v. District of Columbia Board of Education, et al.*, Civil Action No. 80-1333 DDC, 3 *E.H.L.R.*, 552:272 (1980). This was an action by parents of a disabled child to compel the District of Columbia Board of Education to award a diploma where the child had been placed by the district in a private school during which time she completed the educational

program prescribed for her. The parents attempted to obtain a certificate of completed diploma for the child rather than a "special education diploma." It was held that where a child successfully completed a prescribed course of study and would otherwise be entitled to the awards that come from such completion, different treatment of the child regarding the award of a diploma is a step that the school system must take only on the soundest basis. Although the child in that case was not entitled to an ordinary diploma because she had not completed the necessary units, she was entitled to a "special education diploma" to certify that she had completed satisfactorily pursuant to her IEP that which had been designed and approved for her by the District of Columbia.

While the Montague students would receive only one type of diploma in New Jersey, in New York they have the possibility of receiving several. Students who are involved in special education are not restricted to receiving an IEP diploma but may obtain any other diploma for which they qualify. As a result they are not batched solely by their status as disabled students into receiving only an IEP diploma. The mere fact that another state engages in a practice slightly different from that of New Jersey does not alone make that practice invalid. Here there is a legitimate nondiscriminatory basis for the awarding of different diplomas. It is based upon achievement and no student is locked into a particular diploma based solely upon status rather than performance and completion.

As originally indicated, the only question is whether or not the action of the Montague Board of Education was arbitrary, capricious and unreasonable. While it might be preferable to engage in an arrangement which keeps New Jersey students within the state it is not a case of substituted judgment. These is the added issue that no concrete alternative is available at this time. There is not another district which has agreed to engage in an sending-receiving relationship with Montague. The fact that the matter has been hotly contested shows that there is no unanimity among the residents of Montague as to providing facilities within Montague for their students. Questions of costs and feasibility remain.

While it may be that High Point offers a state of the art facility, unless and until final figures have been offered for consideration to the board of education, it would be premature to determine that reasons of economy would dictate High Point as the appropriate location. In its determination the board of education in Montague took

into consideration that there was an adjacent school district outside the state, as well as the financial considerations coupled with the question of the topography and intervening country on the way to High Point. The travelling conditions during the winter would make the second route or bad weather route necessary which is a longer distance from Montague. While all these things have been considered by the board of education it must remembered that no other school district has even expressed an interest or a potential ability to handle students from Montague. It is impossible for Montague to weigh the impact on the school district without a full explanation of what the economic impact would be upon them.

While the petitioners have expressed their concerns most articulately about sending students to Port Jervis, New York and the reasons for their dissatisfaction with the action of the board of education, they have not shown by a preponderance of the evidence that the action of the board of education at the time the decision was made to send students to Port Jervis was arbitrary, capricious and unreasonable. This is not merely a continuation of a situation that began in the 1930s but rather a reevaluation on an ongoing basis of the circumstances as evidenced by the board taking into account the possibility of High Point and obtaining facts and figures in order to determine feasibility of such a change.

CONCLUSION

Based upon the foregoing I **CONCLUDE** that the actions of the Montague Board of Education in seeking and receiving the consent of the Commissioner to send their students to a district outside the state pursuant to *N.J.S.A.* 18A:38-10 was reasonable. I further **CONCLUDE** that the reasons for the Commissioner originally giving consent to the application of this statute to Montague have not been shown to have ceased to exist as of the time of the hearing.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/28/94
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

3/29 PM
Date

HOPE R. BLACKBURN, ACTING
DEPARTMENT OF EDUCATION DIRECTOR

Mailed to Parties:

MAR 31 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witnesses

For petitioners:

James Oiekun
Vivian Edwards
Stephen Lange
Patrice Green
Michael Policelli
Eleanor Haeny

For respondent:

Richard Innella
John Connelly
Bernard Andrew
Edwin Muhlbeck

Evidence

P-1	Guidelines prepared by Robert Savitt
P-2	Letter dated May 21, 1991, to Linda Price from John A. Mulhern
P-3	Letter dated March 4, 1987, to Charles Lusto and Vivian Edwards from Saul Cooperman
P-4	Letter dated December 23, 1986, to Charles Lusto and Vivian Edwards from Bernard J. Andrews, Ed.D.
P-5	Minutes from May 24, 1993 facilities planning committee meeting
P-6	Report of visits to K-8 schools - Lafayette (May 23, 1991), Green May 23, 1991) and Port Jervis Middle School (May 29, 1991)
P-7	Ad Hoc Grade Alignment Committee report submitted by Alicia C. Batko, dated May 20, 1991
P-8	Report on meeting at High Point Regional High School on January 25, 1993
P-9	Minutes of special meeting on November 27, 1989
P-10	Committee report dated September 10, 1990
P-11	Committee report dated March 11, 1991

P-12	Committee report dated May 13, 1991
P-13	Committee report dated June 10, 1991
P-14	Committee report dated June 17, 1991
P-15	Committee report dated June 27, 1991
P-16	Committee report dated July 8, 1991
P-17	Committee report dated May 11, 1992
P-18	Committee report dated June 1, 1992
P-19	Committee report dated September 21, 1992
P-20	Committee report dated November 9, 1992
P-21	Committee report dated January 14, 1993
P-22	Committee report dated February 22, 1993
P-23	Committee report dated March 8, 1993
P-24	Report on meeting at High Point Regional High School, dated January 25, 1993
P-25	Overview
P-26	Response to Montague Committee 2000 letter
P-27	Performance
P-28	Finance
P-29	Statistics for public school districts
P-30	Letter to members of the board from Patrice M. Green
P-31	Map of Sussex County
P-32	Letter dated October 4, 1993, from Jordan and Pease

R-1	Letter dated September 4, 1992, to John Ellis from Patrice M. Green
R-2	Letter dated September 28, 1992, to Patrice M. Green from John Ellis
R-3	Memo dated August 6, 1993, to Vivian Edwards from Richard Hammell

R-4 Letter dated August 23, 1993, to Craig U. Dana, Esq. from Robert A. Onofry, Esq.

R-5 Sending/receiving tuition contract agreement dated August 17, 1993

R-6 Letter dated June 2, 1992, to John Ellis from E. Scott Garrett, Assemblyman

R-7 Letter dated June 16, 1992, to Alicia Batko from Michael A. Vrancik

R-8 No exhibit

R-9 Report on meeting at High Point Regional High School dated January 25, 1993

R-10 Letter dated June 8, 1993, to James J. Opiekun from Bernard J. Andrews

R-11 Minutes of school board meetings dated October 5, 1931 to July 17, 1950

R-12 High Point High School information (mileage report prepared by a district bus driver)

R-13 Kittatinny High School information (mileage report prepared by a district bus driver)

R-14, id only - Campaign press release by Thomas Quinn, dated April 8, 1993

R-15, id only - Campaign release by Jane Brace

R-16, id only - Miscellaneous newspaper articles

R-17 A study of safety and security in the public schools of New York State, completed by the Port Jervis district

R-18 Port Jervis enrollment projections, updated September 3 and September 10, 1993

R-19 Letter of Patrick Hammill to Charles Lusto dated September 26, 1988

R-20 Letter of Patrick Hamill to James Opiekun dated January 26, 1990

R-21 Letter of Vivian Edwards to Port Jervis public schools dated March 2, 1990

R-22 Letter of James Opiekun to Patrick Hamill dated November 16, 1992

R-23 Memorandum from Port Jervis public schools to Vivian Edwards dated October 1, 1992

R-24 Letter of Port Jervis city school district to James J. Opiekun dated January 29, 1993

R-25 Memorandum from Diane Dennis to Vivian Edwards dated September 23, 1993

R-26 Memorandum from Diane Dennis to Vivian Edwards dated September 24, 1993

R-27 Fiscal year audit report

R-28, id only - Letter dated December 1, 1992 Bryant to Green

R-29, id only - 1993 school report card-financial report

R-30 October 5, 1993 letter from Garbarini and Company to the Montague Board of Education re: cost study 7th and 8th grades

ANDREE CAMPBELL, ON BEHALF OF MONTAGUE 2000,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Primary exceptions submitted by petitioners on April 14, 1994 and by the Board on April 20, 1994, in response to an initial decision mailed on March 31, 1994, were untimely filed pursuant to N.J.A.C. 1:1-18.4. Although the parties' submissions aver that the initial decision did not reach their respective offices until April 8, 1994 and April 6, 1994, it is here noted that N.J.A.C. 1:1-18.4 is clear that exceptions must be filed within 13 days of the mailing not receipt of the initial decision. It is further noted that at no time prior to the expiration of the regulatory timeframe for the filing of exceptions in this matter did either of the parties request an extension of time within which to file. Consequently, the exceptions of both parties will not be considered herein.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge that petitioners have not established

that the Board's action with respect to the development of a sending/receiving relationship with Port Jervis, New York, and its continuation of that relationship was arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter for the reasons articulated in the initial decision, and the within Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

MAY 4, 1994

DATE OF MAILING - MAY 4, 1994

111-94

111-94

DORIS ZEBERL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROCHELLE PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 4, 1994

OAL DKT. NO. EDU 4083-93

DORIS ZEBERL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROCHELLE PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 4, 1994

DATE OF MAILING - MAY 4, 1994

112-94

112-94

JOSEPH PREDOTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 9, 1994

OAL DKT. NO. EDU 11444-93

JOSEPH PREDOTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice as to the 1993-94 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 9, 1994

DATE OF MAILING - MAY 9, 1994

113-94

113-94

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 9, 1994

OAL DKT. NO. EDU 12014-93

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 9, 1994

DATE OF MAILING - MAY 9, 1994

114-94

114-94

GERARD NAPLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 9, 1994

OAL DKT. NO. EDU 6957-93

GERARD NAPLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 9, 1994

DATE OF MAILING - MAY 9, 1994

115-94

115-94

RICHARD PIAZZA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 9, 1994

OAL DKT. NO. EDU 669-94

RICHARD PIAZZA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

MAY 9, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 9, 1994

116-94

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WATERFORD : DECISION
TOWNSHIP, CAMDEN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each, and for the General Fund proposition, at the annual school election held on April 19, 1994 in the School District of Waterford Township, Camden County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
William Richardson, Jr.	542	6	548
James Foley	478	13	491
Albert Pangia, Jr.	465	9	474
Christine Rosenheim	437	8	445
Philip Scelso	428	8	436
GENERAL FUND PROPOSITION			
YES votes	472	7	479
NO votes	491	5	496

Pursuant to separate letter requests from defeated candidate Philip Scelso filed May 2, 1994 pursuant to N.J.S.A. 18A:14-63.2, and from the Board of Education filed April 25, 1994 pursuant to N.J.S.A. 18A:14-63.3, an authorized representative of the Commissioner of Education was directed to conduct a recount of ballots cast for membership on the Board and for the General Fund proposition. The recount of General Fund votes was conducted on April 29, 1994, and the recount of Board member votes on May 4, 1994, at the Voting Machine Warehouse, South Jersey Port Corporation, Camden. On the same dates, absentee ballots were recounted at the Camden County Board of Elections

pursuant to the broad authority granted the Commissioner for the 1994 annual school election under P.L. 1994, c. 6.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
William Richardson, Jr.	542	6	548
James Foley	478	13	491
Albert Pangia, Jr.	465	9	474
Christine Rosenheim	437	8	445
Philip Scelso	428	8	436
GENERAL FUND PROPOSITION			
YES votes	472	7	479
NO votes	391	5	396

As indicated, there were no changes in the tally for members of the Board of Education. However, a major change was found in the tally for the General Fund proposition, resulting in its approval rather than disapproval as had been announced at the conclusion of the election.

This concludes the report of the Commissioner's authorized representative.

* * * * *

Upon review, the Commissioner accepts the report of his authorized representative and adopts it as his own.

Accordingly, William Richardson, Jr., James Foley and Albert Pangia, Jr. are deemed elected to full terms of three years each on the the Waterford Township Board of Education, and the General Fund proposition is deemed approved by the voters of the district.

IT IS SO ORDERED.

MAY 9, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 9, 1994

117-94

117-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 9, 1994

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the voting machine balloting for three members of the Board of Education for full terms of three years each and for the General Fund proposition at the annual school election held on April 19, 1994 in the School District of the City of Passaic, Passaic County, were as follows:

(3) THREE-YEAR TERMS

Candidate	Polls Total
Jane Gurtman Grubin	1,023
Clayton A. Barker	979
Maxine Baker	918
Kifah Zeiden	829
Joseph Nayda	590
Mary L. Guzman	538
Sue "Fragale" Menichella	480
Eriberto Carrero	384
Jose "Alex" Ybarra	218
Luis Rivera	210

GENERAL FUND PROPOSITION

	Polls Total	
	Yes	No
General Fund	541	1,007

Pursuant to the Order of the Commissioner of Education dated April 22, 1994 directing a recount of the voting machines used in the April 19, 1994 school election issued in response to an

application of the Attorney General of New Jersey, attorney for petitioner Passaic County Superintendent of Elections, a recount was conducted on April 26, 1994 by the Commissioner's representative from the Office of the Passaic County Superintendent of Schools, at the voting machine warehouse, Paterson, New Jersey.*

At the conclusion of the recount of the voting machine ballots, the results remained the same:

(3) THREE-YEAR TERMS

Candidate	Polls Total
Jane Gurtman Grubin	1,023
Clayton A. Barker	979
Maxine Baker	918
Kifah Zeiden	829
Joseph Nayda	590
Mary L. Guzman	538
Sue "Fragale" Menichella	480
Eriberto Carrero	384
Jose "Alex" Ybarra	218
Luis Rivera	210

GENERAL FUND PROPOSITION

	Polls Total	
	Yes	No
General Fund	541	1,007

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the recount report of his representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Jane Gurtman Grubin, Clayton A. Barker and Maxine Baker were elected

---

* It is noted that no separate request was made for a count of absentee ballots.

to full terms of three years each on the Board of Education of the School District of the City of Passaic and that the General Fund proposition was defeated by the voters.

COMMISSIONER OF EDUCATION

MAY 9, 1994

DATE OF MAILING - MAY 9, 1994

118-94

118-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF CLIFTON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 9, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
CLIFTON, PASSAIC COUNTY. :
:

The announced results of the voting machine balloting for three members of the Board of Education for full terms of three years each and for the General Fund proposition at the annual school election held on April 19, 1994 in the School District of the City of Clifton, Passaic County, were as follows:

(3) THREE-YEAR TERMS

Candidate	Polls Total
Steven Hatala, Jr.	6,215
Stefan Tatarenko	5,030
James M. Smith	4,499
Stephen C. Kolakowsky	3,874
John J. Rutledge	3,593
Bertil C. Nelson	2,453

GENERAL FUND PROPOSITION

	Polls Total	
	Yes	No
General Fund	3,302	5,453
Question 1	2,471	7,218
Question 2	5,095	4,649

Pursuant to the Order of the Commissioner of Education dated April 22, 1994 directing a recount of the voting machines used in the April 19, 1994 school election issued in response to an

application of the Attorney General of New Jersey, attorney for petitioner Passaic County Superintendent of Elections, a recount was conducted on April 26, 1994, by the Commissioner's representative from the Office of the Passaic County Superintendent of Schools, at the voting machine warehouse, Paterson, New Jersey.*

At the conclusion of the recount of the voting machine ballots, totals were as follows:

(3) THREE-YEAR TERMS

Candidate	Polls Total
Steven Hatala, Jr.	6,199
Stefan Tatarenko	5,015
James M. Smith	4,478
Stephen C. Kolakowsky	3,863
John J. Rutledge	3,577
Bertil C. Nelson	2,340

GENERAL FUND PROPOSITION

	Polls Total	
	Yes	No
General Fund	3,183	5,364
Question 1	2,319	7,220
Question 2	5,201	4,479

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the recount report of his representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Steven Hatala, Jr., Stefan Tatarenko and James M. Smith were elected

---

* It is noted that no separate request was made for a count of absentee ballots.

to full terms of three years each on the Board of Education of the School District of Clifton, that the General Fund proposition of the School District of the City of Clifton was defeated by the voters, and that Question 1 was defeated and Question 2 was passed for the Clifton School District.

COMMISSIONER OF EDUCATION

MAY 9, 1994

DATE OF MAILING - MAY 9, 1994

119-94

119-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF CAPE MAY,	:	
CAPE MAY COUNTY.	:	
	:	

MAY 16, 1994

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF CAPE MAY,	:	
CAPE MAY COUNTY.	:	
	:	

The announced results of the balloting, for three members of the Board of Education for full terms of three years each and for one unexpired term of one year, at the annual school election held on April 19, 1994 in the school district of Cape May City, Cape May County, were as follows:

THREE-YEAR TERMS

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Margaret Bethel	264	3	267
Terrance O'Brien	225	4	229
Elissa Campanella	200	3	203
John Daly	199	4	203

UNEXPIRED ONE-YEAR TERM

Susan Laudeman	262	5	267

Pursuant to N.J.S.A. 18A:12-15(c), which requires recount and certification of results by the Commissioner in the event of a tie vote for members of the Board of Education, an authorized representative of the Commissioner from the Office of the Cape May County Superintendent of Schools was directed to recount ballots cast for members of the Board. The recount was conducted on May 5, 1994, at the Cape May County Airport, Building No. 5. Present were representatives of the school district, the Board of Elections and Candidate John Daly.

At the conclusion of the recount, the tally stood unchanged and was as follows:

THREE-YEAR TERMS

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Margaret Bethel	264	3	267
Terrance O'Brien	225	4	229
Elissa Campanella	200	3	203
John Daly	199	4	203

UNEXPIRED ONE-YEAR TERM

Susan Laudeman	262	5	267

One absentee vote involving John Daly was voided by the County Board of Elections because the intent of the voter could not be clearly determined; on the ballot, marked C-1 for review by the Commissioner and counted in all other respects (two three-year votes, one one-year vote and a vote on the budget), the block next to Daly's name includes both a check and an obliterating mark.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts its findings and conclusions as his own.

With respect to the disputed ballot, the Commissioner concurs that it is not possible to ascribe an intent on the part of the voter to cast a vote for Daly, as the voter appears to have checked off Daly's name but then obliterated the check by blacking over it. Therefore, the Commissioner finds, as did the County

Board of Elections, that this ballot cannot not be counted as a vote for Daly. In the Matter of the Annual School Election Held in the School District of The Township of Vorhees, Camden County, 1972 S.L.D. 141.

Accordingly, a tie remains for the third of the three-year seats to be filled on the Cape May City Board of Education, so that pursuant to N.J.S.A. 18A:12-15(c) the Board is directed to conduct a special election for the vacant seat, restricted to candidates Elissa Campanella and John Daly, as soon as practicable consistent with the scheduling limitations imposed by N.J.S.A. 18A:14-3.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 16, 1994

DATE OF MAILING - MAY 16, 1994

120-94

120-94

IN THE MATTER OF THE ANNUAL	:	COMMISSIONER OF EDUCATION
SCHOOL ELECTION HELD IN THE	:	DECISION
SCHOOL DISTRICT OF THE	:	
BOROUGH OF FRENCHTOWN,	:	
HUNTERDON COUNTY,	:	

MAY 16, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE : DECISION
BOROUGH OF FRENCHTOWN, :
HUNTERDON COUNTY. :
:

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 April 19, 1994 in the school district of Frenchtown Borough, Hunterdon County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Jane Rossa	112	3	115
Eileen Godley Lewis	106	1	107
Dennis L. Heil	91	1	92
Joyce Taylor	92	0	92
Christine Housel	63	1	64
Brian Green (write-in)	1	0	1
Bruce Adams (write-in)	1	0	1
Robert Mhyre (write-in)	1	0	1
B. Jamhoury (write-in)	0	1	1

Pursuant to N.J.S.A. 18A:12-15(c), which requires recount and certification of results by the Commissioner in the event of a tie vote for members of the Board of Education, an authorized representative of the Commissioner from the Office of the Hunterdon County Superintendent of Schools was directed to recount ballots cast for members of the Board. The recount was conducted at the Hunterdon County Superintendent's office on April 27, 1994.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Jane Rossa	111	3	114
Eileen Godley Lewis	104	1	105
Joyce Taylor	93	0	93
Dennis L. Heil	91	1	92
Christine Housel	62	1	63
Brian Green (write-in)	1	0	1
Bruce Adams (write-in)	1	0	1
Robert Mhyre (write-in)	1	0	1
B. Jamhoury (write-in)	0	1	1

Comparison of the number of ballot coupons with the number of persons signing the poll list revealed one missing coupon, but the number of ballots cast (180) matched the number of persons signing the poll list. Two ballots were voided on recount (marked C-1 and C-2 for Commissioner review) owing to failure to have the required mark within the designated box alongside the name of the candidates chosen; however, such voiding had no impact on breaking the tie vote, in that the two ballots would, if counted, have added one vote each to the tallies of Heil and Taylor, leaving Taylor still ahead by one vote.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts its findings and conclusions as his own.

Accordingly, no tie exists for the third seat on the Frenchtown Board of Education and Joyce Taylor is deemed duly elected to a full term of three years on that Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 16, 1994

DATE OF MAILING - MAY 16, 1994

121-94

121-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ATLANTIC	:	DECISION
CITY, ATLANTIC COUNTY.	:	
	:	

MAY 16, 1994

121-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ATLANTIC	:	DECISION
CITY, ATLANTIC COUNTY.	:	
	:	

MAY 16, 1994

At the conclusion of the recount, the totals were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Michael P. Toland	1,636	67	1,703
Jeffree M. Fauntleroy	1,474	65	1,539
Alma Y. Dobson	1,392	54	1,446
John P. Dollard	1,345	38	1,383
Lillian E. Waters	893	21	914
Sabina M. Walsh	757	18	775
Nancy Anna Brennan	596	21	617
Gregorio "Buddy" Maturgo	412	12	424

Although there were some minor changes, the names of the three winning candidates remained the same as those derived from the balloting of April 19, 1994. Therefore, it is recommended by the Commissioner's representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Michael P. Toland, Jeffree M. Fauntleroy and Alma Y. Dobson were elected to three-year terms on the Board of Education of the School District of Atlantic City.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law where inquiries are pending into the conduct of the above-captioned election, the results of which remain binding on the parties unless

At the conclusion of the recount, the totals were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Michael P. Toland	1,636	67	1,703
Jeffree M. Fauntleroy	1,474	65	1,539
Alma Y. Dobson	1,392	54	1,446
John P. Dollard	1,345	38	1,383
Lillian E. Waters	893	21	914
Sabina M. Walsh	757	18	775
Nancy Anna Brennan	596	21	617
Gregorio "Buddy" Maturgo	412	12	424

Although there were some minor changes, the names of the three winning candidates remained the same as those derived from the balloting of April 19, 1994. Therefore, it is recommended by the Commissioner's representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Michael P. Toland, Jeffree M. Fauntleroy and Alma Y. Dobson were elected to three-year terms on the Board of Education of the School District of Atlantic City.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law where inquiries are pending into the conduct of the above-captioned election, the results of which remain binding on the parties unless

122-94

122-94

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF COLTS NECK, MONMOUTH	:	
COUNTY.	:	
	:	

MAY 17, 1994

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF COLTS NECK, MONMOUTH	:	
COUNTY.	:	
	:	

The announced results of the balloting for the Special Election School Building Referendum held March 22, 1994 in the Township of Colts Neck, Monmouth County, were as follows:

POLLING PLACE	YES	NO
Cedar Drive School #1	286	414
St. Mary's Parish Hall #2	269	260
Board of Education, Administration Building #3	264	244
Board of Education, Administration Building #4	185	174
Absentee Votes	148	56
TOTAL	1,152	1,148

Pursuant to a letter request of ten qualified voters filed on March 30, 1994, an authorized representative of the Commissioner from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the votes cast on the voting machines. The recount was conducted on Monday, April 11, 1994, at the Voting Machine Warehouse on Halls Mills Road in Freehold Township.

At the conclusion of the recount, the tally stood as follows:

POLLING PLACE	YES	NO
Cedar Drive School #1	286	414
St. Mary's Parish Hall #2	269	260
Board of Education, Administration Building #3	264	244
Board of Education, Administration Building #4	185	174
Absentee Votes	148	56
TOTAL	1,152	1,148

Absentee totals are as reported at the conclusion of the election as no request to recount absentee ballots was made to the County Board of Elections.

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that as originally reported, the breakdown of votes cast in the Special School Election held in the School District of Colts Neck, March 22, 1994 stays the same.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law where an inquiry is pending into the conduct of the above-captioned election, the results of which remain binding on the parties, unless and until a contrary determination is rendered by the Commissioner upon

receipt and review of the initial decision on the inquiry issued by the Office of Administrative Law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 17, 1994

DATE OF MAILING - MAY 17, 1994

124-94

EDU #10555-93
C # 124-94
SB # 28-94

JOHN LE ROSE,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, May 17, 1994

For the Petitioner-Respondent, James P. Granello, Esq.

For the Respondent-Appellant, Arthur Stein & Associates (Gary Brower, Esq., of Counsel)

The motion filed by petitioner to dismiss the district board's appeal to the State Board of Education as interlocutory is denied. Contrary to petitioner's contention, the decision of the Commissioner of Education rejecting the Administrative Law Judge's determination that petitioner's petition was filed out of time was clearly a "final decision" for purposes of appeal of that issue. See N.J.A.C. 6:2-1.1(a)(1).[1] The fact that the Commissioner

1 N.J.A.C. 6:2-1.1 provides, in pertinent part:

(a) Final decisions of the Commissioner of the Department of Education ... are appealable to the State Board of Education. Final decisions include the following:

1. Any determination of the Commissioner, including, as to those separable issues upon which the Commissioner has rendered a final decision, a decision remanding all or part of a controverted case.

AUGUST 3, 1994

remanded this matter to the Office of Administrative Law for further proceedings consistent with his decision did not render such determination interlocutory. See id.

Accordingly, we direct that the briefing schedule be reestablished and that the brief in support of the Board's appeal be filed within twenty days after the date of our decision herein. We further direct the parties to address in their briefs the question of whether petitioner, a custodian challenging the Board's action in failing to provide him with a salary increment for the 1993-94 academic year, has stated a cause of action entitling him to relief under the school laws.

August 3, 1994

Date of mailing AUG 04 1994

124-94

EDU #10555-93
C # 124-94
SB # 28-94

JOHN LE ROSE,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 17, 1994

Decision on motion by the State Board of Education, August 3, 1994

For the Petitioner-Respondent, James P. Granello, Esq.

For the Respondent-Appellant, Arthur Stein & Associates (Gary Brower, Esq., and Arthur Stein, Esq., of Counsel)

Petitioner in this case is a tenured custodian employed by the Board of Education of the Township of Lacey (hereinafter "Board"). On May 17, 1993, the Board acted to reemploy all of the custodians at a 6% increase over their previous year's salary, except petitioner. On that same date, it acted to reemploy petitioner at the same salary he had received the previous year.

Aug. 2, 1995

The Board agreed to give petitioner the opportunity to address the Board in private session concerning his "increment." On June 21, 1993, the Board met in private session, at which time petitioner and his attorney addressed the Board. Then, on July 19, 1993, in closed session, the Board took a roll call vote to "withhold" petitioner's "increment." By letter dated July 26, 1993, from the Superintendent, petitioner was advised that no further request for Board action with respect to petitioner's salary would be put on the agenda.

Petitioner appealed to the Commissioner of Education, asserting that the Board had acted improperly by withholding his salary increment without taking formal action. He sought an award of the 6% salary increase for 1993-94, along with pre- and post-judgment interest.

The Administrative Law Judge (ALJ), relying on the New Jersey Supreme Court's decision in Kaprow v. Board of Education of the Township of Berkeley, 131 N.J. 572 (1993), held that the Board's action of May 17, 1993, to reemploy petitioner provided him with notice of that action so as to trigger the 90 day requirement of N.J.A.C. 6:24-1.2(c). Since petitioner did not file his Notice of Appeal to the Commissioner until October 8, 1993, the ALJ recommended dismissing the petition.

The Commissioner rejected the ALJ's recommendation, finding that

> even assuming, arguendo, that petitioner's cause of action actually ensued with the Board's May 17, 1993 action to reemploy him for the 1993-94 school year at his current salary, ...the sequence of events surrounding petitioner's withholding created sufficient ambiguity so as to warrant a relaxation of the 90-day rule, pursuant to N.J.A.C. 6:24-1.15, to permit a determination on procedural and substantive claims with respect to the increment withholding.

Commissioner's decision, slip op. at 26.

On this basis, the Commissioner remanded the matter to the Office of Administrative Law.

We reverse the Commissioner's decision. As the ALJ found, the only action that the Board took was on May 17, 1993, when it acted to reemploy petitioner at his previous year's salary. By that action, the Board denied petitioner a salary increase for 1993-94. It is this action which petitioner is seeking to challenge. As the ALJ found, petitioner's attempt to convince the Board to reverse the action it took on May 17 neither negates the fact that petitioner had notice of it nor extends the time limit within which petitioner was required to challenge the action. Kaprow, supra.

Even had petitioner made his claim in a timely fashion, we would dismiss his petition on the grounds that he has not

stated a cause of action that would entitle him to relief in this forum. No provision of the education laws confers on custodial staff any entitlement to receive salary increments. Furthermore, in contrast to teaching staff members, the education laws do not include any provisions specifying procedures which a district board must follow in the event it determines not to increase the salary of a custodian when it reappoints him. See N.J.S.A. 18A:29-14, providing that a board of education may withhold the increment of a teaching staff member and specifying the procedures applicable thereto. See also N.J.S.A. 34:13A-26 and -27 (all disputes regarding the withholding of increments of employees of boards of education for disciplinary reasons, excluding actions taken to withhold the increment of a teaching staff member for teaching performance, are to be resolved through the grievance procedure). Any claim petitioner may have is not one arising under the education laws, and, hence, its resolution would lie outside the jurisdiction of the Commissioner.

Therefore, for the reasons stated, we dismiss the petition in this case.

Attorney exceptions are noted.

August 2, 1995

Date of mailing AUG 04 1995

124-94

124-94

JOHN LE ROSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 17, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10555-93
AGENCY REF. NO. 347-10/93

JOHN LeROSE,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,
Respondent.

James P. Granello, Esq., for petitioner

Gary Brower, Esq., for respondent (Arthur Stein & Associates, attorneys)
Arthur Stein, Esq., for respondent (Arthur Stein & Associates, attorneys)

Record Closed: February 7, 1994 Decided: March 25, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a tenured custodian in the employ of the Board of Education of the Township of Lacey (Board), asserts that the Board withheld his salary increment for 1993-94 without formal action contrary to law and its own stated policies and procedures. Petitioner alleges that the Board's action was arbitrary, capricious and unreasonable and seeks the restoration of his six per cent increment for the 1993-94 school year, together with pre - and post - judgment interest

effective July 1, 1993. The Board denies petitioner's allegations and sets forth four separate defenses seeking a dismissal of the Petition of Appeal.

On October 8, 1993, petitioner filed his Petition of Appeal before the Commissioner of Education (Commissioner). On November 3, 1993, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.A.C.* 52:14B-1 to -15 and *N.J.A.C.* 52:14F-1 to -13.

MOTIONS

On January 14, 1994, petitioner propounded a Motion for Summary Decision, pursuant to *N.J.A.C.* 1:12.5, together with his statement of facts, brief of law and exhibits. By way of letter brief, dated January 21, 1994, the Board opposed petitioner's motion for summary decision. On January 26, petitioner submitted his reply. No other submissions were considered thereafter.

Having carefully reviewed the submissions by the parties, I **FIND** and **CONCLUDE** that there are no genuine material facts in dispute and that the criteria are met for summary decision as set forth by our Supreme Court in *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67 (1954). Accordingly, the matter is now ripe for summary decision.

PETITIONER'S STATEMENT OF FACTS

The following facts are uncontested between the parties:

1. Petitioner John LeRose has been employed by the respondent Board as a twelve (12) month head custodian (High School) since January 1986. See paragraph one of petition of appeal and respondent's answer.

2. On March 2, 1987, petitioner was appointed head custodian at the high school for an indefinite term effective July 1, 1987. See answer number one to request for admissions, Exhibits A2 and B2.

3. On March 6, 1992, petitioner, along with other head custodians, was approved for a salary increased by the Board which included a 6.5% increase retroactive from July 1, 1991 for the 1991-92 school year and a 6.0% increase for

both the 1992-93 and 1993-94 school years. See answer number two to request for admissions, Exhibits A3 and B2.

4. On May 17, 1993, petitioner's name and 1992-93 (previous year's) salary appeared on the list of head custodians who were subject for reemployment, and on said date the Board acted to reemploy petitioner at his previous year's salary of $32,393. See answer number four to request for admissions, Exhibits A3 and B2.

5. On May 17, 1993, the Board agreed to delay the discussion regarding the withholding of petitioner's 1993-94 salary increment until petitioner had an opportunity to meet with the Board on June 21, 1993 in private session. See answer number three to request for admissions, Exhibits A3 and B2; see Exhibit "A" attached to petition of appeal; see regular and private session minutes dated May 17, 1993 and private session of June 21, 1993, Exhibits D and E.

6. On May 17, 1993, all other head custodians except petitioner were reemployed by the respondent with a 6% increase added onto their previous year's salary. See answer number five to request for admissions, Exhibits A3 and B2.

7. At no time during the 1992-93 or 1993-94 school years did the Board act in public session by motion and/or resolution to withhold petitioner's increment for the 1993-94 school year. See answer number six to request for admissions, Exhibits A3 and B2.

8. Respondent Board states it acted in private session during its July 19, 1993 Board meeting to withhold petitioner's increment. However, it admits that by letter dated July 26, 1993 from its Superintendent of Schools, petitioner was advised that "no further request for Board action will be placed on the agenda for consideration" with reference to petitioner's present salary. See letter dated July 26, 1993, or Exhibit "C" attached to petition of appeal; see answer number six to request for admissions, Exhibits A3 and B2.

9. Prior to the July 19, 1993 meeting, petitioner was notified by the Board attorney that the Board intended to *discuss* his withholding in private session at that meeting. This statement is borne out by the closed session minutes of July 19, 1993 provided to the petitioner by the Board and there is no indication in the July 29, 1993 minutes that the Board took action in closed session on that date. See letter

dated July 1, 1993, from Arthur Stein to James P. Granello, Exhibit "B" attached to petition of appeal; see private session minutes dated July 19, 1993, Exhibit "F."

CERTIFICATION OF JAMES G. SAVAGE, JR.

1. I am Secretary of the Lacey Township Board of Education and am familiar with the matters set forth herein. I make this Certification in opposition to petitioner's motion for summary decision.

2. Prior to the Board's May 17, 1993, meeting, correspondence was forwarded to it recommending that the increment of petitioner be withheld. This recommendation included as attachments unsatisfactory performance evaluations on petitioner with petitioner's written responses to each evaluation.

3. On May 3, 1993, correspondence was forwarded to petitioner notifying him that the Board would discuss withholding his increment in private session at the Board's May 17, 1993, general meeting. This letter additionally advised that petitioner has the right to request that the Board's discussion be conducted in public session. (See correspondence of James G. Savage, Jr. to petitioner dated May 3, 1993, attached hereto as Exhibit "A.")

4. Subsequent to mailing of the May 3, 1993, correspondence, the Board consented to allow petitioner and his attorney to address the Board in private session. This would occur at the June Board meeting.

5. On May 17, 1993, the Board, by roll call vote in public session, approved the contracts and salaries of various individuals after discussion in private session. The contract of petitioner at his 1992-93 pay scale was included in the contracts acted on by resolution of the Board (See excerpts of Minutes of Board Meeting of May 17, 1993, attached hereto as Exhibit "B.")

6. The petitioner was provided with an opportunity to address the Board in private session. Petitioner and his attorney did appear in private session and did address the Board.

7. Subsequent to petitioner's presentation at the July 19, 1993, private session, the Board considered the withholding of petitioner's increment and voted by roll call in private session to withhold petitioner's increment.

8. Petitioner was notified by letter dated July 26 1993, that the Board had taken action and would not consider further requests for consideration of petitioner's salary. (See correspondence of July 26, 1993, attached hereto as Exhibit "C.")

9. On August 16, 1993, the Board acted on the minutes of the July 19, 1993, private session meeting which included the Board's action on petitioner's increment. This action was taken by roll call of the Board in public session and was passed by unanimous vote of the quorum present. (See excerpts of August 16, 1993, Board General Meeting, attached hereto as Exhibit "D.")

10. The Board provided adequate notice of all meetings referenced herein in compliance with the Open Public Meetings Act.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

PETITIONER'S LEGAL ARGUMENT

POINT I

ASSUMING THE BOARD OF EDUCATION ACTED IN CLOSED SESSION ON JULY 19, 1993, THE RESPONDENT BOARD OF EDUCATION ACTED IN AN *ULTRA VIRES* MANNER IN WITHHOLDING PETITIONER'S INCREMENT

The withholding of an increment by a board of education must be done at a public meeting open to the public. *N.J.S.A.* 18A:10-6; *Cullum v. BOE of North Bergen, Hudson County,* 15 *N.J.* 285 (1954); *Fergen, et al., v. BOE Twp. of Livingston,* 1976 *S.L.D.* 886, 890. Private and final action taken by a local board of education in closed session has been consistently declared *ultra vires* by the Commissioner of Education and the courts. *Cullum, supra. Am Heating and Ventilating Co. v. BOE of Town of West New York, 81 N.J.L.* 423 (1911); *Houman v. Mayor and Council of Borough of Pompton Lakes,* 155 *N.J. Super.* 129, 151-158 (Law Div. 1977). This same

principle is applied to the provisions under the Open Public Meetings Act. *N.J.S.A.* 10:4-6 *et seq.*, 10:4-12(b) ; *Houman, supra.*

The Board maintains that it acted in closed session on July 19, 1993, to withhold petitioner's increment. The Board minutes do not bear out this claim. Nevertheless, even if the Board discussed and acted upon the petitioner's salary increment in closed session, such action would be *ultra vires* and should be declared void. *Houman, supra; N.J.S.A.* 10:4-15; *Cullum, supra.*

On the other hand, it appears that the Board took no official action either at its May 17 or July 19 meeting in public to withhold petitioner's increment. The Board has an affirmative duty to establish the employment and regulate the conduct of its employees by official action. *N.J.S.A.* 18A:11-1(c); *Townsend v. Trustees of School District No. 12 in Essex County,* 41 *N.J.L.* 312 (1979); *see, also, N.J.S.A.* 18A:16-1 ("it shall determine, and fix and alter their compensation▪▪▪"); 18A:17-41 ("The Board of Education of every district shall make such rules and regulations ▪▪▪ as may be necessary ▪▪▪").

The Board failed to take any affirmative action in public to withhold the salary increment which was awarded to the petitioner in March 1992 in the amount of 6% for the 1993-94 school year. Nor did it take any official action to rescind its previous decision which awarded such increment to the petitioner. Having failed to act, it violated its own stated policy by failing to provide petitioner with his 6% increment for the 1993-94 school year.

The Board reemployed petitioner to his previous year's salary on May 17, 1993 contrary to law and its own stated intent. Based on the private session minutes, its intent was to delay discussion and action on the petitioner's salary increment until the following meeting (June 21, 1993). See private session minutes of May 17, 1993. (Exhibit "D.") The respondent Board had no authority to set petitioner's salary in the same amount as last year's without publicly acting to withhold his increment. Its action of May 17, 1993, was *ultra vires* and should be declared void.

Furthermore, the Board showed arbitrariness and bad faith by agreeing to delay the discussion and action on the petitioner's salary increment until a later time and then proceeding to set his salary at its previous rate without notice to the petitioner thereby depriving him of any opportunity to be heard. *See, e.g., Kopera v. West Orange BOE,* 60 *N.J. Super.* 288, 294 (App. Div. 1960) ("discretionary powers

may not be upset unless patently arbitrary, without rational basis or induced by improper motives"). The Board did not discuss petitioner's salary at its May 17, 1993 meeting, yet it acted at that meeting to maintain his salary at its previous level. Such action was patently arbitrary and without any rational basis. *Id.* at 294.

It is for all of the foregoing reasons that the respondent Board should be ordered to restore the 1993-94 salary increment withheld from the petitioner retroactively to the date of initial entitlement plus award interest on the monies withheld in order to make the petitioner whole. See, *N.J.A.C.* 6:24-1.16.

THE BOARD'S LEGAL ARGUMENT

POINT I

PETITIONER'S CHALLENGE TO THE ACTIONS OF THE BOARD IS UNTIMELY AND MUST BE DISMISSED

Pursuant to *N.J.S.A.* 10:4-15, any action taken by a public body at a meeting which does not conform with the provisions of the Act are voidable. Any petition seeking to have such action voided must be brought within 45 days after the action sought to be voided has been made public. *N.J.S.A.* 10:4-15 (a).

In the current petition, the petitioner challenges actions taken by the Board at its May 17, 1993 and July 19, 1993 meetings. Petitioner further acknowledges that he received the Board's letter of July 26, 1993 advising that the Board would accept no further request for consideration of petitioner's salary. Indeed, receipt of this letter was acknowledged in writing by petitioner's counsel dated July 29, 1993, attached hereto as Exhibit "A."

Even if the Board action at the July 19, 1993 meeting is the point of focus, the petitioner's petition, filed with the Commissioner October 5, 1993, is clearly untimely. Indeed, even if the July 29,1993, acknowledgement letter is used, petitioner's challenge is precluded by the clear terms of the Act. *N.J.S.A.* 10:4-15 (a); *Township of Bernards vs. State, Dept. Community Affairs,* 233 *N.J. Super.* 1, 25 (App. Div. 1989), *certif. den.* 118 *N.J.* 194 (1989); *Jersey City v. State Dept. of Environmental Protection*, 227 *N.J. Super.* 5, 22 (App. Div. 1988), *certif. den.* 111 *N.J.* 640 (1988).

Petitioner's claims for relief are clearly untimely and must be dismissed.

POINT II

THE RESPONDENT, LACEY TOWNSHIP BOARD OF EDUCATION, ACTED APPROPRIATELY IN WITHHOLDING PETITIONER'S INCREMENT

In its current filing, petitioner states that the withholding of an increment by a board of education must be done at a public meeting open to the public. It further asserts that both case law and the Open Public Meetings Act, *N.J.S.A.* 10:4-6, *et seq.*, (Act) counsel that the Court must declare the Board's action action in this matter *ultra vires* and void as a matter of law. Further, the court is advised that it should order retroactive restoration of petitioner's increment based upon the facts of this case and further award interest to the petitioner. For the reasons that follow, it is submitted that not only has the petitioner not carried its burden to obtain relief via summary decision, the facts clearly show that the Board's actions were appropriate.

In support of its position, petitioner offers various statutory and case law cites. It cites to *N.J.S.A.* 18A:10-6, the provision which states that the school board shall hold public meetings. It cites to *Cullum v. Bd. of Ed. of North Bergen,* a case involving the hiring of a new employee as Superintendent of Schools. It cites to *Feigen, et al v. Bd. of Ed. of Township of Livingston,* a case involving the merger of two schools. Similarly, it cites to other cases which involve illegal delegation of contracting authority to Board employees and hiring of an attorney to pursue tax appeals (curiously a case which, as will be discussed in Point II of this letter memorandum, recognizes that even acts found to be not in procedural compliance are appropriately ratified/rectified by subsequent action). Finally, petitioner cites to provisions of the Open Public Meetings Act including *N.J.S.A.* 10:4-12 (b).

It is submitted that, even ignoring the specific facts of this case, none of the cited authorities is directly relevant in the context of an increment withholding case. In contrast, each is clearly distinguishable from an increment withholding matter in which a lesser public interest in access to Board deliberations must be balanced against the privacy rights of employee. It is because of these concerns that actions in such matters are specifically directed to be taken in the private session, absent an employee request for discussion in public session. *See, N.J.S.A.* 10:4-12 (b) (8).

However, even if petitioner's basic premise were to be accepted on faith (a standard inappropriate for summary decision), it is submitted that the Lacey Township Board of Education's actions in this matter are in compliance with the letter and intent of the Open Public Meetings Act and applicable requirements.

As summarized in the Certification of James G. Savage, Jr., attached hereto and incorporated herein, petitioner was put on notice of problems with his performance which could impact his increment long before the Board took action. Petitioner was advised of the problems, given a chance to respond and did respond.

As it became apparent that the extent of the problem required consideration of action to withhold petitioner's increment, evaluations and petitioner's responses were forwarded to the Board.

The petitioner was then notified that the Board would discuss the withholding of petitioner's increment in its May 17, 1993 private session meeting and advised that he had the right to request the discussion be held in public session. Petitioner requested that the discussion be held in private session and further requested an opportunity to address it in a subsequent meeting as petitioner was not prepared for the May meeting.

At the May 17, 1993, meeting the Board passed a resolution approving the contracts of various support staff including petitioner. This vote was by roll call at the public portion of the Board's meeting. The salary approved by the Board for petitioner was that received by the petitioner for the 1992-93 school year (*i.e.,* with the 1993-94 increment withheld.)

Subsequent to the Board's public session vote and approval of petitioner's contract without the increment, the Board did provide petitioner an opportunity to address it in private session.

Subsequent to petitioner's appearance at the July 19, 1993, private session meeting, the Board again voted on withholding of petitioner's increment prior to the conclusion of the private session. The Board again determined that the increment should be withheld based upon all information and consistent with the prior public session action on petitioner's contract.

Clearly, the Open Public Meetings Act allows for matter involving evaluation of the performance of, promotion, and terms and conditions of employment to be dealt with in private session. *N.J.S.A.* 10:4-12 (b) (8). Indeed, the Act, recognizing the privacy interests of the employee affected, provides that these topics are to be dealt with in public session *only* if all the individual employees whose rights could be affected request in writing that the matter be discussed at a public meeting.

Here the Board provided notice of the impending action through both unsatisfactory evaluation and written notice of the impending action. The Board provided petitioner the opportunity to request public session discussion. The Board further provided the petitioner with the opportunity to address it in private session. Finally, the Board voted to withhold the increment both in public session in approving the contract and pay rate of petitioner and in private session after allowing petitioner access to the process.

The process followed by the Board protected petitioner's privacy rights in accordance with the Act and in no way inhibit any public interest or right to access to discussion/decision making. Indeed, the Board acted to provide petitioner with even more access than required by the statute.

It is submitted that the Board's actions in the current context comply with the letter and intent of the law and should be upheld. *See, Cole v. Woodcliff Lake Board of Education,* 155 *N.J. Super.* 398 (Law Div. 1978).

Finally, petitioner contends that the Board acted in an arbitrary manner and without any reasonable basis as further justification for a Court ruling in its favor. Particularly, the petitioner contends that the Board did not provide him with notice of the increment withholding, did not provide for discussion of the increment withholding and deprived him of an opportunity to be heard.

It is submitted that the facts as summarized herein and by the Certification of James G. Savage, Jr. attached hereto and incorporated herein, clearly demonstrate that the petitioner was given more than adequate notice through both numerous unsatisfactory evaluations (*See, Hillman v. Caldwell-West Caldwell Bd. of Ed.,* 1977 *S.L.D.* 210 (Commissioner, July 15). The petitioner here was notified that the Board intended to discuss the increment withholding decision in private session and provide him an opportunity to request this decision be held in public session. Petitioner requested that discussion be conducted in private session.

There is similarly no statutory requirement that the employee be allowed to speak or participate in the private session. However, as a point of fact, the petitioner had numerous opportunities to be heard and was heard.

As cited by the petitioner himself, it is well established that an action of a school board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 288, 294 (App. Div. 1960) Denial of increments based on unsatisfactory ratings is clearly discretionary action. *Id.* The unsatisfactory performance of petitioner was the basis of the Board's action here. It is submitted that there is nothing on record to indicate that there is any factual basis to support petitioner's position, let alone carry its burden here.

Further, the petitioner does not explain how it would have the court make factual findings as to the "rational basis" for the Board's actions without any hearing in this matter. It is submitted that a factual finding on the basis of the Board's action can only be made subsequent to a hearing which precludes this as an appropriate basis for a summary decision motion.

POINT III

EVEN IF RESPONDENT, LACEY TOWNSHIP BOARD OF EDUCATION DID NOT COMPLY WITH PROCEDURAL REQUIREMENTS IN ITS ROLL CALL VOTES OF MAY 17, 1993 AND JULY 19, 1993, IT SUBSEQUENTLY RATIFIED THESE ACTIONS

Pursuant to *N.J.S.A.* 18A:16-1, the respondent Board is specifically authorized to act in setting and controlling all aspects of employment including the salaries paid to its employees and any increases thereto. It is undisputed that the respondent was authorized to take action to withhold any increase in petitioner's salary. Indeed, in the context of teaching staff members, it has been held that a Board cannot bargain away the right to withhold an increment. *Bellet v. Bd. of Ed. of Twp. of Teaneck,* 1982 *S.L.D.* 970.

If a public body has the authority to act, but has failed to follow exactly proper procedures to exercise that power, the irregular, although not *ultra vires,* action may be subsequently ratified. *Ferreira v. City of Asbury Park,* 237 *N.J. Super.* 142 (App.

Div. 1989), certif. den. 121 *N.J.* 627 (1990). The subsequent action, being equivalent to the original grant of power, is operative and related back other date of the original action which is subsequently ratified. *Houman v. Mayor and Council of Borough of Pompton Lakes,* 155 *N.J. Super.* 129, 159-161 (Law Div. 1977).

The Open Public Meetings Act does not preclude ratification of nonconforming acts. Rather, the Act recognizes ratification and specifically provides a procedure by which the public body may rectify an otherwise voidable action. *N.J.S.A.* 10:4-15 (a).

In this case, as outlined in the Certification of James G. Savage, Jr., the Board voted initially to approve petitioner's contract at the amount contained in his contract for the 1992-93 school year on May 17, 1993. This vote was conducted in public session by resolution.

In accordance with the provisions of the Open Public Meetings Act, it determined to discuss the withholding of petitioner's increment in private session and did so. Indeed, it even provided petitioner with an opportunity to participate in private sessions.

After such opportunity to participate was granted, the Board again voted in private session on July 19, 1993, affirming its prior contract action and finding withholding of the increment to be appropriate.

Subsequent to the July 19, 1993, private session discussion and Board vote, the Board conducted a regular meeting on August 16, 1993. The Board meeting was properly noticed and was otherwise in compliance with all provisions of the Open Public Meetings Law.

During the public session of the August 16, 1993 regular meeting, the Board by unanimous roll call vote approved and ratified the private session minutes of the July 19, 1993, private session which included the discussion and vote on withholding of petitioner's increment.

Even if it is found that the Board's action up to and including actions taken at the July 19, 1993, private session did not conform with all procedural requirements, it is submitted that the Board's unanimous action approving the meeting minutes by roll call at the Board's public session constituted ratification of the Board's prior action curing any procedural nonconformance.

POINT IV

IF THE BOARD DID NOT SATISFY ALL PROCEDURAL REQUIREMENTS IN ITS INITIAL ACTIONS AND DID NOT ADEQUATELY RATIFY ITS PRIOR ACTION BY SUBSEQUENT VOTE, THE APPROPRIATE REMEDY IS REMAND TO THE BOARD FOR APPROPRIATE ACTION

Pursuant to *N.J.S.A.* 10:4-15, any action taken by a public body which does not comply with the provisions of the Act is voidable. However, as discussed above, the Act further provides at *N.J.S.A.* 10:4-15 that nonconformance may be cured by corrective or remedial action taken in a proceeding conducted in conformance with the Act's requirements. Provided the public body is authorized to take the underlying action, the subsequent ratification is operative and relates back to the date of the original action. *See, Houman, supra.*

The court is directed by the Act to issue orders and provide remedies necessary to insure compliance with the Act. *N.J.S.A.* 10:4-16.

Petitioner, in its current papers, contends that the procedure followed by the Board does not satisfy the Act. Based on this, it is submitted that this court should void the Board's action, order the Board to restore the petitioner's withheld salary increment retroactively and award interest.

While, as detailed above, it is submitted that the Board's action is in compliance with the Act, even if the Board were found to not be in compliance, it is further submitted that the petitioner's requested relief for this alleged procedural noncompliance is inappropriate.

In determining remedies and relief under the Act the court is to consider the nature, quality and effect of the noncompliance of the public body in fashioning corrective measures necessary to conform with the statute. *Polillo v. Deane,* 74 *N.J.* 562, 579 (1977).

In this case, the Board received a recommendation that an increment be withheld based upon repeated performance problems and inadequate performance evaluations. Petitioner received each of the evaluations, had an opportunity to comment on them and did comment on them. These performance evaluations and

petitioner's comments were before the Board for their consideration. The Board voted to approve a contract for petitioner at his prior year salary at the public session of the May 17, 1993 Board meeting.

The Board notified petitioner of its intent to discuss withholding of his increment at a private session. The Board, though not required, provided petitioner with the opportunity to participate in private session discussions. Petitioner did participate in these discussions. After these discussions the Board gain voted to withhold petitioner's increment. Finally, at the August 16, 1993 Regular Board meeting, the Board by roll call vote approved the minutes of the July private session and ratified, in public session, the prior action on petitioner's increment.

It is submitted that the spirit of the Open Public Meetings Law and all applicable standards of conduct were observed by the Board at all points, The Board acted on a personnel matter to protect the privacy rights of the petitioner and took action it felt appropriate including providing petitioner direct input into the process.

Petitioner was not prejudiced by any potential procedural violation so as to justify the relief sought. No would the public interest be protected or served in any way by a remedy that requires the petitioner be paid at an increased salary level despite unsatisfactory evaluations because of a procedural matter.

Rather, if it is found that all procedural requirements were not met, it is submitted that the appropriate remedy to insure compliance with the Act would be to remand this matter to the Board for remedial action to correct the nonconformance.

For all the above reasons the Lacey Township Board Education respectfully submits that petitioner's request for summary decision should be denied and its petition dismissed. In the alternative, if it is found that the Board did not satisfy all procedural requirements in withholding petitioner's increment, it is further respectfully submitted that the appropriate remedy is remand to the Board for further action in conformance with the Act's requirements.

PETITIONER'S REPLY

Petitioner grounded his petition upon the Board's failure to act in public to withhold his salary increment. As stated in his brief in support of the motion for summary decision, the Board of Education was obligated to act in public pursuant to statutory and case law pertaining to educational matters. *See N.J.S.A* 18A:10-6; *Cullum v. BOE of North Bergen,* 15 *N.J.* 285 (1954). Also, its action(s) was a violation of the Open Public Meetings Act. *N.J.S.A.* 10:4-6 *et seq.*; 10:4-12 (a).

The limitation on bringing actions before the State Commission of Education is ninety (90) days. *N.J.A.C.* 6:24-1.2 (c). This time begins to run from the time the petitioner received "adequate notice" of the final order, ruling, or other action being appealed. *Kaprow v. BOE of Berkeley Twp.* 131 *N.J.* 572, 586-587 (1993). In the instant matter, the issue of withholding the petitioner's increment by the respondent Board of Education was under "discussion"by the Board until such time as when the petitioner was advised on or about July 26, 1993, that the Board would no longer consider the matter. See Exhibit "C" respondent's brief, Superintendent's letter to petitioner's attorney.

Even though one could argue that this notice was not enough to adequately inform the petitioner of the Board's true intent, and notwithstanding the vagueness of the Superintendent's letter, the petitioner filed his petition of appeal within ninety (90) days of this apparent Board action. The petition of appeal was filed on October 4, 1993 (71 days later); *see* letter from petitioner's attorney to Superintendent dated July 29, 1993 attached.

The petitioner is not relying solely upon the provisions of the Open Public Meetings Act to support his contention that the Board was required to act in public. The respondent Board's May 17 and July 19, 1993 "actions" violated *N.J.S.A.* 18A:10-6 (conduct of public meetings); 18A:11-1 (c) (make rules for the employment, regulation of conduct of its employees); 18A:16-1 (each board shall determine, fix and alter compensation of janitors, etc.); 18A:17-41 (the Board shall make such rules and regulations as may be necessary for the employment, discharge, management and control of the public school janitor, janitor engineers, custodians or janitorial employees of the district). None of these statutes permit a board to act in private when setting such policies, rules or conditions of employment such as the withholding of a custodial staff member's increment. *N.J.S.A.* 18A:29-14 which

pertain to the withholding of increment for a teaching staff member specifically requires a "recorded roll call majority vote of the full membership of the Board" conducted in public. No less of a requirement should be mandated for a withholding of a custodial staff member. *See e.g., Speer v. BOE OF Twp. of E. Brunswick,* 1984 *S.L.D.* 1100, 1107-1108 (*N.J.S.A.* 18A:11-1 and *N.J.S.A.* 19A:16-1 provide authority to withhold increment of a janitor); *see,* also, *Regent v. BOE Twp. of Woodbridge,* 1981 *S.L.D.* (secretaries and clericals); *Smith v. BOE Twp. East Brunswick,* OAL Dkt. EDU 5654-8? (June 11, 1983), Commissioner of Education decision August 15, 1983, aff'd. State Board April 6, 1984.

Furthermore, even if petitioner's challenge was based solely upon a violation of the Open Public Meetings Act the time limit for bringing such action before the Commissioner of Education is ninety (90) days, not forty-five (45) days as it would be to the Superior Court. *See Voll,* Commissioner of Education decided April 14, 1986; *Smith, supra.,* State Board decision April 6, 1984; *Speer, supra.,* pp. 1107-1108; Sukin v. Northfield BOE, 171 *N.J. Super.* 194 (App. Div. 1979). Even if the Board took a "straw vote" in private session to identify a consensus vote, it should have reentered public session and publicly voted on the matter. *Matter of Cole,* 194 *N.J. Super.* 237, 247 (App. Div. 1984).[1]

The Board of Education admits it gave the petitioner "an opportunity to be heard" *after* it approved the petitioner's salary without an increment on May 17, 1993. As pointed out in his brief in support of summary decision, such action by the respondent Board was contrary to the representations given to the petitioner that no action would be taken on May 17, 1993 and contrary to the Board's stated intent. See petitioner's Exhibit "D" private session minutes of May 17, 1993. In short, the respondent Board acted arbitrarily and capriciously in setting his salary as it was last year contrary to its previous decision in March 1992 to award the petitioner and all other custodians a six percent salary increase. To state that the Board gave the petitioner "an opportunity to be heard" after setting his salary on May 17, 1993, without his increment and then "determined" in private session on July 19, 1993, that an increment should be withheld constitutes a clear violation of the petitioner's rights. *Kopera v. West Orange BOE,* 60 *N.J. Super.* 288, 294 (App. Div. 1960).

[1] The approval of the private session minutes of July 19th by the Board on August 16, 1993 in no way validates the alleged illegal action taken in private session on July 19th which "action" is not even reflected in the private session minutes.

The remedy for such a violation must be to declare what the Board has done as void and not allow the Board to retroactively attempt to withhold the increment granted to the petitioner in March 1992. Rather, the Commissioner of Education should direct the Board of Education that any withholding must be done prospectively and at public meeting conducted in public. *N.J.S.A.* 10:4-15 (b); 10-4-16. As the court stated in *Cullum v. BOE of North Bergen, Hudson County,* 15 *N.J. supra.* at 294: "The Legislatures has unmistakably and wisely provided that meetings of boards of education shall be in public (*R.S.*18:5-47 now 18A:10-6); if a public meeting is to have any meaning or value, final decision must be 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." *In Callum* the court invalidated a resolution regarding the appointment of a Superintendent of Schools. No less a remedy must be afforded to the petitioner herein. The setting of the petitioner's salary on May 17, 1993, should be voided and the petitioner's salary should be adjusted retroactively to July 1, 1993, to include the six percent increase which was approved in March 1992 plus prejudgment interest. *See N.J.S.A.* 10:4-16 (court may issue orders or other remedies to insure compliance with the provisions of the Open Public Meetings Act).

DISCUSSION AND CONCLUSIONS

Petitioner, in his responding brief properly cites the case of *Kaprow v. BOE Berkeley Twp,* 131 *N.J.* 572, (1993) for the proposition of timely notice and the 90 day rule under *N.J.A.C.* 6:24-1.2 (c). However, petitioner misapprehends the holding in the *Kaprow* matter as it applies to the instant matter.

Maurice Kaprow was a tenured assistant superintendent in the employ of the Berkeley Township Board of Education. Kaprow's employment was terminated effective June 31, 1981, as a consequence of a reduction in force (RIF) pursuant to *N.J.S.A.* 18A:28-9. The Berkeley Board failed to maintain Kaprow's name on a preferred eligibility list for reemployment as required by *N.J.S.A.* 18A:28-12. Subsequent to Kaprow's termination, the Berkeley Board filled the position of assistant superintendent with someone other than Kaprow and without notice to him.

On February 23, 1988, Kaprow inquired of the Berkeley Board's secretary as to whether positions for which he retained tenure rights had been established by the Board subsequent to his termination. On February 23, 1988, the Board Secretary wrote Kaprow to advise him that on September 9, 1986, the Board appointed Robert Ciliento to the position of Assistant Superintendent of Administrative Services. The Board Secretary also advised Kaprow that on July 1, 1987, the Board had appointed Sheila McGuckin as District Supervisor of Elementary Schools.

In or about February 28, 1988, Kaprow addressed a letter to the Berkeley Board making claim to both the Assistant Superintendent and District Supervisor positions. Kaprow requested the Board to reinstate him retroactively with full back pay and benefits, pursuant to *N.J.S.A.* 18A:28-12. The Berkeley Board did not reply to Kaprow's letter of February 28, 1988.

On April 25, 1988, Kaprow sent a second letter to the Berkeley Board asserting he wished to amicably resolve the matter and requested a reply by May 16, 1988. On June 14, 1988, the Berkeley Board's attorney responded to Kaprow's April 25, 1988, letter and acknowledged that two positions had been created and filled. The Board's attorney asserted, among other things, that the duties of the two positions were substantially different from those performed by Kaprow and, therefore, his RIF rights did not attach and there was no basis for his reinstatement.

On August 1, 1988, Kaprow filed a verified Petition of Appeal with the Commissioner of Education asserting his claim to the positions of Assistant Superintendent of Administrative Services and/or District Supervisor. Kaprow's case proceeded through the OAL, the Commissioner , the State Board of Education, the Appellate Division of Superior Court, to the New Jersey Supreme Court, which granted his petition for certification at 130 *N.J.* 16 (1992).

The Court in *Kaprow* found that the letter he received from the Berkeley Board's secretary on February 23, 1988, constituted adequate notice under *N.J.A.C.* 6:24-1.2 (c). Justice Garibaldi, writing for the Court, made the following observation:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. *See Burns v. West Am. Corp.,* 137 *N.J. Super.* 422, 446, 349, *A. 2d.* 142 (Dist. Ct. 1975).

> Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. *See Apex Roofing Supply Co. v. Howell,* 59 *N.J. Super.* 462, 158, *A.* 2*d.* 49 (App. Div. 1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. *Ochs v. Federal Ins. Co.,* 90 *N.J.* 108, 112, 447, *A.* 2*d.* 163 (1982). The second purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and stability to human affairs. *Ibid.* (quoting *Farrell v. Votator Div.* 62 *N.J.* 111, 115, 299, *A.* 2*d.* 394 (1973).
>
> > When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntary sleeps on his rights so long as to permit the customary period of limitations to expire,the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [*Farrell, supra.* 62 *N.J.* at 115, 299, *A.* 2*d. 394]*
>
> Adequate notice under *N.J.A.C.* 6:24-1.2 should accommodate both purposes. That is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post-RIF cause of action. *See Burd v. New Jersey Tel. Co.,* 76 *N.J.* 284, 291, 386, *A.* 2*d.* 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone,* 21 *N.J.* 28, 48, 120 *A.* 2*d. 721 (1956) Id.* at 587.

The Court held that the notice to Kaprow on February 23, 1988, albeit unofficial and informal, was sufficient to trigger the ninety-day limitations period. Kaprow's subsequent attempt to negotiate with the Board to resolve his claim was held to be irrelevant. The negotiations did not negate the fact that he received adequate notice on February 28, 1988, nor did it toll the running of the ninety-day limitations period.

The facts in *Kaprow* and the instant matter are similar. In the instant matter, petitioner was advised on May 3, 1993, of the Board's intent to withhold his 1993-94 salary increment (Board's Exhibit A). Subsequently, on May 17, 1993, the Board, by a recorded roll call vote in public session reemployed petitioner at the annual salary of

$32,393. (Board's Exhibit B). Petitioner and petitioner's attorney were both aware of the Board's action on May 17, 1993. Under *Kaprow,* May 17, 1993, triggered the notice to petitioner of the Board's action. May 17, 1993, therefore, commenced the running of the 90 day rule under *N.J.A.C.* 6:24-1.2 (c). Ninety days from May 17, 1993, fell on August 15, 1993.

Notwithstanding petitioner's understanding of the Board's intention to discuss his salary at some subsequent date, the fact remains that it took action on May 17, 1993 and reemployed petitioner at his former salary. In *Kaprow,* the Court said:

> Kaprow's attempt to resolve his claim through negotiations with the Local Board is irrelevant. It does not negate the fact he received adequate notice on February 23, nor does it toll the running of the limitation period. (citation omitted) (*Id.* at 588).

The *Kaprow* Court observed that teachers increments are not statutory entitlements where it held in *North Plainfield Ed. Ass'n v. Board of Ed.* , 96 *N.J.* 587 (1984), that:

> Because the award of the annual increment is not a matter of statutory right, but is subject to "denial for inefficiency or other good cause," *N.J.S.A.* 18A:29-14, it is subject to the time bar provided in the regulation [*N.J.A.C.* 6:24-1.2] issued by the Commissioner pursuant to that statute. (*Id.* at 594). 131 *N.J.* at 585

Thus, custodial increments cannot be statutory entitlements and, as teacher increments, subject to the 90 day rule under *N.J.A.C.* 6:24-1.2 (c).

I **CONCLUDE** that petitioner, John LeRose, was afforded adequate notice when the Board action on May 17, 1993, by a recorded roll call vote in public session, to award him a salary of $32,392 for the 1993-94 school year.

I **CONCLUDE** that the 90 day rule, pursuant to *N.J.A.C.* 6:24-1.2 (c) commenced to run on May 17, 1993.

I **CONCLUDE** that petitioner, pursuant to *Kaprow, supra.,* had until August 15, 1993, to file his Petition of Appeal before the Commissioner with regard to the Board's action concerning its failure to award his salary increment for the 1993-94 school year.

I FIND and CONCLUDE that petitioner filed his petition out of time on October 8, 1993.

Having concluded that petitioner's petition was filed out of time pursuant to *N.J.A.C.* 6:24-1.2 (c) and the holding in *Kaprow, supra.,* it is not necessary for this tribunal to deal with the remaining issues.

ORDER

Accordingly, it is hereby **ORDERED** that petitioner's Motion for Summary Decision is hereby **DISMISSED** and that Summary Decision is **ENTERED** on **BEHALF** of the Lacey Township Board of Education.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 25, 1994
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11/4/94
Date

Hope Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 08 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

JOHN LE ROSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner excepts to the ALJ's finding that petitioner was advised on May 3, 1993 of the Board's intent to withhold his increment. He maintains that the letter sent to him by the Board on that date simply stated that

> the Board "intends to discuss withholding of your 1993-94 salary increment. Formal action involving withholding of your 1993-94 salary increment may be taken." (emphasis in text)
> (Petitioner's Exceptions, at p. 1)

Petitioner argues that there was nothing contained in the May 3 letter stating that the Board intended to withhold his increment at its May 17, 1993 meeting.

Petitioner also excepts to the ALJ's statement that he and his attorney were both aware of the Board's action on May 17, 1993.

He argues

> Again, the Administrative Law Judge infers that the petitioner and his attorney were aware that they knew the Board had acted to withhold petitioner's increment on May 17, 1993 when the only thing concerning the petitioner that was done by the Board on May 17, 1993 was his reemployment for the 1993-94 school year along with all other support staff members and a notation in the closed session minutes that the discussion of the petitioner's withholding was being delayed until the following month's Board meeting***. To infer that the petitioner and his attorney knew that the Board had not only intended to act but acted on May 17, 1993 to withhold the petitioner's increment is clearly erroneous and not supported by the Board of Education minutes or the correspondence between the parties that preceded that meeting.***
> (Petitioner's Exceptions, at p. 2)

Petitioner further contends that fundamental fairness dictates that this matter be decided on the merits. He argues

> ***This Board agreed to delay the discussion of withholding the petitioner's increment until the petitioner and his attorney had an opportunity to meet with the Board to review the circumstances surrounding taking such action. This discussion did take place between the parties on June 21, 1993. The petitioner was given assurance that the matter of his withholding was still under review and had not been decided. Rather than act on this matter, the Board advised the petitioner that it was going to continue its discussion into the following Board meeting. These facts left the petitioner with the reasonable expectation that the issue of his withholding was not going to be resolved until after July 19, 1993. To charge the time between May 17 and July 19 against the petitioner's 90 day limitation is fundamentally unfair, particularly when the petitioner filed within 90-days of what he believed to be the final action taken by the Board on July 19, 1993 which according to the Board's own admission was the date when it decided and "acted" in private session to withhold his increment.*** (Id., at p. 4)

In reply, the Board asserts that petitioner's arguments that the ALJ misconstrued the facts of this case regarding the action taken by the Board on May 17, 1993 and petitioner's claim

that he should not be held to have had notice that the Board intended to take action to withhold his increment and keep his salary at the salary he received in the previous year are incredible and totally unsupported by the facts in this matter. The Board argues

> ***[P]etitioner was given more than adequate notice through both numerous unsatisfactory evaluations (see, Hillman v. Caldwell-West Caldwell Bd. of Ed., 1977 SLD (Commissioner, July 15); aff'd 1981 SLD (State Board, February 4)) and the May 3, 1993 letter. The Board voted to keep the petitioner's salary level at the level received in the previous year by roll call vote at the public portion of the Board's May, 1993 meeting. A Board vote setting an employee's salary at the level paid in the prior year makes the Board's intent to withhold all increments obvious. Rosania v. Bd. of Ed. of Bor. of Middlesex, 1988 SLD 78, 79, aff'd and modified 1988 SLD 81 (Commissioner). Indeed, as acknowledged by the petitioner in his petition in this matter, he even received an employment contract in May of 1993 for the 1993-94 school year which did not include the increment.***
>
> (Board's Reply Exceptions, at p. 3)

The Board further contends

> The petitioner's reference to the further action taken by the Board at its July, 1993 meeting is not on point. ***[N]either the Board's decision to allow petitioner the opportunity to address it to seek modification of the salary level set at the May meeting or the additional action it took at its July 19, 1993 meeting reaffirming its prior public session vote, do anything to change the fact that public action was taken by the Board in May of 1993. The Board satisfied all requirements of notice of its public meeting. The petitioner was notified of his inadequate performance through his performance appraisals. Petitioner was notified that action was pending at the May meeting regarding his salary level by letter. The Board voted in public session to keep petitioner's salary at the level received in the prior year. The petitioner was provided with a contract clearly indicating he was to be compensated at the prior year's salary. Petitioner even commenced work under this contract. All of this occurred more than 90 days prior to filing of the petition in this matter.
>
> (Id., at pp. 5-6)

The Board urges affirmance of the ALJ's determination that the within petition is out-of-time under the 90-day rule.

Upon a careful and independent review of the record in this matter, including the exceptions advanced by the parties, the Commissioner cannot concur with the ALJ's conclusion that the within petition must be dismissed as untimely. Even assuming, arguendo, that petitioner's cause of action actually ensued with the Board's May 17, 1993 action to reemploy him for the 1993-94 school year at his current salary, the Commissioner finds and determines that the sequence of events surrounding petitioner's withholding created sufficient ambiguity so as to warrant a relaxation of the 90-day rule, pursuant to N.J.A.C. 6:24-1.15, to permit a determination on petitioner's procedural and substantive claims with respect to the increment withholding.

Accordingly, the initial decision of the Office of Administrative Law is reversed and the within matter is hereby remanded for further proceedings consistent with this decision.

COMMISSIONER OF EDUCATION

MAY 17, 1994

DATE OF MAILING - MAY 17, 1994

125-94

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF LAWNSIDE, CAMDEN COUNTY. :
:

MAY 19, 1994

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the General Fund proposition at the annual school election held on April 19, 1994, in the School District of the Borough of Lawnside, Camden County, were as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES Votes	65	0	65
NO Votes	66	2	68

Pursuant to a letter request from the Lawnside Borough Board of Education, filed April 26, 1994, the Commissioner of Education directed an authorized representative from the Office of the Camden County Superintendent of Schools to conduct a recount of the ballots cast. The recount was conducted on April 29, 1994 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden New Jersey. Pursuant to P.L. 1994, c.6, the absentee ballots were recounted at the Camden County Board of Elections on April 29, 1994.

At the conclusion of the recount, the totals were as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES Votes	65	0	65
NO Votes	66	2	68

There were no changes on the recount, so the outcome remains the same as derived from the balloting of April 19, 1994. Therefore, it is recommended by the Commissioner's Representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that the General Fund proposition of the Lawnside Borough school district was not approved by the voters.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 19, 1994

DATE OF MAILING - MAY 19, 1994

126-94

126-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CHERRY HILL, CAMDEN COUNTY.	:	
	:	

May 19, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF CHERRY HILL, CAMDEN COUNTY. :
:

The announced results of the balloting for the General Fund proposition at the annual school election held on April 19, 1994, in the School District of the Township of Cherry Hill, Camden County, were as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES Votes	3,009	53	3,062
NO Votes	3,104	34	3,138

Pursuant to a letter request from the Cherry Hill Township Board of Education, filed April 21, 1994, the Commissioner of Education directed an authorized representative from the Office of the Camden County Superintendent of Schools to conduct a recount of the ballots cast. The recount was conducted on April 29, 1994 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden New Jersey. Pursuant to P.L. 1994, c.6, the absentee ballots were recounted at the Camden County Board of Elections on April 29, 1994.

At the conclusion of the recount, the totals were as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES Votes	3,011	55	3,066
NO Votes	3,102	33	3,135

Although there were some minor changes at the recount, the outcome remains the same as derived from the balloting of April 19, 1994. Therefore, it is recommended by the Commissioner's Representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that the General Fund proposition of the Cherry Hill Township school district was not approved by the voters.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 19, 1994

DATE OF MAILING - MAY 19, 1994

127-94

127-94

ARTHUR PAGE AND PASQUALE MAFFEI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 19, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9333-92
AGENCY DKT. NO. 475-10/92

ARTHUR PAGE AND
PASQUALE MAFFEI,
Petitioners,
v.
BOARD OF EDUCATION
OF THE CITY OF TRENTON,
MERCER COUNTY,
Respondent.

Robert M. Schwartz, Esq., on behalf of petitioners (Lake and Schwartz, attorneys)

Thomas W. Sumners, Jr., Esq., on behalf of respondent (Sumners, Council, George & Dortch, attorneys)

Record Closed: April 8, 1994 Decided: April 12, 1994

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to the School Law, *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The matter was settled in two steps over time, and consequently, there are two settlement orders annexed; together they fully dispose of all issues in controversy. I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It

is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are **CONCLUDED**.

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

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

4/12/94
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

4/14/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 20 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

/cae

LAKE AND SCHWARTZ
ATTORNEYS AT LAW
2109 Pennington Road
Trenton, N.J. 08638
(609) 771-6767
Attorneys for Petitioners

Petitioner PASQUALE MAFFEI and ARTHUR PAGE	**BEFORE THE COMMISSIONER OF EDUCATION** **OFFICE OF ADMINISTRATIVE LAW**
vs.	*Docket No.* EDU 9333-92 *Agency Docket No.* 475-10/92
Defendant TRENTON BOARD OF EDUCATION	***CIVIL ACTION*** CONSENT ORDER

THIS MATTER being opened to the court by Robert M. Schwartz, Esquire, of the law firm of Lake and Schwartz, on behalf of the Petitioners, Arthur Page and Pasquale Maffei, and the parties having agreed that the documents presented indicate that certain monies representing payment for fifty-five (55) unused vacation days are owed to Petitioner, Arthur Page, and the parties having agreed to the rate of pay at which the aforementioned number of vacation days are to be paid,

IT IS on this 12th day of April, 1994,

ORDERED that the Respondent, Trenton Board of Education, provide payment to Arthur Page for fifty-five (55) vacation days at Petitioner, Arthur Page's, per diem rate as of June 30, 1992, $406.25. Of this amount, Petitioner, Arthur Page, is to receive retroactive payment for 34.37 days at the per diem rate of $406.25 with the balance of 20.63 days to be paid and incorporated at the same per diem rate of $406.25 in the

LAKE AND SCHWARTZ
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TRENTON, N. J. 08638

remaining seven equal installments by which Petitioner is to be paid for other days owed to him by the Respondent, Trenton Board of Education.

Petitioner consents to the filing of this Order.

by ROBERT M. SCHWARTZ

Respondent consents to the filing of this Order.

by THOMAS SUMNERS, ESQUIRE

HONORABLE SOLOMON METZGER

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(609) 771-6767
ATTORNEYS FOR Petitioner

Plaintiff Pasquale Maffei and Arthur Page	**BEFORE THE COMMISSIONER OF EDUCATION** **OFFICE OF ADMINISTRATIVE LAW**
vs.	*OAL Docket NO. EDU 9333-92* *Agency Docket No. 475-10/92*
Defendant Trenton Board of Education	Order

This matter having been opened before this court by Robert M. Schwartz of the law firm of Lake and Schwartz on behalf of the petitioners, Arthur Page and Pasquale Maffei, and the parties having agreed that the documents presented indicate that certain monies representing payment for unused vacation days and sick days are owed to petitioners, and the parties having set forth the sums of monies which are owed,

It is on the 22nd day of ~~October~~ November 1993 Ordered:

1. That the respondent, Trenton Board of Education, provide payment to petitioner, Pasquale Maffei, for 39.2 days at petitioner's per diem rate as of June 30, 1992, $404.78. Of this amount, petitioner is to receive retroactive payment for 14.7 days with the balance of 24.5 days to be paid and incorporated in the remaining 10 equal

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TRENTON, N. J. 08638

installments by which petitioner is already scheduled to receive payment for other days owed to him by the respondent.

2. That the respondent, Trenton Board of Education, provide payment to petitioner, Arthur Page, for 67.16 days at petitioner's per diem rate as of June 30, 1992, $406.25. Of this amount, petitioner is to receive retroactive payment for 25.2 days with the balance of 41.96 days to be paid and incorporated in the remaining 10 equal installments by which petitioner is already scheduled to receive payments for other days owed to him by the respondent.

3. That the respondent obtain records no later than January 2, 1994 from the Internal Revenue Service and Social Security Administration reflecting petitioner, Arthur Page's, income for the 1972, 1973 and 1974 calendar years for the purpose of ascertaining whether the petitioner was paid for 55 accumulated vacation days during this period and that the respondent through its attorney immediately notify counsel for petitioners and the court upon receipt of the records.

The Honorable Solomon Metzger

LAKE AND SCHWARTZ
ATTORNEYS AT LAW
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TRENTON, N. J. 08638

OAL DKT. NO. EDU 9333-92

ARTHUR PAGE AND PASQUALE MAFFEI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

MAY 19, 1994

DATE OF MAILING - MAY 19, 1994

128-94

ROE JANKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 19, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 158-92
AGENCY DKT. NO. 433-12/91

ROE JANKOWSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,
Respondent.

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

John T. Barbour, Esq., for respondent

Record Closed: April 4, 1994 Decided: April 8, 1994

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

This matter was transmitted to the Office of Administrative Law on January 6, 1992, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F- to -13.

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

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

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

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

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

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

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

8 April 1994
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4/15/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 21 1994
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

DOCUMENTS IN EVIDENCE

None

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

ROE JANKOWSKI Petitioner, v. BOARD OF EDUCATION OF TOWNSHIP OF DELRAN, BURLINGTON COUNTY, Respondent.	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 00158-92S STIPULATION OF SETTLEMENT AND DISMISSAL

The parties to this matter, through their respective counsel, hereby agree that this matter shall be deemed settled and withdrawn on the following terms.

1. The parties recognize that there is a dispute between them as to the amount of vacation time accrued by, and compensation due Petitioner as a result of her employment with Respondent, and from the circumstances of her accepting employment with Respondent.

2. By entering into this agreement, neither party accepts the legal or factual assertions of the other party, or waives any claims or defenses they may have had.

3. Due to the uncertainty of this matter, and in order to

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

avoid the expense and risks of litigation, the parties seek to settle this matter.

4. The parties agree that while employed in her current position, Petitioner will be provided with twenty (20) vacation days per year by Respondent, with the compensation for said vacation days to be set at her salary during the year in which said vacation days are used. This agreement does not otherwise alter the provisions for use or carrying forward of vacation days.

5. Petitioner agrees to withdraw all claims that she was improperly compensated for vacation days that she previously took, or that Respondent's recoupment of monies paid to her for such vacation days was improper.

6. Both counsel represent that they are authorized to sign this agreement on behalf of their respective clients.

7. If the Commissioner rejects any provision of this Settlement Agreement, the matter shall be returned for further proceedings before the Office of Administrative Law, without prejudice to the rights of the parties to resolve the matter amicably, without inclusion of any term rejected by the Commission, or of any other term.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

Dated: 12/30/93

Richard A. Friedman, Esq.

Dated: _____

Roe Jankowski
Roe Jankowski

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NEWARK, N.J. 07102

Attorneys for Respondent

Dated: 1/12/94

John T. Barbour

John Barbour, Esq.

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NEWARK, N.J. 07102

OAL DKT. NO. EDU 158-92

ROE JANKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

MAY 19, 1994

DATE OF MAILING - MAY 19, 1994

129-94

RUTH A. CAHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 19, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6174-93
AGENCY REF. NO. 152-5/93

RUTH A. CAHN,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

Honora O'Brien Kilgallen, Esq., for respondent (Shebell & Schibell, attorneys)

Record Closed: February 22, 1994 Decided: April 7, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 27, 1993, the Commissioner of Education (Commissioner) was in receipt of a Petition of Appeal by Ruth A. Cahn, *pro se*, who alleged that the Board of Education of the Borough of Deal (Board) failed to maintain her name on its preferred eligible list subsequent to her reduction in force (RIF) as required by *N.J.S.A.* 18A:28-12. The Board denies petitioner's allegations asserting, among other things, that petitioner made a claim against the Teachers' Pension and Annuity Fund

(TPAF) and her decision to retire and collect under the TPAF forced her removal from the Board's preferred eligible list.

Prehearing conferences were held on September 9, 1993 and October 5, 1993, during which petitioner represented herself. Subsequently, petitioner retained legal counsel and the third prehearing conference followed.

The Board raised the issue of petitioner's timeliness of her Petition of Appeal, pursuant to *N.J.A.C.* 6:24-1.2 (c) and has been granted leave to argue the issue. The Board now moves for summary decision with respect to that, and other issues.

BACKGROUND FACTS

Petitioner, Ruth Cahn, was employed by the Board as a teacher commencing September 1965. She subsequently acquired a tenure status with the Board, pursuant to *N.J.S.A.* 18A:28-5. In the course of her employment with the Board, she taught grade five from the 1965-66 school year through the 1975-76 school year. In 1976, petitioner was assigned to teach mathematics and music for the 1976-77 school year. In or about February 11, 1977, petitioner was advised that the Board would abolish her teaching position and that she would be subject to a RIF at the conclusion of the 1976-77 school year. Petitioner was fifty-five (55) years of age in 1977.

The Board did not recall petitioner under the provisions of *N.J.S.A.* 18A:28-12. Pursuant to *N.J.S.A.* 18A:66-8, petitioner was continued in membership with the TPAF for a period of five years subsequent to the RIF in the event she had not acquired a teaching position with the Board or any other local board of education in New Jersey. Petitioner was unable to locate other employment. As a consequence, petitioner applied for her retirement benefits with the TPAF.[1] Her application was approved by the Board of Trustees, effective November 1, 1981.

[1] *N.J.S.A.* 18A:66-8 was amended under *L.* 1991, *c.* 138, §1, allowing a period of ten years continuance of TPAF membership subsequent to separation by RIF.

On July 16, 1986, the Board's Superintendent sent a letter to petitioner and offered her a 75 percent (3/4) teaching position with the Board, pursuant to *N.J.S.A.* 18A:28-12. Petitioner rejected the offer for part-time employment on July 22, 1985, and requested consideration for the first available full time position.

On February 23, 1993, while in the Office of the Monmouth County Superintendent of Schools, petitioner inspected the Board's Certificated Staff List. Subsequently, on May 27, 1993, the Commissioner was in receipt of petitioner's *pro se* Petition of Appeal alleging, among other things, that the Board failed to maintain her name on the preferred eligibility list pursuant to *N.J.S.A.* 18A:28-12 and sought compensation for the period when she alleges she should have been recalled.

The Board now requests summary decision and dismissal of the matter on procedural grounds. The petitioner opposes the Board's application.

LEGAL ARGUMENTS OF THE PARTIES

THE BOARD'S POSITION

POINT I

THE PETITION FILED BY RUTH A. CAHN MUST BE DISMISSED AS BEING UNTIMELY

On May 24, 1993, Ruth A. Cahn filed a petition with the Commissioner seeking, *inter alia,* damages for the alleged failure of respondent Board of Education of the Borough of Deal to "honor her preferred eligibility rights to reemployment in the Deal School District." Petitioner argues therein that she discovered that various individuals were hired to teach in the Deal School District when she "looked at records in the office of the Monmouth County Superintendent of Schools." This allegedly took place on February 23, 1993.

Unfortunately for petitioner, two dates cannot be changed. On August 13, 1981, the Board of Trustees of the Teachers' Pension and Annuity Fund approved petitioner's application for a service retirement. This is indicated by a letter dated August 18, 1981, which is attached hereto for the Court's reference as Exhibit "A." On July 16, 1986, Anthony F. Moro, Jr, Ed. D. as Superintendent of respondent,

forwarded a letter to petitioner advising her of a vacancy for a three-quarter teaching position at the Deal School for the 1986-87 school year. A copy of this letter is attached hereto for the Court's reference as Exhibit "B."

Petitioner apparently spoke to Dr. Moro on or about July 17, 1986 and a letter confirming the conversation was forwarded by Dr. Moro on behalf of respondent on or about July 18, 1986, a copy of which is annexed hereto for the Court's reference as Exhibit "C." On July 22, 1986, petitioner forwarded a letter to Dr. Moro wherein she declined the opportunity to teach. A copy of this letter is annexed hereto for the Court's reference as Exhibit "D."

As will be discussed in Point II, the filing for pension benefits by petitioner forced her removal from the preferred eligible list. For purposes of this discussion, her filing for pension benefits in 1981 should have served as a time when she would review the hiring lists of respondent.

Moreover, petitioner should have reviewed the hiring lists of respondent when she was notified in 1986 of a three quarter teaching position. Again, she did nothing and waited until (she alleges) February of 1993, over sixteen years after the reduction in force.

N.J.A.C. 6:24-1.2 is entitled "Filing and service of Petition." Subsection (c) of that section states in its entirety:

> (c) The petitioner shall file a petition no later than the ninetieth day from the date of receipt of the notice of a final order, ruling or other action by the District Board of Education, individual party, or agency, which is the subject of the requested contested case hearing.

This subsection was recently discussed by the Supreme Court in *Kaprow v. Board of Education of Berkeley Township,* 131 *N.J.* (1993). There the court had to decide whether a petitioner's demand for reinstatement was time-barred.

Petitioner Kaprow was employed as a tenured Assistant Superintendent. His position was terminated as a result of a reduction in force in or about June of 1981. In February of 1988 petitioner Kaprow made inquiry of the Secretary for the Board of Education of Berkeley Township as to whether any positions were filled for which he had eligibility. The Board Secretary wrote to petitioner Kaprow on February 23, 1988, informing him that two years prior an individual had been appointed Assistant

Superintendent of Administrative Services and that one year prior an individual had been appointed District Supervisor of Elementary Schools.

On or about February 28, 1988 petitioner Kaprow sent a letter to the Board of Education of Berkeley Township asserting his right to the two positions. The Board's attorney did not respond to petitioner Kaprow's letter until approximately June 14, 1988. The Verified Petition was filed with the Commissioner on August 1, 1988. The State Board affirmed the Commissioner's decision that the petition had been filed in an untimely manner pursuant to *N.J.A.C.* 6:24-1.2. The Appellate Division affirmed as did the Supreme Court.

Under Section IV of the Court's decision, the general purpose for limitation periods is set forth:

> A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. The second purpose is to 'penalize dilatoriness and serve as a measure of repose' by giving security and stability to human affairs ...
>
> Adequate notice under *N.J.A.C.* 6:24-1.2 should accommodate both purposes. That is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with the post-RIF cause of action. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order 'to enable the proper and efficient administration of the affairs of government.'
>
> The final order, ruling or other action by the local board occurred when it appointed nontenured persons to positions which Kaprow claims tenure rights ... Kaprow obviously believed that his tenured status entitled him to one or both of those positions under *N.J.S.A.* 18A:28-12 and the notice he had received was adequate to enable him to pursue his claim. (citations omitted) *Id.* at 587-588.

The Supreme Court found that petitioner Kaprow had sufficient notice when he forwarded his initial letter to the Secretary of the Board of Education of Berkeley Township. This then triggered the ninety day period under *N.J.A.C.* 6:24-1.2 (c).

The Supreme Court in *Kaprow* , as noted above, held that the cause of action really accrued when the Board of Education of Berkeley Township appointed nontenured person to persons to positions to which petitioner claimed rights. However, the Supreme Court did not begin to toll the ninety day limitation period until Kaprow had notice. In short, then, the Supreme Court essentially applied the "discovery rule" (otherwise known as the "discovery doctrine").

In *Abboud v. Viscomi,* 111 *N.J.* 56 (1988), our Supreme Court explained the rule or doctrine as follows:

> [T]he doctrine 'postpones the accrual of a cause of action' so long as a party reasonably is unaware either that he has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity. Once a person knows or has reason to know of this information, his or her claim has accrued since, at the point, he or she is actually or constructively aware 'of the state of facts which may equate in law with a cause of action.' ▪▪▪
>
> 'The discovery rule is essentially a rule of equity,' and therefore, 'each case calls for an identification, evaluation, and weighing of the equitable claims of the parties.' To be sure, 'it is not every belated discovery that will justify an application of the rule lifting the bar of the limitation statute. The interplay of the conflicting interests of the competing parties must be considered.' (citations omitted) *Id.* at 62-64.

It has also been held that "ignorance of the existence of a cause of action will not prevent the running of a period of limitations except when there has been concealment." *Reilly v. Brice,* 109 *N.J.* 555, 559 (1988). Throughout this case petitioner Ruth A. Cahn has espoused the fact that she remained close with the Deal community after she left the Deal School. She put in for retirement in 1981. She received a courtesy letter from the Deal Board of Education in 1986. Surely she was aware that the Deal School had hired other teachers.

The point is that petitioner Ruth A. Cahn sat on her rights and asks us to accept February 23, 1993 (sixteen years and twelve days after her RIF date) as her "discovery" date. The allowance of such would defy all principles of equity as well as standard notions of logic. Petitioner Ruth A. Cahn's petition should be dismissed as untimely pursuant to *N.J.A.C.* 6:24-1.2 (c)

POINT II

RUTH A. CAHN'S PETITION MUST BE DISMISSED AS SHE RETIRED IN AUGUST OF 1981 THEREBY RENDERING HER INELIGIBLE TO BE CONSIDERED FOR A TEACHING POSITION. NO TEACHERS WERE HIRED BETWEEN HER RIF DATE AND HER RETIREMENT DATE FOR WHICH SHE COULD HAVE RECEIVED APPOINTMENT

According to Ruth A. Cahn's Petition, she "was RIFFED by letter on February 11, 1977 at age fifty-five, due to decline in enrollment." Sometime prior to August 18, 1981, petitioner Ruth A. Cahn made application to the Department of Treasury, Division of Pensions, Teachers' Pension and Annuity Fund. (Please refer to the letter from that office annexed hereto as Exhibit "A" which is dated August 18, 1981.) Again, as set forth in Point I, petitioner Ruth A. Cahn should have then made inquiry to the Deal School as to whether any teaching positions had been inappropriately filled. She did not do so and decided to retired instead.

As illustrated by the attached Certification of Anthony F. Moro, Jr., Ed. D., Superintendent and Board Secretary of the Deal Board of Education, no teachers were hired inappropriately between petitioner Ruth A. Cahn's RIF date and the date of her retirement. Indeed, programs were cut as enrollment dropped. Furthermore, all of those individuals set forth in paragraph 3 of Ruth A. Cahn's petition were hired after her retirement in 1981.

In *Noble Young v. Board of Education of the City of West Orange, Essex County,* decided initially by Administrative Law Judge Elinor R. Reiner on February 20, 1987, it was held that the retirement of a principal effectively removed him from continuing to be placed on the preferred eligibility list. Judge Reiner concluded that the retirement did, indeed, preclude the principal from being maintained on the preferred eligibility list and this decision was confirmed by both the Commission of Education and the State Board of Education. Please refer to that which is attached hereto for the Court's reference as Exhibit "E."

The very well reasoned opinion by Judge Reiner in the *Noble Young* case also dismisses arguments that he did not "voluntarily" retire which is also espoused by petitioner here. The judge stated:

> [I]t appears clear that petitioner had the option of whether or not to retire. His determination to retire was his alone. There is no indication that he was

> compelled to retire or that he suffered duress sufficient to necessitate the determination that his choice was not a free one. It is quite possible that petitioner did not like his options. Yet, it was essentially his decision either to be eligible for a new position as principal or to seek retirement. He chose retirement and must bear the consequences of his choice. Since petitioner's decision to apply for his pension was intentional and voluntary, his name was properly removed from the preferred eligibility list and his tenure and seniority rights were rightfully terminated. *Id.* at 5-6.

The respondent's Motion for Summary Judgment was thus granted which, again, was affirmed by both the Commissioner of Education and the State Board of Education.

The judge also cited *N.J.S.A.* 18A:66-43; subsection (b) of that statute provides:

> (b) Any member in service who attains seventy 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.

Simple arithmetic tells us that petitioner Ruth A. Cahn is now over the mandatory retirement age of seventy years. Thus, even though her teaching certificate may have lifetime validity, she would not be able to teach currently in any event.

PETITIONER'S POSITION

POINT I

TIMELINESS OF THE PETITION

Point I of the respondent's brief offers to the Office of Administrative Law the argument that as a result of a written communication with Dr. Moro in July of 1986, the petition which was filed in 1993, is outside the limitations of *N.J.A.C.* 6:24-1.2(c). As a "fall-back" position, the respondent offers the hypothesis that the petitioner was under a "duty" to review the hiring lists prior to 1981, and subtly suggests that perhaps the 90 day period should commence to run during an even earlier period than 1986. The petitioner concedes that her petition was filed on May 21, 1993, and relies upon the language contained therein as a description of the relief sought. She

argues contemporaneously herewith, that she was without knowledge of the allegedly improper hirings and violation of her rights until, at the earliest, she reviewed records in the Office of the Superintendent of Schools in Monmouth county on February 23, 1993. Since it cannot be meaningfully argued that the petitioner filed her petition outside the requirement of *N.J.A.C.* 6:24-1.2 (c) if the February date is the relevant commencement point, it is left for the Office of Administrative Law to review and determine the validity of the respondent's arguments as they relate to prior times.

Apparently, the respondent does not challenge the timeliness of the petition predicated upon the 90 day period commencing with the discovery date of February 23, 1993. The respondent's position appears to be that the petition should have been filed years earlier, and it is that argument which petitioner will address herein.

Before presenting the argument of the petitioner to rebut the initial point in the respondent's brief, it is respectfully submitted that certain fundamental concepts relevant to the ultimate issue need be examined. Initially, an examination of the pertinent case law indicates that seniority rights continue indefinitely, and there is no time limitation on recall rights. *Bodine v. Bd. of Ed. of the Twp. of Burlington,* 1989, *S.L.D.* 1053, 1056, aff'd. State Board of Education, 1989, *S.L.D.* 1064. There is nothing in *N.J.S.A.* 18A:28-12 which references a term of years after which the priority status for recall is limited. Therefore, the statute in question grants to parties who have been severed from their employment due to a reduction in force, a right to be reemployed based upon seniority, which right is intended to continue indefinitely.

Further support for the proposition that *N.J.S.A.* 18A:28-12 intended to create a fundamental right for reemployment can be gleaned from reading *Boguszewski v. Bd. of Ed. of Demarast,* 1979 *S.L.D.* 232. In that case, the Commissioner held that an employee did not **waive** his rights to reemployment under *N.J.S.A.* 18A:28-12 by refusing to accept reemployment in a part-time capacity. In that decision, the Commissioner indicated that the decision not to accept a 3/5th teaching position would not interfere with the employees position on the preferred eligibility list for a full-time position.

It is further respectfully submitted that as a general principal the right to reemployment after a reduction in force forms a part of an employee's tenure rights.

As such, the tenure status which an employee holds prior to a reduction in force remains valid and pertinent at the time of the availability of a position for reemployment requiring consideration ahead of any nontenured teacher and ahead of any other tenured employee with inferior seniority in a qualified area. Even more compelling, is the acknowledgement that the right created by *N.J.S.A.* 18A:28-12 entitles an employee to a position whether or not they apply for it if their tenure and/or seniority background are paramount. *Camilli v. Northern Highland Regional High School Dist.* OAL Dkt. No. EDU 57-52-84 (Nov. 14, 1984), adopted Comm'r of Ed. (Jan. 3 1985), aff'd St. Bd. of Ed. (decided 5-22-89), *Mirandi v. Bd. of Ed. of West Orange,* St. Bd. of Ed. 1989, *Herbert v. Bd. of Ed. of the Township of Middletown,* (App. Div. 1991) (unpublished opinion - attached hereto).

Within the context of the foregoing decisions, which **underscore** the significance of the tenure right encompassed by *N.J.S.A.* 18A:28-12, the Office of Administrative Law is requested to consider the instant situation. Acknowledging that recall rights continue without limitation, that the decline or part-time employment is insufficient to waive the right to full-time reemployment, and the absence of a necessity to even apply for a potential position, this agency is asked to consider the respondent's argument.

Initially, despite the apparent requirement and responsibility of the Board to undertake to notify the employee in a situation where the employee qualifies for consideration in connection with a full-time position, the Board concedes through its certification that this responsibility was never discharged. Dr. Moro's letter in 1986 referenced only a 3/4th teaching position not a full-time position. Certainly, the respondent would not ask the Office of Administrative Law to accept the argument that this letter, which the case law acknowledges is **insufficient** to create a waiver of the petitioner's rights to a full-time position, should be utilized as the "trigger-point" for notice under *N.J.A.C.* 6:24-1.2 (c). Perhaps even less persuasive is that portion of the argument which indicates that, despite the case law which assesses the responsibility for notification to the Board, the "failure" of the petitioner to undertake her own investigation and determine that a violation had occurred after 1977 or at some time thereafter, should similarly be used as "trigger-point" to compute the 90 day period. Both of these suggestions by the respondent are at direct variance with the case law and clash with the spirit and intent of the statutory right under consideration in this circumstance.

Parenthetically, the petitioner raises the issue of the timing of the letter from Dr. Moro regarding the availability of a part-time position in 1986. Apparently, no previous communication had been undertaken regarding other part-time positions which it would appear the petitioner was qualified to hold. Even if it is determined that the petitioner's rejection of part-time positions, what about the positions that were filled prior to 1986?

In its brief, the Board cites the recent decision of the New Jersey Supreme Court in *Kaprow v. Board of Education of Berkeley Twp.* 131 *N.J.* 572 (1993). Candidly, other than acknowledging that the Court upheld the propriety of the regulation in question, the case is of substantial value to the arguments offered by the petitioner. It is salient to note that in *Kaprow* the Court was given a document wherein the local board secretary provided the employee with **clear and unambiguous** notice of the Board of Education's final action regarding the awarding of two full-time positions which he later challenged. In and of itself, that compelling fact distinguishes that portion of the holding from the instant case, since there is no proof that the Deal Board of Education **ever** provided the petitioner with "clear and unambiguous notice" of final action regarding full-time reemployment which she could then challenge.

Secondly, of pertinent note in *Kaprow*, is the Court's examination of the concept of "adequate notice." Since the regulation had been challenged,the Court infused the concept into *N.J.A.C.* 6:24-1.2 (c) in order to justify its ultimate decision upholding the regulation. The decision makes it eminently clear that the period for triggering the limitations section of the Administrative Code would *not commence* until the tenured teachers had been alerted to the existence of facts that would equate with a post-RIF cause of action, *supra.,* at p. 587. The Court went on to disregard the earlier dates reference therein, and underscored its decision to uphold the elimination segment under consideration, based upon the "clear and unambiguous" notification contained in a February letter. Only upon receipt of this definitive directive, was the Court willing to initiate the calculation of the limitation period. The decision is also distinguishable because the petitioner waited some five months **after** discovery to file a petition.

In the instant matter, the evidence discloses that at no time did the Board discharge its duty to provide "clear and unambiguous" notice to petitioner regarding full-time positions that she later sought to challenge, despite the apparent statutory responsibility to do so. In light of that omission and the

requirement of "adequate" notice that our highest Court acknowledged to be contained within the regulation, it is difficult to perceive how *Kaprow* is of any compelling assistance to the respondent.

It is also interesting to note that the Supreme Court rejected the arguments in *Kaprow* regarding equitable estoppel for reasons that are not manifest in the current matter. In the instant case, there was no period of time subsequent to the recognition of substantive issues to cure the situation, if the petition is dismissed. Secondly, they did not find a compelling basis for reliance by the employee in *Kaprow,* simply because the Board did not respond to his letters. It is respectfully submitted that an equitable estoppel argument in the instant case is of substantially more appeal due to the facts as they relate to the conduct of the Deal Board.

In addition to the foregoing, the petitioner would respectfully point out that there is no mention in the respondent's brief of *N.J.A.C.* 6:24-1.15 which is discussed at length in the *Kaprow* decision. That provision allows the Commissioner to **relax** the procedural rules in his discretion. Obviously, this regulation underscores the principal that the time limitation set forth in *N.J.A.C.* 6:24-1.2 (c) is neither jurisdictional nor intractable and can be extended to encompass situations within the discretion of the Commissioner. The relaxation provision, *N.J.A.C.* 6:24-1.15, provides therein that the 90 day period may be relaxed where a strict adherence may be deemed inappropriate, unnecessary, or may result in injustice. Therefore, even if the respondent is initially successful in convincing the Office of Administrative Law that the 90 day limitation may somehow be applicable to an earlier period, (although the same is strenuously contested by the petitioner), the Administrative Law Judge has the ability to recommend a relaxation or dispensation of that period **despite** the finding.

In the instant fact pattern, the absence of affirmative proof that the respondent discharged its obligation under the statute in question to advise the petitioner regarding full-time reemployment, may be in and of itself sufficient to require a dispensation of the requirement. Clearly, the petitioner acted within the 90 day period from her discovery of the situation which she now challenges. In addition to support her earlier position that she has complied with *N.J.A.C.* 6:24-1.2 (c), at the very least she has demonstrated the type of conduct which would justify **relaxation** of the period. The attempt by the respondent to transpose the requirement of notice and conduct in relation thereto from the Board to the petitioner, is even less appealing as it relates to the relaxation argument then it was

in the original argument that the terms of the period should commence earlier than the discovery date.

Finally, the petitioner would like to comment herein on the reference in respondent's brief concerning the "discovery rule." (p.5) Petitioner concurs with the characterization contained therein that the Supreme Court essentially applied the "discovery rule" in considering the viability of *N.J.A.C.* 6:24-1.2 (c). Earlier in this point heading there was a discussion of the *Kaprow* decision concerning the infusion of "adequate notice" into the time limitations, and it is respectfully submitted that this term emanates from recognition of the "discovery rule" in the aforementioned regulation. Again, however, it is uncertain how this issue is of any meaningful assistance to the respondent in connection with its motion for summary judgment. Initially, in a procedural vein, the respondent cites *Abboud v. Viscomi,* 111 *N.J.* 56 (1988), which was a dental malpractice case which references an earlier Supreme Court case involving the discovery rule examined in *Lopez v. Swyer,* 62 *N.J.* 67 (1973). A careful reading of *Lopez* indicates that the type of judgment the respondent is asking the Administrative Law Judge to make herein is only done after the trial judge conducts a hearing and investigates the factual pattern through testimony. *Supra.* at p. 275. At the very least, the petitioner herein would be entitled to a hearing prior to trial to investigate the factual pattern related to the utilization of the discovery rule in the circumstances before the Office of Administrative Law.

However, it is significant and imperative to note that the "discovery rule" reference in professional malpractice cases has been developed within the context of the statute of limitations. Obviously, a statute presents a different consideration than the discretionary regulation under consideration in the matter before the Office of Administrative Law. The standard for extending a statutory mandate directive which is jurisdictional and finite in nature, is or should be **substantially different** than the extension of a discretionary administrative time regulation. In fact, it is interesting to note that the very case the respondent cites in connection with this argument, *Reilly v. Brice,* 109 *N.J.* 555 (1988), resulted in a directive to the trial court to **enlarge** the 45 day limitation period for review of municipal action. In fact, the Supreme Court directed the **extension** of the time period as a purely discretionary measure based upon the language in *R.* 4:69-6 (c), which is essentially the same type of discretion afforded to the Commissioner of Education in *N.J.A.C.* 6:24-1.5

POINT II

The Effect of Petitioner's Retirement

In Point II of its brief, the Board contends that the relief sought is barred by the petitioner's retirement in 1981. Further, the Board argues that there was no teachers hired between the RIF date (1977) and her retirement date (1981), and, therefore, there were no positions she was qualified to hold available during that period.

Dealing with the initial question regarding the effect of her retirement, the Office of Administrative Law is asked by the respondent to consider *Noble Young v. Board of Education of the City of West Orange,* 1987 *S.L.D.* 776, aff'd by State Bd. of Ed. (1987). Conversely, the petitioner would respectfully submit that the instant case is factually distinguishable from the fact pattern in *Young.*

Initially, it is pointed out to the Office of Administrative Law that the petitioner in *Young* was notified of a reduction in force on April 23, 1985, to be effective on June 30th of that same year. Before he was officially terminated, he applied for retirement on May 30, 1985. He challenged the failure to offer him an elementary school principalship a year later, and the Commissioner denied his claim.

In the instant matter, it is critical to note that the petitioner did not effectuate her retirement while still in service, as did Mr. Young. Secondly, she actively sought employment for a four year period thereafter, and only retired when faced with the previous dictates of *N.J.S.A.* 18A:66-8, which required pension fund action within a five year period. Finally, it is also significant to note that the petitioner in *Young* had retired **before** a position became available. The petitioner herein contends that there were several positions for which she was qualified that were filled prior to her retirement.

Petitioner would respectfully submit that the Board has already conceded that there was a failure to notify her of available positions up until 1986. The Board's defense, as currently expressed, is that she was not qualified for the positions which were filled. This position seems different than its apparent original position, that no new teachers were hired. If the petitioner is successful in proving that the list

attached to her certification includes positions which she was entitled to be notified about and which she was qualified to hold, and these positions **preceded** her retirement, how can this matter be dismissed?

Initially, the Board would clearly have to answer the contentions as they relate to the positions at least until 1981. In addition, the Administrative Judge might well conclude, and recommend to the Commissioner, that the failure of the Board to act in accordance with the statutory mandate, if the petitioner proves her case, acts as the type of conduct which bars it from asserting a defense relevant to her retirement in 1981. If she successfully demonstrates her entitlement to the positions on the list attached to her certification, the Board may have no viable defense other than using 1992, the year when she reached the mandatory retirement age. Simply stated, how can the Board profit from a failure to notify her of potential positions prior to her retirement, and then utilize the defense it created, as a method to deny an otherwise meritorious claim?

In light of the foregoing, it is respectfully requested that this matter should survive the procedural challenges and move to a plenary hearing.

DISCUSSIONS AND CONCLUSIONS

The Board cites the matter *Kaprow* in support of its position that petitioner's demand for reinstatement in its employ is time-barred. In *Kaprow, supra.,* our Supreme Court upheld the application of *N.J.A.C.* 6:24-1.2 (c) known as the 90 day rule, limiting the period for asserting a claim or commencing an action against the Board. A strict application of the *Kaprow* holding in the instant matter would preclude petitioner from going forward with her claim. The uncontroverted facts show that petitioner learned, on February 23, 1993, of the Board's alleged failure to comply with *N.J.S.A.* 18A:238-12 for her reemployment pursuant to its preferred eligible list. Thus, petitioner's discovery on February 23, 1993, constituted adequate notice sufficient to satisfy the notice requirements of *N.J.A.C.* 6:24-1.2 (c). *Kaprow* at 588. The record clearly demonstrates that petitioner's *pro se* Petition of Appeal was received by the Commissioner on May 27, 1993, three days after the expiration of the 90 day limitation period.

Maurice Kaprow and petitioner share a similar experience. Both were subject to a RIF by their respective board of education. Both alleged that their local board

failed to comport with *N.J.S.A.* 18A:28-12. Both filed petitions with the Commissioner after the expiration of the 90 day limitation period. Petitioner asserts that the *Kaprow* Court addressed the regulation, *N.J.A.C.* 6:24-1.15, which authorizes the Commissioner to relax procedural rules in his discretion "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." *Kaprow* at 590-91. The Court observed that the Commissioner did not consider relaxation of the 90 day limitation period. *Id.* at 591. Moreover, the Court concurred with the State Board of Education where it specifically found no circumstances surrounding Kaprow's claims to warrant relaxation of the 90 day filing requirement under *N.J.A.C.* 6:24-1.15. It was the Court's review of the record which demonstrated to it that the State Board did not act arbitrarily or unreasonably in declining to enlarge or relax the 90 day limitation period. The Court observed and found that Kaprow was aware of his claim, "yet he failed to file his petition within ninety days." *Kaprow* at 591.

Having considered the arguments of the parties and having reviewed the entire record, I **FIND** nothing therein that warrants a relaxation of the 90 day filing requirement under to *N.J.A.C.* 6:24-1.15. Petitioner had sufficient time from her discovery on February 23, 1993, to advance her claim against the Board before the Commissioner in a timely manner. Petitioner failed to do so.

Accordingly, I **FIND and CONCLUDE** that petitioner, Ruth A. Cahn, failed to file her petition within ninety days as required by *N.J.A.C.* 6:24-1.2 (c).

I **CONCLUDE**, therefore, that pursuant to the holding in *Kaprow, supra.*, petitioner's Petition of Appeal is time-barred and must be dismissed.

ORDER

It is accordingly **ORDERED** that Summary Decision is hereby **ENTERED** on **BEHALF of the BOARD OF EDUCATION of the BOROUGH of DEAL.**

It is **FURTHER ORDERED** that the Petition of Appeal of Ruth A. Cahn be and is hereby **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7 April 1994
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4/15/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 21 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

RUTH A. CAHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions argue that the ALJ's decision purports to resolve the within matter on a basis which was neither asserted by the Board in its motion for summary decision nor supported by the record. Specifically, she avers that the ALJ's conclusion to dismiss her petition was predicated on his determination that her Petition of Appeal was untimely, pursuant to N.J.A.C. 6:24-1.2(c), since it was received by the Commissioner on May 27, 1993, three days after expiration of the 90-day filing timeline. Petitioner asserts that the record does not disclose such filing date relied upon by the ALJ and, in fact, exhibits and testimony establish that the petition was filed with the Commissioner on May 21, 1993. As support for this contention, petitioner refers to an acknowledgement of the receipt of her petition issued by the Department of Education dated May 24, 1993, (Exhibit C), which clearly indicates that her petition was filed on May 21, 1993.

Petitioner maintains that since the ALJ never provided an explanation for his utilization of the May 27, 1993 date and since there appears to be no justification for the use of that date in the record, it must be assumed that the ALJ either incorrectly noted the filing date or determined that the acknowledgement notice was somehow incorrect by utilizing some reference apparently outside of the record. She argues that, in either case, the Commissioner is compelled to intervene to correct this problem.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the ALJ's determination that the petitioner's cause of action in this matter ensued on February 23, 1993, but he does not concur with the ALJ's conclusion that the within Petition of Appeal is untimely pursuant to N.J.A.C. 6:24-1.2(c). It is noted that the acknowledgment form issued by the Bureau of Controversies and Disputes on May 24, 1993 confirms that the within Petition of Appeal was filed on May 21, 1993, three days prior to the expiration of the 90-day limitation period. (Also see petitioner's certification dated February 17, 1994 stating that such petition was transmitted to the Bureau of Controversies and Disputes on May 21 via fax.) It is further noted that the record substantiates that the Petition of Appeal was also faxed to the Board on May 21, 1993. The Commissioner finds the ALJ's reliance on a filing date of May 27, 1993 understandable given that the Commissioner's review indicates that the May 21 facsimile copy of the petition in this matter is inexplicably absent from the record before him. The copy of the petition which is contained in the record is the hard copy back-up of the faxed petition which was subsequently mailed by the petitioner and received by the Bureau of Controversies and Disputes on May 27, 1993.

Accordingly, having found that petitioner's appeal in the instant matter is timely, the Commissioner hereby reverses the initial decision of the Office of Administrative Law and remands the matter for a plenary hearing on the merits of petitioner's allegations against the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 19, 1994

DATE OF MAILING - MAY 19, 1994

131-94

131-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
LOWER CAMDEN COUNTY REGIONAL	:	DECISION
SCHOOL DISTRICT, CAMDEN COUNTY.	:	
	:	

MAY 23, 1994

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for one member of the Board of Education from the constituent district of Waterford Township for a full term of three years, and for the General Fund proposition of the regional district, at the annual school election held on April 19, 1994 in the Lower Camden County Regional School District, Camden County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Ralph J. Condo	444	5	449
Gary H. Lake	446	0	446
GENERAL FUND PROPOSITION			
YES votes	2042	12	2054
NO votes	2052	20	2072

Pursuant to separate letter requests from defeated candidate Gary H. Lake filed April 25, 1994 pursuant to N.J.S.A. 18A:14-63.2, and from the Board of Education filed April 25, 1994 pursuant to N.J.S.A. 18A:14-63.3, an authorized representative of the Commissioner of Education was directed to conduct a recount of ballots cast for the Waterford Township seat on the Board and for the General Fund proposition of the regional district. The recount of General Fund votes was conducted on April 29, 1994, and the recount of Board member votes on May 4, 1994, at the Voting Machine Warehouse, South Jersey Port Corporation, Camden. On the same dates, at the parties' request, absentee ballots were recounted at the Camden County Board of Elections pursuant to the

broad authority granted the Commissioner for the 1994 annual school election under P.L. 1994, c. 6.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Ralph J. Condo	444	5	449
Gary H. Lake	446	0	446
GENERAL FUND PROPOSITION			
YES votes	2042	12	2054
NO votes	2045	20	2065

As indicated, there was no change in the tally for member of the Board of Education and the minor change in the tally for the General Fund proposition was not sufficient to alter the outcome of the election. Thus, both outcomes remain the same as announced at the conclusion of the election.

This concludes the report of the Commissioner's authorized representative.

* * * * *

Upon review, the Commissioner accepts the report of his authorized representative and adopts it as his own.

Accordingly, as announced at the conclusion of the election, Ralph J. Condo is deemed elected to a full term of three years as the Waterford Township member of the regional Board of Education, and the General Fund proposition of the district is deemed defeated by the voters.

IT IS SO ORDERED.

MAY 23, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 23, 1994

132-94

132-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF GARWOOD	:	DECISION
BOROUGH, UNION COUNTY.	:	
_____	:	

MAY 25, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF GARWOOD : DECISION
BOROUGH, UNION COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for three members of the Board of Education for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Raymond E. Grimes	259	1	260
Patricia Marseglia	231	3	234
William Nierstedt	219	2	221
Ralph Urrico	210	1	211
Mary Ann Kjetsaa	209	1	210
Patricia Quattrocchi	166	1	167

In response to a letter application filed April 27, 1994, pursuant to N.J.S.A. 18A:14-63.2 by Ralph Urrico, an authorized representative of the Commissioner of Education from the office of the Union County Superintendent of Schools was directed to conduct a recount of absentee and machine ballots cast. The machine recount was conducted on May 4, 1994, at the Scotch Plains Warehouse, Scotch Plains. Following the machine recount, the absentee ballots were recounted at the Board of Elections Office in Elizabeth, Union County, pursuant to the broad authority granted the Commissioner for the 1994 election under P.L. 1994, c. 6.

At the conclusion of the recount, the announced results for the candidates were unchanged:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Raymond E. Grimes	259	1	260
Patricia Marseglia	231	3	234
William Nierstedt	219	2	221
Ralph Urrico	210	1	211
Mary Ann Kjetsaa	209	1	210
Patricia Quattrocchi	166	1	167

Therefore, Raymond E. Grimes, Patricia Marseglia and William Nierstedt have won three-year terms on the Board of Education of the Borough of Garwood.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Raymond E. Grimes, Patricia Marseglia and William Nierstedt were elected to full terms of three years each on the Garwood Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 25, 1994

DATE OF MAILING - MAY 25, 1994

133-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WYCKOFF	:	DECISION
TOWNSHIP, BERGEN COUNTY.	:	
	:	

MAY 25, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WYCKOFF : DECISION
TOWNSHIP, BERGEN COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for two members of the Board of Education for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Anne S. Maganzini	773	7	780
Robert B. Yudin	521	10	531
Philip A. Tornetta	503	7	510
James D. Miller	350	4	354

In response to a letter request filed on April 27, 1994 by Philip A. Tornetta pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the Office of the Bergen County Superintendent of Schools was directed to conduct a recount of ballots cast. The recount of machine votes was conducted on May 10, 1994 at the Bergen County Voting Machine Warehouse in Carlstadt. Absentee ballots were recounted at the Bergen County Board of Elections in Hackensack, pursuant to the broad authority granted the Commissioner for the 1994 school election by P.L. 1994, c. 6.

At the conclusion of the recount, the tally stood unchanged as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Anne S. Maganzini	773	7	780
Robert B. Yudin	521	10	531
Philip A. Tornetta	503	7	510
James D. Miller	350	4	354

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Anne S. Maganzini and Robert B. Yudin were elected to full terms of three years each on the Wyckoff Township Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 25, 1994

DATE OF MAILING - MAY 25, 1994

134-94

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF : DECISION
CLIFFSIDE PARK, BERGEN COUNTY. :
:

MAY 25, 1994

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the General Fund proposition of the Board of Education at the annual school election held on April 19, 1994 were as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES votes	527	8	535
NO votes	565	10	575

In response to a letter request filed on April 27, 1994 by Board Secretary Robert Paladino pursuant to N.J.S.A. 18A:14-63.3, an authorized representative of the Commissioner of Education from the Office of the Bergen County Superintendent of Schools was directed to conduct a recount of ballots cast. The recount of machine votes was conducted on May 9, 1994 at the Bergen County Voting Machine Warehouse in Carlstadt. Absentee ballots were recounted at the Bergen County Board of Elections in Hackensack, pursuant to the broad authority granted the Commissioner for the 1994 school election by P.L. 1994, c. 6.

At the conclusion of the recount, the tally stood unchanged as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES votes	527	8	535
NO votes	565	10	575

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, the General Fund proposition of the Cliffside Park Board of Education was defeated by the voters of the district.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 25, 1994

DATE OF MAILING - MAY 25, 1994

135-94

135-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
CARLSTADT-EAST RUTHERFORD	:	DECISION
SCHOOL DISTRICT, CONSTITUENT	:	
DISTRICT OF EAST RUTHERFORD,	:	
BERGEN COUNTY.	:	
	:	

MAY 25, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
CARLSTADT-EAST RUTHERFORD : DECISION
SCHOOL DISTRICT, CONSTITUENT :
DISTRICT OF EAST RUTHERFORD, :
BERGEN COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for two members of the regional Board of Education from the constituent district of East Rutherford for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joseph Morris	277	3	280
Sybil Speake	270	2	272
Richard Evans	263	1	264

In response to a letter request filed on May 2, 1994, pursuant to N.J.S.A. 18A:14-63.2 by Richard Evans, an authorized representative of the Commissioner of Education from the Office of the Bergen County Superintendent of Schools was directed to conduct a recount of ballots cast by voting machine. The recount was conducted on May 9, 1994 at the Bergen County Voting Machine Warehouse in Carlstadt.

At the conclusion of the recount, the tally stood unchanged as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joseph Morris	277	3	280
Sybil Speake	270	2	272
Richard Evans	263	1	264

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Joseph Morris and Sybil Speake were elected to full terms of three years each to represent the constituent district of East Rutherford on the Carlstadt-East Rutherford Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 25, 1994

DATE OF MAILING - MAY 25, 1994

136-94

136-94

IN THE MATTER OF THE ANNUAL	:	
ELECTION HELD IN THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
GIBBSBORO, CAMDEN COUNTY.	:	
	:	

MAY 26, 1994

IN THE MATTER OF THE ANNUAL :
ELECTION HELD IN THE SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF : DECISION
GIBBSBORO, CAMDEN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each and for one member for a one-year unexpired term at the annual school election held on April 19, 1994, in the School District of the Borough of Gibbsboro, Camden County, were as follows:

FOR THE THREE THREE-YEAR TERMS

CANDIDATE	AT POLLS	ABSENTEE	WRITE-IN	TOTAL
Dorothy Warner	116	1	0	117
Peter Carbone	0	0	20	20
Howard Leonard	0	0	15	15

FOR THE ONE-YEAR UNEXPIRED TERM

CANDIDATE	AT POLL	ABSENTEE	WRITE-IN	TOTAL
James Smith	0	0	2	2
Thomas Egan, Jr.	0	0	2	2
Carol Cressman	0	0	2	2
Barry Campbell	0	0	2	2

Pursuant to N.J.S.A. 18A:12-15(c), which requires recount and certification of results by the Commissioner in the event of a tie vote for members of the Board of Education, an authorized representative of the Commissioner from the office of the Camden County Superintendent of Schools was directed to recount ballots cast. The recount was conducted at the Voting Machine Warehouse,

South Jersey Port Corporation, Camden, on April 29, 1994. Absentee and write-in ballots were counted on the same day at the office of the Camden County Board of Elections.

At the conclusion of the recount, the totals were as follows:

FOR THE THREE THREE-YEAR TERMS

CANDIDATE	AT POLLS	ABSENTEE	WRITE-IN	TOTAL
Dorothy Warner	116	1	0	117
Peter Carbone	0	0	47	47
Howard Leonard	0	0	36	36

FOR THE ONE-YEAR UNEXPIRED TERM

CANDIDATE	AT POLLS	ABSENTEE	WRITE-IN	TOTAL
Thomas Egan, Jr.	0	0	24	24
Carol Cressman	0	0	22	22
Mark Pratt	0	0	16	16

There were also 29 individuals who received less than five write-in votes each.

There were some significant changes on recount, due primarily to inclusion by the Commissioner's representative of write-in ballots lacking a mark or check alongside the written name but otherwise correctly cast. On recount, the original results for the winning candidates for the three three-year terms remain the same as derived from the balloting of April 19, 1994. However, the results of the recount for the one-year unexpired term indicates that Thomas Egan, Jr. received the most write-in votes. Therefore, it is recommended by the Commissioner's representative that Thomas Egan, Jr. be seated on the Board of Education for the one-year unexpired term.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that Dorothy Warner, Peter Carbone and Howard Leonard have been, as announced at the conclusion of the election, elected to full terms of three years each on the Board of Education. The Commissioner further finds and determines that, following recount, a tie for the one-year seat no longer remains and that Thomas Egan, Jr., has been elected to the unexpired term on the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1994

DATE OF MAILING MAY 27, 1994

137-94

137-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF WEST PATERSON, PASSAIC COUNTY.	:	
_____	:	

MAY 26, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WEST PATERSON, PASSAIC COUNTY. :
:

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 April 19, 1994 in the School District of the Borough of West Paterson, Passaic County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Dominick DiDomenico	556	33	589
Jay Trent	497	32	529
Fred A. DeNude	480	26	506
Susan Varcadipane	485	19	504
Robert J. Muccio	410	20	430
Janine B. Semrau	402	16	418
James MacRae	358	3	361

Pursuant to a letter request from Matthew J. Trella, Esq. filed May 2, 1994, on behalf of Susan Varcadipane pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the office of the Passaic County Superintendent of Schools was directed to conduct a recount of the voting machine and absentee ballots cast. The voting machine recount was conducted on May 6, 1994 at the voting machine warehouse, Paterson, and the absentee ballot recount at the Passaic County Administration Building, Paterson, on the same date pursuant to the broad authority granted the Commissioner for the 1994 election under P.L. 1994, c.6.

At the conclusion of the recount, the tally changed as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Dominick DiDomenico	556	33	589
Jay Trent	497	32	529
Fred A. DeNude	480	26	506
Susan Varcadipane	485	19	504
Robert J. Muccio	410	20	430
Janine B. Semrau	402	15	417
James MacRae	358	3	361

Although there was a minor change in tally, the winning candidates remained the same as announced at the conclusion of the election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Dominick DiDomenico, Jay Trent and Fred A. DeNude were elected to full terms of three years each on the West Paterson Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1994

DATE OF MAILING - MAY 26, 1994

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SOUTHERN REGIONAL SCHOOL DISTRICT, CONSTITUENT DISTRICT OF STAFFORD TOWNSHIP, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 26, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SOUTHERN REGIONAL SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT, CONSTITUENT DISTRICT OF : DECISION
STAFFORD TOWNSHIP, OCEAN COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for three members of the regional Board of Education from the constituent district of Stafford Township for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Timothy G. Hart	1,382	33	1,415
John Mull	1,258	38	1,296
David Crossley	1,102	34	1,136
Carol Williams	1,069	48	1,117
Carol Warr	1,007	53	1,060
Daniel Taylor	993	49	1,042

In response to a letter request filed May 2, 1994, pursuant to N.J.S.A. 18A:14-63.2 by Carol Williams, an authorized representative of the Commissioner of Education from the office of the Ocean County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on May 4, 1994 at the Ocean County Voting Machine Warehouse, Toms River. Following the machine recount, the absentee ballots were recounted at the Board of Elections Office in Toms River, Ocean County, pursuant to the broad authority granted the Commissioner for the 1994 election under P.L. 1994, c.6.

At the conclusion of the recount, the announced results for the candidates were unchanged:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Timothy G. Hart	1,382	33	1,415
John Mull	1,258	38	1,296
David Crossley	1,102	34	1,136
Carol Williams	1,069	48	1,117
Carol Warr	1,007	53	1,060
Daniel Taylor	993	49	1,042

Therefore, David Crossley, Timothy G. Hart and John Mull have won the three-year terms for the school district Board of Education of Southern Regional.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, David Crossley, Timothy G. Hart and John Mull were elected to full terms of three years each to represent Stafford Township on the Southern Regional Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1994

DATE OF MAILING - MAY 26, 1994

139-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BERKELEY	:	DECISION
TOWNSHIP, OCEAN COUNTY.	:	
	:	

MAY 26, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BERKELEY : DECISION
TOWNSHIP, OCEAN COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for three members of the Board of Education for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carmen F. Amato, Jr.	1,631	59	1,690
Donald Blydenburgh	1,400	39	1,439
Doris Moore	1,354	72	1,426
Sam Kalmanowitz	1,384	36	1,420
Pellegrino (Bill) Goione	1,125	70	1,195
Fred Whiteley	1,072	65	1,137

In response to a letter request filed April 27, 1994, pursuant to N.J.S.A. 18A:14-63.2 by Sam Kalmanowitz, an authorized representative of the Commissioner of Education from the office of the Ocean County Superintendent of Schools was directed to conduct a recount of ballots cast. The recount was conducted on May 4, 1994 at the Ocean County Voting Machine Warehouse, Toms River. Following the machine recount, the absentee ballots were recounted at the Board of Elections Office in Toms River, Ocean County, pursuant to the broad authority granted to the Commissioner for the 1994 election by P.L. 1994, c. 6.

At the conclusion of the recount, the announced results for the candidates were unchanged:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carmen F. Amato, Jr.	1,631	59	1,690
Donald Blydenburgh	1,400	39	1,439
Doris Moore	1,354	72	1,426
Sam Kalmanowitz	1,384	36	1,420
Pellegrino (Bill) Goione	1,125	70	1,195
Fred Whiteley	1,072	65	1,137

Therefore, Doris Moore, Carmen F. Amato, Jr. and Donald Blydenburgh have been elected to three-year terms on the Board of Education of Berkeley Township.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Carmen F. Amato, Jr., Donald Blydenburgh and Doris Moore were elected to full terms of three years each on the Berkeley Township Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1994

DATE OF MAILING - MAY 26, 1994

140-94

140-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SEASIDE PARK	:	DECISION
BOROUGH, OCEAN COUNTY.	:	
	:	

MAY 26, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SEASIDE PARK : DECISION
BOROUGH, OCEAN COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for two members of the Board of Education for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Lawrence A. McCauley	245	9	254
Patricia B. Roe	234	3	237
Stephanie Ann Kiziukiewicz	190	8	198
Wanda Muermann	125	5	130

In response to a letter request filed April 27, 1994, pursuant to N.J.S.A. 18A:14-63.2 by Stephanie Ann Kiziukiewicz and Wanda Muermann, an authorized representative of the Commissioner of Education from the office of the Ocean County Superintendent of Schools was directed to conduct a recount of ballots cast. The recount was conducted on May 4, 1994 at the Ocean County Voting Machine Warehouse, Toms River. Following the machine recount, absentee ballots were recounted at the Board of Elections Office in Toms River, Ocean County, pursuant to the broad authority granted the Commissioner for the 1994 election by P.L. 1994, c.6.

At the conclusion of the recount, the announced results for the candidates were unchanged:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Lawrence A. McCauley	245	9	254
Patricia B. Roe	234	3	237
Stephanie Ann Kiziukiewicz	190	8	198
Wanda Muermann	125	5	130

Therefore, Lawrence A. McCauley and Patricia B. Roe have won three-year terms on the Board of Education of the Borough of Seaside Park.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Lawrence A. McCauley and Patricia B. Roe were elected to full terms of three years each on the Seaside Park Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 26, 1994

DATE OF MAILING - MAY 26, 1994

141-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MORRIS HILLS REGIONAL SCHOOL	:	DECISION
DISTRICT, MORRIS COUNTY.	:	
	:	

SYNOPSIS

Board sought emergent relief to require Board of Elections to include absentee ballot that was received prior to required date of receipt but did not have a postmark.

ALJ concluded absentee ballot was mailed prior to closing of the polls, and there was no showing of actual or attempted fraud. Thus, ballot was properly cast and emergent relief was granted.

Having considered the specific facts in the matter herein, Commissioner adopted findings and determination in initial decision.

MAY 31, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
GRANTING EMERGENT RELIEF
OAL DKT. NO. EDU 4761-94
AGENCY DKT. NO.153-5/94

IN THE MATTER OF
THE BOARD OF EDUCATION
OF THE MORRIS HILLS REGIONAL
SCHOOL DISTRICT, MORRIS COUNTY,

Sidney A. Sayovitz, Esq., and **Joanne L. Butler**, Esq., for petitioner, Morris Hills Regional School District, (Young, Dimiero & Sayovitz, attorneys)

Bruce J. Solomon, Deputy Attorney General, for respondent, Morris County Board of Elections (Deborah T. Poritz, Attorney General of New Jersey)

Record Closed: May 18, 1994 Decided: May 18, 1994

This is a transcript of the substance of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2

BEFORE **ARNOLD SAMUELS**, ALJ:

This decision is based solely on the argument of counsel that has just concluded and a review of the papers that were filed by the Board of Education of the Morris Hills Regional School District. No papers in oppostion were filed by the Board of Elections. Instead, the Board relied on the oral argument of counsel. The papers I have before

me consist of the transmittal by Ms. Butler, a brief on behalf of the petitioner, and a copy of the verified petition, the substance of which has been restated in part in the brief. There are exhibits attached to the papers submitted, marked A through I.

The exhibits are: First, an affidavit of the Business Administrator of the Morris County Superintendent of Schools. Exhibit B is information to the County Superintendents and County School Business Administrator's from the Assistant Commissioner of Education pertaining to clarification and additional information regarding the election calendar and absentee ballots. Exhibit C is letter advice from the Attorney General regarding the April 19, 1994 school board elections. Exhibit D is the election results. Exhibit E are copies of the civilian absentee ballots. Exhibit F are the results of the absentee ballots certified by the Morris County Board of Elections. Exhibit G is an affidavit of Jane A. McNasby, Superintendent of the Morris Hills Regional Board of Education. Exhibit H is an affidavit by Kim McGinley, whose ballot is in question here. Exhibit I is an affidavit of James Davidson, Postmaster of the U.S. Postal Service in Morristown, with proof of service.

I FIND the following facts by a preponderance of the credible evidence:

On April 19, 1994, there was a Board of Education election in the Morris Hills Regional District.

By special legislation, the rules relating to receipt of absentee ballots were relaxed.

Such ballots needed to be mailed and postmarked no later than 8:00 p.m. on election day, April 19th.

In order to be counted, an absentee ballot had to be received by the County Board of Elections before 4:00 p.m.on April 22.

Kim McGinley placed her ballot in the mail slot at her school in Trenton on April 18, 1994, prior to the April 19th required date for mailing. She affixed a postage stamp to it.

The ballot was received by the County Board of Elections on the day after the election, April 20, 1994, and two days prior to the date on which the ballot had to have been received in order to be counted. The only flaw in the situation was the absence of the postmark.

The Office of Morris County Board of Elections marked the envelope as having been received on April 20, 1994 at 1:10 p.m. An employee of the Morris County Board of Elections noted that it was not stamped or postmarked. There is no question that it was received through the usual device by which the Board of Elections receives its daily mail.

The Morris County Board of Elections would not open the absentee ballot, and would not count it, under the circumstances, because of the lack of the postmarking. The Morris County Board of Elections was following the letter of the law when it rejected the ballot.

This issue in the case has the ability to directly affect the outcome of the election, because without this one vote it was a tie.

The moving papers and the brief, together with Mr. Solomon's argument, refer to just about all of the applicable law that I know of in this situation. Both parties have referred to the same statutes and to many of the same cases, plus several others that were cited in oral argument. I have no disagreement at all with any of the case law or with the statutes cited. However, I have found no authority that indicates anything directly on point. One thing I agree with wholeheartedly is the reason for the detailed and stringent regulations involved in this situation. That is to protect the public from any possibility of fraud or unfairness. Certainly, Mr. Solomon is correct when he indicates that, when the absentee ballots are to be counted three days after the

election, there is a greater potential for fraud, because of the delay, and the added possibility that somehow a vote might be cast with knowledge by the voter of the completed tally. I do not find that to be the case here.

According to the uncontested facts, there was no actual or attempted fraud or unfair dealing. Ms. McGinley did indeed post her ballot in the mail on the day before the polls were closed on April 19. At the time she did so, which was one day earlier, she had no way of knowing what the election result would be. I think that the purpose of the cautions involved in the statutes and regulations and in the actions of position taken by the Board of Elections has been served. Some kind of positive and strong assurance must be shown that there has been no foul play, no unfairness, and not even a suggestion of foul play. That showing has been made. Furthermore, the matter has been taken totally out of the political process and put into the hands of an independent forum that can make a decision such as this.

Under the circumstances, I **CONCLUDE** that Ms. McGinley's ballot was properly cast. I also **CONCLUDE** that she should not be deprived of the right to cast her ballot and have it cancelled because of the obvious omission of a postmark, and for that reason only. The general concepts involved in this situation can be found in the March 22, 1994 clarification letter from the Department of Education to the County Superintendent and to the Hudson County school district business administrator. I refer to the next to the last paragraph of that letter, which states the reason for the extension of the deadline for the receipt of absentee ballots by the County Board Of Elections. The last sentence is revealing. It states that the reason for utilizing the postmark date of April 19 for the mailing of those ballots is to preclude the preparation and mailing of absentee ballots after the closing of the polls and the announcements of preliminary results of the election. That supports my previous statement of the assurances that the public is entitled to.

I **CONCLUDE** that there was no preparation or mailing of this absentee ballot after the closing of the polls. The aims and goals referred to above have been accomplished in this case.

Having concluded that Ms. McGinley's ballot should be counted, I therefore **ORDER** that the emergent relief sought by the Board of Education of the Morris Hills Regional School District is **GRANTED**.

This oral decision may be adopted, modified or rejected by the **DEPARTMENT OF EDUCATION** which, by law, is empowered to make a final decision in this matter. However, if the **Department of Education** does not so act in forty-five (45) days andunless such time limit is otherwise extended, this oral decisionshall become a final decisionin accordancewith *N.J.S.A.* 52:14B-10.

END OF TRANSCRIPT

I, Margarita Diaz, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Samuels' oral deicision rendered in the above matter on May 18, 1994.

5/19/94
DATE

Margarita Diaz
MARGARITA DIAZ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

sej/md

OAL DKT. NO. EDU 4761-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MORRIS HILLS REGIONAL SCHOOL	:	DECISION
DISTRICT, MORRIS COUNTY.	:	
	:	

For the Petitioner, Young, Dimiero & Sayovitz (Sidney A. Sayovitz, Esq. and Joanne L. Butler, Esq.)

For the County Board of Elections, Deborah T. Poritz, Attorney General of New Jersey (Bruce J. Solomon, Deputy Attorney General)

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed pursuant to N.J.A.C. 1:1-18.4.

The Commissioner adopts the findings and conclusions of the Administrative Law Judge as his own.

Accordingly, based upon the specific facts determined herein, the Commissioner finds and determines that the absentee ballot be opened, counted and added in the recount of ballots cast in the April 19, 1994 election of the Board of Education of the Morris Hills Regional School District, Morris County.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 31, 1994

DATE OF MAILING - MAY 31, 1994

142-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BOUND BROOK	:	DECISION
BOROUGH, SOMERSET COUNTY.	:	
	:	

JUNE 2, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BOUND BROOK : DECISION
BOROUGH, SOMERSET COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for three members of the Board of Education for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carol Ann Koupiaris	468	3	471
Howard Wagner (write-in)	158	4	162*
Ted Settle (write-in)	154	1	155
Alison Ward (write-in)	142	2	144
Ed Southgate (write-in)	34	1	35

There were an additional number of write-in votes cast for other candidates which were not significant in number. There were also a number of votes cast for the above-listed people which were counted as separate names due to minor variants in spelling and like errors.

In response to a letter request from Alison Ward, filed April 26, 1994 pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the office of

*In the election results reported to the County Superintendent by the district at the conclusion of the election, Mr. Wagner's tallies were given as 154 at one polling place, 4 at another, and 4 absentee ballots; however, his total vote was given as 158. The correct total, which affects neither the announced results nor the results on recount, is reflected herein.

the Somerset County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount of machines was conducted on May 9, 1994 at the Somerset County election machine warehouse in the VA Depot, Route 206, Hillsborough Township. The recount of write-in votes was conducted at the county administration building in Somerville in the Board of Elections office. A comparison of voting authorities to the poll lists took place on this same day at the office of the Somerset County Superintendent of Schools.

A comparison of poll lists, ballots cast and voting authorities results in differences at the following polling places. The following differences are noted for the record.

POLLING PLACE	NUMBER ON POLL LIST	NUMBER OF BALLOTS CAST	NUMBER OF VOTING AUTHORITIES
Lafayette School	419	419	417
Smalley School	512	512	508

The machines were recounted and checked. It was noted that slots 4 through 8 were locked out to prevent write-in votes in this area. It was also noted that on the face of the machine the name Alison Ward was written in ballpoint pen. This name was covered with masking tape and was not visible without removing the tape.

A recount of the paper rolls used in the machines to cast write-in votes resulted in a number of ballots being voided. Voided ballots were:

V1, 7, 8, 9, 18, 19, 20, 21, 22, 23 because more than one name was written in the voting slot.

V2 and V24 because the candidate listed on the face of the machine was also recorded as a write-in.

V3 4, 5, 6, 11, 13, 14, 15, 16, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 because the write-in votes were cast in the wrong slots.

V10, 11, 13, 14 because there were two (2) write-in votes for the same person on the same row.

V16, 17 because the write-ins were for Jane Doe and John Doe.

There were no votes challenged at the recount.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carol Ann Koupiaris	468	3	471
Alison Ward	171	2	173
Howard Wagner	167	4	171
Ted Settle	165	1	166
Ed Southgate	41	1	42

As indicated, the changes in tally resulted in a change in the outcome of the election, with Alison Ward obtaining the seat formerly announced as won by Ted Settle.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own. In particular, the Commissioner notes that his representative's determinations with respect to voided ballots are consistent with prior decisional law, such as In the Matter of the Annual School Election Held in the Matawan-Aberdeen Regional School District, Monmouth County, 1987 S.L.D. 1140, aff'd State Board 1146, and the precedent cited therein (more than one vote per slot); In the Matter of the Annual School Election Held in the School District of Haddonfield Borough, Camden County, decided June 17, 1981 (write-in vote for candidate on printed ballot); and In the Matter of the Annual School Election Held in the School District of East Amwell

Township, Hunterdon County, decided May 14, 1993, and the precedent cited therein, primarily In the Matter of the Annual School Election Held in the School District of Shamong Township, Burlington County, 1986 S.L.D. 1347, 2438 (votes cast in wrong slots).

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Carol Ann Koupiaris and Howard Wagner have been elected to full terms of three years each on the Bound Brook Board of Education; however, on recount, Alison Ward, rather than Ted Settle, has been elected to the remaining term.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law, where an inquiry is pending into the conduct of the above-captioned election. It is noted that the results of this election, as set forth herein, remain valid unless and until a contrary determination is made by the Commissioner in his decision on inquiry.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 2, 1994

DATE OF MAILING - JUNE 2, 1994

143-94

143-94

IN THE MATTER OF THE ANNUAL	:	COMMISSIONER OF DECISION
SCHOOL ELECTION HELD IN THE	:	DECISION
SCHOOL DISTRICT OF EDGEWATER	:	
BOROUGH, BERGEN COUNTY.	:	
_____	:	

JUNE 2, 1994

IN THE MATTER OF THE ANNUAL : COMMISSIONER OF DECISION
SCHOOL ELECTION HELD IN THE : DECISION
SCHOOL DISTRICT OF EDGEWATER :
BOROUGH, BERGEN COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for two members of the Board of Education for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Margaret Carlson	372	15	387
Cynthia Morgan	357	12	369
Laurie Grant	326	38	364
Nadia Masuda	294	35	329

In response to a letter request filed on April 26, 1994 by Laurie Grant pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the Office of the Bergen County Superintendent of Schools was directed to conduct a recount of ballots cast. The recount of machine votes was conducted on May 10, 1994 at the Bergen County Voting Machine Warehouse in Carlstadt. Absentee ballots were recounted at the Bergen County Board of Elections in Hackensack, pursuant to the broad authority granted the Commissioner for the 1994 school election by P.L. 1994, c. 6.

At the conclusion of the recount, the tally stood unchanged as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Margaret Carlson	372	15	387
Cynthia Morgan	357	12	369
Laurie Grant	326	38	364
Nadia Masuda	294	35	329

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Margaret Carlson and Cynthia Morgan were elected to full terms of three years each on the Edgewater Borough Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 2, 1994

DATE OF MAILING - JUNE 2, 1994

144-94

144-94

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MONTVILLE : DECISION
TOWNSHIP, MORRIS COUNTY. :
:

JUNE 2, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MONTVILLE : DECISION
TOWNSHIP, MORRIS COUNTY. :
:

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 April 19, 1994, in the School District of Montville Township, Morris County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joanne Vasak	689	9	698
Ann Mariash (Write-In)	532	7	539
Dorie E. Berman	457	7	464
Brad Weisberger (Write-In)	392	12	404
Richard Cohen (Write-In)	275	7	282

In response to a letter request from Brad Weisberger, filed April 26, 1994, pursuant to N.J.S.A. 18A:14-63.2, the Commissioner of Education directed an authorized representative from the office of the Morris County Superintendent of Schools to conduct a recount of the ballots cast. The machine recount was conducted on May 5, 1994 at the Morris County Voting Machine Warehouse, Highview Avenue, Cedar Knolls. Absentee ballots were recounted at the Morris County Board of Elections also on May 5, 1994, pursuant to the broad authority granted the Commissioner for the 1994 election by P.L. 1994, c.6.

At the conclusion of the recount, the totals were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joanne Vasak	686	9	695
Ann Mariash (Write-In)	532	7	539
Dorie E. Berman	456	7	463
Brad Weisberger (Write-In)	392	12	404
Richard Cohen (Write-In)	275	7	282

There was a change in tally based on the number of votes at the polls for candidates on the ballot. The change, however, did not affect the election results as previously announced as derived from the balloting of April 19, 1994. Therefore, it is recommended by the Commissioner's representative that the results, as announced at the conclusion of the election, remain unaltered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Joanne Vasak, Ann Mariash and Dorie E. Berman were elected to full terms of three years each on the Montville Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 2, 1994

DATE OF MAILING - JUNE 2, 1994

145-94

145-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JUNE 2, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
ELIZABETH, UNION COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for three members of the Board of Education for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carlos J. Alma	1,674	21	1,695
Angel G. Estrada	1,643	23	1,666
Daniel P. Sullivan	1,509	53	1,562
Jorge A. Castro	1,507	16	1,523
George G. McGuirk	1,433	52	1,485
Dexter A. Martin	1,324	32	1,356
David A. Lewis	822	7	829
Ernest M. Spinelli	635	36	671

In response to a letter request filed April 29, 1994, pursuant to N.J.S.A. 18A:14-63.2 by Jorge A. Castro, an authorized representative of the Commissioner of Education from the office of the Union County Superintendent of Schools was directed to conduct a recount of ballots cast. The recount was conducted on May 4, 1994 at the Union County Voting Machine Warehouse, Westfield. Following the machine recount, absentee ballots were recounted at the Board of Elections Office in Elizabeth, pursuant to the broad authority granted the Commissioner under P.L. 1994, c.6.

At the conclusion of the recount, the announced results for the candidates were unchanged:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carlos J. Alma	1,674	21	1,695
Angel G. Estrada	1,643	23	1,666
Daniel P. Sullivan	1,509	53	1,562
Jorge A. Castro	1,507	16	1,523
George G. McGuirk	1,433	52	1,485
Dexter A. Martin	1,324	32	1,356
David A. Lewis	822	7	829
Ernest M. Spinelli	635	36	671

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Carlos J. Alma, Angel G. Estrada and Daniel P. Sullivan were elected to full terms of three years each on the Elizabeth Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 2, 1994

DATE OF MAILING - JUNE 2, 1994

148-94

ANTHONY MAGARELLO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

JUNE 2, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8103-93S
AGENCY DKT. NO. 264-7/93

ANTHONY MAGARELLO,
Petitioner,
v.
HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner (Lake and Schwartz, attorneys)

Robert P. Martinez, Esq., for respondent (Martinez and Jennings, attorneys)

Record Closed: April 20, 1994 Decided: April 26, 1994

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

This matter was opened to the Office of Administrative Law following transmittal from the Department of Education. Petitioner alleged that his tenure and seniority rights had been violated in connection with an action of the Board purportedly making him a 3/5ths supervisor. Following transmittal the parties entered into discussions that have led to the execution of a stipulation of settlement and the placement of the settlement on the record in open hearing. Pursuant to the terms of the settlement, the petitioner, who has become ill since the time of the Board's action, and the Board, have agreed to a resolution of the issues in dispute between them including the placement of the respondent on an extended sick leave pursuant to *N.J.S.A.* 18A:30-7 during the period of his disability, but not to exceed the period ending on and including

December 31, 1995. The Stipulation provides for the petitioner's compensation during the extended sick leave and provides other terms and conditions regarding his employment during the extended sick leave. In addition, Mr. Magarello has agreed to resign his supervisory position effective the close of business March 23, 1994, with the understanding that he is giving up any existing tenure rights in the district. Mr. Magarello testified under oath at the hearing concerning his understanding and acceptance of the settlement, which he has entered into voluntarily. He described the particular medical difficulties affecting him and indicated that they had not in any way affected his ability to understand and enter into the settlement. His wife testified under oath in support of these positions.

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

I have reviewed the record and the settlement terms and :

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

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

Based upon the representations of counsel and the testimony of the petitioner and his spouse, I **FIND** that the terms and conditions of the settlement are acceptable and within the law and that they should be accepted. It is therefore, **ORDERED** that the parties shall comply with the terms and conditions of the stipulation of settlement, subject to its review and approval by the Commissioner of Education. The contested case shall be **DISMISSED** upon acceptance by the Commissioner.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

April 26, 1994
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

4/28/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 03 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Martinez & Jennings
2109 Pennington Road
West Trenton, NJ 08638
Te: 609-883-8000
Attorneys for Respondent

Anthony Magarello, Petitioner vs. Hopewell Valley Regional School District, Mercer County, Respondent	Before The Commissioner of Education, State of New Jersey Agency Docket No. 264 - 7/93 STIPULATION OF SETTLEMENT

Petitioner and Respondent, having conferred through their respective attorneys, and having reached an agreement under which all outstanding controversies and disputes between them shall be amicably and permanently resolved, do hereby memorialize said agreement and submit same to the Administrative Law Judge and Commissioner of Education for approval in accordance with applicable rules of administrative procedure.

In consideration of the mutual covenant and understandings hereinafter expressed, Petitioner Anthony Magarello and Respondent Hopewell Valley Regional School District hereby represent, undertake and agree as follows:

1. Petitioner has become ill and has not returned to work since November, 1993. Petitioner has provided medical information to Respondent indicating that Petitioner is presently unable to return to work and is unlikely to be able to return to work in the foreseeable future.

2. In addition to the claims in the instant matter for restoration of certain tenure entitlements, Petitioner has formally demanded of respondent certain wage benefits pursuant to N.J.S.A. 18A:30-2.1.

3. Respondent denies the claims and demand set forth in paragraph #2, including the claim that Petitioner's medical condition is job related, but is desirous of permanently resolving Petitioner's employment status and of exercising its discretion pursuant to N.J.S.A. 18A:30-7 to provide additional compassionate sick leave to Petitioner. Without admitting that any of his claims are without merit, Petitioner is desirous of inducing Respondent to act as provided herein by permanently and irrevocably withdrawing and adjusting his employment claims as specified herein.

4. The parties agree that Petitioner has remained in the position of part-time supervisor and was compensated at his annual contract salary rate of $38,724.00 per annum through and until March 23, 1994, the day on which his existing accumulated sick leave, vacation and other available personal leave was used up.

5. The parties agree that Petitioner shall, on and as of March 24, 1994, be deemed to be employed by Respondent as a teaching staff member and placed upon an extended sick leave pursuant to N.J.S.A. 18A:30-7 during the period of Petitioner's disability but not to exceed the period ending on and including December 31, 1995. In the event that Petitioner believes that his disability ends prior to the conclusion of this extended leave, petitioner may request a return to active employment status but nothing contained herein shall be read to require or oblige Respondent to return Petitioner to such status, and Respondent's sole obligation shall be to pay compensation for such extended leave through December 31, 1995 as set forth herein, whereupon Petitioner's employment will be terminated. Petitioner shall receive compensation during such extended sick leave at an annual salary rate of $19,602.00 per annum. Petitioner shall be entitled to all Insurance and Health coverage during this period as provided by Article XI of the current Agreement between Respondent and the Hopewell Valley Administrators and Supervisors Association or any successor to such Agreement, which is scheduled to expire on June 30, 1995. A copy of the current Article XI is attached hereto as Exhibit A. Respondent agrees to deem that Petitioner

satisfies the 20 hour per week standard for eligibility set forth therein and in Respondent's policies for purposes of these benefits. Petitioner waives any claim to any other leave, vacation, tuition reimbursement, salary adjustment or any other benefit under said Agreement or any other collective bargaining agreement in Respondent's district.

6. Respondent will permanently and irrevocably resign from any and all tenured employment with Respondent on and as of March 23, 1994 and shall submit a letter of resignation to that effect prior to the entry of this stipulation in the form set forth as Exhibit B. Respondent will also simultaneously execute a notarized Release of Claims in the form set forth in Exhibit C.

7. The parties stipulate and agree that this settlement is voluntary, consistent with law and fully dispositive of all issues now in contention between them, and that, upon the approval of this settlement, a order of dismissal with prejudice shall be entered in the within matter.

Lake & Schwartz
Attorneys for Petitioner

By: _____
Robert M. Schwartz

Martinez & Jennings,
Attorneys for Respondent

By: _____
Robert P. Martinez, Esq.

Dated: April 20, 1994

ARTICLE XI

INSURANCE AND HEALTH

A. Any individual Administrator/Supervisor may arrange for coverage for individual or extended family medical insurance coverage of Blue Cross/Blue Shield, Rider "J" coverage, and Outpatient Medical Emergency Care, and the cost thereof to said individual Administrator/Supervisor, if so elected by said Administrator/Supervisor, shall be borne ninety-five (95%) percent by the Board and five (5%) percent by the Administrator/Supervisor. The five (5%) percent of said cost to be paid by the Administrator/Supervisor may be paid through salary deduction upon the request of said Administrator/ Supervisor.

B. Any individual Administrator/Supervisor may arrange for individual or extended family Prepaid Prescription coverage to be administered by Blue Cross of New Jersey. The cost thereof shall be borne ninety-five (95) percent by the Board of Education and five (5%) percent by the Administrator/ Supervisor. The five (5%) percent of said cost to be paid by the Administrator/Supervisor may be paid through salary deduction upon the request of said Administrator/Supervisor. Effective July 1, 1993, the co-pay for prescription insurance shall be $6 Brand/ $3 Generic/$0 Mail order.

C. Any individual Administrator/Supervisor may arrange for individual or family dental insurance coverage. This dental insurance coverage does not include orthodontia. An Administrator/Supervisor must be employed by contract for 20 hours or more per week to be considered eligible for this dental insurance coverage.

D. The Board of Education will provide major medical insurance coverage for regular employees of the Board of Education. This coverage is not automatic and must be applied for on the forms provided. The insurance company will permit the employee to cover his/her family at his/her own cost. Effective July 1, 1993, the major medical coverage shall include a $10,000 stop loss which will provide a $2,000 maximum out of pocket cost per year pursuant to this coverage.

E. The Board of Education will offer coverage in two HMO's; one offering facility HMO coverage and one offering individual practice association coverage. In no case, will the Board of Education pay more for this coverage than it would be required to pay for coverage under paragraphs A and D, if applicable. The two HMO companies must be mutually agreed upon by the Board Secretary and the H.V.E.A.

F. Any Administrator/Supervisor who retires from the district may continue any of the above health insurance benefits if available from the carrier. Administrators/Supervisors shall be responsible for payment at the group rate.

April 20, 1994

Hopewell Valley Regional Board of Education
c/o Mr. John Nemeth, Board Secretary
425 South Main Street
Pennington, NJ 08534

Dear Board Members:

I hereby resign my supervisory position effective at the close of business on March 23, 1994. I submit this resignation in accordance with, and subject to your compliance with, the Stipulation of Agreement which has been signed on my behalf by my attorney, Robert M. Schwartz.

I understand that this resignation letter means that I am giving up my existing rights to tenured employment in the district. I have reviewed this matter thoroughly with my attorney and I have made the decision to accept the Stipulation of Agreement and to submit this resignation of my own free will, and without any undue pressure or coercion or influence from anyone.

Very truly yours.

A. Magarello

Anthony Magarello

Exhibit B

RELEASE

This Release, dated , 1994

BY the releasor(s) Anthony Magarello

referred to as "I",

TO Hopewell Valley Regional Board of Education

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

Any and all claims included in my petition to the Commissioner of Education, Agency Docket No. 264-7/93 and

Any and all claims arising under N.J.S.A. 18A:30-2.1, and

Any and all claims to tenured employment as a result of my service supervisor and as adult school director.

2. Payment. I will be paid a total in accordance with the terms of a contemporaneous Stipulation of Agreement, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release, and I sign this release as evidence of my understanding, and I do so willingly, after consultation with my attorney, and with no undue pressure or coercion.

Witnessed or Attested by:

A. Magarello (Seal)

STATE OF NEW JERSEY, COUNTY OF MERCER SS:

I CERTIFY that on , 1994
personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his

OAL DKT. NO. EDU 8103-93S

ANTHONY MAGARELLO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

JUNE 2, 1994

DATE OF MAILING - JUNE 2, 1994

149-94

149-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF PEMBERTON, BURLINGTON COUNTY.	:	
	:	

JUNE 3, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF PEMBERTON, BURLINGTON COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each, and for one member for an unexpired term of one year, at the annual school election held on April 19, 1994 in the School District of the Township of Pemberton, Burlington County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
THREE-YEAR TERM			
Stephen Moon	623	8	631
John C. Ulrich	610	4	614
Ingrid E. Campbell	594	7	601
Peter M. Montovani	423	2	425
Leon Rosenberg	350	3	353
UNEXPIRED ONE-YEAR TERM			
Diane P. Stinney	381	3	384
UNEXPIRED ONE-YEAR TERM (WRITE-IN)			
Tom Bridge	102	1	103
Bridge	61	0	61
Thomas Bridge	31	4	35
T. Bridge	2	0	2
Mr. Bridge	1	0	1
Thomas Bridges	1	0	1
Bridge Tom	1	0	1
Tom Bribbe	1	0	1
Tom Bridges	1	0	1
Glenn Malpeta	1	0	1

There was a great deal of confusion on election night as to which write-in votes should be counted. Write-in votes were counted for Tom Bridge, Thomas Bridge, Bridge, Mr. Bridge, and T. Bridge regardless of the line number on which they were written.

Following a request from Thomas Bridge, filed April 26, 1994, pursuant to N.J.S.A. 18A:14-63.2, the Commissioner of Education directed an authorized representative from the office of the Burlington County Superintendent of Schools to conduct a recount of the ballots cast. The recount was conducted on May 16, 1994 at the Burlington County Superintendent of Elections Office, Eayrestown Road, Mount Holly. The absentee ballots and write-in votes were recounted at the same location, the former pursuant to the broad authority granted the Commissioner for the 1994 election by P.L. 1994, c. 6.

Prior to conducting the recount of write-in votes, the Commissioner's representative announced that he would count any write-in vote for Thomas Bridge that was written in as either Thomas Bridge or Tom Bridge and opposite line number six. At the conclusion of the recount, the totals were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
THREE-YEAR TERM			
Stephen Moon	632	8	640
John C. Ulrich	610	4	614
Ingrid E. Campbell	603	7	610
Peter M. Montovani	432	2	434
Leon Rosenberg	350	3	353
UNEXPIRED ONE-YEAR TERM			
Diane P. Stinney	420	3	423
UNEXPIRED ONE-YEAR TERM (WRITE-IN)			
Tom/Thomas Bridge	122	5	127
Glen Malpeta	1	0	1

There were a significant number of write-in votes written below line number six for various candidates that were not counted.

There were some significant changes on recount, but the original results for the winning candidates for the three three-year terms and for the one-year unexpired term remain the same as derived from the balloting of April 19, 1994. Therefore, it is recommended by the Commissioner's Representative that Ingrid E. Campbell, John C. Ulrich, and Stephen Moon were elected to full terms of three years and Diane P. Stinney to the unexpired term of one year on the Board of Education of the School District of the Township of Pemberton, Burlington County.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own, with the exception of the apparent determination not to count in the tally for Thomas Bridge write-in votes properly cast opposite line six but giving only Mr. Bridge's last name, first initial and last name, or full name with minor misspelling, there being no evidence of any other person with the same or similar name having campaigned as a write-in candidate. In the Matter of the Annual School Election Held in the School District of the Township of Washington, Gloucester County, Commissioner's Decision of May 21, 1987, relying on In re Fifteen Registered Voters, Cty. of Sussex, 129 N.J. Super. 296 (App. Div. 1974). It is not possible to ascertain from the present record how many, if any, of the votes listed above under "Bridge," "Mr. Bridge," "T. Bridge," "Thomas Bridges," "Tom Bridges"

and "Bridge Tom" were cast opposite line six, as would be required for them to be counted in Mr. Bridge's final tally. However, even inclusion of all such votes would not be sufficient to alter the outcome of the election, so that no further determination with regard to these votes is necessary herein.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Ingrid E. Campbell, John C. Ulrich and Stephen Moon were elected to full terms of three years each, and Diane P. Stinney to an unexpired term of one year, on the Pemberton Township Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1994

DATE OF MAILING - JUNE 3, 1994

150-94

150-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
BRIDGEWATER-RARITAN REGIONAL	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, CONSTITUENT	:	DECISION
DISTRICT OF BRIDGEWATER TOWNSHIP,	:	
SOMERSET COUNTY.	:	
	:	

JUNE 3, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
BRIDGEWATER-RARITAN REGIONAL : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, CONSTITUENT : DECISION
DISTRICT OF BRIDGEWATER TOWNSHIP, :
SOMERSET COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for three members of the regional Board of Education from the constituent district of Bridgewater Township for full terms of three years each, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joanne Kane	2,489	33	2,522
Thomas D. Del Franco	2,451	38	2,489
Nancy Sobelson	2,429	35	2,464
Michael F. Ryan	2,134	25	2,159
Clara L. Navarrete	2,024	27	2,051
Dr. Martha A.T. Marciscano	1,999	32	2,031

In response to a letter request from Michael F. Ryan filed April 25, 1994, pursuant to N.J.S.A. 14-63.2, an authorized representative of the Commissioner of Education from the office of the Somerset County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 28, 1994 at the Somerset County election machine warehouse in the VA Depot, Route 206, Hillsborough Township. The comparison of voting authorities to poll lists took place on April 28 at the election warehouse and was continued on May 3, 1994 in the office of the Somerset County Superintendent of Schools.

A comparison of poll lists, ballots cast and voting authorities resulted in differences at the following polling places: Hamilton School, Van Houton School, Adamsville School and Crim School. The following differences are noted for the record.

POLLING PLACES	# ON POLL LIST	# BALLOTS CAST	# VOTING AUTHORITIES
Crim	1,310	1,319	1,295
Van Houton	1,100	1,099	1,097
Hamilton	907	907	901
Adamsville	726	726	722

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joanne Kane	2,569	33	2,602
Thomas D. Del Franco	2,451	38	2,489
Nancy Sobelson	2,439	35	2,474
Michael F. Ryan	2,154	25	2,179
Clara L. Navarrete	2,024	27	2,051
Dr. Martha A.T. Marciscano	1,999	32	2,031

The difference in tally for Michael F. Ryan is attributed to the Hamilton School count. This count was 20 less than the two-machine total of 170 plus 183, a total of 353, not the 333 figure recorded.

The difference in tally for Nancy Sobelson is attributed to the count at the Clubhouse - The Bridle Club polling place. This count was 10 less than the two-machine total 76 plus 25, a total of 101 not the 91 figure recorded.

There was one write-in vote for Donald Duck, which is not included in the candidate list. The original intent of the recount request by Mr. Ryan was to determine if the names in the machines were in the proper order. All machines had the names of candidates in the order as assigned in the drawing for the ballot.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Joanne Kane, Thomas D. Del Franco and Nancy Sobelson were duly elected to full terms of three years each to represent Bridgewater Township on the Bridgewater-Raritan Regional Board of Education at the annual school election held on April 19, 1994.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1994

DATE OF MAILING - JUNE 3, 1994

151-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY.

COMMISSIONER OF EDUCATION

DECISION

JUNE 3, 1994

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MORRIS SCHOOL DISTRICT, MORRIS	:	DECISION
COUNTY.	:	
	:	

The announced results of the balloting for two members of the Board of Education from Morris Township for full terms of three years each at the annual school election held on April 19, 1994, in the Morris School District, Morris County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joan A. Johnson	1,246	14	1,260
John Schafer	1,126	15	1,141
Timothy Schmitt	1,127	9	1,136
Paul F. Hughes	1,017	12	1,029

The announced results of the balloting for one member of the Board of Education from Morristown for a full term of three years at the annual school election held on April 19, 1994, in the Morris School District, Morris County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Jamil AlRazi	511	7	518
Esperanza Porras-Field	285	15	300

In response to a letter request from Timothy Schmitt filed April 27, 1994, pursuant to N.J.S.A. 18A:41-63.2, the Commissioner of Education directed an authorized representative from the office of the Morris County Superintendent of Schools to conduct a recount of the ballots cast. The recount was conducted on May 4, 1994 at

the Morris County Voting Machine Warehouse, Highview Avenue, Cedar Knolls. Absentee ballots were recounted at the Morris County Board of Elections also on May 5, 1994 pursuant to the broad authority granted the Commissioner by P.L. 1994, c.6.

At the conclusion of the recount, the totals were as follows:

MORRIS TOWNSHIP SEATS	AT POLLS	ABSENTEE	TOTAL
Joan A. Johnson	1,246	14	1,260
John Schafer	1,126	15	1,141
Timothy Schmitt	1,127	9	1,136
Paul F. Hughes	1,017	12	1,029
MORRISTOWN SEAT			
Jamil AlRazi	511	7	518
Esperanza Porras-Field	285	15	300

There were no changes on recount, so the names of the winning candidates remain the same as derived from the balloting of April 19, 1994. Therefore, it is recommended by the Commissioner's representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Joan A. Johnson and John Schafer were elected to full terms of three years each to represent Morris Township, and Jamil AlRazi to a full term of three years to represent Morristown, on the Morris School District Board of Education.

The Commissioner further directs that a copy of this decision be transmitted to the Office of Administrative Law, where an inquiry is pending into the conduct of the above-captioned election. In this regard, it is noted that the results of this election, as set forth herein, remain valid unless and until a contrary determination is made by the Commissioner in his decision on inquiry.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1994

DATE OF MAILING - JUNE 3, 1994

152-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF OLDMANS	:	DECISION
TOWNSHIP, SALEM COUNTY.	:	
	:	

JUNE 3, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF OLDMANS : DECISION
TOWNSHIP, SALEM COUNTY. :
:

The announced results of the balloting at the annual school election held on April 19, 1994, for three members of the Board of Education for full terms of three years each, in the School District of Oldmans Township, Salem County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
William Keating	138	0	138
David Sanderlin	127	0	127
Charles K. Perry, Sr. (write-in)	96	0	96
Alice Percheski	83	0	83
Michael Sutton (write-in)	4	0	4
Cheryl McGowan (write-in)	1	0	1
Kathy Pedrick (write-in)	1	0	1

In response to a letter request filed on April 28, 1994 by Alice Percheski pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the office of the Salem County Superintendent of Schools was directed to conduct a recount of ballots cast. The recount of paper ballots cast for Percheski and the write-in candidate who defeated her was conducted on May 16, 1994 at the office of the Salem County Superi request that the recount include all ballots, including absentee ballots pursuant to the broad authority granted the Commissioner for the 1994 school election by P.L. 1994, c. 6, was rendered unnecessary by the absence of any such ballots in this election.

At the conclusion of the recount, the tally of uncontested ballots for the affected candidates was as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Alice Percheski	82	0	82
Charles K. Perry, Sr. (write-in)	78	0	78

There were twenty-two (22) contested ballots, which were designated as C-1 through C-22 for determination by the Commissioner on the following basis:

> Ballots C-1, 2, 4, 8, 9, 15, 16, 17, 18 and 21 were marked "Charles Perry" with no middle initial or designation as "Sr." Ballots C-2, 8 and 16 also failed to have a check or mark in the box to the left of the candidate's name.
>
> Ballots C-5, 11, 12, 13, 14, 19 and 22 were marked "Charles Perry, Sr." with no middle initial. Ballot C-5 also failed to have a check or mark in the box to the left of the candidate's name.
>
> Ballots C-6, 7, 10 and 20 were marked "Mr. Perry" or "Perry." Ballot C-10 also failed to have a check or mark in the box to the left of the candidate's name.
>
> Ballot C-3 was marked "Charles Berry."

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings with respect to uncontested ballots. With respect to contested ballots as described above, the Commissioner finds and determines that all of these ballots should be counted for Charles K. Perry, Sr. as it is well established that last names only, lack of middle initials or appellations such as "Sr." and "Jr." and minor misspellings will not render ballots void where they may reasonably be attributed to

a particular candidate and there is no evidence that any person with the same or similar name actively campaigned for the office at issue. In re Fifteen Registered Voters of Sussex County, 129 N.J. Super. 296 (App. Div. 1974) and subsequent Commissioner decisions such as In the Matter of the Annual School Election Held in the School District of Washington Township, Gloucester County, decided May 21, 1987. Likewise, it is by now well established that a mark or check in the square alongside a write-in candidate's name is not necessary in order for a vote to be counted for that candidate. In the Matter of the Annual School Election Held in the School District of the Township of Eastampton, Burlington County, 1979 S.L.D. 390 and subsequent cases, overruling prior decisions holding mark or check necessary for valid vote.

Accordingly, the Commissioner finds and determines that the final tally for candidates Perry and Percheski is as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Charles K. Perry, Sr. (write-in)	100	0	100
Alice Percheski	82	0	82

The Commissioner further finds and determines that, as announced at the conclusion of the election, William Keating, David Sanderlin and Charles K. Perry, Sr. were elected to full terms of three years each on the Oldmans Township Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1994

DATE OF MAILING - JUNE 3, 1994

153-94

153-94

IN THE MATTER OF THE TENURE	:	
HEARING OF JACQUELINE HOLMES-	:	COMMISSIONER OF EDUCATION
WILLIAMS, RIVERFRONT STATE	:	DECISION
PRISON, NEW JERSEY STATE	:	
DEPARTMENT OF CORRECTIONS.	:	
	:	

SYNOPSIS

Tenure charges of unbecoming conduct were filed with the Commissioner against respondent teacher by the Department of Corrections on grounds that respondent had engaged in an improper relationship with an inmate, thus compromising the security of the institution and violating established procedures and guidelines. Concurrently, CWA filed Unfair Labor Charges with PERC, alleging that tenure charges were filed in retaliation for union activities and because of anti-union animus.

Following transmittal of both matters to OAL by their respective agencies, a joint order was entered consolidating the matters for hearing and establishing a three-step review process wherein the initial decision would be first reviewed by PERC for determination on the Unfair Labor Charges, then forwarded to the Commissioner for determination on the tenure charges, including a determination as to whether they were brought for legitimate business reasons, and then returned to PERC for consideration of specialized relief under labor law as appropriate.

The initial decision found no basis for CWA's Unfair Labor Charges, and in its April 29, 1994 final agency decision, PERC dismissed CWA's complaint. The initial decision further found that tenure charges were brought by the Department for legitimate business reasons and that they were fully sustained by the weight of evidence. ALJ recommended dismissal of respondent from tenured employment.

Commissioner affirmed findings and determination of ALJ on tenure charges and ordered respondent's dismissal as of the date of Commissioner's decision. Matter was further forwarded to State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a). In view of PERC's dismissal of CWA complaint, matter was not returned to PERC for specialized relief.

JUNE 13, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6849-92
AGENCY DKT. NO. 388-8/92

IN THE MATTER OF THE TENURE HEARING OF JACQUELINE HOLMES WILLIAMS RIVERFRONT STATE PRISON, NEW JERSEY DEPARTMENT OF CORRECTIONS.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Charging Party,
v.
STATE OF NEW JERSEY, DEPARTMENT OF CORRECTIONS,
Respondent.

OAL DKT. NO. PRC 2301-93
PERC DKT. NO. CO-H-93-25

Edward H. O'Hare, Deputy Attorney General, for petitioner-respondent, New Jersey Department of Corrections, Riverfront State Prison (Frederick P. DeVesa, Acting Attorney General)

Lisa Morowitz, Esq., for respondent, Jacqueline Holmes-Williams and charging party, Communications Workers of America, AFL-CIO

Record Closed: June 28, 1993 Decided: December 29, 1993

BEFORE **MARY ANN BURGESS,** ALJ/TA:

STATEMENT OF THE CASE

Jacqueline Holmes-Williams, a tenured teacher employed by the New Jersey Department of Corrections at Riverfront State Prison, was charged with conduct unbecoming a public employee and teacher. It was alleged that, contrary to

Departmental policy, Ms. Holmes-Williams participated in an improper relationship with an inmate which compromised the security of the institution.

Ms. Holmes-Williams was specifically charged with engaging ". . . in improper and unauthorized correspondence with this inmate" and doing so ". . . surreptitiously to avoid detection." It was further charged that this

> . . . relationship, as revealed through intercepted correspondence, is one that clearly exceeds the normal and expected bounds of the professional relationship between teacher and student or that relationship which should exist between correctional staff and inmate.
>
> [Petition for Dismissal]

Ms. Holmes-Williams denied the charges. She is presently suspended with pay pending the outcome of these tenure charges pursuant to N.J.S.A. 18A:6-14.

An Unfair Practice Charge was thereafter filed with the Public Employment Relations Commission. It was alleged therein that the tenure charges, certified against Ms. Holmes-Williams, were filed in retaliation for her union activities and that the Department of Corrections had demonstrated anti-union animus. It was specifically alleged that Ms. Holmes-Williams

> . . . a certified shop steward for the Professional Unit and a Union activist filed a contractual grievance on February 6, 1992, against the Riverfront Administration concerning the development of a Performance Assessment Review (PAR). Prior to the filing of the grievance, Williams had filed other grievances and had represented coworkers who had filed grievances and complaints against the administration. Williams also supported other unfair labor practices filed against Riverfront State Prison.
>
> [Unfair Labor Charge]

Both the Tenure Charges and the Unfair Labor Charge were transmitted to the Office of Administrative Law (OAL) and consolidated for hearing in a single proceeding. The specific issues which must be resolved by this tribunal are:

1. Whether Jacqueline Holmes-Williams was engaged in activity protected under the New Jersey Employer-Employee Relations Act and whether that activity, if protected, was a substantial or motivating factor in bringing tenure charges against her;

2. Whether the tenure charges were filed against Ms. Holmes-Williams for legitimate educational or business reasons; and

3. Whether the actions of the Department of Corrections requires specialized remedial relief under the New Jersey Employer-Employee Relations Act.

PROCEDURAL HISTORY

In accordance with N.J.S.A. 18A:6-9, on August 14, 1992, the New Jersey Department of Corrections formally filed tenure charges against Jacqueline Holmes-Williams with the Commissioner of Education. These charges were transmitted by the Commissioner to the Office of Administrative Law for hearing on September 4, 1992.

A prehearing conference was conducted on September 25, 1992, which resulted in an Order dated September 29, 1992 which specified:

> An Unfair Labor Charge has been filed on behalf of Jacqueline Holmes-Williams with P.E.R.C. When that matter is set for hearing, a motion will be made for consolidation and for a "Predominant Interest" determination.

The Unfair Labor Charge had been filed on July 16, 1992, with the Public Employment Relations Commission by Local 1040, Communication Workers of America, AFL/CIO against the State of New Jersey. A Complaint and Notice of Hearing was issued on September 11, 1992. An Answer on behalf of the State was filed with P.E.R.C. on October 14, 1992.

In accordance with the terms of the Prehearing Order, counsel for Jacqueline Holmes-Williams moved for consolidation and a predominant interest determination while a cross-motion was filed on behalf of the State. Counsel for both parties agreed that the two administrative proceedings should be consolidated for hearing in a single administrative proceeding. However, counsel for Ms. Holmes-Williams contended that there should be no determination of predominant interest. Rather ". . . both agencies should review a recommended decision and apply their respective statutes" (Rb3-20 to 21). The State argued that the Commissioner of Education has the predominant interest and could ". . . dispose of all issues, including those occasioned by the Unfair Labor Practice charge . . . with sufficient expertise and competence" (Pb3-5 to 7).

In accordance with N.J.A.C. 1:1-17.2(c), oral argument was heard on January 26, 1993. Thereafter, a proposed Order of Consolidation and Predominant Interest,

dated January 29, 1993, was submitted to the respective agency heads. It was recommended that the Education and P.E.R.C. matters be consolidated and that the

> . . . New Jersey Commissioner of Education has the predominant interest in these matters and, following the issuance of an Initial Decision by the Administrative Law Judge, . . . [should] render the Final Decision herein; and
>
> . . . following the issuance of the Final Decision by the Commissioner of Education, the entire record . . . be forwarded to the Public Employment Relations Commission for consideration of the grant of any specific relief which may be solely within its statutory powers.

In a Joint Order entered by the Chairman of the Public Employment Relations Commission on February 25, 1993, and by the Commissioner of Education on March 5, 1993, the Order proposed by the Administrative Law Judge herein was substantially modified. While the Joint Order consolidated the two proceedings for hearing, it established a three-step review of the Initial Decision to be issued herein.

> (a) At the first step, the Public Relations Employment Commission will decide whether Jacqueline Holmes-Williams was engaged in activity protected under the New Jersey Employer-Employee Relations Act and whether that activity, if protected, was a substantial or motivating factor in the bringing of tenure charges;
>
> (b) At the second step, the Commissioner of Education will determine whether the bringing of tenure charges was for legitimate business reasons and will issue a Final Decision on the tenure charges; and
>
> (c) At the third and final step, the matter will be returned to the Public Employment Relations Commission for consideration of specialized remedial relief under its Act.

During the pendency of the consolidation motion, the parties engaged in extensive discovery. As part of this process, counsel for Ms. Holmes-Williams, moved for discovery of certain portions of the State's investigatory file. Counsel for the Department of Corrections opposed the release of the requested documents arguing that the material would disclose the identity of the inmate informant and expose him to potential harm. Counsel for the State also argued that certain requested documents would invade the privacy of staff members. Following an in camera inspection of the controverted documents, this court determined that the deletion of all identifiers from the material would satisfy the Department's security concerns while enabling Ms. Holmes-Williams to prepare and present her defense. An Order was, therefore, entered on March 17, 1993, directing the release of the documents as

redacted, to Ms. Holmes-Williams.* Subsequent discovery problems were resolved informally by means of a telephone conference conducted on March 30, 1993.

The plenary hearing on these consolidated matters was conducted on April 1, 2, 12, and 23 and on May 17, and 18, 1993. The April 13, 1993, hearing was conducted at Northern State Prison in Newark, New Jersey to permit Inmate Hillard Phillips to testify as part of respondent's case. Following the close of the hearing, written summations were filed on behalf of the Department of Corrections on June 25, 1993, and on behalf of Ms. Holmes-Williams on June 28, 1993. The time for the filing of this initial decision has been extended to December 23, 1993, by Orders of Extension granted herein. On December 6, 1993, counsel for the State Department of Corrections filed a submission updating the status of a case cited in his written summation. Counsel for Ms. Holmes-Williams filed a response on December 15, 1993.

SUMMARY OF TESTIMONY

The State Department of Corrections commenced the hearing by presenting its evidence in support of the tenure charges filed against Ms. Holmes-Williams. In order to avoid duplication of testimony and unnecessary delay, counsel for the Department was permitted to also elicit testimony from his witnesses concerning the unfair labor charge filed by Ms. Holmes-Williams. Thereafter, counsel for Ms. Holmes-Williams, presented evidence in support of the unfair labor charge and, where appropriate, questioned her witnesses concerning the tenure charges.

The Department of Corrections called as its first witness, Barney Dyrnes, a Senior Investigator assigned to investigate the alleged relationship between Ms. Holmes-Williams and Inmate Hillard Phillips. Senior Investigator Dyrnes testified that he has been employed by the Department for seventeen years and has served as an investigator for the Internal Affairs Unit since September 1992. This witness graduated from the Correction Officers' Training Academy and has taken accredited courses offered by the Division of Criminal Justice.

Senior Investigator Dyrnes testified that he has investigated numerous cases involving suspected relationships between staff members and inmates. These

* The security of these documents has been maintained during the pendency of this proceeding.

relationships, if they exist, are extremely dangerous within a correctional institution since they compromise staff members and often result in institutional disturbances. Senior Investigator Dyrnes further explained that these relationships are disruptive whether they are of an intimate nature or entirely platonic. Indeed, an inmate, as a first step, may simply try to be "friends" with a staff member. The inmate may then ask for a favor such as bringing contraband into the prison or carrying correspondence out of the institution. Once that has been accomplished, the inmate has achieved control over the staff member since he can threaten to inform the authorities.

According to Senior Investigator Dyrnes, the present matter began in August or September 1991, when Greg Bartkowski, Supervisor of Education at Riverfront, received an anonymous letter alleging inmate-staff relationships in the school area. This witness testified that he did not act on the anonymous letter. In order to proceed with an investigation, more credible information would be necessary. For example, if one staff member reported that another was paying too much attention to an inmate, Senior Investigator Dyrnes would take action.

This witness testified that after the receipt of the anonymous letter, he received further information from a reliable source -- an inmate who had previously provided information. This informant reported that Inmate Hillard Phillips and Ms. Holmes-Williams were seen caressing and kissing. This informant produced a statement on September 15, 1991, which Senior Investigator Dyrnes took to the administration of Riverside State Prison (P-1). This same inmate produced a second statement on September 21, 1991, concerning the improper use of A.M.I.R.A. funds and again implicating Ms. Holmes-Williams and Inmate Phillips (P-2).

These two statements resulted in the transfer of Inmate Phillips to Bayside State Prison. This transfer was approved by Thomas Hundley, Superintendent of Riverside State Prison. However, Investigator Dyrnes testified that no immediate action was taken with regard to Ms. Holmes-Williams. It was thought that as a result of Inmate Phillips's transfer, the relationship would simply die. He did, however, instruct Greg Bartkowski to observe Ms. Holmes-Williams to see if she were involved in any improprieties. A request was also made to monitor all correspondence to, and from, Inmate Phillips at Bayside State Prison (P-4). This request was made to Senior Investigator Keith Arch, Senior Investigator Dyrnes's counterpart at Bayside State Prison. Bayside was also provided with Ms. Holmes-Williams's picture and her identifying characteristics (P-5). By monitoring Inmate Phillips's mail, Senior

Investigator Arch would review and, where pertinent, copy all incoming and outgoing mail. Once this process was completed, the mail would be sent on.

Senior Investigator Dyrnes explained that the decision to monitor Inmate Phillips's mail was his own, based on prior experience. No one asked or directed him to do so. If, after Inmate Phillips's transfer, there was no contact with Ms. Holmes-Williams, the matter would probably be closed with no further action taken against this staff member. However, Senior Investigator Dyrnes testified that monitoring of Inmate Phillips's mail did disclose further contact with Ms. Holmes-Williams.

This witness first identified an outgoing letter from Inmate Phillips to Carson Edwards, a paroled ex-offender. In this letter, dated October 5, 1991, Inmate Phillips concluded that he would tell Edwards, at a later date "why I was sent here" (P-6). Thereafter, Senior Investigator Dyrnes identified an envelope addressed by Inmate Phillips to his sister, Mildred Knighton. Within that envelope was a second addressed to Ms. Holmes-Williams together with a note requesting that his sister mail the second envelope to Ms. Holmes-Williams. The letter to Ms. Holmes-Williams contained directions to Bayside State Prison, as well as that institution's visiting hours. It concluded with "I love and miss you so much." (P-7). This witness testified that a check of Riverfront's records confirmed that Inmate Phillips had utilized Ms. Holmes-Williams' correct address. Senior Investigator Dyrnes further explained that any notations made on these documents were made by Senior Investigator Arch at Bayside State Prison where the monitoring of Inmate Phillips's mail took place.

The next correspondence identified by Senior Investigator Dyrnes was a large manila envelope addressed to Inmate Phillips's sister, Mildred Knighton. Within that large envelope was a second envelope addressed to Ms. Holmes-Williams. Within that second envelope was a picture of a man and woman, engaged in a sex act, drawn on a piece of cloth (P-9). This witness then identified a piece of correspondence sent to Inmate Phillips from "Wamethia" Phillips (P-10). "Warenthia" Phillips is listed as Inmate Phillips's niece on his Visit Request form (P-8). This correspondence consisted of a card with a romantic verse and signed with an Ankh symbol.

Senior Investigator Dyrnes next identified correspondence written to Inmate Phillips from Carson Edwards. In this letter, Mr. Edwards suggests that there is something Inmate Phillips wants him to do and that he "will do it quick as I can for" Inmate Phillips (P-11). Among Inmate Phillips's monitored mail, this witness further

identified a packet received from Senior Investigator Arch, which included an envelope addressed to Inmate Phillips from Warenthia Atkins, the same individual as Warenthia Phillips. Contained in this envelope was a birthday card "For My Husband", signed with an Ankh symbol. A second envelope to Inmate Phillips from Warenthia Atkins contained a birthday card, also signed with an Ankh, and a necklace of red and black beads. A photocopy of the necklace was included in the packet of material sent to Senior Investigator Dyrnes. Also included therein were two additional cards from Warenthia Atkins to Inmate Phillips and both signed with an Ankh (P-12).

Senior Investigator Dyrnes testified that he received from Senior Investigator Arch on December 18, 1991, a copy of a letter sent by Inmate Phillips to Mr. Carson Edwards. In this letter Inmate Phillips informed Mr. Edwards that "Jacquline (Ms. Williams) is moving Saturday and she may need your services (business)." Inmate Phillips then provided Mr. Edwards with Ms. Holmes-Williams' address and concluded "I've already told her about your business. This note is in case I can't reach you by phone." (P-13) This witness emphasized that it is against the institution's security rules for inmates to have any personal information concerning staff members including their home addresses.

The next packet received from Bayside State Prison included a note from Inmate Phillips to his sister asking her to place an address label to Ms. Williams over the address already on an enclosed envelope (P-14). Senior Investigator Dyrnes further identified material which included a larger manila envelope from Inmate Phillips to his sister Mildred Knighton containing a second envelope addressed to "Ms. Jacquline Williams." Within the second envelope was a Valentine's Day card signed with the Ankh symbol as well as by "Phill" (P-15). Also received from Bayside State Prison, as monitored mail, was a letter from Inmate Phillips to Mr. Carson Edwards requesting Mr. Edwards to complete the ordering of a bud vase to be shipped to "Ms. Jacquline Williams" (P-16).

Senior Investigator Dyrnes next identified a copy of a letter sent by Inmate Pickett from Riverside State Prison to Inmate Phillips. This letter contained pictures of the Kwanzaa celebration at Riverside. this witness believed that Ms. Holmes-Williams appeared in one of the pictures but was uncertain because of its poor quality (P-17). Also received from Bayside was a second letter from Inmate Phillips to Carson Edwards concerning the bud vase for Ms. Holmes-Williams (P-18).

Senior Investigator Dyrnes testified that he next received from Bayside State Prison a packet including a photograph of a package sent to Inmate Phillips from Warenthia Phillips. This witness pointed out that although Ms. Phillips's return address was listed as Paterson, the package was post marked "Camden" where Ms. Holmes-Williams resides (P-19 and P-21). The package contained a gift of food for Inmate Phillips together with a card signed with the Ankh symbol. On February 18, 1992, Senior Investigator Arch sent to Senior Investigator Dyrnes photocopies which showed two envelopes: the exterior from Inmate Phillips to his sister, Mildred Knighton and the interior one from Inmate Phillips to "Ms. Jacqueline Williams". Within the envelope addressed to Ms. Williams was a three page letter describing with explicit detail a sexual "fantasy". The communication was signed "phill" and contained the Ankh symbol (P-20).

After receipt of this last packet, Senior Investigator Dyrnes testified that he discussed the matter with his supervisor,Bruce Assante. He obtained authorization to confront Inmate Phillips and to search his property. This witness explained that he was not certain that they had seen all incoming correspondence. Senior Investigator Dyrnes wanted to determine if there was anything sent directly from Ms. Holmes-Williams to Inmate Phillips. On February 20, 1992, Senior Investigator Dyrnes interviewed Inmate Phillips at Bayside State Prison. Inmate Phillips was confronted with the results of the mail monitoring. He admitted that he had a relationship with Ms. Holmes-Williams but he refused to give a written statement. Inmate Phillips argued that if they had seen the correspondence, they knew there was a relationship and they did not need his statement to establish it. He also denied that this relationship was sexual or that Ms. Holmes-Williams had brought any contraband into the institution. Senior Investigator Dyrnes described Inmate Phillips as a very sophisticated, intelligent individual. This witness testified that Inmate Phillips appeared genuinely concerned about possible disciplinary action which might be taken against Ms. Holmes-Williams.

Senior Investigator Dyrnes testified that Inmate Phillips stated that he had destroyed the correspondence he had received from Ms. Holmes-Williams. However, while Inmate Phillips remained in the Board Room at Bayside State Prison, Senior Investigator Dyrnes searched his locker. This witness testified that among its contents were some items which he had seen as apart of the mail monitoring process and others which he had not. The items seized from Inmate Phillips's locker were described as:

(a) three-page love letter signed with the Ankh symbol (P-22);

(b) envelope from Warenthia Atkins to Inmate Phillips containing a birthday card "For My Husband" with an Ankh symbol for a signature (P-12);

(c) blank envelope containing romantic card with an Ankh symbol for a signature (P-23);

(d) blank envelope containing "Missing You" card with an Ankh symbol (P-24);

(e) blank envelope containing card with Ankh symbol (P-25);

(f) blank envelope containing card with handwritten notes and an Ankh signature (P-26);

(g) blank envelope containing card with Ankh symbol signature (P-27);

(h) envelope addressed to Inmate Phillips from Warenthia Phillips containing card with Ankh symbol signature (P-28);

(i) envelope addressed to Inmate Phillips from Warenthia Phillips containing card with handwritten notes and an Ankh symbol signature (P-29);

(j) blank envelope containing card with handwritten message and Ankh symbol signature (P-30);

(k) blank envelope containing card with handwritten message and an Ankh symbol signature (P-31);

(l) blank envelope containing printed insert (P-32);

(m) original picture of Jacqueline Holmes-Williams taken during a trip to the Baltimore Aquarium (P-33);

(n) assorted cards previously obtained during the mail monitoring process (P-12).

Senior Investigator Dyrnes testified that he put this correspondence in a bag and gave a receipt for the material taken from the Inmate's locker (P-34). This witness then returned to the Board room and confronted Inmate Phillips with the fact that the items of correspondence were found in his locker. Inmate Phillips put his head down and explained that he did not think his locker would be searched. He further stated that he wanted no part of anything that would hurt Ms. Williams. Senior Investigator Dyrnes further explained that the cards in the blank envelopes would not have been mailed and, therefore, would not have been intercepted by the mail monitoring process. Rather, these cards would probably have been passed by hand to Inmate Phillips.

Senior Investigator Dyrnes testified that upon returning to Riverside State Prison, it was decided to confront Ms. Holmes-Williams. This interview took place on

February 20, 1992, in the Board room at Riverfront. It was this witness's recollection that this meeting was attended by Ms. Holmes-Williams, as well as her union representative, Faith Matthews, and by Senior Investigators Susan Nelson and Ronald Randall and by Principal Investigator Bruce Assante.

Senior Investigator Dyrnes testified that he confronted Ms. Holmes-Williams with the material confiscated from Inmate Phillips's locker, including her picture. Ms. Holmes-Williams denied any involvement with Inmate Phillips. She stated she did not give him her picture and had no idea how he had obtained it. Ms. Holmes-Williams was informed that the documents would be submitted to a document examiner for analysis. Based on the accumulated evidence, Ms. Holmes-Williams was offered the opportunity to resign in good standing. Senior Investigator Dyrnes reported that Ms. Holmes-Williams declined the offer and the interview was terminated.

Senior Investigator Dyrnes testified that other staff members facing charges of improper relationships with inmates, had been offered the option of resignation in good standing. That option has been discussed by this witness with his supervisor, Bruce Assante and had also been authorized by the Superintendent of the institution, Thomas Hundley. Since Ms. Holmes-Williams rejected the option of resigning in good standing, the interview was terminated. She was thereupon suspended with pay and advised not to enter the security perimeter of the institution.

Following her suspension, Senior Investigator Dyrnes arranged to meet with Ms. Holmes-Williams and her union representative, on February 24, 1992. During this meeting, Ms. Holmes-Williams acknowledged a random sampling of her Tour Reports containing large blocks of her handwriting (P-36 (1-A to 1-k)). This witness then had Ms. Holmes-Williams give exemplars of her hand writing: twenty-eight with her right hand and twenty-eight with her left hand. The exemplars required of Ms. Holmes-Williams were addresses (P-37). Senior Investigator Dyrnes reported that he and the union representative remained during the two and one-half hours required to complete the requested exemplars (P-37). He then marked the Tour Reports as well as the exemplars given by Ms. Holmes-Williams.

Senior Investigator Dyrnes testified that on February 25, 1992, he sent these documents, together with those seized from Inmate Phillips at Bayside State Prison, to the Internal Affairs Unit at the State Department of Corrections. This witness

requested that Internal Affairs compare the documents seized from Inmate Phillips's locker with the exemplars of Ms. Holmes-Williams and determine the "author of the documents . . . seized from Inmate Phillips" (P-38). A report was received on April 22, 1992, from James J. Lennon, a Senior Investigator-Document Examiner with the Department's Internal Affairs Unit. In his report, Senior Investigator Lennon concluded that Ms. Holmes-Williams was "positively identified" as the writer of certain of the documents seized from Inmate Phillips's locker (P-39).

In the opinion of Senior Investigator Dyrnes, the report from the Document Examiner supported the conclusion that Ms. Holmes-Williams had a relationship with Inmate Phillips and that the two went to extraordinary lengths to disguise that relationship.

This witness asserted that no one pressured him to go forward with this investigation. When he first received the allegations of a relationship, he recommended that the staff member and inmate be separated. Thereafter, as a result of the monitoring of the inmate's mail, more formal action was taken. Senior Investigator Dyrnes contended that he was not directed by anyone in authority to take these steps. Further, this witness testified that he did not go forward with the investigation because of Ms. Holmes-Williams union activities. Indeed, Senior Investigator Dyrnes testified that he was a member of PBA-105 and has been a member of the Executive Board and has held the position of treasurer.

On cross examination, Senior Investigator Dyrnes conceded that he had never observed undue familiarity between Ms. Holmes-Williams and Inmate Phillips. Mr. Bartkowski, Director of Education, who was told to look out for improper conduct, also reported nothing improper. This witness further explained that he had conducted between twenty and fifty investigations involving relationships between inmates and staff members. Although allegations by inmates against staff members are common, allegations involving relationships between staff and inmates are infrequent. This witness testified that his investigations have shown that a substantial number of the latter allegations have proved true.

Senior Investigator Dyrnes confirmed that Ms. Holmes-Williams never attempted to visit Inmate Phillips after he was transferred to Bayside State Prison. With regard to Inmate Phillips's mail, this witness explained that none was confiscated. Outgoing mail must be unsealed; it was read, copied and then sent out. Incoming mail was opened, copied and then given to Inmate Phillips. Further, not all

incoming mail was intercepted as was shown by the search of Inmate Phillips's locker. The efficiency of the mail monitoring process depended very much on the attention of the mail room personnel. With regard to the cards in blank envelopes seized from Inmate Phillips's locker, this witness theorized that Ms. Holmes-Williams had passed them to the inmate before his transfer. Senior Investigator Dyrnes explained that when an inmate is transferred, possessions, such as correspondence, are inventoried but not confiscated.

As to the confiscated pictures, this witness conceded that Ms. Holmes-Williams was not the only staff member shown therein. Indeed, he had some uncertainty as to which individual shown in P-17 was Ms. Holmes-Williams. Concerning his interview with Inmate Phillips, Senior Investigator Dyrnes asserted that Inmate Phillips was not threatened in any way but that the inmate did express concern about Ms. Holmes-Williams. This witness testified that he did not know if Inmate Phillips was disciplined in any way.

This witness further asserted that the same informant volunteered information in P-1 and in P-2. This informant reduced his allegations, the first concerning an improper relationship and the second concerning stealing, to writing. Senior Investigator Dyrnes emphasized that he did not seek out his informant. Rather, the informant voluntarily brought this information to him.

Upon cross-examination, Senior Investigator Dyrnes confirmed that he did attempt to verify Ms. Holmes-Williams's move to a new residence. This witness stated that Ms. Holmes-Williams did move on the date indicated in Inmate Phillips's letter (P-13) but that the move was not accomplished by the paroled ex-offender, Carson Edwards.

On re-direct, Senior Investigator Dyrnes testified that he had no contact with Senior Investigator Lennon during the review of the documents implicated in the present matter. He further reiterated that no one in authority told him how to proceed with his investigation.

The next witness called by the Department of Corrections was Bruce Assante, the Principal Investigator at Riverfront State Prison. This witness testified that he has been an employee of the Department for approximately eighteen years and that he is Senior Investigator Dyrnes's immediate supervisor. Earlier in his career, he had conducted investigations while he presently supervises all investigations in the

Internal Affairs Unit. Principal Investigator Assante opined that charges involving relationships between inmates and staff were very serious since they could compromise the security of the institution often leading to escape attempts. This witness also confirmed that the relationship between staff and inmate need not be sexual in nature to lead to a breach in institutional security.

In 1991, there were rumors of a relationship between Ms. Holmes-Williams and Inmate Hillard Phillips. Senior Investigator Dyrnes was assigned to investigate the allegations subject to Principal Investigator Assante's supervision. Since there appeared to be some substance to the rumors, it was determined to transfer Inmate Phillips to another institution and to have his mail monitored. Inmate Phillips was not confronted nor told the reason for his transfer. Given the evidence then available, this approach was deemed appropriate rather than taking action which might tarnish Ms. Holmes-Williams's reputation.

Principal Investigator Assante explained that the Internal Affairs Unit is an autonomous unit within the institution. The unit accepts and investigates referrals from the Superintendent, the Commissioner and the Governor's Office. With regard to the present matter, Thomas Hundley, Superintendent of Riverfront, was not advised of the investigation when it was first undertaken. However, Superintendent Hundley did approve the transfer of Inmate Phillips.

This witness further testified that he was present when Senior Investigator Dyrnes interviewed Inmate Phillips on February 20, 1992. Although the inmate first denied the relationship, he later explained that the relationship was not a sexual one. Inmate Phillips also felt that Ms. Holmes-Williams would resign if confronted with the evidence seized from his locker. Principal Investigator Assante asserted that Inmate Phillips was not threatened, in any way, during the interview.

After leaving Bayside State Prison, Principal Investigator Assante and Senior Investigator Dyrnes arranged to interview Ms. Holmes-Williams at Riverfront. Prior to the interview, the possibility of offering the option of a resignation in good standing was discussed with Superintendent Hundley. This option, which was commonly offered when a staff member faced such charges, was authorized by the Superintendent.

Principal Investigator Assante testified that he attended the interview of Ms. Holmes-Williams and basically confirmed the earlier testimony of Senior Investigator Dyrnes.

Following this interview, all that was necessary to complete the case was an analysis of Ms. Holmes-Williams's handwriting. This witness described the investigation as a rather long one; perhaps because of the inmate's transfer and the long period of mail monitoring. Principal Investigator Assante explained that although he does not direct the investigations in progress, his subordinates make him personally aware of the important details of every case. Senior Investigator Dyrnes did so during the course of the Phillips/Holmes-Williams investigation.

Once the analysis was received from the Documents-Examiner, Senior Investigator Dyrnes completed his report. Superintendent Hundley first received the report so that he would be aware of what was happening within his institution. The report was then sent to Trenton where it was received by the Commissioner and Deputy Commissioner (P-3).

Principal Investigator Assante concluded his direct testimony by indicating that he is a union member and had served as vice-president of the Association of Internal Affairs Investigators.

This witness explained on cross-examination that he had five years experience as an investigator. During that time he investigated approximately twenty cases involving suspected relationships between staff and inmates. Of those cases, a large number were substantiated. However, Principal Investigator Assante conceded that many rumors of alleged relationships proved false. Many times the allegations were used by the inmates as a manipulative tool. It was possible for the inmates to have their own agenda; perhaps Ms. Holmes-Williams ran her classroom "too tight" and they wanted to get rid of her.

Principal Investigator Assante acknowledged that he had conferred with Superintendent Hundley approximately midway in the investigation. However, at no time, was he asked by the Administration to take any particular action with regard to it. This witness did recall that Superintendent Hundley authorized Inmate Phillips's transfer to Bayside State Prison and also authorized giving Ms. Holmes-Williams the option of resigning in good standing.

This witness also confirmed that Inmate Phillips, as a member of the A.M.I.R.A. organization, was often in the education building since the group met there in the evenings. Furthermore, Ms. Holmes-Williams, as coordinator for A.M.I.R.A., was also required to be present at these after-hour meetings.

On re-direct, Principal Investigator Assante explained that during the course of an investigation, all information is kept confidential. This witness further stated that any relationship between a staff member and an inmate can be dangerous. Inmates often try to develop friendships with staff in the hope of having a "little hook", passing a card out of the institution, or a "big hook" bringing contraband into the prison, over staff members.

Gregory Bartkowski, the Supervisor of Education for Riverfront, was the next witness to testify on behalf of the Department. Mr. Bartkowski testified that he has certificates as a teacher and as principal/supervisor and has been employed by the Department of Corrections for fifteen years. This witness came to Riverfront when it first opened in 1985 and has always been Supervisor of Education in that facility. He received training in security issues through the Correction Officers' Training Academy. The goal of the training was to sensitize educators to the unique problems of providing educational services within correctional institutions.

When Riverfront opened, the teachers received an intensive two-month training during June and July 1985, before the inmates arrived. The teachers were being trained to teach adults and not children. They were alerted to the problems of dealing with prisoners who can be very manipulative, trying to use the teachers to get things.

Mr. Bartkowski testified that he knew Ms. Holmes-Williams; in fact, he had hired her for Riverfront in 1985 when that institution opened. She, therefore, received the intensive two-month training given the other teachers before Riverfront officially opened. All the teachers, including Ms. Holmes-Williams, were given departmental material including the Handbook of Information and Rules for all employees of the Department of Corrections. Ms. Holmes-Williams, signed for the Handbook and was required to read it (P-41). Section I of the General Rules provides:

> Employees shall not indulge in undue familiarity with inmates or parolees or permit inmates or parolees to be unduly familiar toward them.

During the training sessions, the points of prime importance were fully explored with the incoming teachers. Mr. Bartkowski further testified that the book Games Criminals Play was circulated among the teachers and that particularly relevant chapters were copied and discussed. These discussions often centered upon the efforts of inmates to compromise staff members.

Following the initial training, Mr. Bartkowski testified that Riverfront circulated further directives received from the Central Office of Educational Services in the Department of Corrections. One such communication set forth particularized Rules Governing Your Relationships with Inmates (P-43). These rules were fully discussed at staff meetings. It was emphasized that a teacher should never be alone with an inmate in a classroom and should never take anything from an inmate.

This witness testified that in August, 1991, he received an anonymous letter from an inmate stating that Ms. Holmes-Williams was involved in a relationship with an inmate. The letter did not name the inmate. Mr. Bartkowski stated that he placed the letter in its original envelope and turned it over to the Internal Affairs Unit. This witness indicated that the investigators have a broader picture of what is happening in the institution. He further stated that he did not direct Senior Investigator Dyrnes nor Principal Investigator Assante to investigate the allegations involving Ms. Holmes-Williams. During the course of the investigation, Mr. Bartkowski had no formal contact with those involved beyond a casual inquiry as to whether the matter had yet been concluded.

This witness testified that on February 20, 1992, he met with Superintendent Hundley, Assistant Superintendent Finney, Principal Investigator Assante and Senior Investigator Dyrnes. The seriousness of the allegations were discussed and a decision was made to take action because of the risk to security. Since the matter involved a teacher, it would require the filing of tenure charges against Ms. Holmes-Williams. It was decided that all the ramifications of the filing of tenure charges should be explained to Ms. Holmes-Williams and that she should be given the option of resigning in good standing.

Mr. Bartkowski testified that he went into the Board room and discussed the possibility of filing tenure charges with Ms. Holmes-Williams in the presence of her union representative. He then left the room. Ms. Holmes-Williams, after

conferencing privately with her union representative, declined the offer to resign in good standing. At this point, Ms. Holmes-Williams was suspended with pay and was then escorted from the institution. Mr. Bartkowski explained that the decision to suspend was the Superintendent's decision.

This witness confirmed that A.M.I.R.A. is an inmate organization at Riverfront. Staff members act as liaison between all inmate organizations and the administration. The staff liaison attends all meetings and functions of a particular organization and then reports back to the Deputy Commissioner concerning the group's activities and future plans. Generally, organizations such as A.M.I.R.A. meet twice a week after 4:00 p.m.

With regard to the tour reports, Mr. Bartkowski explained that they are prepared daily by each teacher and represent a form of communication between teachers and their supervisors. The teacher will generally note on the report whether there have been any problems in class and the supervisors will often return the reports to the teachers with comments and recommendations. This witness identified the handwriting on Ms. Holmes-Williams's reports as "absolutely" hers. He also testified that some of the notations were his and others possibly that of Ms. McGovern, the other supervisor (P-36).

On cross-examination, Mr. Bartkowski conceded that the training he had received at the Correction Officers' Training Academy was limited to supervisors and was not extended to the teachers at Riverside. This witness also admitted that although teachers are instructed not to be alone with an inmate, it is sometimes impossible to avoid such occurrence. Mr. Bartkowski emphasized that although "teachers," the instructional staff also have "custodial" duties to prevent escapes. Teachers are required to report any improper conduct either in their tour reports or by special report. This witness further testified that he was not involved in reviewing Ms. Holmes-Williams's tour reports in order to select samples for handwriting analysis.

Mr. Bartkowski testified that the receipt of the anonymous letter alleging undue familiarity was not that unusual within a prison setting. He reiterated that he delivered this letter to Internal Affairs and, thereafter, only casually asked the investigators about the status of the matter.

Concerning the February 20, 1992 interview, this witness explained that he received a telephone call asking him to bring Ms. Holmes-Williams to the Board room at Riverfront for a 4:00 p.m. meeting. Mr. Bartkowski had no prior notice that action was to be taken concerning the allegations involving this staff member. Responding to this telephone call, Mr. Bartkowski escorted Ms. Holmes-Williams to the Board room; it was his recollection that members of the Internal Affairs Unit were already present. He left the Board room when called in to a meeting with Superintendent Hundley and Deputy Superintendent Finney.

This witness denied that he had ever discussed the investigation of Ms. Holmes-Williams with inmates or with Ms. Holmes-Williams herself. He also did not recall Mr. Holmes-Williams saying that she was told, by an inmate, that she was the target of an ongoing investigation. Mr. Bartkowski also did not remember being asked by Senior Investigator Dyrnes to monitor Ms. Holmes-Williams's conduct for any improprieties.

On re-direct, this witness explained that although teachers did not attend the Correction Officers Training Academy, he had relayed the training he had received to them. This teacher training was enhanced through regularly scheduled staff meetings. Mr. Bartkowski testified further that while his office is outside the security perimeter of the institution, the series of classrooms are within the secure area. As to the number of teachers, Mr. Bartkowski stated that there were ten teachers when Riverfront opened in 1985 and that there are presently five.

The fourth witness to testify on behalf of the Department of Corrections was William Finney, the Assistant Superintendent of Riverfront State Prison. This witness testified that he has been an employee of the Department for twenty-five years, serving in various capacities including Corrections Officer and Superintendent of the Newark House, a group home. Assistant Superintendent Finney came to Riverfront State Prison in 1985, the year it opened, as one of its original administrators.

From his Departmental experience and from his years at Riverfront, this witness testified that he is familiar with the programs for training employees and with the various informational materials provided them. Assistant Superintendent Finney stressed that the interaction between staff and inmate is thoroughly discussed both during staff orientation and as part of ongoing training. Indeed, the Handbook provided to employees when hired clearly sets out the parameters of appropriate staff conduct (P-40). All employees are provided these materials and must sign for

them when they are hired. Through orientation and ongoing training, employees are constantly reminded of where they are working and how they should conduct themselves.

This witness had personal knowledge of a staff member at Riverfront engaging in an improper relationship with an inmate. That person, when confronted with the facts, chose to resign. Assistant Superintendent Finney testified that the option to resign is given so that the staff member can go on with his/her life without the reputation damage which may result from the public airing of charges. If that option is rejected, the institution simply goes forward with the filing of formal charges against the individual involved.

Assistant Superintendent Finney explained that if a civilian staff member is "unduly familiar" with an inmate or interacts with an inmate in other than a professional manner, his credibility and integrity is seriously jeopardized. All staff, including civilians, are privy to confidential information. A staff member who is friendly with an inmate cannot be trusted to maintain strict confidentiality. Indeed, the inmate might be able to coerce confidential information from the staff member thereby breaching institutional security with the possible result of an escape. It is most important, in the correctional setting, to be certain that all staff, including civilians, abide by all applicable rules and regulations thereby assuring that the security of the institution is maintained.

Assistant Superintendent Finney testified that he became directly involved in the present case on February 20, 1992 when he suspended Ms. Holmes-Williams. Based on instructions from Superintendent Hundley, this witness gave Ms. Holmes-Williams the opportunity to resign in good standing, an option which she rejected. When she declined to resign, Assistant Superintendent Finney immediately suspended Ms. Holmes-Williams. This suspension was with pay.

When questioned about the inmate organization, A.M.I.R.A., this witness explained that it was a group in which members studied minority cultures. The liaison assigned to the group was to monitor the organization to assure that it was acting in accordance with the mandates of the institution. The liaison was required to attend one general and one executive meeting per month. Assistant Superintendent Finney testified that Inmate Hillard Phillips was a member of A.M.I.R.A. and chairperson of one of its committees. Occasionally, a chairperson

would interact with the group's staff liaison or would meet with other committee members.

This witness explained that no staff members were directed to act as liaison with inmate organizations. Rather, the administration called for volunteers to act in this capacity. A staff member was granted hour-for-hour comp time for after-hours time spent on group activities. Assistant Superintendent Finney also confirmed that April Gordon, together with Ms. Holmes-Williams, acted as liaison to A.M.I.R.A. Only one of the liaison had to attend the group's activities.

On cross-examination, Assistant Superintendent Finney explained that Ms. Gordon assisted Ms. Holmes-Williams as liaison to A.M.I.R.A. In her absence, Ms. Gordon would attend the group's activities. In order to receive comp time, the staff member acting as liaison, would submit a request to administration which, in turn, would authorize the provision of comp time.

The last witness called by the Department in support of the tenure charges filed against Ms. Holmes-Williams was James J. Lennon. This witness testified that he has been an employee of the Department of Corrections for ten years and is currently working within the Department's Internal Affairs Unit as a Senior Investigator-Documents Examiner. Senior Investigator Lennon stated that he served an internship as a documents examiner in 1990 and received specialized training in that field in 1991 with the United States Secret Service. During this training, the students reviewed documents from Secret Service files involving forged documents comparing line quality and various letter characteristics. Senior Investigator Lennon received a certificate when he completed this training.

This witness testified that most individuals begin with "copybook" style of handwriting and gradually develop their own unique writing style as they mature. According to this witness, no two people write exactly alike and each person does not write the same way, each time he writes.

Senior Investigator Lennon testified that he has examined approximately five hundred documents in his capacity as Document Examiner for the Department of Corrections. He has worked under the supervision of Assistant Chief Brian Storer who continues to act as forensic consultant to the Department. Assistant Chief Storer reviewed this witness's work on an ongoing basis and was responsible for his continuing training. This supervised training by a senior documents examiner was

consistent with the policies of both the Department of Corrections and the United States Secret Service.

Senior Invêstigator Lennon testified that he was previously qualified as an expert in document analysis before the Office of Administrative Law in a Division on Civil Rights matter. This witness also worked on a case involving Mercer County and acted as "sub-contractor" for Johnson and Johnson helping uncover a mail fraud scheme within that company.

Following direct examination, counsel for Ms. Holmes-Williams conducted an extensive cross-examination of this witness's credentials. Senior Investigator Lennon testified that he began employment with the Department of Corrections in 1983 as a Corrections Officer. He was promoted to the positions of Investigator and Senior Investigator. His initial promotion was based on seniority and the passing of an examination. Thereafter, he was promoted on the basis of "education and experience." Senior Investigator Lennon explained that there is no civil service position of "documents examiner"; it is one of his assignments as a Senior Investigator. This witness further testified that he works within the Central Office of the Department of Corrections and not within a particular institution.

As to this Secret Service training, Senior Investigator Lennon conceded that it was a course of two-weeks duration conducted by the United States Secret Service within its Georgia facility. He took this course with twenty-seven other individuals and, after passing an oral examination, received a certificate at its completion. This witness was unaware of the availability of other, longer, training programs.

Senior Investigator Lennon further acknowledged that he is not a member of any professional group of document examiners, has received no formal training following his certification by the United States Secret Service and has not published any articles in the field of document analysis.

With regard to his experience, this witness explained that he has examined approximately five hundred separate documents during the past three years although he did not recall the exact number. After the commencement of the present case, Mercer County requested the Department's assistance in a case requiring document examination. This witness was assigned to provide these services to Mercer County. However, Senior Investigator Lennon was not required to testify as a result of his involvement in that case.

Following examination of his credentials, this tribunal was satisfied that Senior Investigator Lennon possessed the necessary training, experience and skill to give an opinion as to whether Ms. Holmes-Williams was the author of certain documents in evidence. This witness was, therefore, admitted as an expert in the area of handwriting analysis. This tribunal did not find, however, that Senior Investigator Lennon possessed expertise in the area of ink or paper analyses and he was not admitted as an expert in those areas.

Senior Investigator Lennon testified that Riverfront State Prison, through Senior Investigator Dyrnes, had requested that the Internal Affairs Unit conduct an examination of certain documents. This witness was assigned the matter by his supervisor, Brian Storer. As Senior Investigator Lennon worked on this case, he continued under Mr. Storer's supervision, discussing his findings with him. This witness confirmed that he did not know Ms. Holmes-Williams and had never met with her.

This witness testified that since document examination cannot be done on copies, he analyzed the originals of the documents entered in evidence before this tribunal. These originals included Ms. Holmes-Williams's Tour Reports (P-36), her exemplars (P-37), and the documents seized from Inmate Phillips (P-22 through P-33). He performed his analysis by comparing letter combinations from the "known" documents (P-36 and P-37) with the same combinations found in the questioned documents (P-22 through P-33). Senior Investigator Lennon explained that most individuals start with grade school writing and, during the teenage years, begin to develop their own unique characteristics. These embellishments are the distinguishing characteristics of an individual's handwriting. When analyzing the documents, this witness did not read them for content. He simply studied the formation of the letters considering, inter alia, their size and slant and the spacing between them.

Senior Investigator Lennon testified that he compared the upper case cursive "I" in P-22 (the romantic letter seized from Inmate Phillips) with the same letter appearing on Ms. Holmes-Williams's Tour Reports, P-36 (12-9-91). This witness gave his opinion that there was exceptional agreement between the two. He also compared the lower case cursive "v" which appeared in both documents. The writer of each document formed that letter so it appeared to be a "u" rather than a "v." This witness also compared the cursive, lower case word "that" which appeared in both the known and the questioned documents. In his opinion, there was excellent

agreement between the two. Senior Investigator Lennon also testified that the author of each document formed the cursive lower case "a" in a very unusual manner when it appeared at the beginning of a word. This witness described this feature as a unique embellishment. There was also excellent agreement between the cursive, lower case "with" which appeared in both documents. The writer of each combined the "w" and "i" so that they appeared to be two, cursive lower case u's. Senior Investigator Lennon further observed that there is agreement between the cursive, lower case "the" when it appeared at the beginning of a word in both the known and questioned documents. There was also excellent agreement between the combination of cursive, lower case letters "for" appearing either alone or in "forever." Finally, this witness opined that the documents displayed the normal variations found within each person's writing.

Senior Investigator Lennon testified further that on the second page of the romantic letter (P-22), the embellished upper case, cursive "I," which is contained in Ms. Holmes-Williams's Tour Report (P-36), again appeared. Also on this page of the letter, the cursive, lower case word "be" appeared as "lie." This same distinguishing characteristic appeared in Ms. Holmes-Williams's Tour Report for December 19, 1991 at page two. It was this witness's opinion that agreement between the word "be" in both documents was excellent. Senior Investigator Lennon testified that Ms. Holmes-Williams's Tour Reports contained an upper case "A" which combined both cursive and printing characteristics and has a hook in the middle. He described this upper case "A" as unique. In this witness's opinion there is excellent agreement between Ms. Holmes-Williams's unique "A" and the same letter which appeared on a card seized from Inmate Phillips (P-26). This card also contained the cursive, lower case word "be" which appeared as "lie" and which agreed with that word as written by Ms. Holmes-Williams's in her December 19, 1991 Tour Report (P-36).

This witness explained that he was not making a word-for-word, letter-for-letter comparison. Rather, his intent was to point out the main characteristics of agreement for the benefit of lay people. Senior Investigator Lennon was of the opinion that the upper case "A," half printing and half cursive with a hook in the middle, was unique to Ms. Holmes-Williams. Further, there was excellent agreement between Ms. Holmes-Williams's "A" and the same letter found in the questioned documents seized from Inmate Phillips. Senior Investigator Lennon also testified that there was excellent agreement between the lower case, cursive "v" consistently appearing in Ms. Holmes-Williams's Tour Reports as "u" and the letter "v," also appearing as the letter "u" on the documents seized at Bayside State Prison.

This witness also compared the exemplar given by Ms. Holmes-Williams (P-37 (31G)) to the envelope seized from Inmate Phillips's locker (P-12). Senior Investigator Lennon opined that there was excellent agreement between the two in all details. Both contained two styles of the lower case, printed "e" and the number "5" which almost appeared to be the number "6." Although the printed directions on the exemplar requested Ms. Holmes-Williams to complete an address to Inmate Phillips at Leesburg, she mistakenly printed "Leeburg." Senior Investigator Lennon pointed out that the envelope seized from Inmate Phillips contained that same erroneous spelling of "Leeburg."

This witness testified that when he completed his analysis, he set it aside because he wanted to discuss his conclusions with his Supervisor, Deputy Chief Storer. This discussion was delayed because Mr. Storer was recuperating from a heart attack. Once Senior Investigator Lennon was able to review his conclusions with his supervisor, he reduced his report to writing (P-39). In this report, he gave his "professional opinion" that Ms. Holmes-Williams was "positively identified . . . as the writer of questioned documents"

BMD6, 1A/B/C	Three page romantic letter signed with ANKH symbol (P-22)
BMD7, 1A	Envelope from Warenthia Atkins to Hillard Phillips (P-12)
BMD 8A	Card containing written note signed with ANKH symbol (P-23)
BMD 9A	Card containing written note and signed with an ANKH symbol (P-24)
BMD 11A	Card containing written note and signed with ANKH symbol (P-26)
BMD 12A	Card with brief inscription and ANKH symbol (P-27)
BMD 13	Envelope from Warenthia Phillips to Hillard Phillips (P-28)
BMD 14	Envelope from Warenthia Phillips to Hillard Phillips (P-29)
BMD 15A	Card with written note and signed with ANKH symbol (P-30)
BMD 16, 16A	Envelope and card (P-31)

BMD 17	Envelope from Warenthia Phillips to Hillard Phillips (P-32)
BMD 18	Envelope from Warenthia Atkins to Hillard Phillips (P-12)
BMD 19	Envelope from Warenthia Atkins to Hillard Phillips (P-12)
BMD 20	Envelope from Warenthia Atkins to Hillard Phillips (P-12)
BMD 21	Envelope from Warenthia Phillips to Hillard Phillips (P-12)

Additionally, Senior Investigator Lennon concluded that it was "highly probable" that Ms. Holmes-Williams was the writer of questioned documents:

BMD 7, 1B	Card with brief note (P-12)
BMD 10A	Card with brief note and ANKH symbol (P-25)
BMD 13A	Card with brief note and ANKH symbol (P-28)
BMD 14A	Card with written note and ANKH symbol (P-29)
BMD 19A	Card with brief note (P-12)
BMD 20A	Card with brief note and ANKH symbol (P-12)

Finally, this witness concluded that BMD 17A and BMD 18A (notes on cards) (P-12) were "not comparable with the known handwritings of Jacqueline Williams" (P-39).

During the course of cross-examination, Senior Investigator Lennon explained that, in handwriting analysis, it is standard procedure to compare known documents to questioned documents. He followed this procedure in the present case comparing every document with the exemplars both forced (P-37) and spontaneous (P-36). This witness admitted to recording his findings on worksheets as he proceeded with this analysis. Once he prepared his written report, he admitted that he destroyed his notes. Senior Investigator Lennon asserted that his rough notes were only for his personal use. This witness further explained that the questioned documents were only compared to the known handwriting of Ms. Holmes-Williams since there were no other suspects in the case.

Senior Investigator Lennon estimated that he spent one week analyzing the documents in this case. He noted that he spent a significant amount of time on each document. This witness acknowledged, however, that he performed no ink, fingerprint or paper analysis. He also did not compare a questioned document to another questioned document since that was not consistent with the standard practice of comparing known to questioned document.

This witness defined a positive identification as one in which there is excellent agreement in all details of writing necessary for comparison and in which any differences are outweighed by overall consistency. In the case of Ms. Holmes-Williams, he studied the line quality of her writing; its speed, skill and pen pressure. Senior Investigator Lennon found that the documents contain the normal variations common to all handwriting. No individual writes exactly the same each time he/she writes. Upon examination of the documents in this case, this witness concluded that any unexplained differences were outweighed by the similarities between Ms. Holmes-Williams's known writings and the questioned documents seized from Inmate Phillips. Senior Investigator Lennon acknowledged that although one might argue about small characteristics in the writings, his overall examination of the documents enabled him to "positively" identify Ms. Holmes-Williams as the author of the documents seized from Inmate Phillips. This witness conceded that he did not quantify the "unexplained differences" in his report.

Senior Investigator Lennon further explained that he did not analyze the ANKH symbol since there was no known document from Ms. Holmes-Williams with which to compare it. This witness also recalled speaking briefly with Principal Investigator Assante and Senior Investigator Dyrnes. These individuals simply contacted him to determine the status of his investigation. He did not discuss his findings with them.

With the testimony of Senior Investigator Lennon, the Department of Corrections completed its case in support of the tenure charges filed against Ms. Holmes-Williams. It reserved the right, however, to call witnesses to rebut the evidence in support of the unfair labor charge.

Ms. Jacqueline Holmes-Williams thereafter testified, first in defense to the tenure charges and then in support of the unfair labor charge lodged against the Department of Corrections.

TENURE CHARGES

This witness stated that she had been at Riverfront State Prison for seven years; first as a Teacher II and more recently as a Teacher I. During that entire time, Gregory Bartkowski was her overall supervisor and Ms. Cinthia Masckiewicz McGovern, her immediate supervisor. Ms. Holmes-Williams also testified that she generally received a standard rating on her Performance Assessment Review Standards (P.A.R.S.) and had never been formally disciplined at Riverfront State Prison. She did admit, however, that she had received a letter of counselling, which did not constitute formal discipline. Her teaching duties included teaching basic education in the Pre-GED program. This witness recalled there were eight other teachers when Riverfront opened; however, that number has been reduced to three other academic teachers. Because of the staff reductions, this witness was responsible for between ten and twenty to twenty-five students on an on-going basis.

Ms. Holmes-Williams testified that Inmate Phillips was never one of her students. She did meet him, however, while liaison with A.M.I.R.A., an organization in which Inmate Phillips was actively involved. This witness explained that, as liaison, she acted as "go-between" the group and the administration reporting to Assistant Superintendent William Finney.

According to Ms. Holmes-Williams, the only time she was alone with Inmate Phillips was when he dropped off mail. This witness denied that Inmate Phillips ever said anything inappropriate to her or acted toward her in a familiar or improper manner. The only incident involving Inmate Phillips occurred in October, 1991, after his transfer to Bayside State Prison. At that time, another inmate, Thomas Parr, came to her and said he knew all about "her and Phillips." Inmate Parr stated that Phillips said he "owned" Ms. Holmes-Williams and wanted her to be his woman. This witness included Inmate Parr's statements in her Tour Report and wrote a Special Report concerning it. Ms. Holmes-Williams provided a copy of the Special to all supervisors in the chain of command at Riverfront. As a result of his statement, Inmate Parr was removed from this witness's classroom.

Ms. Holmes-Williams also identified an obscene letter which she received through Inter-Office mail in September, 1991 (R-2). The mailboxes are located in the education area outside the supervisor's office. Both staff and inmates would have access to this area. As far as this witness knew, the author of the typewritten letter

was never identified. This was the only such letter she received while at Riverfront and Superintendent Hundley spoke to her about it.

With regard to A.M.I.R.A., Ms. Holmes-Williams confirmed that she and Ms. April Gordon, a secretary in Administration, served for two to three years as co-liaison to this group. This witness testified that she had earlier assisted the librarian, Ms. Kirkland, with A.M.I.R.A. activities. When Ms. Kirkland decided to leave Riverfront, she recommended that Ms. Holmes-Williams and Ms. Gordon become co-liaison to the group. The two agreed to serve in that capacity and their appointment was approved by the Administration. Ms. Holmes-Williams explained that liaison to inmate groups did not receive additional monetary compensation; they did, however, receive "comp" time for hours spent after 4:00 p.m. This witness confirmed that A.M.I.R.A. met two to three times per week and the meetings were held after normal working hours. Ms. Holmes-Williams testified that she attended most meetings of A.M.I.R.A., a group which had approximately thirty inmate members directed by a Board of five to seven members.

According to this witness, the meetings took place in the education area in her classroom. A corrections officer was present in the area during the meetings and could view the interior of the classroom through a window in the door. Ms. Holmes-Williams's desk was by the door to the classroom. She testified that she attempted to keep the desk drawers always locked to protect her supplies and to keep her personal belongings secure. Despite these precautions, materials were taken from her classroom causing her to report the thefts in both tour and special reports. Ms. Holmes-Williams identified a special report she submitted on November 13, 1991, complaining of the theft of a locked tool box from under her desk (R-4) and a second report submitted on January 3, 1992, concerning a box of bulletin board supplies missing from the cabinet in her classroom (R-5). Ms. Holmes-Williams observed that in addition to A.M.I.R.A., a Hispanic group met in her classroom after hours.

This witness recognized her picture entered into evidence as P-33. This picture, taken during a CWA trip to Maryland, was locked with others in her desk. On the day of her interview, Bruce Assante showed this picture to her. Ms. Holmes-Williams testified it was then she realized that the picture was no longer in her desk with her other personal belongings. This witness also described pictures, previously entered into evidence as P-17, as taken during A.M.I.R.A.'s Quanzaa celebration. She denied, however, that she appeared in the top picture appended to this exhibit.

Ms. Holmes-Williams further denied that she received any cards or letters from Inmate Phillips. She did admit, however, that she received a vase and flower together with a card signed "Phil." This witness indicated that she told Debbie Riggs, a CWA staff member, about this gift. However, Ms. Holmes-Williams denied ever writing to Inmate Phillips or having any relationship with him.

This witness acknowledged that she moved to her present address on December 21, 1991. Ms. Holmes-Williams denied, however, that an ex-inmate helped her move or that she used his truck. Indeed, she testified that she rented a U-Haul vehicle to move her belongings to her new address (R-6).

Ms. Holmes-Williams also described in detail February 20, 1992, her last day at Riverfront State Prison. After classes were over that day, Mr. Bartkowski came to her door and told her she was wanted upstairs. He escorted her to the Board room where she was met at the door by Bruce Assante. Also present were Barney Dyrnes, Susan Nelson and an investigator from another institution.

This witness testified that she was immediately confronted with the statement that an inmate had confirmed that she had an affair with him. Ms. Holmes-Williams estimated that the questioning continued for approximately thirty to forty-five minutes. During that period, according to this witness, no union representative was present. Ms. Holmes-Williams testified that she felt intimidated; felt that they were trying to force her to resign. When her union representative, Faith Matthews, arrived the questioning continued "but not as rough as before" her arrival. Ms. Matthews then took Ms. Holmes-Williams from the room so they could contact the main C.W.A. office. At that point, she was told not to sign anything. When Ms. Holmes-Williams returned to the Board room, she refused to sign a letter of resignation. She later returned to the institution to give handwriting exemplars as required by the administration.

On cross-examination, Ms. Holmes-Williams conceded that she did not have a copy of the special report she prepared following the incident with Inmate Parr although she did have copies of the reports submitted with regard to the missing toolbox and supplies. This witness admitted that she always kept copies of the documents submitted to her supervisors.

This witness did concede that she and Inmate Phillips were occasionally alone before class in her classroom. Ms. Holmes-Williams testified that she would

generally arrive early: between 8:00 and 8:15. Occasionally, Inmate Phillips was there, dropping off a memo when she arrived. Sometimes the witness would request that Inmate Phillips come over at lunch time to transact A.M.I.R.A. business. Ms. Holmes-Williams explained that her classroom was approximately twenty to thirty feet from the officer's station. Generally, the officer on duty would stay at his station but he might walk around checking on the classrooms. The inmates walked around freely in the education area both during class and after hours.

Ms. Holmes-Williams denied that she volunteered to be A.M.I.R.A. liaison. However, she acknowledged that she did not object when Ms. Kirkland recommended her for that position. She also admitted that she received the vase from Inmate Phillips at her new address. Ms. Holmes-Williams insisted that this was the only thing she had received from Inmate Phillips. Although she informed the C.W.A. representative of this incident, she never reported it to the institution. This witness also denied that the handwriting in the questioned cards and envelopes was her handwriting. She also acknowledged that during her orientation, she was given a copy of the book Games Criminals Play and that she read it (P-42).

UNFAIR LABOR CHARGE

Addressing the P.E.R.C. matter, Ms. Holmes-Williams testified that she has been a Shop Steward with C.W.A. at Riverfront for six years. She explained that she represented anyone in the professional unit, under the bargaining agreement, in the grievance process with management. Ms. Holmes-Williams also filed grievances on her own behalf. For her efforts, she received a commendation as the Department of Corrections Shop Steward of the Year. Because of the heavy caseload, this witness requested that Elizabeth Monaghan also become a shop steward.

Ms. Holmes-Williams testified that on January 29, 1991, she filed three grievances concerning her own P.A.R.S.'s evaluation. Each essentially sought to have her P.A.R.S. rewritten "to contain comments which accurately reflect" her job performance (R-7, R-8 and R-9). On June 20, 1991, Ms. Holmes-Williams filed three grievances which essentially challenged non-teaching duties which she was assigned. This witness explained that she had been working as a CAB Coordinator and, in that capacity, would test and interview students. She had asked Mr. Bartkowski to relieve her of these duties but he refused. It was this decision which she grieved (R-10, R-11 and R-12). These grievances were denied but the witness recalled that R-11, which

involved class size, proceeded to Step II at Riverfront. That grievance was denied on appeal.

Ms. Holmes-Williams testified that on September 6, 1991, she filed three grievances challenging her classroom observation reports (R-13, R-14 and R-15). This witness testified that these grievances were also denied. She thereafter filed two grievances on September 23, 1991. The first grieved an incomplete telephone message which was taken for her while she was away from the institution campaigning for the office of State Senator (R-16). That matter proceeded to a second step hearing at which point it was denied. The second challenged "harassment" which occurred the next day when her supervisor returned her Tour Report to her (R-17). That grievance also proceeded to a second step, at which point, it was denied.

Ms. Holmes-Williams testified that on October 2, 1991, she received a "Letter of Counseling" concerning an incident which occurred in the office of her immediate supervisor, Cindi McGovern (R-21). On October 9, 1991, this witness filed three grievances seeking to have this Letter expunged from her record (R-18, R-19 and R-20). Thereafter, Ms. Holmes-Williams filed a grievance on December 9, 1991 challenging the refusal of release time on December 5, 1991, to further investigate information needed for a grievance hearing "on that day" (R-22). The denial of this grievance was appealed; it was also denied on appeal. The final grievance filed by Ms. Holmes-Williams was on January 10, 1992, wherein she challenged the language contained in her "final PARS" rating as false and misleading (R-23). In a decision dated February 7, 1992, it was found that management erred when it gave her a final evaluation. Management was, therefore, directed to rewrite the evaluation.

Ms. Holmes-Williams testified that every year she filed approximately fifteen grievances on her own behalf. The vast majority involved her immediate supervisor, Cindi McGovern, or her overall supervisor, Greg Bartkowski. This witness stated that until 1990, Ms. McGovern was a full member of CWA. In that year, she withdrew because the supervisors did not get a raise. Mr. Bartkowski is an 85% member.

Ms. Holmes-Williams testified that she was informed, by memo dated December 9, 1991, that she was to meet with a representative of the Employee Advisory Service to discuss "apparent difficulties demonstrated in communications and interpersonal relations" (R-24). Mr. Bartkowski confirmed that he was aware of the referral and thought it might help alleviate the "unhappiness with your working

environment" (R-25). Ms. Holmes-Williams testified that she met with the E.A.S. counsellor who had a manila envelope with her name on it and a stack of grievances within. This witness felt that E.A.S. was not involved in the grievance process and that the representative should not have had copies of her grievances. She said nothing to the E.A.S. representative; she simply left the meeting. An Unfair Labor Charge was thereafter filed with P.E.R.C. on behalf of Ms. Holmes-Williams and two other teachers at Riverfront who were involved in this incident (R-26). At the time of Ms. Holmes-Williams's testimony, that matter was still in process.

As to her other union activities, this witness explained that she attended conventions on a regular basis. She also ran for State Senate as part of a slate of union activists who ran as independents. Ms. Holmes-Williams indicated that the Administration at Riverfront was aware of her candidacy.

This witness further testified that in January, 1991, while she was in the CAP file room, Mr. O'Sullivan, a member of the Professional Unit came in and asked to discuss something with her. While they were speaking, Ms. McGovern came in and objected to their conducting union business during class preparation time. Ms. Holmes-Williams received a memorandum to that effect from Ms. McGovern on the same day (R-27).

This witness also described a meeting with her supervisors which took place the following year in January, 1992. This meeting was arranged by Mr. Bartkowski and Mr. McGovern in an effort to mediate the problems in the Education Department. Ms. Holmes-Williams thought the meeting was not informal but for the purpose of reprimanding her so she refused to participate. It was her view, forcefully expressed, that unless the Superintendent and Assistant Superintendent were present at the meeting, nothing would be accomplished. The witness received a letter from Mr. Bartkowski on the same day as the aborted meeting criticizing her conduct (R-28).

On cross-examination, Ms. Holmes-Williams described in greater detail her meeting with the E.A.S. counsellor. She indicated that the conference lasted approximately thirty to forty-five minutes during which time she did not speak but simply listened. Indeed, this witness admitted that she turned him off; his area was inter-personal relationships not the grievance process. Ms. Holmes-Williams testified that she made no comment when the representative handed her a stack of her grievances -- twenty-four in number.

With regard to the meeting with Mr. Bartkowski and Mr. McGovern in January 22, 1992, this witness testified that she left after ten minutes. It was her view that this meeting was becoming disciplinary in tone and that she needed a union representative present. This witness acknowledged that although her overall supervisor had called the meeting, she declared it "over" after ten minutes and left.

As to the number of grievances she filed on her own behalf, Ms. Holmes-Williams confirmed that for the last five years, she filed a minimum of fifteen grievances per year on her own behalf. However, in the early years, 1987 and 1988, the teachers were treated as the step-children of the correctional institution, and she probably filed as many as forty-five grievances per year to correct those conditions. Ms. Holmes-Williams estimated that she represented others in grievances approximately five to six times per week. However, this witness testified that, at times, she may have been involved with as many as forty grievances per week.

Of the seventeen grievances entered into evidence before this tribunal, Ms. Holmes-Williams confirmed that R-23, challenging the final P.A.R.S. rating, was resolved in her favor. She also conceded that many of the others challenged management policies which in no way demonstrated anti-union animus, i.e., R-10, R-11, R-12. Ms. Holmes-Williams further acknowledged that she is currently working as a union representative for CWA 1040 handling grievances for other teachers.

Ms. Holmes-Williams, on redirect, addressed once again the issue of the volume of grievances filed. This witness explained that over the years she has filed grievances for herself alone; grievances for the group of teachers including herself and grievances for teachers and others -- not including herself. Ms. Holmes-Williams testified that in 1986, she filed less than five grievances on behalf of herself. She filed a similar number of grievances on behalf of herself in 1987 and 1988. However, in 1989, 1990 and 1991, she filed what she described as "bulk" grievances both for herself alone and for the group to which she belonged. Ms. Holmes-Williams further estimated that she attended several informal meetings per month with management and attended each grievance hearing which fluctuated from a low of three to five a month to a high of more than fifteen a month.

For reasons of security, and to accommodate the parties, the testimony of Inmate Hillard Phillips was taken out of turn and at the Northern State Prison. Also for reasons of security, three correction officers were present while Inmate Phillips gave his testimony. This witness testified that he was found guilty of first degree

robbery and sentenced to fifteen to thirty years in prison with a mandatory minimum. His parole eligibility date is September, 1994.

Inmate Phillips testified that he served one year of his sentence at Riverfront State Prison. During that time, he was active in A.M.I.R.A. and met Ms. Holmes-Williams who was staff liaison for that organization. Inmate Phillips was not a student at any class at Riverfront. This witness described A.M.I.R.A. as an organization which sought to improve the inmates' knowledge of their cultural heritage and to involve them in activities which would help them achieve that goal. Any inmate could belong to A.M.I.R.A. which was not religious in nature. This inmate testified that he was a member of the Board of A.M.I.R.A. and head of its speakers' bureau. As a general rule, A.M.I.R.A. meetings took place two or three times per week; A.M.I.R.A. functions occurred two or three times per year.

For the entire time Inmate Phillips was involved with A.M.I.R.A., Ms. Holmes-Williams was one of two staff liaison for that organization. It was this witness's recollection that whenever he met Ms. Holmes-Williams, it was in the presence of others. If they were alone, it was only for a short time, while making copies or doing an errand. Inmate Phillips further denied any sexual interest in Ms. Holmes-Williams and denied that he ever expressed any personal feelings to her.

This witness did admit writing to Ms. Holmes-Williams although he testified that she did not ask him to write or give him permission to do so. Inmate Phillips admitted that he had a personal friendship with Ms. Holmes-Williams and wrote to her at her home. This witness denied that Ms. Holmes-Williams gave him her address; rather he took it from an envelope which was partially visible among her belongings. Inmate Phillips stated that he continued to write to Ms. Holmes-Williams while corresponding with other females.

This witness explained that "Warenthia Phillips" listed as a "niece" on his Visitor Identification Card, was really not a blood relative (P-8). The two grew up together and many thought they were family. Warenthia sometimes used the name "Atkins" as well as the name "Phillips." This witness further admitted knowing "Pickett" an inmate at Riverfront and Carson Edwards, a paroled offender.

When shown the letter to Carson Edwards, Inmate Phillips admitted writing it (P-6). Although he did not explain in that letter why he was transferred to Bayside State Prison, he believed it was because of a confrontation at Riverfront with an

individual known to be a "snitch." He also thought he might have been transferred because of his involvement in A.M.I.R.A. which some thought was a racist organization.

Inmate Phillips testified that Ms. Holmes-Williams never told him that she was moving, the date of her move nor her new address. He further asserted that no staff member at Riverfront gave him this information.

This witness denied drawing the picture on white cloth which was copied as P-9. He also could not recall sending the picture to anyone although it was contained in a smaller envelope from him to Ms. Holmes-Williams which was included in a larger envelope from him to his sister, Mildred Knighton.

As to P-7, Inmate Phillips admitted that it contained his handwriting. He further testified that he wrote to his sister, Mildred Knighton, and asked her to send an enclosed letter to Ms. Holmes-Williams. That letter contained directions to Bayside State Prison. Inmate Phillips asserted that he was afraid to send the letter directly to Ms. Holmes-Williams so he decided to send it to her through his sister. He signed the letter with the ANKH, a symbol for life which has its origins in African history. This witness acknowledged that Ms. Holmes-Williams never visited him at Bayside.

Inmate Phillips, however, admitted that he had a photograph of Ms. Holmes-Williams in his possession but denied that she had given it to him. This witness explained that he took the photo from Ms. Holmes-Williams's desk in her classroom at Riverfront. He then took the photograph with him when he was transferred to Bayside State Prison.

With regard to the cards found among his belongings at Bayside, Inmate Phillips denied that they were received from Ms. Holmes-Williams. He insisted these cards, expressing affection, were sent by his "niece" whom he variously referred to as Warenthia or Warnita. He did admit, however, that he purchased a vase for Ms. Holmes-Williams in order to show his affection for her. Inmate Phillips also testified that he wrote the sexual fantasy contained in P-20 and sent it to Ms. Holmes-Williams. He denied that he ever received an answer to that communication. When shown P-17, Inmate Phillips acknowledged that Inmate Pickett had sent him pictures from the Kwanzaa celebration at Riverside. He explained that he was sent the pictures to inform him of what was going on in A.M.I.R.A.

Inmate Phillips testified that he was questioned by Barney Dyrnes in February, 1992. At that time he denied that he had a sexual or intimate relationship with Ms. Holmes-Williams. He also denied that they wrote to each other or that he had any cards in his cell. After the documents were removed from his locker, he admitted he had received the cards but denied they were from Ms. Holmes-Williams. This witness further testified that he was threatened with lock-up if he did not give the investigators a statement. When he refused to give the requested statement, he was sent to lock-up for one day. This witness acknowledged that he knew he was violating prison rules when he wrote to Ms. Holmes-Williams and sent her a gift.

On cross-examination, Inmate Phillips testified that, at one time, he and Warenthia Phillips had been lovers. He could offer no explanation, however, why this individual spelled her name "Warmethia" on P-10 and "Warnethia" on all other documents. He did insist that all documents were written by the same person, his "niece," and not by Ms. Holmes-Williams.

This witness conceded that when interviewed by Barney Dyrnes, he initially denied that he had written to Ms. Holmes-Williams. He recanted this denial when confronted with copies of his outgoing letters to her. Inmate Phillips explained that he refused to give the investigators a statement which would harm Ms. Holmes-Williams.

This witness acknowledged that he came to know Ms. Holmes-Williams through his involvement with A.M.I.R.A. As liaison, she was responsible for keeping the administration informed of the organization's activities. Sometimes he would drop off memos to her or she would call him if a memo was late. Inmate Phillips insisted that he was never alone with Ms. Holmes-Williams and if he were, it was only for a few seconds. He did acknowledge that they sometimes made copies together in the copy room. This witness explained that the corrections officer on duty, although not in the room with them, could probably see them from his booth. Inmate Phillips, however, conceded that he was able to avoid detection while taking a photo from Ms. Holmes-Williams's desk and copying an address from an envelope in her purse.

The next witness called on behalf of the respondent was Elizabeth Monaghan who testified that she has been employed at Riverfront State Prison since August, 1985. Ms. Monaghan was hired as a reading specialist and is currently a Teacher I at Riverfront. Addressing the tenure charges, Ms. Monaghan testified that she met Ms.

Holmes-Williams in the summer of 1985, when they both began their employment with Riverfront State Prison. She noted that the teaching staff at the institution is quite small so the teachers saw one enough very often.

Ms. Monaghan explained that she also acted as staff liaison for an inmates' group, the Toastmasters, from 1988 through 1992. This group had two general membership meetings and two executive board meetings per month; all held in the evenings in a classroom in the education area of the institution. This witness identified a Special Report, dated June 7, 1989, in which she complained that she found the cabinet containing teaching supplies and union materials unlocked (R-34). It does not appear from this report that any items were missing from the cabinet. In another Special Report, dated November 15, 1990, Ms. Monaghan complained that her locked desk drawer was opened and her papers "shifted about" (R-35). Again, it does not appear that any items were taken. This witness testified that unlocked drawers and missing items continue as a problem at Riverfront (R-36 to R-43).

With regard to the tenure charges, Ms. Monaghan denied that she had ever seen Ms. Holmes-Williams act in an unduly familiar, or improper manner, with an inmate. This witness also indicated that Ms. Holmes-Williams had never said that she was involved in a relationship with an inmate. Ms. Monaghan also explained that teachers do have contact with inmates who act as teachers' aides helping to set up and clean classrooms.

On cross-examination, this witness conceded that she considers Ms. Holmes-Williams to be a friend and colleague. However, she testified that had never heard anything about a relationship between Ms. Holmes-Williams and an inmate. Ms. Monaghan also admitted that eight of the ten special reports she submitted concerning missing items and opened drawers were filed after Ms. Holmes-Williams's suspension. This witness explained that she had failed to keep copies of earlier reports although she recalled submitting them.

This witness also explained that if an inmate was called to the classroom on "organization" business, he would briefly be alone with the teacher either in the classroom or when they went to the back to duplicate materials. Correction Officers were never in the classroom; they would either be at their station or walking around. Only one officer was on duty and responsible for the entire education area.

Addressing the P.E.R.C. aspect of this controversy, Ms. Monaghan testified that since 1987 she had been Vice President of the Professional Unit at Riverfront State Prison. She explained that they would mobilize during contract years urging employees to join the Professional Unit. This witness also became a shop steward for the union, representing employees in grievance proceedings. She confirmed that CWA 1040 made Ms. Holmes-Williams "Shop Steward" of the year. Ms. Monaghan explained that a shop steward is the enforcer of the union contract, policies and procedures; the shop steward is concerned that the contact not be breached.

This witness testified that she had represented Ms. Holmes-Williams in her grievance proceedings. Ms. Monaghan testified that she was always present at the first step and was frequently at the second step either as an observer or witness. She confirmed that from January, 1991 through January, 1992, Ms. Holmes-Williams filed twenty-four grievances. Ms. Monaghan further confirmed that in 1989, approximately forty-five grievances were filed on behalf of the Professional Unit at Riverfront State Prison. She testified that she represented Ms. Holmes-Williams in the series of grievances challenging her P.A.R.S. (R-7, R-8 and R-9). These grievances were denied at the first step and never moved to the second.

Ms. Monaghan identified a Grievance Hearing Memorandum concerning the Employee Advisory Service counselling offered to her as well as to Ms. Holmes-Williams. This witness explained that she did not represent the respondent in this matter since she was personally involved in a similar grievance.

This witness also testified concerning the inicident when she, Ms. Holmes-Williams, and two other teachers were in a room with a closed door. Ms. Monaghan explained that they closed the door because there were inmates in the area and they did not want their conversation overheard by them. Unfortunately, Greg Bartkowski forced the door open and came into the room. When he saw four teachers present, he assumed they were discussing union business. Mr. Bartkowski stayed in Ms. Monaghan's room until the other three teachers left. He stated to her that the teachers were having many secret meetings which he assumed were to discuss union business. This witness explained that union activities, except for scheduled grievances, were not to take place during the school hours between 8:00 a.m. to 4:00 p.m. However, union business could be scheduled for a member's break time.

Ms. Monaghan further testified that she was present during the search of Ms. Holmes-Williams's room. Originally, management had arranged for a shop steward from another unit to be present. Ms. Monaghan learned of the arrangement and insisted that she be present since she was the only remaining shop steward for the Professional Unit. Investigators Barney Dyrnes and Sue Nelson were also present as well as Greg Bartkowski who was needed to unlock the cabinets. This witness observed items, including pictures, being removed from Ms. Holmes-Williams's desk.

Ms. Monaghan identified a memorandum which she wrote to Superintendent Hundley requesting the return of ". . . personal/union materials of Ms. J. Williams" (R-45). Of primary concern to this witness was the return of Ms. Holmes-Williams's log of union activities which was kept separate from her teaching materials. As a general rule, Ms. Holmes-Williams took the log home with her. However, on the day of her suspension, Ms. Holmes-Williams was not permitted to return to her room to collect her personal belongings. Ms. Monaghan received the union log several days later in Superintendent Hundley's office.

During cross-examination, this witness acknowledged that she reviewed her records in preparation for this hearing. She denied, however, that she specifically discussed the case with either Ms. Holmes-Williams or her counsel.

As to her own union activities, Ms. Monaghan testified that she was elected the representative for the building in 1987 and began acting as shop steward in 1989 before receiving formal training. This witness explained that Ms. Holmes-Williams continued to handle the majority of cases for the Professional Unit. In this capacity, Ms. Holmes-Williams represented Ms. Monaghan in her grievances. Conversely, Ms. Monaghan essentially handled only those cases involving Ms. Holmes-Williams.

This witness also testified that she is currently Shop Steward of the Year, an honor received by Ms. Holmes-Williams the year before when she ran for the State Senate. Ms. Monaghan was uncertain of the criteria utilized in bestowing this honor but assumed it was made for vigorous enforcement of the contract.

This witness conceded that she had never heard anyone say that the tenure charges were filed in retaliation for Ms. Holmes-Williams's union activities. Indeed, she heard no rumor to that effect. With regard to the search of Ms. Holmes-Williams's room, Ms. Monaghan thought that it would be irregular if no bargaining unit shop steward was present. This witness conceded that this irregularity was

cured when she was permitted to witness the entire search. She also acknowledged that, in correctional facilities, the right always exists to search an employee's personal belongings in order to keep the institution secure.

Ms. Monaghan also admitted that Superintendent Hundley, the ultimate "boss" of Riverfront, had been amenable to the union in the past on various issues. For example, when the staff lounge was removed, Superintendent Hundley tried to restore it. Ms. Monaghan explained that the Superintendent wanted cooperation at every level; he basically wanted a happy staff. This witness conceded that Superintendent Hundley did not have an "anti-union bias."

The last witness called by Ms. Holmes-Williams was Starr Kirkland who testified that she was Librarian at Riverfront from July, 1985 through August, 1990 when she left the institution. Ms. Kirkland also served as first liaison for the inmate organization A.M.I.R.A. She explained that she was approached by an inmate to help develop the group. Ms. Kirkland testified that she adjusted the proposal for A.M.I.R.A. and brought it to the Superintendent. In order to receive approval, staff liaison was needed. Ms. Kirkland agreed to serve as liaison and the group was approved. This witness explained that A.M.I.R.A. was not a black organization. She also recalled that Greg Bartkowski, Supervisor of Education, at one time acted as staff liaison to the group.

Ms. Kirkland testified that when she decided to leave Riverfront, she recommended in writing to the administration that Ms. Holmes-Williams and Ms. April Gordon become co-liaison for A.M.I.R.A. She explained that Ms. Holmes-Williams had worked with her on A.M.I.R.A. activities from the very beginning and that Ms. Gordon, a secretary, did all the paper work.

This witness testified further that she knows Inmate Phillips and had seen Ms. Holmes-Williams in his presence during A.M.I.R.A. functions. She never observed any signs of affection between them.

On cross-examination, Ms. Kirkland explained that although she "knew of" Ms. Holmes-Williams when she came to Riverfront, the two only became friends while working at the latter institution. She further testified that she "pulled" in Ms. Holmes-Williams and Ms. Gordon to work on A.M.I.R.A. activities. However, she never requested that she be relieved from her role as liaison to that group; rather, she continued to work with the two as partners. Ms. Kirkland confirmed that she

discussed the role of A.M.I.R.A. liaison with Ms. Holmes-Williams and Ms. Gordon before she recommended their appointment to the Administration.

This witness described the A.M.I.R.A. board meetings, composed of seven members as "business, strictly business." These meetings took place in the Library never in the classroom. Ms. Kirkland conceded that although she knows Inmate Phillips, he had only just become an A.M.I.R.A. board member at the time she left. This witness explained that she appointed the original board members; thereafter they were elected by A.M.I.R.A. members to two year terms. Ms. Kirkland also acknowledged that it was rare for her to call and ask for an inmate; occasionally an inmate's name would be placed on an approved business list which would permit him to come to the library.

Upon completion of Ms. Kirkland's testimony, Ms. Holmes-Williams rested her case both in defense of the tenure charges filed against her and in support of the unfair labor charge filed against the Department of Corrections.

At this point, the Department exercised its right to call rebuttal witnesses. The first witness to testify in this phase of the hearing was Gregory Bartkowski, who had testified earlier in the Department's tenure case. Mr. Bartkowski explained that as Supervisor of Education at Riverfront, he knew that Ms. Holmes-Williams was staff liaison with A.M.I.R.A. However, in the role as liaison, Ms. Holmes-Williams reported directly to Assistant Superintendent William Finney who is responsible for coordinating liaisons between staff and inmate groups. Mr. Bartkowski confirmed that he did not object to Ms. Holmes-Williams acting as liaison to A.M.I.R.A. but it was his understanding that she had volunteered for that position (R-44).

This witness provided further testimony concerning the events of February 20, 1992, the day on which Ms. Holmes-Williams was suspended. Mr. Bartkowski confirmed that he escorted Ms. Holmes-Williams to the Board room, at about 3:35 p.m. Ms. Holmes-Williams entered the room; Mr. Bartkowski remained in the hallway. This witness was then called into the Superintendent's office shortly before 4:00 p.m. and briefly told what had transpired. Mr. Bartkowski was asked to explain the options available to Ms. Holmes-Williams so that she would be able to make a wise decision.

As to aspects of the unfair labor charge, Mr. Bartkowski testified that he recalled the incident when he pushed open a door in the education area and found

three teachers in the room. This witness explained that the meeting occurred during the teachers' prep time when the teachers should have been preparing for class or completing their paper work. Mr. Bartkowski testified he said: "What's up ladies? Is this prep work?" This witness did not remember their response or know what they were discussing. He did recall that the teachers did not have any books or files and emphasized that it was improper to conduct either personal business or union activities during the teacher's prep time.

Mr. Bartkowski next testified concerning the January 22, 1992 meeting with Ms. Holmes-Williams. This witness stated that Superintendent Hundley had asked that he and Jim McGovern meet with the teachers to discuss their problems. Mr. Bartkowski said the two planned to meet with each teacher individually in order to "hash out" the issues between supervisors and staff. This witness testified that he started with a brief statement of purpose for the meeting. After less than ten minutes, Ms. Holmes-Williams stated that the meeting would accomplish nothing since the Superintendent was not there. Mr. Bartkowski testified that Ms. Holmes-Williams got louder and became more agitated. When he tried to calm her down, Ms. Holmes-Williams became angry and exclaimed she was "no house nigger" and left the meeting, effectively ending it. Mr. Bartkowski denied that the purpose of the meeting was to discipline Ms. Holmes-Williams. He asserted that he could not conduct a disciplinary hearing.

With regard to the referral to the Employee Advisory Service, Mr. Bartkowski recalled that Ms. McGovern had voluntarily sought the advice of an E.A.S. counsellor during one of his weekly visits to the institution. Ms. McGovern was seeking ways to handle various situations with her staff. During the conference, the counsellor recommended that the teachers come in to talk to him. Mr. Bartkowski supported the decision to refer the teachers to the Employee Advisory Service which is part of the Department of Personnel. It was his view that there were personality conflicts between Ms. McGovern and the teachers which might be alleviated through counselling.

Mr. Bartkowski also identified a letter of commendation which he sent to Ms. Holmes-Williams on June 7, 1990 (P-45). This witness testified that the respondent had cooperated with him and had demonstrated a team spirit when she maintained the library during Ms. Kirkland's absence.

Although not presently a union member, Mr. Bartkowski testified that he has been a union member in the past and does not dislike unions. Mr. Bartkowski asserted that there was no mention of Ms. Holmes-Williams's union membership or activities during the entire time leading to the filing of tenure charges against this teacher.

In the course of cross-examination, Mr. Bartkowski acknowledged that he discussed his testimony with the Department's counsel. He also admitted that he discussed the hearing with Ms. McGovern to give her some idea of what would occur.

As to A.M.I.R.A., this witness confirmed that Ms. Kirkland was the first liaison to that organization and that she was the concept person for that group. Mr. Bartkowski testified that he did not participate in conversations with Assistant Superintendent Finney concerning A.M.I.R.A. This witness further explained that when inmates were involved in sanctioned group activities then were given "authorized absences." These indicated the proper whereabouts of the inmates. Mr. Bartkowski further testified that at its inception everyone in the prison could belong to A.M.I.R.A. and exchange information about their cultural heritage. However, over time, the group has essentially become one which advances black culture.

Mr. Bartkowski conceded that although he could join the union, he has chosen not to. Rather, 85% of the normal union dues are deducted from his salary. This witness further acknowledged that he did not know that the teachers were discussing union business during their prep time in the July 1990 incident. However, when Ms. McGovern observed Ms. Holmes-Williams's meeting with personnel from another unit, on January 31, 1991, there could be no other purpose than to conduct union business (R-27). Mr. Bartkowski emphasized that prep time should be used to prepare for class. Although Ms. Holmes-Williams was a good teacher, this witness did not believe that she spent a great deal of time in preparation. Mr. Bartkowski confirmed that it was Ms. McGovern's opinion that Ms. Holmes-Williams was spending too much time on non-educational matters.

This witness further explained that although there were seven teachers at Riverfront, only the three who were having problems with Ms. McGovern were referred to the E.A.S. counsellor. Ms. Holmes-Williams was one of the three so referred. According to Ms. McGovern these teachers were not cooperative; they

filed untimely reports and were often argumentative and confrontational. Mr. Bartkowski asserted that he did not have these problems with the three teachers involved.

Concerning his January 22, 1992 meeting with Ms. Holmes-Williams, Mr. Bartkowski explained that Superintendent Hundley had directed him to meet with all the teachers individually. It was recognized that there were problems; there would be verbal confrontations between staff and supervisors at staff meetings. This witness believed that the teachers did not like Ms. McGovern's style of supervision.

Mr. Bartkowski testified that on the day of Ms. Holmes-Williams's suspension, he was directed to explain to her the ramifications of the filing of tenure charges. This witness emphasized that the decision to file tenure charges was an institutional one. Mr. Bartkowski was responsible for the "paper work" needed to support the tenure charges. He performed this responsibility under the direction of Superintendent Hundley.

As to the volume of grievances, Mr. Bartkowski explained that all grievances involving teachers came to his attention. It was his view that some teachers filed more grievances than others. He testified that a large number of grievances were generated by Ms. Monaghan, Ms. Holmes-Williams and Ms. Darkatsh.

The final witness to testify in this controversy was Cinthia Maszkiewicz McGovern. This witness testified that she was Assistant Supervisor of Education at the New Jersey Training School for Boys in Jamesburg in 1981. She came to Riverfront in 1985 and remained until October, 1992. Ms. McGovern was Assistant Supervisor for Education during her time at Riverfront and, in that capacity, was Ms. Holmes-Williams's immediate Supervisor.

Although Ms. McGovern was aware of the tenure charges filed against Ms. Holmes-Williams, she testified that she did not participate, in any way, in the decision to bring the charges. Indeed, she first became aware of the charges on February 20, 1992, the day Ms. Holmes-Williams was suspended. Ms. McGovern testified that her only involvement in the actual filing of tenure charges was to provide Mr. Bartkowski with the proper citations from the education statutes and regulations. This witness also testified that she never heard anyone talk of Ms.

Holmes-Williams's union affiliation in conjunction with the filing of tenure charges against her.

Ms. McGovern confirmed that she was the author of the January 31, 1991 memorandum to Ms. Holmes-Williams (R-27). This witness explained that she came upon Ms. Holmes-Williams's meeting with the staff psychologist in the CAP file room during prep time. She emphasized that prep time was not to be used for personal or union business. Indeed, the teachers at Riverfront, including Ms. Holmes-Williams, had complained that they had insufficient prep time. Therefore, Ms. McGovern thought it essential that what time was provided be used solely for educational purposes.

This witness further testified concerning the "Letter of Counseling" which she sent to Ms. Holmes-Williams on October 2, 1991 (R-21). Ms. McGovern explained that she had asked the respondent to provide her with an inmate folder and attendance card so that she could close it out. Ms. Holmes-Williams came to her office and, almost yelling, told her she had already sent the folder to her. At the time a corrections officer and repairman were in Ms. McGovern's office. Despite their presence, Ms. Holmes-Williams continued to yell "at the top of her voice." Indeed, others in the area could hear her. This witness denied that she yelled during the incident. Ms. McGovern described the respondent's conduct as unprofessional and believed that it could not be condoned.

This witness further testified that she arranged to meet with an E.A.S. counsellor after discussing the matter with Mr. Bartkowski. She felt it would be helpful to discuss her difficulties with an unbiased, third party. She relayed to the counsellor her perceptions of her staff; how they reacted with negativism to her request that they perform their job functions. The counsellor, Mr. Marucci, discussed with her ways of working through her problems with the teachers. Mr. Marucci also suggested that the teachers themselves come to him so that he could help resolve their differences. At Mr. Marucci's suggestion, and with Mr. Bartkowski's approval, Ms. McGovern referred the three teachers: Ms. Monaghan, Ms. Holmes-Williams and Ms. Darkatsh to the E.A.S. for counselling.

Ms. McGovern confirmed that the Employee Advisory Service is a support service offered through the Department of Personnel. This witness acknowledged that the employees involved had the option of taking advantage of the service or not. Ms. McGovern asserted that Ms. Holmes-Williams's union activities were simply

not considered when referring her and the other two teachers to the E.A.S. counsellor. This witness only wanted to take advantage of this impartial forum to improve relations with her staff.

On cross-examination, Ms. McGovern admitted that she discussed her testimony with counsel to the Department. She maintained, however, that she had never discussed any matter with the Internal Affairs Unit. Ms. McGovern also admitted that although she may join the union, she is currently not a member. She further described the frustrations which prompted her to seek assistance from the Employee Advisory Service. Often when she requested staff members to perform certain tasks, she was met with hostility and a barrage of questions. She had tried to resolve these conflicts on her own; however, as a last resort, she turned to the Employee Advisory Service. Ms. McGovern confirmed that the three teachers referred to E.A.S. were the three with whom she was having difficulties. This witness testified further that the counsellor, Mr. Marucci, asked to see the grievances filed by these teachers in order to understand the kinds of actions they were grieving.

Ms. McGovern confirmed that she had attended grievance hearings for management. Although she did not recall the precise number of grievances filed, this witness estimated that more were filed in 1991 than in earlier years. Ms. McGovern also acknowledged her view that union activities should not interfere with duties. This witness also conceded that she sometimes felt that Ms. Holmes-Williams interfered with her authority.

On redirect, Ms. McGovern explained that she had been a member of CWA 1040 from 1981 through 1991. However, she withdrew from the union during the last contract period since she felt that the interests of her Supervisors and Assistant Supervisors of Education were not adequately represented. Efforts to establish a bargaining unit for those employees were unsuccessful.

This witness also explained the importance of complete record keeping. Daily prescriptive sheets are necessary to generate funding for the educational programs. Furthermore, monthly student summaries are utilized in pre-parole reports. It was Ms. McGovern's opinion that good record keeping was critical to the successful operation of the educational programs. It was also her view that Ms. Holmes-Williams's records often had "holes" in them.

With the testimony of this witness, the Department rested its case and the hearing on both the tenure charges and the unfair labor charge was concluded.

TENURE CHARGES

FINDINGS OF FACT

Having carefully considered the testimony of the witnesses presented by the State Department of Corrections as well as the testimony of Ms. Holmes-Williams and the witnesses presented in support of her position, and having had the opportunity to view the demeanor of these witnesses as they gave their testimony, and having fully reviewed the numerous exhibits entered into evidence, I **FIND** the following:

1. Riverfront State Prison, located in Camden, New Jersey, was opened in 1985 as part of the New Jersey State Department of Corrections. The new institution included an educational program which, in accordance with N.J.S.A. 18A:7B-8, was subject to the general supervisory authority of the Director of Educational Services within the Department of Corrections, Office of Education.

2. In order to provide the educational program planned for Riverfront, ten teachers were hired in June, 1985. These newly hired teachers were provided an intensive two-month training program before the inmates arrived at Riverfront. The program prepared them to teach adults rather than children and sensitized the teachers to the unique problems of providing educational services within a correction institution.

3. As part of Riverfront's training, the new teachers were given Departmental material including the Handbook of Information and Rules, which governs the conduct of all employees within the Department. Section I prohibits employees from indulging "in undue familiarity with inmates or parolees." Conversely, employees may not permit inmates or parolees to be "unduly familiar" with them. Departmental employees may not give to, or receive from, inmates or parolees, gifts, services or things of value. Except as required by their official responsibilities, employees may not correspond with inmates or parolees. Handbook, §§ K, L, M and N (P-40).

4. Riverfront's newly hired teachers also read and discussed the book Games Criminals Play (P-42). The discussions centered upon inmates' efforts to manipulate and compromise staff members.

5. Following the initial period of training, Riverfront circulated to its teachers, and discussed at staff meetings, various directives received from the Department of Corrections, Office of Education. These directives included Rules Governing Your Relationship with Inmates which provided in part:

> Employees shall not indulge in undue familiarity with inmates or permit inmates to be unduly familiar toward them. An employee cannot perform his job properly if he attempts to be "one of the boys." The word fraternizing implies an association with the inmates on equal terms. The correctional employee has no such association with the inmates. The correctional employee constantly represents authority to the inmates. It is therefore impossible for you to fraternize with the inmates and maintain the role model which is essential to successfully perform your job.
>
> [P-42]

6. Through its program of orientation and ongoing training, the supervisory staff at Riverfront alerted its teachers to the serious problems generated by "undue familiarity" with inmates. Should a staff member interact with an inmate, in other than a professional manner, the credibility and integrity of that staff member can be seriously jeopardized. All correctional employees, including civilians such as teachers, are privy to confidential information. A staff member who is friendly with an inmate represents a serious risk to the security of the correctional institution. The inmate may persuade the staff member to divulge confidential information or introduce contraband into the institution. These acts may endanger the safety of other personnel and breach the security of the institution itself.

7. Ms. Jacqueline Holmes-Williams was hired by Riverfront State Prison in 1985 as one of its original teachers. She, therefore, received the intensive two-month program of orientation as well as Riverfront's ongoing training for its teachers. Ms. Holmes-Williams received and was familiar with the various Departmental materials provided by Riverfront. She also read a copy of the book Games Criminals Play.

8. Ms. Holmes-Williams's teaching duties included basic education in the Pre-GED program. During her entire time with Riverfront, Assistant Supervisor of

Education Cindi McGovern was Ms. Holmes-Williams's immediate supervisor and Supervisor of Education Gregory Bartkowski was her overall supervisor. Ms. Holmes-Williams was never formally disciplined during her years at Riverfront although she received a Letter of Counselling dated October 2, 1991 concerning a confrontation with her immediate supervisor, Ms. McGovern (R-21). Ms. Holmes-Williams also received an informal letter of commendation from Supervisor Bartkowski, dated June 7, 1990, for her assistance in maintaining the library in the absence of the librarian, Starr Kirkland (P-45).

9. In addition to its formal program of education, inmates at Riverfront were permitted to engage in group activities which would help them develop skills, knowledge and attitudes necessary to their rehabilitation. Assistant Superintendent William Finney was responsible for oversight and coordination of these inmate organizations. In order to become operational, inmates had to have their proposed organization approved by the administration and a staff member had to be designated as liaison between the group and the administration. The staff who acted as liaison did not receive monetary remuneration for performing this function although they were given "comp" time for hours spent in group activities after the normal work day.

10. The inmates at Riverfront approached Starr Kirkland for assistance in organizing a group to study minority cultures. This group, designated A.M.I.R.A. (African Americans and Other Minorities Incorporated for Reconstruction Associations), was approved by the Riverfront administration and Ms. Kirkland agreed to be the first liaison to the group. In that capacity, she appointed the original seven members of the Board of A.M.I.R.A. Thereafter, board members were elected to two year terms by the membership.

11. As a result of Ms. Kirkland's encouragement, Ms. Holmes-Williams became involved in A.M.I.R.A. activities from the very beginning of the organization. Ms. Kirkland also was able to enlist the services of April Gordon, a secretary in Administration, to take care of the group's paper work.

12. When Ms. Kirkland decided to leave Riverfront in August, 1990, she discussed with Ms. Holmes-Williams and Ms. Gordon the role of liaison for A.M.I.R.A. With their agreement, Ms. Kirkland recommended that they become co-liaison

to that group. At approximately the same time, Ms. Holmes-Williams and Ms. Gordon prepared a memorandum in which they informed the Administration:

> Since we have volunteered our time and received comptime approval from Mr. W. Finney, we wish to continue as Co-liaisons of the AMIRA Organization.
>
> [P-44]

The administration, therefore, approved the appointment of Ms. Holmes-Williams and Ms. Gordon as co-liaison to A.M.I.R.A.

13. A.M.I.R.A. met two to three times each week after 4:00 p.m. in Ms. Holmes-Williams's classroom in the education area of Riverfront. Ms. Holmes attended most meetings of A.M.I.R.A. which had a membership of approximately thirty inmates.

14. Inmate Hillard Phillips was found guilty of first degree robbery and sentenced to fifteen to thirty years in prison with a mandatory minimum. His parole eligibility date is September, 1994. Inmate Phillips served one year of his sentence at Riverfront State Prison. He was transferred to Bayside State Prison in October, 1991.

15. Inmate Phillips was not a student of Ms. Holmes-Williams. However, he was a member of A.M.I.R.A.; he also was a member of the Board of A.M.I.R.A. and head of its Speakers Bureau. Ms. Holmes-Williams was co-liaison to A.M.I.R.A. during the time Inmate Phillips's was involved with that group. In addition to attending the general membership and board meetings, Inmate Phillips would come to Ms. Holmes-Williams's classroom in the education area, before the beginning of class, to drop off or duplicate A.M.I.R.A. material. Ms. Holmes-Williams would also request that Inmate Phillips be permitted to come to her classroom.

16. In August, 1991, Gregory Bartkowski received an anonymous letter from an inmate stating that Ms. Holmes-Williams was involved in a relationship with an inmate; the inmate was not named. Mr. Bartkowski turned the letter over to the Internal Affairs Unit assigned to Riverfront State Prison.

17. The Internal Affairs Unit is an autonomous unit within each correctional institution. Its charge includes the investigation of referrals from the Office of the Governor, the Commissioner and the Superintendent of the institution.

18. Senior Investigator Barney Dyrnes, of the Internal Affairs Unit at Riverfront, was assigned to investigate the allegations concerning Ms. Holmes-Williams. The anonymous letter was not considered reliable. However, information was thereafter received from an known informant who reported that Inmate Phillips and Ms. Holmes-Williams were seen caressing and kissing. This information was reduced to a Statement dated September 15, 1991.

19. Based on the Statement of the Informant, Internal Affairs recommended that Inmate Phillips be transferred to Bayside State Prison. Thomas Hundley, Superintendent of Riverfront, approved Inmate Phillips's transfer. Upon transfer, Inmate Phillips's personal papers and other belongings were generally inventoried, boxed and forwarded to Bayside.

20. At the time of his transfer, the Internal Affairs Unit at Bayside was requested to monitor all correspondence to, and from, Inmate Phillips. The incoming and outgoing mail was not confiscated; it was copied and then sent on. Senior Investigator Keith Arch at Bayside agreed to monitor Inmate Phillips's mail to ascertain if there was any correspondence between this inmate and Ms. Holmes-Williams. Bayside was also provided with a picture of Ms. Holmes-Williams together with her identifying characteristics.

21. Ms. Holmes-Williams was not observed visiting or attempting to visit Inmate Phillips at Bayside State Prison.

22. The monitoring of Inmate Phillips's mail, however, did disclose a possible romantic relationship between the two. Through this procedure, five outgoing communications were intercepted. Each consisted of an envelope addressed to Ms. Holmes-Williams enclosed within a large envelope addressed to Inmate Phillips's sister, Mildred Knighton. In the first, dated October 15, 1991, Inmate Phillips asked his sister to drop the second envelope "in the mail to Jacquie for me." The interior envelope, addressed to Ms. Holmes-Williams, contained directions to Bayside State Prison and information concerning visiting hours at the institution "just in case baby." It concluded "I Love and Miss You so much" and was signed with an Ankh (P-7). The second large manila envelope was sent

on October 25, 1991 by Inmate Phillips to his sister. Enclosed within was a second manila envelope addressed to Ms. Holmes-Williams, containing a drawing depicting two individuals engaged in a sexual act (P-9). The next two, sent on January 4, 1992 and in February, 1992, similarly consisted of larger envelopes sent to Mrs. Knighton containing smaller envelopes addressed to Ms. Holmes-Williams (P-14, P-15). The final communication in this series was a three page sexual fantasy contained in an envelope addressed to Ms. Holmes-Williams and included in a large envelope addressed to Inmate Phillips's sister, Mrs. Knighton (P-20).

23. The monitoring process also disclosed a letter from Inmate Phillips to Carson Edwards, a paroled ex-offender. This letter, intercepted on December 18, 1991, stated that Ms. Williams was moving on Saturday, December 21, and might need his services. Inmate Phillips then provided Mr. Edwards with Ms. Holmes-Williams's address. As a result of this communication, Senior Investigator Dyrnes surveilled the address provided in Inmate Phillips's letter and confirmed that Ms. Holmes-Williams did, indeed, move to that address on Saturday, December 21, although she did not utilize the services of Mr. Edwards (P-13, R-6).

24. Also intercepted was a package of food from Warenthia Phillips to Inmate Phillips. Although the package showed Ms. Phillips's return address as "Paterson," it was post marked from "Camden," the residence of Ms. Holmes-Williams. Included within this package was a card signed with an Ankh symbol.

25. After discussing the material intercepted by the monitoring process at Bayside State Prison with his supervisor, Senior Investigator Dyrnes was authorized to confront Inmate Phillips and to search his belongings. This interview took place on February 20, 1992. After being shown copies of his outgoing correspondence, Inmate Phillips admitted he had a relationship with Ms. Holmes-Williams but refused to give a statement to that effect. This inmate stated he wanted no part of anything that would hurt Ms. Holmes-Williams. Inmate Phillips asserted that he had not kept the correspondence received from Ms. Holmes-Williams. However, a search of Inmate Phillips's locker disclosed a three page love letter and various cards signed with the Ankh symbol; a series of romantic correspondence from "Warenthia Phillips" and an original picture of Jacqueline Holmes-Williams. Senior Investigator Dyrnes seized this material from Inmate Phillips's locker.

26. At hearing, Inmate Phillips admitted writing to Ms. Holmes-Williams, at her home, but denied that she had given him her home address. He also identified, as his own, various copies of letters sent through his sister to Ms. Holmes-Williams. Inmate Phillips characterized his relationship with Ms. Holmes-Williams as one of friendship. He denied that Ms. Holmes-Williams had written to him at Bayside maintaining that the material received from "Warenthia Phillips" was indeed received from that individual. Inmate Phillips admitted he knew of the date on which Ms. Holmes-Williams moved and her new address but offered no explanation as to how he acquired that personal information. He also acknowledged that he had Ms. Holmes-Williams's picture but explained that he had taken it from her desk while he was at Riverfront. Inmate Phillips conceded that he had written the sexual fantasy contained in P-20 and had sent it to Ms. Holmes-Williams. He also admitted that h e had purchased a vase for Ms. Holmes-Williams to "show his affection for her."

27. Inmate Phillips conceded that he and Ms. Holmes-Williams were occasionally alone in her classroom. He also acknowledged that he was able to avoid detection when, by his account, he took Ms. Holmes-Williams old address and picture from her desk.

28. Inmate Phillips was sent to lock up for one day after his interview with Senior Investigator Dyrnes. He acknowledged that he knew he was violating prison rules when he wrote to Ms. Holmes-Williams and sent her a gift.

29. After completing Inmate Phillips's interview, Senior Investigator Dyrnes and Principal Investigator Assante returned to Riverfront State Prison and discussed the results of their investigation with Superintendent Hundley and Assistant Superintendent Finney. Because of the seriousness of the allegations, the investigators were authorized to confront her with the results of their investigation and to offer her the opportunity to resign in good standing rather than to go forward with the filing of tenure charges. The option of "resigning in good standing" is generally offered to a staff member facing charges of improper relationships with inmates since it limits damage to the employee's reputation. This is particularly important for teachers since removal on charges may impact on future employability in the field of education.

30. When confronted by Senior Investigator Dyrnes, Ms. Holmes-Williams denied any involvement with Inmate Phillips. In the presence of her union representative, and after discussing the matter with the main C.W.A. office, Ms. Holmes-Williams rejected the offer of a resignation in good standing. Assistant Superintendent Finney immediately suspended Ms. Holmes-Williams with pay.

31. Following her suspension, Ms. Holmes-Williams returned to Riverfront State Prison on February 24, 1992. At that time she acknowledged a random sampling of her Tour Reports (P-36). She then gave exemplars of her handwriting: twenty-eight with her right hand and twenty-eight with her left (P-37).

32. The forced and voluntary exemplars, together with the documents seized from Inmate Phillips's locker at Bayside, were sent to the Internal Affairs Unit at the Department of Corrections, for analysis to determine the author of the seized documents.

33. In a report received April 22, 1992, James J. Lennon, a Senior Investigator - Document Examiner with the Department's Internal Affairs Unit, concluded that Ms. Holmes-Williams was "positively identified" as the writer of the majority of the documents seized from Inmate Phillips's locker. Following receipt of this report, Riverfront State Prison went forward with the filing of tenure charges against Ms. Holmes-Williams.

34. At hearing, Senior Investigator Lennon was admitted as an expert in the area of handwriting analysis. This expert designation was based on his specialized training with the United States Secret Service and his experience in examining approximately five hundred separate documents during the past three years under the general supervision of a senior documents analyst. Senior Investigator Lennon was the only expert in this proceeding.

35. In making his analysis, Senior Investigator Lennon compared the questioned documents seized from Inmate Phillips's locker with the known exemplars, both forced and voluntary, of Ms. Holmes-Williams's handwriting. He closely analyzed the embellishments in the writings which represent the distinguishing characteristics of an individual's handwriting. There was excellent agreement between the upper case, cursive "I" which appeared in

the romantic letter seized from Inmate Phillips (P-22) and the same letter which appeared in Ms. Holmes-Williams's Tour Reports (P-36, 12-9-91). The writer of both the romantic letter and the Tour Report formed the lower case, cursive "v" so that it appeared to be a "u." The author of each document formed the lower case, cursive "a" in a very unusual manner when it appeared at the beginning of a word. There was excellent agreement between the lower case, cursive "with" appearing in both the known and questioned documents. The author of both combined the "w" and the "i" so that they appear to be two lower case, cursive "u's." There was also excellent agreement between the cursive, lower case "be" which appeared both in the romantic letter seized from Inmate Phillips and in Ms. Holmes-Williams's Tour Report. In both documents, the word "be" appeared as "lie." The author of both documents also demonstrated an unique embellishment when writing an upper case "A." This letter is half written and half printed and has a hook in the middle. This unique "A" appears both in the letter seized from Inmate Phillips and in Ms. Holmes-Williams's Tour Report. It was this agreement of unique embellishments and characteristics that led Senior Investigator Lennon to positively identify Ms. Holmes-Williams as the writer of the majority of the documents seized from Inmate Phillips.

36. At hearing, Ms. Holmes-Williams again flatly denied that she was the author of the documents seized from Inmate Phillips. She also denied that this inmate had ever acted in an inappropriate or familiar manner toward her. The two were briefly alone together when Inmate Phillips would drop off A.M.I.R.A. material or when making copies of A.M.I.R.A. documents. Ms. Holmes-Williams explained that Inmate Phillips could have taken her picture and old address from her desk which was not always secure. However, she offered no explanation as to how Inmate Phillips, after his transfer to Bayside State Prison, knew the exact date and location of her move in Camden. Ms. Holmes-Williams admitted receiving, at her new address, a vase and flower together with a card signed "Phil." She did not report the gift to the administration at Riverfront State Prison.

37. No witness for the Department of Corrections or for Ms. Holmes-Williams had observed Ms. Holmes-Williams and Inmate Phillips acting toward one another in an improper or unduly familiar manner.

38. Based upon the above determinations, I **FIND** further that the investigation in this matter, conducted by members of the Internal Affairs Unit, proceeded in an entirely proper and even-handed manner. When first alerted to a possible relationship between Ms. Holmes-Williams and Inmate Phillips, Senior Investigator Dyrnes took no action since he considered an anonymous "tip" to be unreliable. Only when that rumor was substantiated by a known informant, who reduced his allegations to writing, was action taken to transfer Inmate Phillips to another correctional facility and to have his mail monitored. This action in no way harmed Ms. Holmes-Williams but rather served to protect her reputation should the informant have been in error or maliciously motivated. Indeed, the investigation was conducted in a confidential manner; a fellow teacher, Ms. Monaghan, confirmed at hearing that she did not know that Ms. Holmes-Williams was the subject of an ongoing investigation until she was suspended. However, the disclosure of outgoing correspondence to Ms. Holmes-Williams, through the mail monitoring process, moved the investigation forward to a direct confrontation with Inmate Phillips. This individual confirmed the relationship with Ms. Holmes-Williams when faced with the material seized from his locker. Recognizing the seriousness of the charges, and the information developed which would support those charges, the investigators were authorized to confront Ms. Holmes-Williams. Although somewhat blunt in approach, I do not believe that the investigators endeavored to intimidate Ms. Holmes-Williams. Indeed, I have had the opportunity to observe Ms. Holmes-Williams during this extensive hearing and find her to be an exceptionally strong and determined individual who fully exercised her rights to confer with her union on the day of her interview and who emphatically rejected the option of "resignation in good standing." This option was simply offered to Ms. Holmes-Williams as an alternative which would not adversely impact on future employment in the field of education.

39. I **FIND** further that the investigation into the relationship between Ms. Holmes-Williams was conducted independently by the Internal Affairs Unit at Riverfront and was driven by the information as developed. There is no evidence in the record herein that the administrators at Riverfront or the supervisors within its Education Department directed or influenced this investigation. Further, the handwriting analysis was performed by an investigator within the Department's Central Office who was totally removed from any institutional concerns.

40. I **FIND** that Inmate Hillard Phillips was an intelligent and articulate witness. He was extremely cautious in his testimony. His admissions were circumscribed by the hard evidence confronting him. He admitted writing to Ms. Holmes-Williams from Bayside State Prison when presented with copies of his letters secured as a result of the mail monitoring process. He admitted sending Ms. Holmes-Williams a gift when confronted with copies of relevant correspondence. Inmate Phillips sent this gift as a sign of his affection for Ms. Holmes-Williams. He further admitted he considered her to be his friend but denied that their relationship was sexual in nature or that she had introduced contraband into the facility. I **FIND** these admissions entirely credible. I also am persuaded that Inmate Phillips, a seasoned and sophisticated inmate, knew the consequences to Ms. Holmes-Williams of a relationship with him. He, therefore, undertook a elaborate scheme to avoid detection including the use by Ms. Holmes-Williams of the name of "Warenthia Phillips," Inmate Phillips's niece. I **FIND** entirely credible his explanation that he did not wish to harm Ms. Holmes-Williams and tried to shield her from the consequences of a relationship with him. I do not accept as true, Inmate Phillips's explanation that the letters were written by his niece. The substance of the love letter (P-22) clearly describes the emotions of a person new to a relationship such as Ms. Holmes-Williams and not the feelings of someone "almost a member of the family" who may have been Inmate Phillips's lover many years ago when she was little more than a teenager. I also **FIND** unpersuasive Inmate Phillips's explanation of how he obtained both Ms. Holmes-Williams's picture and home address without her cooperation and without detection. Finally, I **FIND** particularly significant the lack of any explanation of how Inmate Phillips, after his transfer from Riverfront, became privy to personal information concerning the date of Ms. Holmes-Williams's move and her new address. Based upon the above, I **FIND** that Ms. Holmes-Williams was involved in a relationship with Inmate Phillips in which she shared personal information with him.

41. I **FIND** that the analysis of the handwriting expert, Senior Investigator Lennon, was helpful to this tribunal in determining whether or not Ms. Holmes-Williams was the author of the documents seized from Inmate Phillips's locker. From the detailed analysis provided by Senior Investigator Lennon, as well as from my own comparison of the known exemplars to the questioned documents, I **FIND** that there is excellent agreement between the two on the various embellishments and characteristics found on both sets of documents. While there may be someone in the general population who shares these unique

writing characteristics with Ms. Holmes-Williams, I **FIND** it incredible that that person would be Inmate Phillips's "niece" who was writing love letters to him. This is particularly unlikely since Ms. Holmes-Williams has never met "Warenthia Phillips" and Ms. Phillips has not had the opportunity to develop a similar writing style similar to Ms. Holmes-Williams, as sometimes happens between members of the same family or between teacher and student. I **FIND**, therefore, that Ms. Holmes-Williams was the author of the love letter and various cards seized from Inmate Phillips's locker at Bayside State Prison. These pieces of correspondence clearly demonstrate that Ms. Holmes-Williams was involved in an improper, romantic relationship with Inmate Phillips.

42. I **FIND** Ms. Jacqueline Holmes-Williams was a strong and articulate witness who gave her testimony in a direct manner. From the record before me, I **FIND** that Ms. Holmes-Williams was essentially a competent and effective teacher although she did receive a "Letter of Counselling" because of a confrontation with her immediate supervisor, Ms. McGovern. Ms. Holmes-Williams was fully aware of the requirement that all contacts with inmates be in a professional manner and of the serious threat to security which would result from undue familiarity. Ms. Holmes-Williams was cognizant of the disciplinary consequences which would flow from improper relationships with inmates. I **FIND** that Ms. Holmes-Williams willingly acted as co-liaison for the prisoner organization A.M.I.R.A. and by doing so performed a necessary service for the institution. This position also provided her with the opportunity to meet Inmate Hillard Phillips who was not only a member of A.M.I.R.A. but also on its Board and head of its Speakers' Bureau. Through their involvement with A.M.I.R.A., the two met several times a week at general membership and board meetings and A.M.I.R.A. functions. They also were alone together before class when Inmate Phillips's delivered A.M.I.R.A. papers or when duplicating A.M.I.R.A. material or when Ms. Holmes-Williams would send for him. These contacts provided the opportunity for the development of a relationship between the two and for the exchange of personal information between them. When Inmate Phillips was transferred, Ms. Holmes-Williams could have terminated the relationship without disciplinary consequence to herself. She chose not to do so but rather engaged in a clandestine correspondence with Inmate Phillips calculated to avoid detection.

43. I **FIND** that Ms. Holmes-Williams's general denial of a romantic relationship with Inmate Phillips is clearly outweighed by the evidence before this tribunal

including the believable admission by Inmate Phillips that a relationship with Ms. Holmes-Williams existed; the copies of correspondence sent by Inmate Phillips to Ms. Holmes-Williams; the gift sent by Inmate Phillips to Ms. Holmes-Williams as a sign of his affection for her; Inmate Phillips's possession of personal information about Ms. Holmes-Williams which could only have been disclosed by her and the romantic letter and cards written by Ms. Holmes-Williams to Inmate Phillips.

Based upon the above, I **FIND** that the State Department of Corrections has established by a preponderance of the credible evidence that Ms. Holmes-Williams engaged in an improper relationship with Inmate Hillard Phillips; that the relationship, which was romantic in nature, exceeded the professional relationship between correctional staff and inmate; that the relationship was furthered by means of an unauthorized correspondence with Inmate Phillips undertaken in a surreptitious manner to avoid detection and that the relationship between Ms. Holmes-Williams and Inmate Phillips had the potential of compromising the security of Riverfront State Prison. The State Department of Corrections has, therefore, established by a preponderance of credible evidence that Ms. Holmes-Williams was guilty of conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(A)6.

LEGAL DISCUSSION

State statutes grant teachers in New Jersey the right to tenure. The law protects teachers from being dismissed for "unfounded, flimsy or political reasons." Zimmerman v. Newark Board of Education, 38 N.J. 65, 70-72 (1962) certif. denied 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d (1963). Under N.J.S.A. 18A:7B-11 teachers employed in State facilities, including correctional facilities, have the same rights as were enjoined by teachers in the earlier Garden State School District. Teachers in correctional facilities, such as the Riverfront State Prison, are therefore protected by tenure as encompassed in N.J.S.A. 18A:6-10.

It is well recognized, however, that teachers employed in correctional facilities are subject to security regulations unique to those institutions. Indeed, the Commissioner of Education has underscored that teachers in correctional institutions share with custodial employees a duty to maintain the security of their institution. In the Matter of the Tenure Hearing of Russell Somano, Southern State Correctional Facility, 295-92.

Essential to maintaining the safety and security of correctional facilities is the regulation precluding unduly familiar relationships between correctional staff members, including teachers, and inmates. In Bowden v. Bayside State Prison, A-4766-91T1 (App. Div. 1993) the Appellate Division, recently reviewed the discipline imposed upon a correctional officer who was found guilty of playing cards with inmates and with paying off his gambling debts by bringing cigarettes into the institution. The Merit System Board had imposed a six-month suspension rather than the removal sought by Bayside State Prison. The Appellate Division reversed the Merit System Board finding that Bowden's conduct subverted the discipline at Bayside State Prison and warranted his dismissal. The court followed the holding of the Supreme Court of New Jersey in Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980) which

> . . . recognized the danger which inheres when order and discipline are disrupted or destroyed in a prison. The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become 'tinderboxes.'
>
> [Bowden, Slip Op. at 5]

In the present matter, Ms. Holmes-Williams became involved in an unduly familiar relationship with Inmate Phillips. She continued that relationship after Inmate Phillips's transfer to another institution when she could have terminated it without disciplinary consequence to herself. Recognizing the seriousness of her breach, Ms. Holmes-Williams continued the relationship in a surreptitious manner in order to avoid detection. Through their channels of communication, Ms. Holmes-Williams was able to pass personal information to Inmate Phillips. Ms. Holmes-Williams could easily have passed confidential institutional information to Inmate Phillips which could have endangered the safety and security of the institution. Even Ms. Holmes-Williams, in her most recent legal submission, acknowledged that "undue familiarity with inmates is sanctionable conduct" (Rsb-1).

Based upon these considerations, it is determined that Ms. Holmes-Williams's conduct seriously subverted the discipline at Riverside State Prison and warranted her termination as a teacher in the employ of that institution.

UNFAIR LABOR CHARGE

FINDINGS OF FACT

Having carefully considered the testimony of Ms. Holmes-Williams and the witnesses presented in support of her position as well as the testimony of witnesses presented by the State Department of Corrections, and having had the opportunity to view the demeanor of these witnesses as they gave their testimony, and having fully reviewed the numerous exhibits entered into evidence, I **FIND** the following:

1. Jacqueline Holmes-Williams has been a shop steward with C.W.A. at Riverfront State Prison for six years. In this capacity, Ms. Holmes-Williams represented anyone in the professional unit in the grievance process with management. She also filed grievances on her own behalf.

2. Ms. Holmes-Williams was named Department of Corrections Shop Steward of the Year in recognition of her efforts at Riverfront to assure enforcement of the union contract, policies and procedures.

3. Ms. Holmes-Williams also attended union conventions on a regular basis and unsuccessfully ran for State Senate as part of a slate of union activists who ran as independents. Following her suspension from Riverfront, Ms. Holmes-Williams has been working as a union representative for C.W.A. 1040, handling grievances for other teachers.

4. Because of her heavy caseload, Ms. Holmes-Williams requested that Elizabeth Monaghan, a reading specialist at Riverfront, also be named as Shop Steward. This appointment was made in 1989 and Ms. Monaghan generally represented Ms. Holmes-Williams in her grievance proceedings. Ms. Monaghan is currently Shop Steward of the Year in recognition of her efforts to vigorously enforce the union contract.

5. From January 29, 1991 through January 10, 1992, Ms. Holmes-Williams filed a minimum of sixteen grievances on her own behalf. Ms. Monaghan represented her in the majority of these proceedings while either Ms. McGovern, Ms. Holmes-Williams'immediate supervisor, or Mr. Bartkowski, her general supervisor, appeared on behalf of management.

6. Ms. Holmes-Williams filed three grievances on January 29, 1991, which sought to have her P.A.R.S. evaluation rewritten (R-7, R-8, R-9). On June 20, 1991, she filed three grievances challenging the refusal to relieve her of non-teaching duties (R-10, R-11 and R-12). Three grievances were filed by Ms. Holmes-Williams on September 6, 1991 challenging her classroom observation reports (R-13, R-14 and R-15). She filed two grievances on September 23, 1991: the first complained of an incomplete telephone message taken for her while she was away from Riverfront campaigning for the State Senate (R-16); the second challenged her supervisor's "harassing" action in returning a Tour Report to her (R-17). On October 9, 1991, Ms. Holmes-Williams filed three grievances seeking to have a "Letter of Counselling" (R-21) expunged from her record (R-18, R-19 and R-20). A single grievance was filed on December 9, 1991 challenging the refusal of release time so that Ms. Holmes-Williams might prepare for a grievance hearing on December 5, 1991 (R-22). Ms. Holmes-Williams filed a final grievance on January 10, 1991, in which she challenged the language in her "final P.A.R.S." as false and misleading (R-23). Ms. Holmes-Williams was successful in this last grievance and management was directed to rewrite her evaluation. The other fifteen grievances filed by Ms. Holmes-Williams on her own behalf during 1991 were denied either at the first or second step of the process.

7. Prior to 1991, Ms. Holmes-Williams filed, on her own behalf, a minimum of fifteen grievances per year for the last five years. However, in the early years she filed as many as forty-five grievances to correct a situation where the teachers were treated as the stepchildren of the institution. Some of these "bulk" grievances involved herself alone while others involved the group of teachers including herself. Ms. Holmes-Williams also filed grievances solely on behalf of others.

8. Because the number of grievances fluctuated, Ms. Holmes-Williams sometimes attended between three to five hearings a month; while at other times, she was involved in more than fifteen hearings a month. She also attended several informal meetings per month in an effort to resolve problems before that were formalized as grievances.

9. In January, 1991, Ms. McGovern objected to Ms. Holmes-Williams meeting with a member of the Professional Unit during her class preparation time. Teacher

preparation time was not to be used for either union or personal business and Ms. McGovern sent Ms. Holmes-Williams a memorandum to that effect (R-27).

10. During 1991, four teachers were having a discussion and closed the door to the classroom where they were gathered. Mr. Bartkowski, their general supervisor, pushed the door open and remained in the room until the teachers departed. He asked if they were doing their class prep and expressed concern they were conducting personal or union business during the time set aside to prepare for class.

11. With Mr. Bartkowski's approval, Ms. McGovern met with a counsellor from the Employees Advisory Service, a support service offered through the Department of Personnel. She hoped to receive assistance from an unbiased third party, in dealing with the negative attitudes of three of her staff members. The counsellor suggested that these teachers come to him so that he could help resolve their differences. The counsellor also asked to see the grievances filed by the teachers to understand the type of issues they were grieving. With Mr. Bartkowski's approval, the three teachers, Ms. Monaghan, Ms. Holmes-Williams and Ms. Darkatsh, were referred to the E.A.S. for counselling (R-24 and R-25). These three were referred since they were the ones with whom Ms. McGovern was experiencing difficulties. Ms. Holmes-Williams went to the scheduled session on December 9, 1991, but refused to participate when she saw that the counsellor had a stack of her grievances. An Unfair Labor Charge, which is still pending, was filed with P.E.R.C. on behalf of the three teachers (R-26) concerning their referral to E.A.S.

12. On October 2, 1991, Ms. McGovern sent a "Letter of Counselling" (R-21) to Ms. Holmes-Williams following an incident wherein Ms. Holmes-Williams yelled at her superior, in front of other staff members, when asked to provide an inmate's file. Ms. Holmes-Williams filed three grievances seeking to have this letter expunged (R-18, R-19 and R-20).

13. At the request of Superintendent Hundley, Mr. Bartkowski scheduled meetings with each teacher individually in an effort to resolve the differences between staff and supervisors. Ms. Holmes-Williams appeared for her session on January 22, 1992 but loudly expressed her view that nothing would be accomplished since the Superintendent and Assistant Superintendent were not present. After approximately ten minutes, Ms. Holmes-Williams exclaiming that she was

no "house nigger," declared the meeting over and left. Mr. Bartkowski sent a memorandum to Ms. Holmes-Williams on the same day criticizing her conduct (R-28).

14. Ms. Holmes-Williams, as well as two other teachers, Ms. Monaghan and Ms. Darkatsh, had difficulties with Ms. McGovern's supervising style. Ms. McGovern appeared to be somewhat rigid particularly in her demands that staff submit required paperwork in a timely and complete fashion. This material was necessary to support educational funding provided the institution. As a general rule, Mr. Bartkowski did not experience difficulties with the three teachers.

15. Mr. Bartkowski and Ms. McGovern were aware of the grievances filed by Ms. Holmes-Williams since one of them would generally represent management at the grievance proceedings. These supervisors were also aware of her activities as a Shop Steward and as a candidate for State Senate.

16. Mr. Bartkowski, although eligible to do so, has chosen not to join the union. Ms. McGovern, a member of C.W.A. from 1981 through 1991, withdrew because she felt that the interests of supervisors and assistant supervisors were not adequately represented.

17. Ms. Holmes-Williams's general and immediate supervisors, Mr. Bartkowski and Ms. McGovern, played no role in the on-going investigation into her suspected relationship with Inmate Hillard Phillips. These supervisors were also not involved in the decisions to confront Ms. Holmes-Williams; to offer her the option to resign in good standing and, when that option was rejected, to suspend her. Those decisions, made by the Superintendent of Riverfront, were based on concerns for institutional security and were made following the investigation by members of the autonomous Internal Affairs Unit. The disciplinary action taken was not based on Ms. Holmes-Williams's deficiencies as a teacher. Since her suspension resulted from an improper relationship with an inmate which subverted the security of the correctional institution, her educational supervisors were not brought into the decisional process by the Riverfront administration.

18. Senior Investigator Dyrnes and Principle Investigator Assante, who were responsible for the investigation into the suspected relationship between Ms.

Holmes-Williams and Inmate Phillips, are both union members and have both held positions of leadership in their union. There was no evidence that the two investigators knew of Ms. Holmes-Williams's union activities. The two investigators were not directed or influenced in the conduct of the investigation by anyone in administration at Riverfront. (Cf. Tenure Charges, Finding of Fact No. 39.)

19. Thomas Hundley, Superintendent of Riverfront, ultimately decided that Ms. Holmes-Williams should be confronted with the evidence of her relationship with Inmate Phillips and should be offered the opportunity to resign in good standing. This option was offered to limit damage to Ms. Holmes-Williams's reputation which could impact future employment as a teacher. For reasons of institutional security, Superintendent Hundley authorized Ms. Holmes-Williams immediate suspension when she declined to resign her position.

20. Superintendent Hundley has been amenable to the union on various issues. When a staff lounge was removed, Superintendent Hundley intervened in an effort to restore it. The Superintendent endeavored to alleviate difficulties between supervisors and staff so that there could be coooperation among employees at every level.

21. Based upon the above, I **FIND** that the sole reason for suspending and removing Ms. Holmes-Williams was her improper relationship with an inmate which relationship subverted the security and discipline of a correctional institution. I **FIND** that Ms. Holmes-Williams's union activities played no part in the decision to discipline her. Indeed, the extensive record developed herein shows no factual nexus between (a) the independent investigation conducted by members of the autonomous Internal Affairs Unit at Riverfront and (b) Ms. Holmes-Williams's union activities involving her supervisors in the education department of that institution.

22. I **FIND** further that the supervisors in the education department at Riverfront State Prison made every effort, within the confines of an extremely small staff, to accommodate Ms. Holmes-Williams's union activities. Indeed, although Ms. Holmes-Williams has been a union activist at Riverfront for six years, the extensive record herein disclosed only two instances where the education supervisors questioned whether she was engaged in union activities during her class preparation time. Further, although the teachers, including Ms. Holmes-

Williams, had difficulties with Ms. McGovern, those difficulties were not the result of any hostility to the union but rather more of a personalty conflict. Indeed, Ms. McGovern tried to alleviate those difficulties through the Employee Advisory Service. The Superintendent also directed Mr. Bartkowski to meet with each teacher, in yet another effort to resolve the difficulties between supervisor and staff. Ms. Holmes-Williams refused to participate in either the session scheduled with the Employees Advisory Service or in the conference scheduled in accordance with Superintendent Hundley's instructions. I **FIND** these two sessions were not indicia of hostility to Ms. Holmes-Williams but rather attempts to develop a cooperative, positive relationship between the teachers and supervisory staff.

23. I **FIND** that Jacqueline Holmes-Williams has established by a preponderance of the evidence herein that she was engaged in activities protected under the New Jersey Employer-Employee Relations Act and that her employers knew of those activities. However, Ms. Holmes-Williams has failed to establish that those union activities were a substantial or motivating factor in bringing tenure charges against her.

LEGAL DISCUSSION

The New Jersey Employer-Employee Relations Act prohibits public employers from

> (a)(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed them by this Act;
>
> * * *
>
> (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them.
>
> [N.J.S.A. 34:13A-5.4]

A public employer, including administrators in the State correctional facilities, are clearly prohibited from disciplining public employees in retaliation for the exercise by those employees of rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

The Supreme Court of New Jersey, in In re Bridgewater Tp., 95 N.J. 235 (1984), considered the more difficult situation where dual motives are asserted for disciplinary action. In that case, the Township contended that the employee, Anthony Longo, was transferred for legitimate organizational reasons while the union asserted that the transfer was made in reprisal for Mr. Longo's union activities. The Supreme Court concluded that when dual motives are asserted, the employee must first establish that the protected activity was a substantial, motivating factor in the employer's disputed action. In the absence of direct evidence of anti-union motivation,

> . . . a prima facie case must be established by showing that a employee engaged in protected activity, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected right.
>
> [In re Bridgewater, 95 N.J. at 246]

Once the employee makes that showing, the burden shifts to the employer to establish by a preponderance of the evidence that the action was taken for legitimate business reasons and not in retaliation for union activities. The Supreme Court underscored that public employers clearly retain the right to discharge employees for legitimate business reasons unrelated to the employee's union activities. Those reasons, however, most be genuine and not a mere pretext for discipline based on anti-union motivation.

The Public Employment Relations Commission, addressing the burden of proof in dual motivation cases, has emphasized that

> Proving that one engaged in protected activity and that the employer was aware of it does not, of course, establish a violation. The critical element is the requirement that the employer was hostile towards the protected activity. While that may be established by inference, it is not sufficient merely to establish the presence of anti-union animus. That, in the words of our Supreme Court, is not enough. Indeed, it is not sufficient to find that animus played a part in the decision. Compare, Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 *NJPER* 71 (1977). Rather, the test requires that such animus was a 'motivating force or a substantial reason for the employer's action.' Bridgewater at 242.
>
> [Middletown Township Board of Education, P.E.R.C. No. 86-142, 12 NJPER 17194 (1986) (Emphasis added)]

In the present case, Ms. Holmes-Williams has established that she was engaged in protected union activities at Riverfront State Prison and that her employer was

aware of those activities. However, Ms. Holmes-Williams has failed to establish that her employer was "hostile" to those union activities and that that "hostility" was "a motivating force or a substantial reason" for the disciplinary action taken against her. Ms. Holmes-Williams was suspended as a result of an investigation conducted by members of the autonomous Internal Affairs Unit within the institution. Ms. Holmes-Williams was disciplined because that investigation yielded evidence of an improper relationship with an inmate and such action on her part subverted the order, security and discipline essential to correctional facility. Ms. Holmes-Williams presented no evidence which would establish that the employer's "hostility" to her protected activities was a factor, much less a substantial factor or motivating reason, for her removal from Riverfront State Prison. During her six years as a Shop Steward, Ms. Holmes-Williams was able to demonstrate but two instances when she was reminded that "class prep" time should not be used for union or personal business. Ms. Holmes-Williams also established that her employee, on two occasions, attempted to resolve differences between supervisors and staff, the first attempt was through the Employees Advisory Service and the second through individual conferences. It does not appear that these incidents constitute "anti-union animus" under the Middletown Township Board of Education rationale. However, even if these acts could be so construed, the administrative record herein is devoid of any nexus between that asserted hostility and the actual decision to discipline Ms. Holmes-Williams. That decision was solely motivated by concerns for institutional security. Ms. Holmes-Williams's union activities was simply not a factor considered in determining to discipline this employee.

Ms. Holmes-Williams has, therefore, failed to meet the burden of proof allocated to employees under the Bridgewater Tp. rationale. She has failed to establish a prima facie case that anti-union animus was a motivating factor in her removal from Riverfront State Prison. The Unfair Labor Charge should, therefore, be denied. Since Riverfront State Prison has not violated the provisions of the New Jersey Employer-Employee Relations Act, there is no basis to order specialized remedial relief under that Act.

In accordance with the Joint Order entered herein on February 25, 1993, I hereby **FILE** this Initial Decision with the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for a determination whether Jacqueline Holmes-Williams was engaged in activity protected under the New Jersey Employer-Employee Relations Act and whether that activity, if protected, was a substantial or motivating factor in bringing tenure charges against her.

This recommended decision, as it addresses these issues, may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**. If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not adopt, modify or reject that portion of this decision within forty-five (45) days and unless such time limits is otherwise extended, this recommended decision on the above issues will become final in accordance with N.J.S.A. 52:14B-10.

The **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall then forward the record, including this recommended decision and its final decision on the Unfair Labor Charges to the Commissioner of Education who will determine whether the bringing of Tenure Charges was for legitimate business reasons and who will issue a final decision on the Tenure Charges.

Upon transmitting the record, the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** within forty-five (45) days of the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** decision. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not render a final decision within the extended time, this recommended decision on the tenure charges shall become the final decision.

The **COMMISSIONER OF EDUCATION** shall return the record herein, including this recommended decision and both the final decisions, to the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for its determination of whether any specialized remedial relief may be ordered under its Act. Upon transmitting the record, the **COMMISSIONER OF EDUCATION** shall, pursuant to N.J.A.C. 1:1-17.8(c) request an extension to permit the rendering of a final decision on the issue of the remedial relief by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** within forty-five (45) days of the Tenure determination. If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not render a final decision within the extended time, this recommended decision on the issue of remedial relief shall become the final decision.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, 495 West State Street, CN 429, Trenton, New Jersey 08625**, marked "Attention: Exceptions." Those exceptions will address that portion of the Initial Decision concerning the (1) Unfair Practice Charge and (2) any specialized relief appropriate under the New Jersey Employer-

Employee Relations Act. Within that same timeframe, any party may file written exceptions to that portion of the Initial Decision addressing the Tenure Charges with the **COMMISSIONER OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions."

12-22-93
DATE

Mary Ann Burgess
MARY ANN BURGESS, ALJ/TA

Receipt Acknowledged:

12/28/93
DATE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Receipt Acknowledged:

12/29/93
DATE

Maureen R. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 05 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jz

WITNESSES

FOR PETITIONER:

Barney Dyrnes
Senior Investigator
Riverfront State Prison

Bruce Assante
Principal Investigator
Riverfront State Prison

Gregory Bartkowski
Supervisor of Education
Riverfront State Prison

William Finney
Assistant Superintendent
Riverfront State Prison

James J. Lennon
Senior Investigator/Document Examiner
Department of Corrections

Cinthia Maszkiewicz Mc Govern
Former Asst. Supervisor-Education
Riverfront State Prison

FOR RESPONDENT:

Jacqueline Holmes-Williams
Respondent

Hillard Phillips
Inmate No. 64343
Northern State Prison

Elizabeth Monaghan
Teacher I
Riverfront State Prison

Starr Kirkland
Former Librarian
Riverfront State Prison

EXHIBITS

FOR PETITIONER:

P-1	Statement of Informant, dated September 21, 1991 (redacted to prevent identification of informant)
P-2	Statement of Informant, dated September 15, 1991 (redacted to prevent identification of informant)
P-3	Incident Report, prepared by Barney Dyrnes, Senior Investigator, undated; transmitted June 1, 1992.
P-4	Request to Monitor Mail of Hillard Phillips, dated October 2, 1991
P-5	Copy of photograph of Jacqueline Holmes-Williams
P-6	Monitored Correspondence: Phillips to Edwards, two-page document, dated October 5, 1991
P-7	Monitored Correspondence: Phillips to Knighton and Phillips to Williams; seven-page document; date of incident October 15, 1991
P-8	Visitor Identification Card, Hillard Phillips, dated October 1, 1991
P-9	Monitored Mail: Phillips to Williams and Phillips to Knighton; five-page document; date of incident, October 25, 1991
P-10	Monitored Mail: W. Phillips to H. Phillips; six-page document, dated November 1, 1991
P-11	Monitored Mail: Edwards to Phillips; two-page document, dated October 30, 1991
P-12	Monitored Mail: fourteen page document
P-13	Monitored Mail: Phillips to Edwards; three-page document, dated December 18, 1991
P-14	Monitored Mail: Phillips to Knighton; two-page document, dated January 4, 1992
P-15	Monitored Mail: Phillips to Knighton; five-page document, dated February 10, 1992
P-16	Monitored Mail: Phillips to Edwards; four-page document, dated February 9, 1992
P-17	Monitored Mail: Pickett to Phillips; eight-page document together with original photograph and certified mail envelope; received, February 11, 1992
P-18	Monitored Mail: Phillips to Edwards; three-page document, dated February 12, 1992
P-19	Monitored Mail: W. Phillips to H. Phillips; six-page document together with original photograph, dated February 13, 1992

P-20 Monitored Mail: Phillips to Knighton; five-page document, dated February 18, 1992

P-21 Monitored Mail: W. Phillips to H. Phillips; section of brown wrapping paper, postmarked February 11, 1992

P-22 Three-page document with ANKK Symbol

P-23 Blank envelope and card

P-24 Blank envelope and card

P-25 Blank envelope and card

P-26 Blank envelope and card

P-27 Blank envelope and card

P-28 Envelope addressed to Inmate Phillips from Warenthia Phillips

P-29 Envelope addressed to Inmate Phillips from Warenthia Phillips together with card

P-30 Blank envelope and card

P-31 Blank envelope and card

P-32 Blank envelope and insert

P-33 Original photograph of Jacqueline Holmes-Williams

P-34 Inmate Receipt, Contraband Seizure, signed by Sr. Investigator Dyrnes

P-36 Tour Reports of Jacqueline Williams, dated January 24, 1992, January 6, 1991, December 19, 1991, December 9, 1991, November 26, 1991, November 20, 1991, November 15, 1991, October 31, 1991, October 10, 1991, September 23, 1991, September 13, 1991, August 30, 1991

P-37 Handwriting Exemplars of Jacqueline Holmes-Williams BMD 3-1A through BMD 3-1J; BMD 4-1A through BMD 4-1J; BMD 1A through BMD 1J; BMD 2A through BMD 2J

P-38 Request for Examination of Documents, dated February 25, 1992

P-39 Report of Document Examination, prepared by James J. Lennon, dated April 22, 1992

P-40 Handbook of Information and Rules for Employees of the Department of Corrections

P-41 Receipt of Jacqueline Holmes-Williams, undated

P-42 Games Criminals Play, Bud Allan ad Diana Bosta, 1981

P-43 Rules Governing Relationships with Inmates

P-44 Memorandum from Ms. Williams and Ms. Gordon, dated August 30, 1990

P-45 Letter from Mr. Bartkowski to Ms. Williams, dated June 7, 1990

FOR RESPONDENT:

R-2 Special Report from J. Williams, dated September 23, 1991, together with copy of obscene letter

R-3 Memorandum from C. Maszkiewicz to Education Staff, dated May 17, 1991

R-4 Special Report from J. Williams, dated November 11, 1991, concerning missing toolbox

R-5 Special Report J. Williams, dated January 3, 1992, concerning missing supplies.

R-7 Grievance Procedure Form, dated January 29, 1991

R-8 Grievance Procedure Form, dated January 28, 1991

R-9 Grievance Procedure Form, dated January 29, 1991

R-10 Grievance Procedure Form, dated June 20, 1991

R-11 Grievance Procedure Form, dated June 20, 1991

R-12 Grievance Procedure Form, dated June 20, 1991

R-13 Grievance Procedure Form, dated September 6, 1991

R-14 Grievance Procedure Form, dated September 6, 1991

R-15 Grievance Procedure Form, dated September 6, 1991

R-16 Grievance Procedure Form, dated September 23, 1991

R-17 Grievance Procedure Form, dated September 23, 1991

R-18 Grievance Procedure Form, dated October 9, 1991

R-19 Grievance Procedure Form, dated October 9, 1991

R-20 Grievance Procedure Form, dated October 9, 1991

R-21 Memorandum from C. Maszkiewicz to Jacqueline Williams, dated October 2, 1991

R-22 Grievance Procedure Form, dated December 9, 1991

R-23 Grievance Procedure Form, dated January 10, 1992

R-24 Memorandum from C. Mc Govern to J. Williams, dated December 9, 1991

R-25 Memorandum from B. Darkatsh, E. Monaghan and J. Williams to G. Bartkowski, dated December 11, 1991

R-26 Unfair Practice Charge, Docket No. CO-92-188, filed December 17, 1991

R-27 Memorandum from C. Maszkiewitz to J. Williams, dated January 31, 1991

R-28 Letter from G. Bartkowski to J. Williams, dated January 22, 1992

R-34 Special Report from Elizabeth Monaghan, dated June 7, 1989

R-35 Special Report from Elizabeth Monaghan, dated November 15, 1990

R-36 Special Report from Elizabeth Monaghan, dated March 5, 1992

R-37 Special Report from Elizabeth Monaghan, dated April 22, 1992

R-38 Special Report from Elizabeth Monaghan, dated July 13, 1992

R-39 Special Report from Elizabeth Monaghan, dated July 20, 1992

R-40 Special Report from Elizabeth Monaghan, dated December 10, 1992

R-41 Special Report from Elizabeth Monaghan, dated December 14, 1992

R-42 Special Report from Elizabeth Monaghan, dated January 5, 1993

R-43 Special Report from Elizabeth Monaghan, dated March 8, 1993

R-44 Memorandum from Personnel to Monaghan, Williams and Darkatsh, dated March 18, 1992, concerning grievance hearing 92-9 to 14

R-45 Memorandum from Elizabeth Monaghan to Thomas Hundley, Superintendent, dated March 10, 1992, concerning return of personal belongings to J. Williams

P.E.R.C NO. 94-109

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and- Docket No. CO-H-93-25

COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1040,

Charging Party.

Appearances:

For the Respondent, Deborah T. Poritz, Attorney General
(Edward H. O'Hare, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Lisa Morowitz, of counsel)

DECISION AND ORDER

On July 16, 1992, the Communications Workers of America, Local 1040, a majority representative, filed an unfair practice charge against the State of New Jersey (Department of Corrections), a public employer. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4), and (7),[1/] when it filed tenure charges against Jacqueline

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration

Footnote Continued on Next Page

Holmes-Williams, a teacher at Riverfront State Prison, with the Commissioner.of Education. The tenure charges sought the termination of Holmes-Williams because she allegedly violated a department policy by becoming too friendly with an inmate, thus compromising prison security. The unfair practice charge specifically asserts that the tenure charges were baseless and were filed to retaliate against Holmes-Williams for pressing grievances, supporting unfair practice charges, and serving as a CWA shop steward.

On September 11, 1992, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The employer filed an Answer denying that the tenure charges were unfounded or retaliatory.

The Commissioner of Education and the Chairman of the Commission issued a joint order consolidating the tenure charges and the unfair practice charge for hearing before an Administrative Law Judge ("ALJ"). P.E.R.C. No. 93-78, 19 NJPER 170 (¶24087 1993). On April 1, 2, 12, and 13 and May 17 and 18, 1993, ALJ Mary Ann Burgess

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1/ Footnote Continued From Previous Page

of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

conducted a hearing. The parties examined witnesses,[2/] introduced exhibits, and filed post-hearing briefs.

On December 29, 1993, the ALJ issued her Initial Decision. Concluding that the employer had proven that Holmes-Williams had subverted discipline at Riverside State Prison by being unduly familiar with an inmate, she recommended that the Commissioner of Education sustain the tenure charges. Concluding that CWA had not proven that the protected activity of Holmes-Williams was a substantial or motivating factor in the decision to file the tenure charges, she recommended that the Commission dismiss the unfair practice charge.

The joint order consolidating the tenure charges and unfair practice charge for hearing also specified a three-step process for reviewing the ALJ's initial decision. First, the Commission would decide whether Holmes-Williams was engaged in activity protected by the New Jersey Employer-Employee Relations Act and whether hostility towards protected activity was a substantial or motivating factor in the bringing of tenure charges. Second, the Commissioner of Education would determine whether the tenure charges were brought for legitimate business reasons and should be sustained. Third, if an unfair practice was found, the matter would be returned to the Commission to consider what relief was appropriate under the New Jersey Employer-Employee Relations Act.

2/ A tape recording was made of the testimony, but neither party asked that transcripts be prepared.

On February 15, 1994, CWA filed exceptions on primarily legal grounds. It asserts that it submitted sufficient circumstantial evidence to establish that the employer was hostile towards the protected activity of Holmes-Williams and that this hostility motivated the decision to bring tenure charges. It also asserts that the employer's reason for dismissing Holmes-Williams --undue familiarity with an inmate-- was a pretext and that the ALJ erred in admitting the testimony of a handwriting analyst who was not qualified to give an expert opinion.

On March 22, 1994, the employer responded to CWA's exceptions. It asserts that the ALJ correctly concluded that anti-union animus did not motivate the tenure charges; Holmes-Williams did violate department policy against undue familiarity with inmates; and the handwriting analyst was a properly qualified expert.

We accept the ALJ's findings of fact concerning the unfair practice charge (Initial Decision at 62-67). We add to findings no. 2 and 3 that Holmes-Williams was named Shop Steward of the Year for 1991 and that she ran for the State Senate in 1991. We add to finding no. 5 that Cinthia McGovern, the immediate supervisor of Holmes-Williams, estimated that more grievances were filed in 1991 than in earlier years, even though she did not recall the precise number of grievances filed. We add to finding no. 13 that Holmes-Williams asked for CWA representation during the January 22, 1992 meeting because she believed the meeting had turned

disciplinary. Her request was denied because Greg Bartkowski, the general supervisor of Holmes-Williams, did not believe that the purpose of the meeting was disciplinary. The meeting ended.

In re Bridgewater Tp., 95 N.J. 235 (1984), sets forth the standards for evaluating allegations that a discharge was discriminatorily motivated in violation of subsections 5.4(a)(1) and (a)(3). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a

whole, that anti-union animus was a motivating or substantial reason for the personnel action.

Holmes-Williams was engaged in a great deal of protected activity. Between January 29, 1991 and January 10, 1992, she filed at least 16 grievances on her own behalf and she had filed many grievances in prior years as well. She also served as a CWA shop steward, earning an award as the 1991 steward of the year in the Department of Corrections. In addition, she attended union conventions and unsuccessfully ran for the State Senate on a slate of union activists. Her supervisors, McGovern and Bartkowski, knew of her protected activity.

There is no direct evidence of managerial hostility towards Holmes-Williams because of her protected activity. CWA asserts that the circumstantial evidence proves that McGovern and Bartkowski were hostile towards this activity and relies upon three events: (1) McGovern's referral of Holmes-Williams and two other teachers to the Employees Advisory Service in December 1991; (2) a meeting attended by McGovern, Bartkowski, and Holmes-Williams on January 22, 1992, and (3) a grievance filed by Holmes-Williams and sustained on February 7, 1992. The ALJ's findings of fact (Initial Decision at 64-65) about the referral and the meeting establish that they were part of a good faith attempt to improve staff relationships, not an

attempt to curb protected activity.[3/] The grievance involved whether Holmes-Williams should have been given an interim or a final evaluation. There is no evidence that its filing or resolution disturbed her supervisors.

Even if CWA had proved that McGovern and Bartkowski were hostile towards protected activity, the ALJ properly found that such hostility did not motivate the tenure charges. McGovern and Bartkowski were not part of that decision or the investigation preceding it. Instead the investigation was conducted by the Internal Affairs Unit after it received a tip from a reliable informant that Holmes-Williams and an inmate had been seen kissing. The investigation began in September 1992, before any of the three events relied upon by CWA to suggest anti-union animus, and produced the evidence that led to the decision to ask Holmes-Williams to resign. The decision was made by the Superintendent of Riverfront without any input from McGovern or Bartkowski. There is no evidence in the record suggesting that the Superintendent harbored any hostility towards protected activity.

We therefore conclude that CWA has not demonstrated that hostility towards protected activity was a substantial or motivating factor in bringing the tenure charges.

3/ CWA asserts that the referral to EAS constituted an independent violation of subsection 5.4(a)(1). That allegation was not pleaded in this unfair practice charge and will not be considered now. An unfair practice charge (CO-92-188) concerning the referral is still pending.

CWA asserts that the ALJ erred in finding that a handwriting analyst was an expert and in accepting his testimony. We decline to consider that question since it concerns the admissibility and sufficiency of the evidence to sustain the tenure charges. We will forward the record to the Commissioner of Education to consider the tenure charges.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: April 28, 1994
Trenton, New Jersey
ISSUED: April 29, 1994

OAL DKT. NO. EDU 6849-92 and PRC 2301-93 (CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF JACQUELINE HOLMES-	:	COMMISSIONER OF EDUCATION
WILLIAMS, RIVERFRONT STATE	:	DECISION
PRISON, NEW JERSEY STATE	:	
DEPARTMENT OF CORRECTIONS.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Consistent with the ALJ's procedural directives as set forth at pp. 70-71 above, the Public Employment Relations Commission (PERC) issued its final decision on the Unfair Labor Charges on April 29, 1994 and obtained an extension of time so that the Commissioner of Education might issue his final decision on the tenure charges below within forty-five (45) days of PERC's decision. Exceptions to all aspects of the initial decision were filed by Holmes-Williams ("Williams"), as were replies thereto by the Department of Corrections ("Department"), likewise in accordance with the ALJ's directives and duly granted extensions.

In her exceptions addressing the tenure charges, Williams renews her contention that the reasons for her dismissal were pretextual, arising from animus between herself and her superiors. She asserts that the ALJ erred in finding a wall of

silence between her supervisors and the staff who participated in the investigation and filing of charges, noting that 1) the investigation was sparked in the first place by supervisor Bartkowski's passing to investigators of an anonymous "tip" about her alleged relationship with inmate Phillips; 2) Bartkowski maintained a continuing interest in the outcome of the "tip" he supplied; and 3) it was highly unlikely, given general testimony about how widely and quickly talk of staff-inmate relationships was known to spread, that supervisor McGovern would somehow have been unaware of the allegations regarding Williams and Phillips. (Exceptions, at pp. 13-14)

Williams further reiterates that there is no valid evidence of any improper relationship between herself and Phillips. There is, she contends, no proof of her having visited or attempted to visit Phillips after his transfer, and the only "evidence" of undue familiarity between them, certain correspondence to and from Phillips, fails because letters purportedly authored by Williams were not indisputably linked to her. (Exceptions, at pp. 14-15)

In this regard, Williams specifically questions the ALJ's determination to credit the testimony of Senior Investigator Lennon. Lennon was not, according to Williams, the independent, qualified expert the Department should have produced to sustain its case. Rather, his only full-time employment has been with the Department, and document examination is only one of his duties as Senior Investigator, not a separate job title with corresponding

Civil Service specifications. His only pertinent training was a two-week course with the U.S. Secret Service Agency in 1991, and he was unable to state whether his supervisor in that program was a "board certified expert." Lennon has never taken a proctored examination, published any professional articles, subscribed to any professional journals, nor taken any refresher courses. Although he is aware of commonly used technical dictionaries, he routinely uses the Layman's Guide to Document Examination. Lennon is uncertified and unlicensed, belongs to no nationally recognized board, and had only been examining documents for two years at the time of the investigation at issue herein. Thus, his qualifications are more akin to those of an apprentice than to those of an expert, and his opinion should not have been taken as that of a qualified professional. (Exceptions, at pp. 15-18)

Moreover, Williams continues, even assuming that Lennon had some degree of skill so as to be able to express a net opinion on handwriting comparison, he failed to identify the basis for that opinion through data and supporting rationale, having destroyed the worksheets underlying his final report and having demonstrated in testimony an unreliable memory as to the details of his analysis. Thus unsubtantiated, Lennon's opinion as to the authorship of key documents should not have been accepted as the basis for tenure charges, particularly where his opinion was both contradicted by the testimony of inmate Phillips and belied by the presence, within the documents at issue, of errors and modes of

diction more characteristic of a high school dropout than a teacher. (Exceptions, at pp. 18-23)

In reply, the Department contends that, contrary to Williams' assertions, the record fully supports the ALJ's finding that the determination to file tenure charges was made for legitimate business reasons and was in no way based on animus toward Williams, for union activity or otherwise. On the contrary, the record overwhelmingly shows that the investigation leading to the tenure charges was conducted independent of the central actors in, and initiated well in advance of the central events of, the activities cited by Williams as the source of the Department's alleged animus. Moreover, it was at all times governed by the recognition, embodied in numerous Department rules, regulations and guidelines well known to Williams, that activity of the type in which Williams was allegedly engaged presents an imminent threat to the security and integrity of a penal institution. Any such potential breach, must be, and consistently has been, investigated and acted on by the Department, so that Williams was not singled out for harsh or unusual treatment in any manner.

With respect to the Department's substantive case on the tenure charges themselves, the Department urges acceptance of the ALJ's findings and contests Williams' challenge to the credibility of Senior Investigator Lennon. Lennon was, the Department notes, specifically found qualified as an expert by the ALJ based on his Secret Service training and experience in examining over five

hundred documents over the past three years under the general supervision of a senior documents analyst; moreover, in addition to admitting that there are no uniformly recognized standards for the identification of "experts" in the field of document examination, Williams never established precisely what credentials would be required to qualify for "expert" designation, nor did she call any expert witness of her own to challenge Williams' professional credibility or rebut his findings. In response to Williams' contention that Lennon did not substantiate his opinions, the Department references Lennon's testimony as described in detail in the Initial Decision at pp. 23-26, and notes that work-related documents written by Williams, examples of which are part of the record herein, evince the very lack of language skill cited by Williams as evidence that she could not be the author of the documents at issue in the tenure matter.

Upon careful review and consideration of the record herein, the Commissioner affirms the initial decision of the ALJ with respect to the bringing and sustaining of tenure charges. Specifically, the Commissioner finds that the initial decision fully and fairly sets forth the testimony, evidence and arguments of the parties, and reaches from them factual conclusions that are overwhelmingly supported by the record, and legal conclusions that are consistent with both established decisional precedent and sound institutional policy. Nor has Williams raised anything in her exceptions sufficient, in the Commissioner's view, to warrant rejection of the ALJ's credibility determinations or counter the great weight of evidence against her own claims and defenses.

Accordingly, the initial decision of the Office of Administrative Law, finding that tenure charges were brought for legitimate business reasons and directing removal of Jacqueline Holmes-Williams from tenured employment with the New Jersey State Department of Corrections as of the date of the Commissioner's decision, is affirmed for the reasons well expressed therein. Further, this matter is forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a) for action with respect to Williams' certificate as it deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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*The ALJ's directive, at p. 70 above, that this matter be returned to PERC following the Commissioner's decision for determination as to any specialized remedial relief to be ordered under the New Jersey Employer-Employee Relations Act, is rendered moot by PERC's April 29, 1994 determination affirming the initial decision on the Unfair Labor Charges and dismissing CWA's complaint. (See May 2, 1994 transmittal letter to the Commissioner of Education from PERC Chairman James W. Mastriani)

JUNE 13, 1994

DATE OF MAILING - JUNE 14, 1994

155-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MOUNT LAUREL, BURLINGTON	:	
COUNTY.	:	
	:	

JUNE 17, 1994

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MOUNT LAUREL, BURLINGTON	:	
COUNTY.	:	
	:	

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 April 19, 1994 in the School District of the Township of Mount Laurel, Burlington County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Marshall J. Craig	1,497	28	1,525
Rene Leimberg	1,471	25	1,496
William Youse	1,328	16	1,344
Robert M. Sacks	1,312	17	1,329

In response to a letter request from Robert M. Sacks, filed April 28, 1994 pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the office of the Burlington County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on May 16, 1994 at the Burlington County Superintendent of Elections Office, Eayrestown Road, Mount Holly.

The the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Marshall J. Craig	1,499	28	1,527
Rene Leimberg	1,472	25	1,497
William Youse	1,330	16	1,346
Robert M. Sacks	1,312	17	1,329

While a slight change in the results was found, the original outcome remained the same.

The Commissioner's representative therefore finds that Marshall J. Craig, Rene Leimberg, and William Youse were elected to full terms of three years each on the Board of Education of the School District of the Township of Mount Laurel.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Marshall J. Craig, Rene Leimberg and William Youse were elected to full terms of three years each on the Mount Laurel Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 17, 1994

DATE OF MAILING - JUNE 17, 1994

156-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WILLINGBORO, BURLINGTON COUNTY.	:	
_____	:	

JUNE 17, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF WILLINGBORO, BURLINGTON COUNTY. :
:

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 April 19, 1994 in the School District of the Township of Willingboro, Burlington County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Rodriguez	1,308	6	1,314
Margaret A. Reynolds	1,244	7	1,251
Cindi Seider Collins	974	3	977
Robert F. Goodson	968	1	969
Patricia C. LaRocco	774	1	775
Donald C. Robbins, Sr.	756	0	756
Hosey Best	545	6	551
Willinell Wright	540	0	540
Tony John	420	0	420

In response to a letter request from Robert F. Goodson, filed April 29, 1994 pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the office of the Burlington County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on May 16, 1994 at the Burlington County Superintendent of Elections Office, Eayrestown Road, Mount Holly. Absentee ballots were included pursuant to the broad authority granted the Commissioner for the 1994 election by P.L. 1994, c. 6.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Rodriguez	1,308	6	1,314
Margaret A. Reynolds	1,250	7	1,257
Cindi Seider Collins	974	3	977
Robert F. Goodson	968	1	969
Patricia C. LaRocco	774	1	775
Donald C. Robbins, Sr.	756	0	756
Hosey Best	545	6	551
Willinell Wright	540	0	540
Tony John	420	0	420

While a slight change in the results was found, the original outcome remained the same.

The Commissioner's representative therefore finds that Robert Rodriguez, Margaret Reynolds, and Cindi Seider Collins were elected to full terms of three years each on the Board of Education of the School District of the Township of Willingboro.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, as announced at the conclusion of the election, Robert Rodriguez, Margaret Reynolds and Cindi Seider Collins were elected to full terms of three years each on the Willingboro Board of Education.

IT IS SO ORDERED.

JUNE 17, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - JUNE 17, 1994

158-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
HOBOKEN, HUDSON COUNTY.	:	
	:	

JUNE 17, 1994

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
HOBOKEN, HUDSON COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each, and for the General Fund proposition, at the annual school election held on April 19, 1994 in the School District of the City of Hoboken, Hudson County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
David Anthony	4384	129	4513
Peter B. Belfiore	4202	123	4325
Sandra Ramos	4004	118	4122
Mario Mercado	2960	139	3099
Renee Turonis	2764	138	2902
Jonathan Gordon	2650	134	2784
GENERAL FUND PROPOSITION			
YES Votes	1921	88	2009
NO Votes	1915	127	2042

Pursuant to letter requests from Arnold M. Mellk, Esq., filed April 27, 1994 on behalf of ten qualified voters pursuant to N.J.S.A. 18A:14-63.3, and from Jonathan Gordon, filed April 25, 1994 pursuant to N.J.S.A. 18A:14-63.2, an authorized representative of the Commissioner of Education from the office of the Hudson County Superintendent of Schools was directed to conduct a recount of the

ballots cast. The recount was conducted on May 6, 1994 at the County Voting Machine Warehouse, 150 Pacific Avenue, Jersey City.

At the conclusion of the recount, the tally stood unchanged as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
David Anthony	4384	129	4513
Peter B. Belfiore	4202	123	4325
Sandra Ramos	4004	118	4122
Mario Mercado	2960	139	3099
Renee Turonis	2764	138	2902
Jonathan Gordon	2650	134	2784
GENERAL FUND PROPOSITION			
YES Votes	1921	88	2009
NO Votes	1915	127	2042

The following anomalies were discovered during the recount and examination of related election documents:

> In ward 4 district 2, there was a difference between the public counter information on the statement of results and the machine. The statement was 200 and the machine during recount was 198. Examination of the voting records in the Hudson County Superintendent of Schools Office revealed 200 signatures, which would agree with the arithmetic difference on the protective counter pre- and post-election.
>
> In ward 5 district 3, it appears that the Board of Elections had a different starting number pre-election for the protective counter. The difference between the two, based on the Board of Elections numbers, was 239. This agrees with the public counter. There are 240 signatures in the book for this site.
>
> In ward 6 district 1, there appears to have been a malfunction of the protective counter. The arithmetic difference pre- and post-election was 6. The public counter on site was 190 and the sign-in book had 190 signatures.
>
> In summary: in ward 4 district 2, two people signed in but may not have operated the machine properly to record the vote. In ward 5 district 3, it is unclear what occurred. The

number of signatures would tend to agree with the pre- and post-election figures as reported on the statement of results, i.e., 240. It is possible that here also one person did not operate the machine correctly, i.e., signed in but not counted on the public counter. Ward 6 district 1 appears to have had a malfunction of the protective counter only.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that David Anthony, Peter B. Belfiore, and Sandra Ramos were elected to full terms of three years each on the Board of Education of the School District of the City of Hoboken. The Commissioner further finds and determines that the General Fund proposition for the Board of Education of the School District of the City of Hoboken was defeated.

The Commissioner also directs that a copy of this decision be transmitted to the Office of Administrative Law, where inquiries are pending into the conduct of the above-captioned election. In this regard, it is noted that the results of this election, as set forth herein, remain valid unless and until a contrary determination is made by the Commissioner in his decision on inquiry.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

159-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICTS OF MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JUNE 17, 1994

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICTS OF MIDDLESEX	:	DECISION
COUNTY.	:	
	:	

The announced results of the balloting at the annual school election held April 19, 1994 in the Type II School Districts of Middlesex County were reported to the Middlesex County Superintendent of Schools in accordance with statute on form A-33, Regular/Combined Statement of Result of School Election.

Pursuant to a request of the Attorney General, on behalf of the Middlesex County Board of Elections, the Commissioner of Education issued an administrative order releasing the election machines upon the conduct of a recheck of all election machines utilized in the April 19, 1994 school election.

The Middlesex County Superintendent of Schools office, as an authorized representative of the Commissioner of Education, conducted a recheck of the voting machines in cooperation with the Middlesex County Board of Elections and the School Board Secretaries in the affected districts. The recheck was conducted on April 26 and 27, 1994.

Following recheck, the results of the election were unchanged in the following districts:

Carteret	Jamesburg	Piscataway	South Plainfield
Cranbury	Metuchen	Sayreville	South River
Dunellen	Middlesex Borough	South Amboy	Spotswood
Helmetta	Old Bridge	South Brunswick	West Windsor-Plainsboro
			Woodbridge

Following recheck, the results were modified in the listed districts as follows:

EAST BRUNSWICK Candidates vote adjusted as follows:

CANDIDATE	REPORTED	ADJUSTMENT	REVISED
Barry A. Bachenheimer	0	+1	1 No Change in Outcome

EDISON TOWNSHIP Candidates vote adjusted as follows:

CANDIDATE	REPORTED	ADJUSTMENT	REVISED
William M. Lehman	2,555	-400	2,155 No Change in Outcome
Robert A. Wcislo, Jr.	588	-1	587 No Change in Outcome

HIGHLAND PARK General Fund vote adjusted as follows:

GENERAL FUND	REPORTED	ADJUSTMENT	REVISED
YES	900	-5	895 No Change in Outcome
NO	744		744 No Change in Outcome

MILLTOWN General Fund and Cap Waiver votes adjusted as follows:

GENERAL FUND	REPORTED	ADJUSTMENT	REVISED
YES	652	+3	655 No Change in Outcome
NO	685	+3	688 No Change in Outcome

CAP WAIVER

GENERAL FUND	REPORTED	ADJUSTMENT	REVISED
YES	645	+3	648 No Change in Outcome
NO	668	+3	671 No Change in Outcome

NORTH BRUNSWICK Candidates vote adjusted as follows:

CANDIDATE	REPORTED	ADJUSTMENT	REVISED
Ian Hotes	-0-	+1	1 No Change in Outcome

PERTH AMBOY General Fund vote adjusted as follows:

GENERAL FUND	REPORTED	ADJUSTMENT	REVISED
YES	845		845
NO	913	+2	915 No Change in Outcome

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

Accordingly, the Commissioner finds and determines that, there being no changes in outcome upon recheck, the results of the annual school election held in the school districts of Middlesex County remain as announced at the conclusion of the election.

IT IS SO ORDERED.

JUNE 17, 1994

DATE OF MAILING - JUNE 17, 1994

COMMISSIONER OF EDUCATION

160-94

JOHN DEAN, IV, AND JOHN DEAN, III, on behalf of his minor son, T.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

JUNE 17, 1994

JOHN DEAN, IV, AND JOHN DEAN, III, on behalf of his minor son, T.D.,

PETITIONERS,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioners, Tomar, Simonoff, Adourian & O'Brien (Lawrence W. Lindsay, Esq.)

For the Respondent New Jersey State Interscholastic Athletic Association, Pico, Mack, Herbert (Steven P. Goodell, Esq.)

For the Respondent Board of Education of the Township of Deptford, Zane & Lozuke (Raymond J. Zane, Esq.)

This matter has come before the Commissioner of Education by way of Petition of Appeal, Motion for Emergent Relief and Motion for Consolidation on May 4, 1994, by counsel for John Dean, IV, and John Dean, III, on behalf of his minor son, T.D. Petitioners seek an order staying the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Eligibility Appeals Committee (EAC) on April 14, 1994, declaring petitioners ineligible to participate in interscholastic competition for the spring term of 1994 at Camden High School. The NJSIAA decision was based on the finding that petitioners violated Article V, Section 4K(6) of the

NJSIAA Bylaws in transferring from Deptford High School for "athletic advantage" as defined as "a means to nullify punitive action by the previous school." (NJSIAA 1993-94 Handbook, at pp. 44-45) Petitioners assert that the NJSIAA erred by arbitrarily and capriciously interpreting its rules overbroadly and in a manner contrary to the clear intent of the rule and imposed a penalty which was not rationally related to the act sought to be prevented. Petitioners, also, seek to consolidate this matter with a simultaneously filed action entitled John Dean, IV, and John Dean, III, on behalf of his minor son, T.D. v. Board of Education of the Township of Deptford, Gloucester County, Agency Dkt. No. 144-5/94. The later action contests the short-term suspensions of both petitioners by the Board of Education of the Township of Deptford for disciplinary reasons which were imposed on February 3, 1994, an action taken 89 days before the Petitions of Appeal were filed. This decision addresses both the Motion for Emergent Relief and the Motion for Consolidation. For the reasons expressed herein, both the Motion for Emergent Relief and the Motion for Consolidation are hereby denied.

I have carefully considered the briefs of counsel for the petitioners and the respondent Board and Association, the record and transcript of the NJSIAA proceeding, the requirements set forth in N.J.A.C. 6:24-1.5 and the standards for granting an application for emergent relief or a stay established by Crowe v. DeGioia, 90 N.J. 126 (1982). I find that petitioners have failed to advance sufficient evidence to meet the standards articulated in Crowe.

Petitioners assert that John Dean, IV, a high school senior, will suffer irreparable harm by not being able to compete in track meets thereby rendering his chances of receiving a track scholarship to college virtually nonexistent. No evidence has been proffered, however, indicating that petitioner has been accepted to any college or that he is being considered for a track scholarship. As to the irreparable harm to be suffered by T.D., petitioners make no assertions. I find petitioners have failed to establish irreparable harm in that there is no entitlement to play interscholastic sports. Burnside v. NJSIAA, unpublished decision of the Appellate Division, November 15, 1984, Docket No. A-625-84T7, cert. den. 101 N.J. 236 (1985). See, also, Van Velsen v. NJSIAA, 92 N.J.A.R. 2d (EDU) 264.

The parties do not agree to the substance of the legal right in question. Here, the counsel for the NJSIAA agrees that the legal right underlying the claim, i.e the petitioners' right to appeal decisions of the NJSIAA to the Commissioner of Education, has been settled. Counsel for the respondent Board asserts, however, that the legal right of petitioners to participate in interscholastic sports at Camden High School following a transfer precipitated, at least in part, by a disagreement over a disciplinary action is unsettled. Petitioners aver in their brief that:

> A common sense interpretation of Article V, Section 4(K)(6) of the NJSIAA bylaws, is that an athlete should be ineligible to compete at a school if he or she transferred there in order to participate in a better athletic program or to avoid a disciplinary action which would prevent them from competing at their previous school. The intent of the rule is not to render a student ineligible from competing when he or she is transferring for reasons unrelated to athletics***. (Petitioners' Brief, at p. 5)

Petitioners cite Smith v. NJSIAA, 3 JAR 193 (1981) for the proposition that to interpret the rule to encompass transfers as a result of non-athletic disciplinary action and other factors "would allow the rule such a broad application as to render it meaningless and void." The argument, however, ignores the plain language of the rule.

In considering the reasonable likelihood of success on the merits the petitioners assert that the father, John Dean, III, removed all three of his children from the Deptford public schools for a variety of reasons including an ideological clash with the principal over policy, the safety of his children and the health of his wife. Petitioners aver that if the rule governing transfers for athletic advantage is limited to a rational interpretation based upon the policy reasons for the rule, petitioners have a reasonable probability of success on the merits. This is based in part on petitioners' argument that despite the fact that petitioners withdrew from Deptford High School during the term of their suspensions following their father's refusal to allow them to sign a "Return to School Contract" agreeing to abide by the rules and regulations of the Board and state law, they did not start school at Camden High School until they had "effectively served out their suspension[s]."

Both respondents aver that petitioners have no likelihood of success on the merits. Counsel for the NJSIAA argues that petitioners were provided complete due process with a full and fair hearing before the EAC. The language of the transfer for athletic advantage rule clearly defines transfer for athletic advantage to include "seeking a means to nullify punitive action by the previous

school." (NJSIAA 1993-94 Handbook, at pp. 44-45) Lastly, counsel for the NJSIAA asserts that the NJSIAA did not act arbitrarily or capriciously in making its determination, and that there was an adequate basis for the determination that the students transferred for athletic advantage as defined by the NJSIAA Bylaws.

Respondent Board avers that the entire case is based on the father's belief that his sons could not return to school in Deptford without signing the "Return to School Contract." I find that petitioners have not demonstrated a reasonable likelihood of success on the merits in that there has been no showing that the actions of either respondent were arbitrary, capricious or an abuse of discretion.

Petitioners aver that no harm will come to the respondents, but John Dean, IV, will be devastated by losing all chance of attending college on a track scholarship. No argument was asserted on behalf of T.D. Petitioners, however, will have every opportunity to pursue their academic careers.

Turning to the Motion for Consolidation, I find the nature of the questions of fact and law to be dissimilar and involving the application of different statutes and different facts. The action against NJSIAA involves the right of an association to enforce its rules, while the action against the Board requires an inquiry and determination of the legality of a suspension. The Motion for Consolidation is, therefore, denied.

JUNE 17, 1994

DATE OF MAILING - JUNE 17, 1994

COMMISSIONER OF EDUCATION

161-94

161-94M

JENNIFER MAURIZIO, on behalf of her son, J.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

JUNE 17, 1994

JENNIFER MAURIZIO, on behalf of her son, J.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioner, Jennifer Maurizio, Pro Se

For Respondent, John Bergh, Esq.

This matter was opened before the Commissioner by way of a petition of appeal with request for emergent relief filed on June 16, 1994, wherein petitioner sought a determination that her son be allowed to participate in graduation exercises on Friday, June 17, 1994, pending resolution of a dispute concerning the Board's action suspending J.D. on June 13, 1994, for assaulting a teaching staff member.

Pursuant to N.J.S.A. 18A:4-34, Assistant Commissioner Win L. Tillery was designated to decide this matter and a hearing was conducted via telephonic conference on June 17, 1994.

Upon consideration of the information obtained from the parties during the telephonic hearing, the Assistant Commissioner determines that petitioner has failed to demonstrate those standards

for extraordinary relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). In so deciding, the Assistant Commissioner finds that petitioner was afforded the opportunity to be heard by the Board. No allegation was made that J.D.'s due process rights were violated. Moreover, petitioner does not deny that J.D. pushed the teaching staff member. Consequently, the Assistant Commissioner finds that petitioner was unlikely to prevail on the underlying merits of her claim that the Board's action in suspending J.D. and prohibiting him from attending graduation ceremonies pursuant to Board Policy 5114 upon a finding that he assaulted a teaching staff member was an arbitrary, capricious or unreasonable action. In the instant matter the Board has exercised its discretionary authority to impose what it considers an appropriate penalty pursuant to N.J.S.A. 18A:37-2.1.

The Commissioner will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the Board's exercise of its discretion constituted an arbitrary, capricious or unreasonable action. Thomas v. Board of Education of the Township of Morris, 89 N.J. Super. 327, 328 (App. Div. 1965), aff'd 46 N.J. 581 (1966) The Commissioner finds no evidence of an abuse of discretion in the matter herein.

Similarly, absent a showing of abuse of Board discretion concerning this underlying claim, petitioner was unable to show irreparable harm in the denial of the privilege of attendance at the graduation ceremonies. Petitioner is not being denied a diploma in this matter. See, James Kenngott v. Lower Camden County Regional Board of Education, Camden County, 1975 S.L.D. 489

Accordingly, the Motion for Emergent Relief is DENIED, and the matter is to move forward for an expedited hearing at the Office of Administrative Law on the underlying merits of petitioner's claims.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 17, 1994

DATE OF MAILING - JUNE 17, 1994

162-94

162-94

LAURA COVIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Board candidate, sought to enforce prior agreement to disallow a certain Board worker the privilege of employment as a poll worker in any future election due to alleged incompetence.

ALJ dismissed petition, finding that Board's action in reappointing was not arbitrary, capricious or unreasonable. Board had considered matter and concluded that with retraining, poll worker could be rehired. No "promise" was made by the Board not to rehire the poll worker; any promise was made unilaterally by the Assistant Superintendent for Business. Board's determination to reappoint worker was a proper exercise of the Board's discretionary authority.

Commissioner adopted findings and determination in the initial decision as his own.

JUNE 20, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3697-93
AGENCY DKT. NO. 47-3/93

LAURA COVIELLO,
Appellant,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY
Respondent.

Laura Coviello, *pro se*

Gregory G. Johnson, Esq., for respondent

Record Closed: March 16, 1994 Decided: April 29, 1994

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

On March 23, 1993, petitioner, Laura Coviello, filed a petition of appeal with the Commissioner of Education, alleging that respondent Board of Education must honor its prior agreement to disallow a certain board worker the privilege of employment as a poll worker in any future election. On March 31, 1993, respondent filed its answer denying certain allegations and asserting that the petition fails to state a claim for which relief could be granted, that petitioner lacks standing to bring the action, and that the petition is untimely.

On April 22, 1993, this matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.*

52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on May 20, 1993. A telephone prehearing conference was held on July 7, 1993, at which time the issues were isolated and a hearing was scheduled for January 6, 1994 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. The hearing was held on January 6, 1994. Witnesses who testified and exhibits admitted into evidence are listed in the attached appendix. The record closed on March 16, 1994, after the submission of briefs in this matter.

ISSUES

The issues in the instant case, as set out in the prehearing order, are:

1. Did respondent properly retain an election worker, Frances Davis, to work in the 1993 annual school election?

    a. Did respondent advise petitioner that it would not retain Frances Davis for the 1993 annual school election?
    b. Did Frances Davis engage in incidents which would make her retention by respondent arbitrary, capricious or unreasonable?

2. If petitioner prevails, to what relief is she entitled?

3. Is this action moot?

STIPULATED FACTS

The parties have stipulated to a number of essential facts. The stipulated facts are as follows:

1. Laura Coviello (hereinafter "petitioner"), a resident of the Borough of Fair Lawn, Bergen County, New Jersey, was a candidate for election to the Fair Lawn Board of Education (hereinafter "Board" or "respondent") at the April 7, 1992 annual school election. Petitioner was not elected to the Board in 1992, and did not run for a seat on the Board in the 1993 annual school election.

2. In 1992, Donald A. Fusco was the respondent's Assistant Superintendent - Business and Board Secretary. In his capacity as respondent's chief school business official, Donald Fusco was responsible for overseeing the 1992 annual school election. Mr. Fusco's secretary was Ruth Dietch. Both Mr. Fusco and Mrs. Dietch retired from employment with respondent effective June 30, 1992.

3. The Borough of Fair Lawn is divided into 23 municipal election districts, which in turn are assigned to 10 polling districts for the annual school election. Respondent utilizes voting machines for school elections. Pursuant to *N.J.S.A.* 18A:14-15, each candidate nominated by petition may act as a challenger, and is permitted to appoint "a legal voter of the school district to act as a challenger for each municipal election district included within each polling district in which he is to be voted for."

4. In the 1992 annual school election, eligible voters residing in municipal election districts 16 and 17 voted at Fair Lawn High School. Petitioner designated Floyd Paladino as her challenger for election districts 16 and 17 (J-1, J-2).

5. Ruth Dietch prepared a list of challengers which was distributed to the election judge in each polling district.

6. In accordance with N.J.S.A. 18A:14-6, respondent appointed a judge of elections, an inspector of elections and clerks of elections for each polling district in the 1992 annual school election. The election workers assigned to the Fair Lawn High School polling district on April 7, 1992 were Elizabeth McGinnis (Judge), George McGinnis (Inspector), Harry Kravetz (Clerk), Leon Abramowitz (Judge), Esse Rosener (Inspector), Frances Davis (Clerk) and Ethel Kledt (Clerk).

7. Shortly before the closing of the polls at the April 7, 1992 school election, Floyd Paladino went to the Fair Lawn High School auditorium, where the voting machines were located, to observe the counting of the votes for that polling district. Election clerk Frances Davis asked Mr. Paladino why he was there; Mr. Paladino stated that he was a challenger, and Mrs. Davis checked

the challenger list for his name. Mrs. Davis advised Mr. Paladino that his name was not on the list and that he could not remain in the polling place. Mr. Paladino then left the polling place and telephoned petitioner to advise her what had happened.

8. Several minutes after Mr. Paladino's departure, and shortly after the closing of the polls, petitioner entered the High School polling place. An exchange of words occurred between petitioner and Fran Davis, whereupon Mrs. Davis directed petitioner to leave the polling place. Petitioner ultimately left and spoke by telephone with Donald Fusco that evening concerning the incident. Petitioner did not return to the High School auditorium.

9. On or about April 9, 1992, respondent's attorney, Paul H. Green, telephoned petitioner at the request of Mr. Fusco to briefly explain the statutory provisions pertaining to election challenges and recounts. In that conversation, Mr. Green also advised that it was his understanding that the respondent's business office would be removing Mrs. Davis's name from the list of election workers in the future. Petitioner also spoke with Mr. Fusco by telephone on or about April 9, 1992.

10. Respondent maintains the names and addresses of its election workers on file cards. At some time following the April 7, 1992 school election, Ruth Dietch wrote the words "Do Not Use Again" on Frances Davis's card (J-3).

11. Following Mr. Fusco's retirement, respondent abolished the position of Assistant Superintendent-Business and appointed Bruce Watson to the newly created position of School Business Administrator/Board Secretary. Ruth Dietch was succeeded upon her retirement by Sandy Ferro.

12. At some time in or about January or February, 1993, Frances Davis telephoned respondent's business office and requested to be placed on the election worker list for the 1993 annual school election. Sandy Ferro later located Frances Davis's card among the other election worker file cards and observed the notation "Do Not Use Again" which Ruth Dietch had written thereon. At some time in February, 1993, Sandy Ferro spoke with Ruth Dietch concerning that notation. After that conversation, Sandy Ferro

placed Frances Davis's name on the list of election workers to be approved by respondent.

13. The list of election workers for the 1993 annual school election was submitted to the respondent for approval at its February 25, 1993 regular monthly meeting. Petitioner was present at that meeting and objected to the list as presented to the respondent. Respondent withheld action on the election workers list and directed its Business Administrator to investigate the issue of Frances Davis's appointment and report back to the Board.

14. By letter dated March 1, 1993 to then Board President Nancy Wallace, petitioner stated in writing the specific nature of her grievance concerning Frances Davis's appointment (J-4).

15. Some time in late February or early March, 1993, Bruce Watson spoke with Donald Fusco concerning the issue of Frances Davis's appointment. Mr. Watson also spoke with Frances Davis, but was unsuccessful in his attempts to contact Ruth Dietch. Following Mr. Watson's investigation and report to the Board, Nancy Wallace spoke with petitioner by telephone on or about March 5, 1993 and advised her that the Board would appoint Frances Davis as an election worker for the 1993 annual school election.

16. By letter to Bruce Watson dated March 8, 1993, petitioner requested a re-evaluation of the decision to appoint Frances Davis (J-5).

17. By letter to petitioner dated March 15, 1993, Nancy Wallace confirmed the Board's decision to appoint Frances Davis as an election worker for the 1993 election and explained the Board's rationale for doing so (J-6).

18. Petitioner filed a Petition with the Commissioner of Education on or about March 23, 1993, challenging the respondent's appointment of Frances Davis and seeking an expedited review of the controversy. By letter dated April 15, 1993, the Commissioner determined that an expedited hearing was not justified, and transmitted the within controversy to the Office of Administrative Law for hearing under customary petition timelines.

19. The respondent approved the appointment of election workers, including Frances Davis, at its March 4, 1993 meeting. Frances Davis served as an inspector of elections for election district 16 at the Fair Lawn High School polling place during the annual school election held on April 20, 1993.

TESTIMONY

George McGinnis testified for petitioner. He served as an election clerk in district 17 on April 7, 1992. He testified that shortly after the polls closed at 9:00 p.m. and as the votes were tallied, Coviello appeared and asked for the results of the election. Since he did not know the correct procedure, he asked his wife, also an election worker, to ask Mrs. Davis, the judge in district 16 the proper procedure. But before this could be accomplished, Mrs. Davis came flying across the room, screamed at him, and asked, "What do you think you are doing?" McGinnis indicated that he was dumbfounded; he advised her that he had not done anything. Davis then turned her attention to Coviello. McGinnis was present during the conversation between Coviello and Davis. He did not recall Coviello screaming that Davis had not let the challenger work.

McGinnis had no other episodes with Davis. But he was upset by this incident, and he called the Board of Education to find out the proper procedure and spoke to Ruth Dietch. He also indicated that he would not work with Davis in any subsequent election. No commitment was made to him but McGinnis did not work with Davis in 1993. Dietch did not advise him that she would remove Davis's name as an election worker.

In further testimony, he stated that he knew that Davis and Coviello were going at each other. He did not recall the specifics of the exchange between Davis and Coviello. He recalled that Davis said that Coviello was not supposed to be there and Coviello indicated that she was. Coviello was trying to get the results of the election. McGinnis indicated that he was trained as an election worker. He did not recall Floyd Paladino and assumed that because Coviello was a candidate she was a challenger.

Ruth Dietch testified for petitioner. She had been a secretary for thirty years and had worked for Donald Fusco. She retired July 1, 1992. For fifteen years it was her responsibility to perform the clerical work for the election; she hired the workers, kept track of the dates, and conducted training sessions. An instruction packet (P-1), prepared by the county, was distributed to every district and to each election officer who went to training. Election workers were given telephone numbers to call if they had a problem. Dietch stated that the counting and tallying of votes is open to the public. Dietch did not recall if she had trained Davis or if Davis had been at the training session. Although she tried to make certain that all workers came to the session, they were desperate for workers and did not prevent workers from working because they had not gone for training. She never put four inexperienced workers together.

Dietch testified that in January or February of 1993, Mrs. Ferro questioned her about the notation on Mrs. Davis's card, "Don't use again." Dietch explained that there had been an incident in the 1992 election and a promise was made not to use her. Dietch indicated she placed a notation on the card because Mr. Fusco had told her that he had promised that Davis would not be used again. She did not believe Fusco told her to put the notation on the card; she did this on her own in order to leave Fusco's message. She asserted that she was not contacted by business administrator, Bruce Watson, after her conversation with Ms. Ferro. There was no message left on her machine and she was not away. She did not recall what Fusco told her about the incident.

On cross-examination, she indicated that the judge is responsible for conducting the election and maintaining order. She indicated that the board appointed election workers on recommendation by Mr. Fusco. The board usually rubber stamped his recommendation, and she never knew them not to approve. She indicated that in certain years the district had difficulty hiring workers. To her knowledge, the district did not investigate the incident between Davis and Coviello.

Donald Fusco had been an assistant superintendent for thirty six years. He stated that pursuant to law, he was responsible for the elections. In reference to Coviello's concern, he spoke to her regarding legal recourse. He also asked Paul Green to telephone Coviello and to further direct her regarding her course of action Fusco had explained the situation to Green; the fact that Davis had objected to people looking at the tallies on the counter. He stated that she caused a lot of

problems because the information is open to the public. He indicated that he would not recommend her to be an election worker the following year. His decision was based on the events in the 1992 election. Fusco testified that he told Dietch how he felt about the situation and that he wanted to leave information in the record for those who would be running the election that she not be employed the next year. His intention was to let them know that he did not recommend her re-employment. Prior to the appointment of the election workers, between October 1992 and February 1993, he spoke to Bruce Watson and Sandy Ferro regarding Davis's card and advised them to make their own decision. He did not discuss other incidents regarding Davis with Watson, as he was not aware of any others.

On cross-examination, Fusco stated that he made recommendations to the Board regarding election workers; the Board never asked him to remove a name and they did not add to his recommendation. He stated that there was no written report regarding Davis and the election. He had not reported the incident to the Board. Coviello gave him information, and he casually spoke to the other poll workers. (He did not recall when.) They all agreed that Davis had not wanted to open the viewing of the counters to the public. He explained that the training session was for the district and later for county certification. Someone from the county board of election explained the machine, and Dietch explained the procedures. Those who attended received certification cards. He opined that Fair Lawn did more than the rest of the municipalities in the county in the way of training and that Davis was a certified poll worker. On many occasions the workers were told that the public had a right to approach the machine to see if the numbers were those appearing on the machine. A judge or anyone in the district could quiet people down.

Next to testify was Sandra Janet Ferro, secretary to the school business administrator. She dealt with the details of the 1993 election, and as such, she was responsible for getting the election workers. She went over the list of workers (those that had been used the year before) and sent a letter to them asking if they wanted to work again. She stated that she saw approximately twenty cards with notations on them. Cards that indicated "remove" or "do not use" she placed aside. Fran Davis called and asked to be on the list. She spoke to Ruth Dietch a week or two before the list was placed on the Board's agenda, and asked why Fran Davis's card said, "do not use." Dietch said that Davis did not get along with election workers and had been moved from one district to another. Ferro advised Dietch that

Davis was president of the League of Women Voters. According to Ferro, her phone was ringing and she advised Dietch that she would call her back. She tried on five or six occasions to reach Dietch and asked Dietch's friend if Dietch received messages. Dietch's friend said the answering machine was broken; there was a problem with her phone. Ferro contended that in the past Dietch did not return phone calls.

Ferro testified that she told Watson about her conversation with Dietch. He asked if there was anything in writing. She informed him that she did not know the problem and he told her to reach Dietch. (She was not told to contact Fusco.) When she could not reach Dietch she submitted the old list to the Board. (She believed the list was completed in early February.) She noted that she had no documentation and did not think too much about it; other cards had notations. She did not have the letters from the workers (a letter is sent based on the cards to the prior election workers, asking if they want to work), at the time the list was submitted to the Board. Although at first, Ferro indicated that once they definitely knew the names of the election workers this was sent to the Board for approval, and then another complete list of names was submitted for payment (maybe three lists), Ferro, thereafter, admitted that there was never a final list before the election. Ferro explained that a list is submitted to the Board with names from the prior year, and before the individuals have responded to the letters (P-2). The Board then authorizes the board secretary to replace any of the appointed officials who cannot serve with qualified substitutes. The amended list is approved subsequent to the election. Francis Davis was on that list.

Ferro stated that she is not sure of the differences in responsibility between the election clerk, inspector and judge. She tried to keep the responsibilities the same as the year before, and she did not recall why Davis became an inspector. She believed it was a matter of moving names around. She first heard of the election night incident after the board meeting; there was no report of the investigation in 1992.

Bruce H. Watson has been employed by respondent since July 1, 1992. He has worked for fourteen years for different boards, and he has been responsible for ten school board elections. As the school business administrator, he is responsible for overseeing the election. He arranged a seminar for election workers, held two to three weeks prior to the election. He noted that the workers appreciated it and said this was the first time a seminar was held in Fair Lawn. Three weeks prior to the

Board meeting, Ferro spoke to him about the notation on Davis's card and informed him that Dietch had had a problem with other election workers. He asked his secretary to look for documentation and there was none other than the note on the card. Therefore, Davis' name was included on the February 25, 1993 agenda. This was his responsibility and he did not contact anybody regarding the matter.

Watson stated that at the February 25, 1993 board meeting, Coviello asked permission to speak. She indicated that there was a problem with the appointment of an election worker on the list. This was the first he knew of the problem. The name was brought up in closed session (he was not sure if Green was there) and the Board asked him to investigate the situation and placed all appointments on hold. He called Fusco and asked him if he recalled the problem with a certain election worker, if he promised Coviello that Davis would not serve again, and whether he so informed the Board. Fusco recalled an incident but not the details of it. Fusco stated that he did not say he had promised that Davis would not serve but had explained to Coviello that there were steps he could take to keep someone from working. Fusco told him that he told Laura Coviello if there was a problem legal steps could be taken not to hire a person back. Fusco had not informed the Board. Watson asked his secretary to call Dietch and that was unsuccessful. He called Fran Davis as the Board had advised him to do. Davis responded that this was the first she had heard of any problem and she would get back to him. She called back and indicated she wanted to stay on the list and would write to the board president regarding what had occurred.

Watson responded to the board at the next meeting during the closed session, with only board members present. The board president had received the information from Davis. Watson informed the Board about Fusco's response and that he had been unable to reach Dietch. The Board asked if there was any written communication and he said, "No." Watson also asked the Board if they had received a written report from the prior business administrator regarding the incident. The Board decided to reappoint Davis.

Watson could not recall if the issue of the League of Women Voters president was discussed at the public meeting. Watson recalled that Green commented on the investigation. Green recalled the problem with Coviello and Davis and talking to

Fusco about it. Green did not tell him that he told Coviello that Davis would not work again.

On further questioning, Watson indicated that the election judge, inspector and clerk are paid at different rates. The judge opens the polls and runs the polling place. He believed the judge and inspector authenticate any individual who claims to be a registered checker. (The challengers names are on a list supplied to them.) A judge has more responsibility than an inspector, and an inspector has more responsibility than a clerk. He was not aware that Davis had been upgraded to the position of inspector. Although it is his responsibility, it was the function of the secretary helping him. He believed it customary to use the prior list of election workers, unless there are written complaints. Normally, the worker is reappointed to the same position but a worker may be moved around. In 1992 there was a typed list of challengers' names that went to the judges. Watson testified that he found a list with Paladino's name in his office (which apparently was the one that should have been circulated in the 1992 election) but he had no idea if this list had gone to the judges. Allegedly, the list at the polling place did not have Paladino's name on it; Davis's written communication indicated that the name was not on the list and someone else agreed. He stated that the standard procedure when the polls are closed is that only challengers and candidates can observe the count but cannot interfere with the process. Watson, referring to the election manual (P-4) with which he was familiar, indicated that he was sure the candidates and challengers can observe and that the public can be present.

On cross-examination, Watson indicated that he informed the Board that he would run a seminar on the election process. The Board directed him to inform Davis that she would be reappointed and they hoped there would be no other incidents. Davis attended the training session. As part of the seminar, he discussed with Davis her function. He hoped all further problems would be eliminated, and no problems were reported. He noted that there is generally a problem getting workers; as the election approaches they are always scrambling.

Next to testify was Frances Davis, an election worker for fifteen years. She served as a clerk each year except 1993 when she served as an inspector. She is on the board of the League of Women Voters in Fair Lawn, Voter Services. She knew Coviello prior to the 1992 election. Regarding the April 7, 1992 election, Davis stated

that at approximately 8:55 p.m., she noticed a man seated in the auditorium. She asked what he was doing and he said, "They sent me." He said, "Coviello." Knowing and noting that challengers are required to wear badges and have letters of authorization, she noted that he did not wear a badge or have identification. At her request he gave his name (Paladino). She advised him that he was not on the list of challengers. She told him he could not remain as a challenger but could make a phone call in the hallway. He left to make a phone call. She opined that he seemed confused as to his mission.

Davis proceeded to describe the setup and procedure for voting. She explained that in district 16 and district 17 voting is in the auditorium. District 16 is to the left of the stage and district 17 to the right of the stage. At 9:00 p.m. the doors were closed and the booth was opened. Noting that the voters use the the main entrance of the auditorium and proceed toward the stage in the front, she observed Coviello barge in from the side entrance of the auditorium, angry and shouting. She asked Coviello to stop shouting. Davis stated that at this time everyone is tense as the judge calls out the figures and they are written down. She recalled that when Coviello would not listen, she asked her to leave. She recalled rage, anger and yelling on Coviello's part. Coviello believed she had a right to be there. The witness opined that if Coviello had come in quietly she had a right to be there. She was asked to leave because she was shouting and was disruptive. Davis could not recall if Coviello spoke about Mr. Paladino. Davis stated that this was the first time there was such an incident. Coviello left one or two minutes later.

Davis saw Coviello again later that night. The returns were brought into Thomas Jefferson Junior High School between 10:00 and 10:30 and those interested in hearing the returns recorded from each district went there. Davis went to the junior high school. After the results were recorded, Davis was ready to leave. Since it was dark, a teacher from the high school accompanied her to her car. Coviello said something insulting and sassy to her; she could not recall what. The man who was with Davis was startled. Davis said, "Let it go," and did not respond. Davis said that Coviello was angry with her.

Davis stated that Mr. Fusco did not call her about a problem election night 1992. The first time she knew about the situation was when Mr. Watson called her. Stunned that she had been discussed at a board meeting, she gave Watson her

version of the story. She recalled that when she received the letter in 1993, she responded and was assigned as an inspector to district 16. She recalled that Watson held a workshop in the auditorium and that Paul Green attended it. There were approximately fifty people there, they were given materials and the entire procedure was discussed. There were no incidents at the April 20, 1993 election regarding the other workers.

In further questioning, Davis stated that she never had a problem with coworkers. She believed she got along well with them and specifically mentioned two such workers. She recalled that one of the voters commended her for opening up the voting process in the other district when a judge was late. She recalled that as voter services chairperson, she had arranged for candidates' night and approved of the format. Mr. Coviello wanted to videotape the program, and she said it was not possible. He responded that it was being held in a public building. She indicated that it was a privately sponsored program and that she would have to ask the candidates and the Board for approval but could not do this five to ten minutes before the program. She had no authorization. Mr. Coviello was angry and said he would sue. He followed her and she advised him to leave her alone.

On cross-examination she indicated that the candidates' night to which she referred was in 1990 or 1991. Coviello or someone from her organization may have run at that time. Referring to the challenger, Mr. Paladino, Davis indicated that Paladino mumbled that they had told him to come. Davis was aware that the general public was allowed to enter, but opined that most of the people who came for the tallying were challengers or candidates. She opined that Paladino probably would have had the right to remain as a member of the public, but he had indicated he was a challenger and did not have the proper identification.

On further questioning, she did not recall speaking to the other poll workers when Coviello came into the auditorium. She could not recall a confrontation with other workers nor did she tell any coworker that the coworker had acted improperly. She agreed that Coviello objected to Paladino being asked to leave the room. She indicated that she discussed the issue with Coviello more in front of district 17, but did not believe she was abandoning her post in district 16. She did not recall being asked to contact the business administrator.

On redirect examination, Davis stated that she believed the McGinnises worked in district 17 in 1992. She agreed that she may have spoken to Mr. McGinnis before speaking to Coviello. She could not recall criticizing Mr. McGinnis but agreed she might have. Davis did not recall shouting at McGinnis and opined that she would not have screamed at him; he is a nice gentleman. She stated that Coviello yelled at her.

FINDINGS OF FACT

It is clear from the testimony adduced at the hearing, as well as the stipulation of facts, that during the 1992 election Fran Davis and Laura Coviello had an exchange of words at the high school polling place. Coviello suggests that it occurred because Fran Davis had improperly advised Mr. Paladino, Coviello's challenger, to leave the polling place and thereafter, also improperly advised Coviello to leave. Fran Davis suggests that it occurred after she properly told Paladino, who did not have proper identification, to leave the polling place and also properly told Coviello, who would not listen and was shouting in the polling place, to leave. Whatever version one accepts is of no great moment for purposes of this court's determination.

Clearly, the situation as described indicates a personal and minor confrontation between two individuals. At worst, Davis improperly advised Paladino to leave the polling place.

Further, the testimony clarifies that thereafter no promise was made by the Board not to rehire Fran Davis. Any such "promise" that may have been made was made unilaterally by Mr. Fusco. Clearly, such a promise was only Fusco's determination that he would not recommend Davis's reemployment in the future. As such, although not an issue here, it was not binding on a subsequent school business administrator or Board.

DISCUSSION

Issues of standing and mootness are related concepts to be used in analyzing the basic issue of whether there is an adversarial contest before a court or administrative agency such that the ultimate decision will not be merely an advisory

opinion. The concept of "standing" focuses on the parties and requires that each party possess an interest in the outcome of the controversy, while mootness applies more to the issues involved and as a general rule requires that legal opinions, via adjudication, not be given concerning issues which are no longer in existence because of changes in facts and circumstances surrounding a case.

A particular cause of action may be mooted by intervening events which include actual changes in the law, administrative actions, and settlement between the parties. It is well settled law in New Jersey, that issues that have become moot prior to adjudication are no longer actionable. *Oxfeld v. N.J. State Bd. of Educ.*, 68 *N.J.* 301, 303-304 (1975); *In re Geraghty*, 68 *N.J.* 209, 212-213 (1975); *Sente v. Clifton Mayor and Municipal Council*, 66 *N.J.* 204, 206 (1974).

In the instant matter, petitioner presents an issue of respondent's continued re-employment of Ms. Davis as an election worker. Arguably, based on the sequence and timing of events, the controversy is capable of repetition yet evading review. As such, the circumstances of the instant matter warrant a finding that the doctrine of mootness is not applicable, and petitioner's case is ripe for adjudication. *See, Application of Boardwalk Regency Corp. for Casino License*, 90 *N.J.* 361 (1982); *In re Geraghty*, 68 *N.J.* 209 (1975).

Standing to sue means that the party initiating litigation has a sufficient stake in the controversy to obtain judicial or administrative resolution of the controversy. See *Trombetta v. Atlantic City*, 181 *N.J. Super.* 203, 221 (Law Div. 1981) (citing *Sierra Club v. Morton*, 405 *U.S.* 727, 731, 92 *S. Ct.* 1361, 1364, 31 *L.Ed.* 2d 636 (1972). In the instant matter, petitioner's stake in the matter is obvious in that she seeks to enforce an agreement between herself and respondent. *Cf. Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98, 107 (1971) *See also N.J.A.C.* 6:24-2.1. The doctrine of standing, however, has a jurisdictional component as well. Specifically, the OAL is a forum for adjudication of disputes that arise from a web of statutes and regulations that comprise the basis of executive administration and enforcement of the laws of this State. Since statutes and regulations are the framework of the administrative process, a petitioner need assert an interest which is either in the zone of interests protected or regulated by the statutory-regulatory scheme known

as administrative law. *N.J. Const. art* VI § 5 ¶ 4. Petitioner, however, does not point to any statute or regulation that forms the basis of her claim[1].

Specifically, petitioner, does point out that *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 19:34-48, respectively, make interfering with the orderly conduct of a school election and willful neglect of duties in performing election duties a misdemeanor. But petitioner does not seek to proceed under the two above statutes as per her letter brief, section C.1. Petitioner only seeks to have her supposed agreement (contract) with respondent, not to allow Ms. Davis to be a poll worker, enforced. Such a claim is not cognizable in an administrative form. The underlying basis of petitioner's claim is purely contractual and outside of the statutory and regulatory scheme of the education and election laws of this state. Therefore, petitioner lacks standing[1] to assert a claim in the OAL and consequently fails to state a claim for which relief can be granted in the administrative law process. *East Brunswick Bd. of Education v. Tp. Council of East Brunswick* 48 *N.J.* 94 (1966); *Board of Education of Fairlawn v. Mayor and Council* 143 *N.J. Super.* 259 (Law Div. 1976); *Salley v. Bd. of Education of the City of Newark*, OAL Dkt. No. EDU 6085-84 (September 20, 1984), adopted by Commissioner of Education (Nov. 8, 1984).

Notwithstanding the above conclusions, I will address petitioner's contention that respondent's action in re-employing Ms. Davis was arbitrary, capricious, and unreasonable. The authority of local school boards (respondent) is grounded in the constitutional requirement that the State provide a thorough and efficient education for all children. To implement this mandate, the Legislature created a scheme under which public education would be provided through powers delegated to local boards of education. Local school boards are empowered to provide, maintain and supervise local schools. *Belvidere Bd. of Education v. Bosco*, 138 *N.J.Super.* 368, 374 (Law Div. 1975). Included in this grant of authority is the board's

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[1] If it so happened that Ms. Davis was found to have violated *N.J.S.A.* 18A:14-65 and *N.J.S.A.* 19:34-48, then arguably petitioner would have standing in that the claim and relief sought both involve Title 18A. In the instant matter, Petitioner seeks to enforce an agreement between her and Respondent and uses the two above statutory provisions as an explanation for her motivations, but by her own admission does not seek enforcement of the two above statutes. See Petitioner's brief, section C.1.

appointment of challengers, *N.J.S.A.* 18A:14-15, and judges of election, *N.J.S.A.* 18A:14-6, in conducting school board elections. The Legislature specifically enacted a statute which sets the ambit of authority exercised by local boards.

N.J.S.A. 18A:11-1 defines the general mandatory powers and duties of local boards of education, and states that:

> 18A:11-1. General mandatory powers and duties
>
> 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;[1] 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.

Under this section, the local boards are clearly granted fairly liberal powers concerning local issues and the daily operation of local schools, which includes conducting school board elections. *See N.J.S.A.* 18A:14-1 to -104. *See also Silverman v. Millburn Bd. of Educ.* 134 *N.J. Super.* 253 (Law Div. 1975); *State v. Lally*, 80 *N.J. Super.* 502 (Law Div. 1963); *In re Annual School Election, Borough of Wanaque*, 91 *N.J.A.R.* 2d (Vol. 4)6 (Dept. of Education); *In re Annual School Election, Lacey Tp.*, 91 *N.J.A.R.* 2d (Vol 4) 3 (Dept. of Education).

The issue in the instant matter centers around respondent's exercise of discretion in re-employing Ms. Davis as an election worker. As with any other employment relationship, there is a mix of practical considerations, social dynamics, fiscal considerations, and market forces that coalesce into an ultimate decision by both employer and employee to form and/or continue the employment relationship. The ultimate decision is a balancing process, exercised by both the employer and employee, whereby pros and cons are considered in juxtaposition with each other and whether their respective goals can be met when all considerations are finally

weighed. As such, even if petitioner's contentions about Ms. Davis's conduct are true, the Board could, nevertheless, conclude that her re-employment is in the best interest of the election process. Moreover, such an administrative decision is presumptively valid if it fell within the ambit of respondent's legislatively delegated authority. *Gormly v. Lan*, 88 *N.J.* 26, 38 (1981). In short, the Board's determination should not be reversed unless it was arbitrary, capricious or unreasonable. *See, Parsippany - Troy Hills Ed. Ass'n. v. Bd. of Educ.,* 188 *N.J. Super.* 161, 166-167 (App. Div. 1983); *Kopera v. West Orange Bd. Of Educ.,* 60 *N.J. Super.* 288, 294-295 (App. Div. 1960).

In the instant matter, arbitrary, capricious and unreasonable would describe a decision which is not reasonably related to the goals and policies that the Legislature has charged respondent with furthering as per *N.J.S.A.* 18A:11-1. *See Worthington v. Fauver*, 88 *N.J.* 183, 197 (1982). Ms. Davis served as an election worker for 15 years. As such, even if the facts are as petitioner alleges, it would not be arbitrary, capricious or unreasonable for respondent to want to retain an experienced and proven reliable election worker. There is no doubt that years of experience and an employee's track record of reliability can outweigh a minor indiscretion and further respondent's interest in meeting the goals and policies of *N.J.S.A.* 18A:11-1. This is not to say that a single incident of sufficient gravity might not be grounds for dismissing an employee who has an unblemished, long established employment record. However, given the circumstances of the instant matter where the alleged offenses are more due to a personal affront then truly disruptive and/or neglectful conduct on the part of Ms. Davis, the employment longevity and proven reliability clearly indicate that respondent had a reasonable basis for re-employing her.

More to the point, it is clear from the testimony adduced at the hearing that the Board investigated the situation, prior to appointing Davis to serve as an election worker in the 1993 annual school election. Bruce Watson spoke with Donald Fusco, Fran Davis, and Paul Green regarding the situation and reported what they told him about the problem in 1992 to the Board. With information in front of them, the Board determined to appoint Davis to serve as an election worker in the 1993 annual school election. The Board advised Davis that she would be reappointed and hoped that there would be no incidents. She attended a training session at which she received materials and the entire procedure was discussed. In addition, Bruce

Watson discussed her function with her. She served as an election worker in the April 20, 1993 election and there were no incidents reported.

Clearly, the Board considered the matter and concluded that with retraining Davis should be given the opportunity to continue working as an election worker. Whether a different determination could have been reached by the Board under the described circumstances is not the bench mark or for this court to determine. The Board's action in reappointing Davis was clearly within its discretion and not in any manner arbitrary, capricious, or unreasonable.

CONCLUSION

Based upon the above facts and discussion, I **CONCLUDE** that respondent's action in reappointing Francis Davis to work in the 1993 annual school election was not arbitrary, capricious, or unreasonable. The Board's action in determining to rehire Francis Davis was proper.

ORDER

Based upon the above, it is hereby **ORDERED** that petitioner's appeal is DISMISSED and respondent's action AFFIRMED.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th**

Floor West, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 27, 1994
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/4/94
Date

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 5 1994
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

APPENDIX

LIST OF WITNESSES

For Petitioner:

George McGinnis
Ruth Dietch
Donald A. Fusco
Sandra Janet Ferro
Bruce H. Watson

For Respondent:

Frances Davis

LIST OF EXHIBITS

JJ-1	Stipulation of Facts dated January 6, 1994 (5 pages)
J-1	Appointment of challengers and alternates dated March 30, 1992
J-2	Certificate of appointment of challengers and alternate dated April 7, 1992
J-3	Card for Frances Davis
J-4	Letter to Nancy Wallace from Laura Coviello dated March 1, 1993 (2 pages)
J-5	Letter to Bruce Watson from Laura Coviello dated March 8, 1993 (2 pages)
J-6	Letter to Laura Coviello from Nancy Wallace president of Fair Lawn Board of Education dated March 15, 1993
P-1	Instructions to school election officers (4 pages)
P-2	Agenda for board meeting dated February 25, 1993 (7 pages)
P-3	Agenda for board meeting dated April 26, 1993 (2 pages)
P-4	State of New Jersey Department of Education Election Manual dated June 22, 1989 revised December 15, 1989 Pages 47, 48 and 47 revised October 22, 1990 (4 pages)

OAL DKT. NO. EDU 3697-93

LAURA COVIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that the Board's determination to reappoint Frances Davis as a poll worker at the 1993 annual school election was neither arbitrary nor unreasonable, notwithstanding the informal representation to petitioner by then-Assistant Superintendent Fusco that Davis' services would not be used again following difficulties in the 1992 election. On the contrary, the record shows this determination to have been a proper exercise of the Board's discretionary authority.

Accordingly, the findings of fact and recommended conclusion of the Office of Administrative Law are affirmed and the instant Petition of Appeal dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 20, 1994

DATE OF MAILING - JUNE 21, 1994

63-94

163-94

BRUCE TURNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 21, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8102-93
AGENCY DKT. NO. 272-7/93

BRUCE TURNER,
Petitioner,
v.
BOARD OF EDUCATION OF SOUTHERN GLOUCESTER CITY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,
Respondent.

Kenneth A. Sandler, Esquire, for petitioner (Selikoff & Cohen, P.A., attorneys)

Louis Rosner, Esquire, for respondent

Record Closed: April 28, 1994 Decided: May 4, 1994

BEFORE **JOSEPH E. KANE**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 26, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

May 4, 1994
DATE

Joseph E. Kane
JOSEPH E. KANE, ALJ

Receipt Acknowledged:

5/12/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

psa

FILED

APR 28 1 53 PM '94

STATE OF
OFF
ADMI

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Counsel for Petitioner, Bruce Turner

BRUCE TURNER,

Petitioner,

vs.

SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF STATE OF NEW JERSEY

OAL DOCKET NO. 08102-93S
AGENCY REF. NO. 278-7/93

STIPULATION OF SETTLEMENT

NOW COME Petitioner and Respondent, by and through their undersigned counsel, and mutually agree to the following in resolution of the above-captioned controversy:

1. By virtue of his service as a "teaching staff member," N.J.S.A. 18A:1-1, in the employ of Respondent since in or about September 1987 until June 30, 1993, Petitioner acquired tenure within the scope of the instructional certificate which he held. N.J.S.A. 18A:28-5.

2. The only endorsement which Petitioner held under his instructional certificate while in the employ of Respondent was as a teacher of physical education. N.J.A.C. 6:11-6.2(a)17.

3. Respondent presently has no positions requiring only a physical education endorsement.

4. Respondent does, however, employ teaching staff members in positions requiring endorsements in both physical education, N.J.A.C. 6:11-6.2(a)17, and in health, N.J.A.C. 6:11-6.2(a)10, or a single combination health and physical education endorsement, N.J.A.C. 6:11-6.2(a)11.

5. In accordance with 2. above, Petitioner does not presently hold the appropriate endorsement or endorsements for the physical education/health position existing at Respondent's schools.

6. Effective June 30, 1993, Respondent eliminated the internal suspension monitor position held by Petitioner, as allowed under N.J.S.A. 18A:28-9.

7. Pursuant to N.J.S.A. 18A:28-11, Respondent shall determine Petitioner's seniority status and notify him of same.

8. Pursuant to N.J.S.A. 18A:28-12, Respondent shall place Petitioner upon a preferred eligible list in accordance with his seniority and shall offer him re-employment "whenever a vacancy occurs in a position for which [he] shall be qualified" and for which he is the most senior person available holding such qualifications.

9. Upon forwarding to the undersigned counsel for Petitioner the resolution of Respondent's Board of Education ratifying this agreement, Petitioner shall withdraw the instant Petition with prejudice. In the event that this agreement is not

ratified by Respondent's Board of Education, it shall be considere null and void, and the instant Petition shall remain in full force and effect.

WHEREFORE, the undersigned counsel set their hands and seals on the date(s) indicated.

FOR PETITIONER, BRUCE TURNER,
SELIKOFF & COHEN, P.A.

BY: Kenneth Sandler
KENNETH A. SANDLER

DATED: 2/7/94

FOR RESPONDENT, SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT

BY: [signature]
LOUIS ROSNER

DATED: 2/14/94

OAL DKT. NO. EDU 8102-93

BRUCE TURNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

JUNE 21, 1994

DATE OF MAILING - JUNE 21, 1994

JANE MARGHELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 21, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 530-94
AGENCY DKT. NO. 407-12/93

JANE MARGHELLA,
Appellant,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,
Respondent.

Victor P. Mullica, Esq., attorney for appellant (Mullica & Mullica, attorneys)

Paul J. Giblin, Esq., attorney for respondent (Giblin & Giblin, attorneys)

Record Closed: May 12, 1994 Decided: May 16, 1994

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

Appellant appealed respondent's refusal to return her to employment following extended childbearing leave.

The matter was transmitted to the Office of Administrative Law and scheduled for a hearing on April 13, 1994.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On May 12, 1994, they submitted the attached Settlement Agreement, dated April 25, 1994, which sets forth the terms of the settlement.

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

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

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

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

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

May 16, 1994
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

5/19/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

RECEIVED
OFFICE OF LAW
MAY 12 11 56 AM '94

MULLICA & MULLICA
800 Summit Avenue
P.O. Box 8095
Union City, New Jersey 07087
(201) 867-6594
Attorneys for Petitioner

	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
JANE MARGHELLA,	OAL DOCKET NO. EDU 00530-94 N AGENCY REFERENCE NO. 407-12/93
Petitioner,	CIVIL ACTION
vs.	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, a Body Corporate and Politic,	
Respondent.	

It is hereby stipulated and agreed by and between the petitioner, Jane Marghella, (hereafter Marghella), and Board of Education of the Township of North Bergen, a Body Corporate and Politic, (hereafter Board), that the parties, desirous of settling the pending litigation before the Commissioner of Education, which fully disposes of all issues between Marghella and the Board, have amicably settled upon the terms set forth below:

1. Marghella withdraws her Verified Petition filed on or about December 6, 1993 with the Commissioner of Education.

2. Marghella is to resume her teaching position with

the Board commencing with the school year 1994-1995.

3. Marghella is not to be compensated for the school year 1993-1994.

4. Marghella retains all of her tenure, contractual, medical, pension, seniority and other rights, benefits entitlements and emoluments of employment with the Board.

5. Marghella is to notify the Superintendent of Schools in writing by June 15, 1994, or fifteen (15) days after the within Settlement Agreement is signed and a signed Agreement is in possession of the attorney representing Marghella, whichever date is later, that she will return, which she will, to teach in the North Bergen Public Schools System for the year 1994-1995.

6. This Agreement will become effective when it is approved by the Office of Administrative Law and the Commissione of Education. Any disapproval shall not interfere with the rights of Marghella to pursue the matter further.

Dated: April 25, 1994

Victor P. Mullica
as to Jane Marghella

JANE MARGHELLA

NORTH BERGEN BOARD OF EDUCATION

By: Leo C. Kelly
Superintendent

ATTEST:

JOHN DUFFY, Secretary
North Bergen Board of Education

OAL DKT. NO. EDU 530-94

JANE MARGHELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

JUNE 21, 1994

DATE OF MAILING - JUNE 21, 1994

165-94

FRANK GIANNANTONIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Director of Maintenance and Custodial Services, alleged termination of his employment and abolition of his position were in bad faith.

ALJ found petition was untimely as petitioner filed well beyond 90 days after receipt of his notice of termination.

Commissioner adopted findings and determination in initial decision as his own.

JUNE 20, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER OF DISMISSAL
OAL DKT. NO. EDU 8925-92
AGENCY REF. NO. 483-10/92

FRANK GIANNANTONIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK,
Respondent.

Joseph R. Mariniello, Esq., for petitioner

Peter J. Scandariato, Esq., for respondent
(Smith, Don, Alampi & D'Argenio, attorneys)

Record Closed: May 4, 1994 Decided: May 16, 1994

BEFORE **RICHARD McGILL,** ALJ:

This matter involves a petition by Frank Giannantonio (petitioner) in which he challenges his termination by the Board of Education of the Borough of Palisades Park (respondent) from the position of Director of Maintenance and Custodial Services. Respondent denies that the termination was in any way improper and now moves to dismiss the petition as not timely filed.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on October 26, 1992, pursuant to the Commissioner's authority to hear and determine controversies

concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on November 6, 1992, and the matter was transmitted to the Office of Administrative Law on November 16, 1992 for determination as a contested case.

On April 14, 1994, respondent filed its motion to dismiss based upon the assertion that the filing of the petition was untimely. Petitioner did not respond to the motion to dismiss.

MOTION TO DISMISS

The motion to dismiss is based upon *N.J.A.C.* 6:24-1.2(c), which provides as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

As set forth in the petition, respondent voted to terminate petitioner's employment and abolish his position. On June 12, 1992, respondent advised petitioner that his employment would be terminated effective August 11, 1992.

Respondent argues that the ninety-day time limit began to run when petitioner received notice of his termination on June 12, 1992. The filing of the petition on October 26, 1992, occurred 137 days subsequent to the notice to petitioner that he was terminated. Respondent concludes that the petition was not filed in a timely manner and should be dismissed.

The ninety-day limitation period set forth in *N.J.A.C.* 6:24-1.2(c) was recently upheld as a proper exercise of the rulemaking authority of the Commissioner of Education and the State Board of Education. *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572, 580-582 (1993). Under *N.J.A.C.* 6:24-1.2(c), the ninety-day period begins to run from the date of receipt of the notice of a final order, ruling or other action.

Here, the ninety-day period began to run on June 12, 1992, when petitioner received notice of his termination. The filing of the petition on October 26, 1992, was well beyond ninety days after receipt of notice of the termination. Under the

circumstances, I **CONCLUDE** that petitioner failed to file the petition within ninety days of receipt of notice of his termination as required by *N.J.A.C.* 6:24-1.2(c) and that therefore the petition must be dismissed.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 16, 1994
Date

RICHARD McGILL, ALJ

Receipt Acknowledged:

5/17/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

OAL DKT. NO. EDU 8925-92

FRANK GIANNANTONIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the within petition is untimely filed pursuant to N.J.A.C. 6:24-1.2(c) and must be dismissed.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JUNE 20, 1994

DATE OF MAILING - JUNE 20, 1994

166-94

STEVEN B. HERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 23, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 439-93
AGENCY DKT. NO. 27-2/91

STEVEN HERN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,
Respondent.

Randi Doner, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Louis C. Rosen, Esq., for respondent
(Patino-Treat & Rosen, attorneys)

Record Closed: May 4, 1994 Decided: May 23, 1994

BEFORE **RICHARD McGILL,** ALJ:

This matter involves a petition by Steven Hern in which he alleges that the Board of Education of the City of Union City charged five days against his allotted sick time in violation of *N.J.S.A.* 18A:30-2.1. The matter was transmitted to the Office of Administrative Law on January 19, 1993 for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted the attached Settlemment Agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 23, 1994
Date

RICHARD McGILL, ALJ

Receipt Acknowledged:

5/24/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

LAW OFFICES

BALK, OXFELD, MANDELL & COHEN

A PROFESSIONAL CORPORATION

50 COMMERCE STREET
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(201) 623-0353
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NANCY I. OXFELD*
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LOUIS DAVID BALK*
DENZIL R. DUNKLEY**

RANDI DONER*
DAVID B. FRIEDMAN
GAIL S. OXFELD

*MEMBER OF NJ & NY BAR
**MEMBER OF NJ & PA BAR

JACOB L. BALK
DORA P. ROTHSCHILD
OF COUNSEL

NEW YORK OFFICE
225 BROADWAY, SUITE 1505
NEW YORK, NEW YORK 10007
(212) 619-4100

RESPOND TO: NEWARK

MAY 4 12 01 PM '94

May 3, 1994

Hon. Richard McGill
Administrative Law Judge
185 Washington Street
Newark, New Jersey 07102

Re: Steven Hern vs. Board of Education of the City of Union City, Hudson County

Dear Judge McGill:

Enclosed please find Settlement Agreement with regard to the above captioned matter.

Respectfully yours,

BALK, OXFELD, MANDELL & COHEN

Randi Doner

RANDI DONER

RD:ar
encs.
cc: Steven Hern
Frank Cocuzza

BALK, OXFELD, MANDELL & COHEN
A Professional Corporation
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Appellant

RECEIVED
OFFICE OF LAW
MAY 4 12 01 PM '94

STEVEN HERN, Appellant, -vs- BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY, Respondent.	OAL DOCKET NO. EDU-00439-93 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matter and enter into the following settlement which fully disposes of all issues in controversy between the Appellant and Respondent:

1. The Appellant withdraws his appeal and request for a hearing.

2. The Respondent agrees to credit Appellant's sick bank with 5 days.

3. The Appellant waives all claims against Respondent including backpay, counsel fees or other monetary relief.

4. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

5. This agreement shall not constitute a precedent in any matters involving other employees of the Respondent.

6. The agreement is conditioned upon the approval of the Board of Education. Should the Board fail to approve this Agreement, petitioner retains the right to proceed to a full hearing.

7. The agreement will become effective when it is approved by the Merit System Board.

Dated: 5/2/94

Randi Doner

RANDI DONER, ESQ.
Attorney for Petitioner

Dated: 4-4-94

Louis C. Rosen

LOUIS C. ROSEN, ESQ.
Attorney for Respondent

OAL DKT. NO. EDU 439-93

STEVEN B. HERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

JUNE 23, 1994

DATE OF MAILING - JUNE 23, 1994

167-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MORRIS HILLS REGIONAL SCHOOL	:	DECISION
DISTRICT, MORRIS COUNTY.	:	
	:	

JUNE 23, 1994

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MORRIS HILLS REGIONAL SCHOOL	:	DECISION
DISTRICT, MORRIS COUNTY.	:	
	:	

The announced results of the balloting for the General Fund proposition at the annual school election held on April 19, 1994, in the Morris Hills Regional School District, Morris County, were as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES Votes	1,805	13	1,818
NO Votes	1,816	2	1,818

In response to a letter request from the Morris Hills Regional Board of Education, filed April 27, 1994, pursuant to N.J.S.A. 18A:14-63.3, the Commissioner of Education directed an authorized representative from the Office of the Morris County Superintendent of Schools to conduct a recount of the ballots cast. The recount was conducted on May 5, 1994 at the Morris County Voting Machine Warehouse, Highview Avenue, Cedar Knolls. Absentee ballots were recounted at the Morris County Board of Elections also on May 5, 1994, pursuant to the broad authority granted the Commissioner of the 1994 election under P.L. 1994, c.6.

At the conclusion of the recount, the totals were as follows:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES Votes	1,805	13	1,818
NO Votes	1,816	2	1,818

There were no changes on the recount. The recount of the absentee ballots did, however, yield one ballot which was received by the Board of Elections on April 20, 1994 but rejected because it was not postmarked. The district has petitioned the Commissioner pursuant to N.J.A.C. 6:24-1.1 et seq. for a determination that this ballot be counted in the election results.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts the findings and conclusions as his own.

The Commissioner notes that, subsequent to preparation of the representative's report, the petition mentioned therein was heard and determined by the Commissioner, resulting in a directive that the disputed absentee ballot be opened, counted and added to the tally on recount. In the Matter of the Annual School Election Held in the Morris Hills Regional School District, Morris County, decided May 31, 1994.

The Commissioner further notes that on June 10, 1994, the County Superintendent of Schools advised that, as directed by the Commissioner in his May 31, 1994 decision, the Board of Elections had opened the disputed ballot on June 2, 1994, and added the vote to the tally on recount.

As a result of such addition, the tally on recount stands at:

GENERAL FUND PROPOSITION	AT POLLS	ABSENTEE	TOTAL
YES Votes	1,805	14	1,819
NO Votes	1,816	2	1,818

Accordingly, the Commissioner finds and determines that the General Fund proposition of the Morris Hills Regional School District, in that it has obtained a majority of the votes cast, was approved by the voters pursuant to N.J.S.A. 18A:14-58.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 23, 1994

DATE OF MAILING - JUNE 23, 1994

168-94

JEFFREY GRUENWALD, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

JUNE 23, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4651-93
AGENCY DKT. NO. 69-4/93

JEFFREY GRUENWALD,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK,
Respondent.

Stephen B. Hunter, Esq., for petitioner
(Klausner, Hunter, Cige & Seid, attorneys)

Stephen R. Fogarty, Esq.
(Fogarty & Hara, attorneys)

Record Closed: May 20, 1994 Decided: May 23, 1994

BEFORE **RICHARD McGILL,** ALJ:

Jeffrey Gruenwald filed a petition to contest a determination by the Board of Education of the Borough of Florham Park to withhold his employment and adjustment increments. The matter was transmitted to the Office of Administrative Law on March 18, 1993 for determination as a contested case.

On the hearing day, the parties agreed to an amicable resolution of the matter and subsequently submitted a Stipulation of Settlement and Dismissal. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 23, 1994
Date

RICHARD McGILL, ALJ

Receipt Acknowledged:

5/25/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY

JANE GALLINA MECCA
ELLEN MARIE WALSH
GARY P. HALL
SUSAN C. MARGULIES

23 HIGHLAND CROSS
RUTHERFORD, N.J. 07070-2110

(201) 935-0440
TELECOPIER (201) 935-3470

MAY 20 12 29 PM '94

May 18, 1994

Honorable Richard McGill, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Jeffrey Gruenwald v. Florham Park
Board of Education
OAL Docket No. EDU 4651-93
Agency Ref. Docket No. 69-4/93

Dear Judge McGill:

We are enclosing an original and one copy of the fully executed Stipulation of Settlement and Dismissal, together with a resolution by the Florham Park Board of Education authorizing and approving same.

We apologize for the delay in transmitting these documents to you. They were approved and executed by the Board on March 28, 1994 and were forwarded to Mr. Hunter immediately thereafter. Mr. Hunter returned the documents to us today.

Assuming the terms of the settlement are acceptable to Your Honor, kindly file same with your initial decision with the Commissioner of Education.

Respectfully submitted,

FOGARTY & HARA

By: Stephen R. Fogarty

SRF:dd
Enclosure
cc: Dr. Fred R. Ferrone
Superintendent of Schools
Stephen B. Hunter, Esq.

MAY 20 12 29 PM '94

KLAUSNER, HUNTER, CIGE & SEID
63 East High Street
P.O. Box 1012
Somerville, N.J. 08876
(908) 685-1552
Attorneys for Petitioner

JEFFREY GRUENWALD,	:	BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:	
		OAL DOCKET NO. EDU 4651-93
vs.	:	AGENCY REFERENCE NO. 69-4/93
FLORHAM PARK BOARD OF EDUCATION,	:	STIPULATION OF SETTLEMENT AND DISMISSAL
Respondent.	:	

The parties, Petitioner Jeffrey Gruenwald, and Respondent, Florham Park Board of Education, agree to the following in full settlement of the above captioned matter:

1. Effective September 1, 1994 the employment and adjustment increments that were withheld pursuant to the attached Board Resolution dated August 20, 1992 would be restored; i.e. Petitioner's salary shall be increased to $ 47,100.00 . (Step 13 of the 1992-93 salary guide).

2. The agreement is subject to ratification by the Board of Education.

3. In consideration of the above Petitioner agrees to withdraw the instant Petition of Appeal with prejudice.

5/10/94
Date

Jeffrey Gruenwald

3/10/94
Date

Florham Park Board of Education
By: Rita Muldoon
Board President

3/10/94
Date

Florham Park Board of Education
By: Michale A. Simometta
Board Secretary/Business Administrator

169-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MAHWAH	:	DECISION
TOWNSHIP, BERGEN COUNTY.	:	
	:	

JUNE 23, 1994

May 10, 1994, at the Bergen County Voting Machine Warehouse, Carlstadt; the recount of Board member votes was conducted on May 20, 1994, at the office of the Bergen County Superintendent of Schools. On the same dates, absentee ballots were recounted at the parties' request at the Bergen County Board of Elections under the broad authority granted the Commissioner for the 1994 annual school election by P.L. 1994, c. 6.

At the conclusion of the recount, the tallies stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Diane Snyder (write-in)	361	2	363
Frank Buquicchio (write-in)	174	13	187

A number of additional persons continued on recount to receive write-in votes, but no tally approached those of the above two candidates. The recount of absentee ballots reflected no change from the corrected tally reported by the Board of Elections subsequent to the election.

GENERAL FUND PROPOSITION

YES votes	673	15	688
NO votes	672	22	694

CAPITAL PROJECT PROPOSITION

YES votes	834	22	856
NO votes	500	15	515

As indicated, there were changes in the tallies for the member of the Board of Education, but the outcome of the election was not affected by them, and the tallies for the General Fund and Capital Project propositions were unchanged. Thus, both outcomes remain the same as announced at the conclusion of the election.

This concludes the report of the Commissioner's authorized representative.

* * * * *

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MAHWAH	:	DECISION
TOWNSHIP, BERGEN COUNTY.	:	
	:	

The announced results of the balloting for one member of the Board of Education for an unexpired term of one year, and for the General Fund and Capital Project propositions of the Board at the annual school election held on April 19, 1994 in the Mahwah School District, Bergen County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Diane Snyder (write-in)	320	0*	320
Frank Buquicchio (write-in)	131	1*	132

A number of additional persons received write-in votes, but no tally approached those of the above two candidates.

*This tally was later corrected by the County Board of Elections to be 2 votes for Snyder and 13 for Buquicchio.

GENERAL FUND PROPOSITION

YES votes	673	15	688
NO votes	672	22	694

CAPITAL PROJECT PROPOSITION

YES votes	834	22	856
NO votes	500	15	515

Pursuant to separate letter requests from defeated candidate Frank Buquicchio filed April 29, 1994 pursuant to N.J.S.A. 18A:14-63.2, and from ten qualified voters filed April 28, 1994 pursuant to N.J.S.A. 18A:14-63.3, an authorized representative of the Commissioner of Education was directed to conduct a recount of ballots cast for the unexpired one-year term and for the General Fund and Capital Project propositions of the district. The recount of General Fund votes was conducted on

The Commissioner has reviewed the report of his representative and adopts the findings and conclusions as his own.

Accordingly, as announced at the conclusion of the election, Diane Snyder is deemed elected to the one-year unexpired term on the Mahwah Board of Education, the General Fund proposition of the district is deemed defeated by the voters, and the Capital Project proposition of the district is deemed approved.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 23, 1994

DATE OF MAILING 23, 1994

170-94

IN THE MATTER OF THE TENURE HEARING OF HOWARD EFFEREN, SCHOOL DISTRICT OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, PETITIONER,	:	DECISION
V.	:	
HOWARD EFFEREN, RESPONDENT.	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent, tenured custodian, for alleged criminal sexual contact. Board also filed petition for declaratory judgment seeking ruling that respondent forfeited his employment pursuant to N.J.S.A. 2C:51-2(a)(2) by virtue of judgment of conviction. Matters were consolidated.

ALJ concluded the offense in question involved and touched respondent's employment and that respondent therefore forfeited his position as custodian. Thus, it was unnecessary to reach a determination on the tenure charges.

Commissioner reversed recommended decision of the ALJ and remanded matter for a full hearing wherein respondent shall be permitted to present proof relating to all of the relevant circumstances surrounding the crime for which he was convicted, as required by Gore and Olek, to reach a determination as to whether an individual forfeited his public employment pursuant to N.J.S.A. 2C:51-2(a)(2). Commissioner further ordered that if it is concluded on remand that respondent did not forfeit his employment, this matter should proceed to hearing on the merits of the outstanding tenure charges filed against him.

UNE 24, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 8672-93 and
8099-93 (CONSOLIDATED)
AGENCY DKT. NOS. 275-7/93 & 308-8-93

BOROUGH OF BERGENFIELD
BOARD OF EDUCATION,
Petitioner,
v.
HOWARD EFFEREN,
Respondent.

Monica E. Peck, Esq., and **Joann L. Butler**, Esq., for petitioner
(Young, Dimiero & Sayrovitz, attorneys)

Harold N. Springstead, Esq., for respondent
(Springstead & Maurice, attorneys)

Record Closed: April 10, 1994 Decided: April 25, 1994

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

PROCEDURAL HISTORY

On June 19, 1993, the Superintendent of Schools of the Borough of Bergenfield filed tenure charges and a sworn Statement of Evidence against Howard Efferen (Efferen or respondent), a tenured custodian employed by the school district, with the Acting Secretary of the district's Board of Education (Board or petitioner). Respondent did not submit a written Statement of Evidence in opposition. The

Board met on July 13, 1993 and passed a resolution certifying tenure charges to the Commissioner of the State Department of Education (DOE) seeking dismissal of respondent. Efferen was suspended without pay. The DOE transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The matter was docketed as EDU 8099-93.

On August 23, 1993, the Board filed a petition for declaratory judgment with the DOE. That matter was transmitted by the DOE to the OAL on September 14, 1993 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. It was docketed as EDU 8672-93 and consolidated with the matter previously transmitted.

Telephone conferences were conducted throughout the proceedings. Petitioner filed a motion for summary decision on February 10, 1994. Respondent filed a reply thereto on March 14, 1994; and the Board, a response on April 10, 1994, on which date the record was closed. Hearings previously scheduled were adjourned with the consent of the parties pending resolution of the motion.

NATURE OF THE CASE

The tenure charges consist of two counts of unbecoming conduct. Count 1 alleges that on July 29, 1992, respondent had criminal sexual contact with his 25-year-old stepdaughter, D.A., who is alleged to be mentally handicapped, and that on January 25, 1993, Efferen pled guilty to a charge of criminal sexual conduct, in violation of *N.J.S.A.* 2C:14-3b. Count 2 alleges that Efferen misrepresented the status of the criminal action pending against him to the Superintendent of the district, Richard Cirelli (Cirelli). More specifically, it is alleged that Efferen stated that the criminal charges had been dropped when they were still pending. The Board's petition for declaratory judgment seeks rulings that respondent is disqualified for employment or service under Title 18A of the New Jersey Revised Statutes, pursuant to *N.J.S.A.* 18A:6-7.1, by virtue of a judgment of conviction dated March 10, 1993, and that respondent has forfeited his employment, pursuant to *N.J.S.A.* 2C:51-2, by virtue of the judgment of conviction.

The Board argues that it is entitled to summary decision regarding its disqualification and forfeiture arguments, as well as regarding the charges of

unbecoming conduct. It relies upon an affidavit by Cirelli, and documents referenced therein, filed in support of the motion, as well as the Statement of Evidence pertaining to the tenure charges and documents filed in support of its petition for declaratory judgment. Respondent opposes the motion, disputes certain of the facts relied upon by petitioner, and argues that certain of the documents relied upon by the Board should not be considered in disposing of the motion. The question presented is whether or not the Board's motion for summary decision should be granted.

FINDINGS OF FACT

A motion for summary decision may be granted if the papers and any discovery demonstrate that no genuine issue exists regarding any material fact and that the moving party is entitled to prevail as a matter of law. A motion for summary decision may be served with supporting affidavits. The decision may be rendered if the papers and discovery, in addition to any affidavits, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. In order to prevail, an adverse party must, by responding affidavit, set forth specific facts demonstrating that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not do so, summary decision, if appropriate, shall be granted. *N.J.A.C.* 1:1-12.5.

I am persuaded that it is appropriate to consider Cirelli's affidavit and documents in support thereof, the documents constituting the Statement of Evidence in support of the tenure charges, and the documents filed in support of the petition for declaratory judgment. Also considered is an answer filed on behalf of respondent to the petition for declaratory relief. Respondent did not file an affidavit nor documents in response to the motion and does not materially dispute the facts alleged by petitioner, except for the allegation that D. A. is mentally handicapped.

Based upon a review of the documents indicated and the papers filed on behalf of the parties in relation to the motion, I **FIND** the following to be **FACTS**.

Efferen commenced employment with the Board in 1980 in the position of

custodian at Bergenfield High School (High School). The duties of high school custodians in the district are as set forth in Exhibit A to Cirelli's affidavit.

During each school year of his employment, respondent was generally assigned as an evening shift custodian at the High School. His hours of employment were from 3:00 p.m. until 11:00 p.m. Efferen was periodically assigned to other shifts and worksites. During the summer months, July 1 through August 30, of each year, respondent worked the day shift at the High School, from 7:00 a.m. until 3:00 p.m. There are usually five custodians at the High School during the evening shift. At that time, custodians generally perform their duties unaccompanied by other custodians and are not under constant supervision.

During the 1992-93 and 1993-94 school years, there were in excess of 900 students attending the High School. A summary of events and activities which occurred at the High School after hours and during the shift on which respondent worked during the 1991-92 school year is as stated in Exhibit B to Cirelli's affidavit. A summary of events and activities which occurred at the High School during the 1992/93 school year, after school hours and during the hours of the evening shift on which respondent previously worked, is as stated in Exhibit C to Cirelli's affidavit. A summary of events which occurred during the summer of 1993, during day time hours during which respondent previously worked during summers, is as stated in Exhibit D to Cirelli's affidavit.

During the various events and activities referenced in Exhibits B, C, and D to Cirelli's affidavit, high school students, faculty members, students and staff from other schools, and numerous other visitors were present at the High School. During the events and activities of the nature referenced in Exhibits B, C, and D to Cirelli's affidavit, high school students, staff and visitors could and did proceed unaccompanied or unescorted through parts of the building and grounds of the High School. During the performance of his duties as a custodian at the High School, respondent had continuing opportunity for contact with students, staff members, and visitors to the High School and its grounds.[1]

---

[1] Efferen disputes that he had regular contact with students but does not deny Cirelli's affidavit regarding the presence of individuals and the occurrence of activities at the High School during respondent's school year and summer shifts.

On July 29, 1992, respondent's wife reported to the Bergenfield police department that respondent had sexually assaulted her daughter, D. A., who is 25 years of age, on July 29, 1992, at their home. In a statement given to a senior investigator with the Bergen County Prosecutor's Office, Sex Crimes/Child Abuse Squad, on July 29, 1992, Mrs. Efferen described D. A. as being "slightly mental," noting that she had attended "handicapped schools most of her life." (Ex. A, p. 4, Statement of Evidence in support of tenure charges). A warrant was obtained for the arrest of arespondent, charging aggravated sexual conduct. Respondent was arrested on July 30, 1992.

During the summer of 1992, Mrs. Efferen advised the Board that respondent had been arrested and was incarcerated. The Board suspended respondent on approximately September 18, 1992. On approximately January 8, 1993, Cirelli received a letter dated January 5, 1993 from respondent requesting reinstatement. The content of this letter is as stated in Exhibit I to the Statement of Evidence Supporting tenure charges.

Respondent was indicted on September 25, 1992. Count 1 averred that on July 29, 1992, Efferen committed sexual assault upon D. A. by performing an act of sexual penetration, *i.e.* inserting his finger into her vagina through the use of physical force or coercion, the victim not sustaining severe personal injury, in violation of *N.J.S.A.* 2C:14-2c(1). Count 2 alleged that on July 29, 1992, respondent committed sexual assault upon D. A. by performing an act of sexual penetration, *i.e.*, anal intercourse with her through the use of physical force or coercion, the victim not sustaining severe personal injury, in violation of *N.J.S.A.* 2C:14-2c(1). Finally, Count 3 stated that on July 29, 1992, Efferen committed criminal sexual contact with D. A. by intentionally touching her breasts for the purpose of degrading or humiliating her or to sexually arose or sexually gratify himself, through the use of force or coercion, in violation of *N.J.S.A.* 2C:14-3b.

On January 25, 1993, respondent pled guilty to Count 3 of the indictment, fourth degree criminal sexual contact, in violation of *N.J.S.A.* 2C:14-3b. A Judgment of Conviction was entered on March 8, 1993. He was sentenced to probation for a period of three years. As a condition of probation, Efferen was required to attend and complete Alcoholic Anonymous or any program deemed appropriate by the probation department and was required to continue psychological counseling.

DISCUSSION

The Commissioner of the DOE (Commissioner) has general jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. Interested persons may petition the Commissioner for a declaratory ruling regarding the applicability to any person, property or state of facts of any statute or regulation enforced or administered by the Commissioner. *N.J.A.C.* 6:24-2.1.

A tenured school janitor shall not be dismissed or suspended or reduced in compensation except because of a reduction in the number of janitors in the local district or except for neglect, misbehavior or other offenses. More specifically, a tenured custodian shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. *N.J.S.A.* 18A-6-10 & *N.J.S.A.* 18A-17-3.

Applicable statutory provisions provide for employment disqualifications. No school or board of education shall employ or contract for the services of any custodian unless the employer has first determined that no criminal history record information exists on file in the Federal Bureau of Investigation (FBI), Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such capacity. Such individual shall be disqualified from employment or service if his/her criminal history record shows conviction of any of certain specified crimes and offenses. *N.J.S.A.* 18A:6-7.1 (Supp. 1993). These include any crime or disorderly person offense bearing upon or involving a sexual offense or molestation as set forth in *N.J.S.A.* 2C:14-1 *et seq. Id.* at §(a). Notwithstanding, an individual shall not be disqualified from employment or service on the basis of a conviction if he/she has affirmatively demonstrated to the Commissioner clear and convincing evidence of his/her rehabilitation. Certain specified factors are to be considered in determining whether an individual has affirmatively demonstrated rehabilitation. *Id.* at §(e).

A local school board may employ a candidate provisionally for a period not exceeding six months, pending completion of a criminal history records check, provided the candidate submits to the Commissioner a sworn statement attesting that he/she has not been convicted of any crime or disorderly persons offense as specified in the disqualification provision. *N.J.S.A.* 18A:6-7.1a. An applicant for employment or service in any of the referenced positions is required to submit to the

Commissioner his/her name, address, and fingerprints. The Commissioner is authorized to exchange fingerprint data with and receive criminal record information from the FBI and the Division of State Police. *Id.* at §7.2. Upon review of the criminal history record information for an applicant, the Commissioner shall notify the applicant of the applicant's qualification or disqualification for employment or service. *Id.* at §7.3. The Commissioner may maintain the records on a candidate for no longer than one year from the date of determination as to the candidate's qualification or disqualification for employment with an employer. *Id.* at §7.4.

It is clear pursuant to the statutory provisions pertaining to disqualification, specifically the references to applicant and candidate, as well as the allowance of provisional employment pending a criminal check, that the disqualification statutes apply to applicants for positions, not currently employed individuals. Petitioner's reliance upon *Miller v. New Jersey Dept. of Education*, 91 *N.J.A.R.* 2d (EDU) 15 (1991), for the proposition that the disqualification provisions apply to current employees is misplaced. Miller commenced employment in 1984 and was notified on July 11, 1990 that a fingerprint search conducted by the New Jersey State Police and the FBI revealed that he had been convicted on July 1, 1986 for aggravated arson. Although Miller was ultimately disqualified pursuant to *N.J.S.A.* 18A:6-7.1, it is noteworthy that that provision was not effective until October 8, 1986, a date subsequent to the commencement of his employment and the conviction. *N.J.S.A.* 18A:6-7.1 (notes). Although not entirely clear, it is reasonable to conclude that the Commissioner applied the disqualification provision to Miller as if he were a new employee.

Statutory provisions pertaining to the forfeiture of persons holding official positions are applicable to employees of local school boards. A person holding any public office, position or employment under State government or any agency or political subdivision thereof who is convicted of certain specified offenses shall forfeit his/her office or position. These are convictions of any offense involving dishonesty or crime of the third degree, conviction of an offense "involving or touching such office, position or employment," or if the constitution or statute so provides. *N.J.S.A.* 2C:51-2(a). Forfeiture shall take effect upon a finding of guilt by the trier of facts or a plea of guilty, if the court so orders, or upon sentencing, unless the court for good cause shown orders a stay of such forfeiture. *Id.* at §b.

The determination of whether a crime touches or involves employment requires ". . . an analysis of the nexus between the crime and the employment to determine if there is a sufficient relationship between the two to warrant the harsh penalty of forfeiture." *Moore v. Youth Correctional Institute, (Moore),* 119 *N.J.* 256, 266 (1990). The employer and administrative agencies should generally initially make such determination, subject to the individual's right to appeal to the Appellate Division. *Moore, supra.*

An offense may involve or touch employment even if it was not committed on the job premises or during work hours. It is the substance of the crime which determines whether or not it involves or touches employment. *Moore, supra* at 269-270. A crucial factor is the relationship between the offense and an individual's capability to perform satisfactorily in the future:

> What does appear relevant is that the offense rendered suspect the employee's future service to the State, both in the capacity of the employee's job at the time of the conviction and in every other potential capacity. Hence, we find that the nexus between the offense and employment is not limited by time and location. When the infraction casts such a shadow over the employee as to make his or her continued service compatible with the traits of trustworthiness, honesty, and obedience to law and order, then forfeiture is appropriate.
>
> The forfeiture statute, as applied in the foregoing cases, is not merely a collateral attempt to punish the criminal offender. It also reflects a belief that the circumstances surrounding a criminal conviction bear directly on an employee's competency and capacity to continue to do his or her job or to perform any other job for the state . . . *Moore,* at 270-271.

An individual is guilty of criminal sexual conduct, a crime of the fourth degree, if he commits an act of sexual contact with the victim under certain specified circumstances. *N.J.S.A.* 2C:14-3(b). These are:

1. The actor uses physical force or coercion but the victim does not sustain severe personal injuries;

2. The victim is one who the actor knew or should have known was physically helpless and mentally incapacitated;

3. The victim is on probation or parole or is detained in a hospital, prison or other institution or is mentally defective and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal or professional or occupational status;

4. The victim is at least 16 but less than 18 years old and the actor is a member of the victim's household with supervisory or disciplinary power over the victim; or

5. The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim. *Id.* at §2(c).

CONCLUSIONS

As discussed hereinabove, the disqualification provisions only apply to applicants for positions in educational settings or employment prior to the effective date of *N.J.S.A.* 18A:6-7.1. They therefore do not apply in the instant matter. It is not necessary to consider the arguments advanced by the parties regarding whether respondent has demonstrated that he has been rehabilitated.

I am persuaded, however, that the offense in question touches and involves respondent's employment and that he is therefore subject to forfeiture, regardless of whether D.A. is mentally handicapped. Forced sexual contact is on its face a serious offense. The context and identity of the victim, factors articulated in *Moore, supra*, involved sexual contact in a family setting, an element which heightens the seriousness of the offense. Based upon the age of D. A., the apparent circumstances, as addressed in *N.J.S.A.* 2C:14-2(c), related to either the use of physical force or coercion where the victim did not sustain severe personal injury or the victim was an individual who the actor knew or should have known was incapacitated in some aspect.

The circumstances and the nature of the offense clearly demonstrate that respondent's qualifications to continue in his position are compromised. As found, respondent had ample opportunity for interaction with high school students, individuals presumably several years younger than D. A. As petitioner argues, the

opportunity for interaction with students and other individuals when respondent is unsupervised argues for forfeiture. Although the disqualification provisions do not apply in this proceeding, the fact that the Legislature has deemed that applicants who have committed sexual offenses are disqualified evidences a judgment that individuals convicted of such offenses should not be employed in a school setting. The Legislature is deemed to be conversant with its own enactments. *Yacenda Food v. N. J. Highway Authority*, 203 *N.J. Super.* 264 (App. Div. 1985).

I am persuaded that respondent forfeited his position as a custodian with the petitioner. It is therefore unnecessary to reach a determination as to whether or not he should be disciplined pursuant to tenure provisions.

I **CONCLUDE** that *N.J.S.A.* 18A:6-7.1 does not apply in the instant case but that the offense in question involves and touches respondent's employment and that he therefore forfeited his position pursuant to *N.J.S.A.* 2C:51-2.

ORDER

It is hereby **ORDERED** that petitioner's motion for summary decision be and is hereby **GRANTED** as it pertains to forfeiture and be and is hereby **DENIED** as it pertains to disqualification. It is also **ORDERED** that respondent be terminated from his position as custodian with petitioner.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 25, 1994
Date

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 29 1994
Date

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF HOWARD EFFEREN, SCHOOL DISTRICT OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
PETITIONER,	:	
V.	:	
HOWARD EFFEREN,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Laws have been reviewed. Respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent excepts to the ALJ summarily deciding that his conviction involved and touched on his employment, thereby requiring forfeiture of his public position pursuant to N.J.S.A. 2C:51-2(a)(2), without first affording him a right to a full hearing. He contends that such decision is in contravention of the Supreme Court's holding in Moore v. Youth Correctional Institute, 230 N.J. Super. (App. Div. 1989), aff'd 119 N.J. 256 (1990)

> Since an analysis of whether the offense touched and involved employment precedes the imposition of forfeiture in this case, the Department and Agencies will be able to consider all mitigating circumstances... The inquiry into whether an offense touches on employment to the extent of meriting forfeiture requires careful examination of the facts and the evaluation of various factors in the "involve and touch" analysis. Id. at 268 (emphasis added)
>
> (Respondent's Exceptions, at p. 2)

Respondent asserts that Moore clearly mandates that the Commissioner must conduct a careful evaluation during which all mitigating circumstances surrounding his conviction are considered, before automatic forfeiture can be applied.

Respondent further argues that the ALJ's "involved and touched" determination also ignores the dictates set forth in School District of the City of Garfield v. Olek, 92 N.J.A.R. 2d (EDU) 323 (1992) wherein the State Board found that Moore requires a careful examination of respondent's employment and the offenses to which he pled guilty which cannot be done on a limited record. Specifically,

> Such analysis must also include consideration of all mitigating circumstances (citations omitted). In that the Commissioner found that the nature of respondent's offenses precluded the applicability of mitigating factors, it is unclear whether he fully considered such facts or provided respondent with ample opportunity to demonstrate their existence and pertinence. Id. at 5. (Respondent's Exceptions, at p. 3)

Respondent argues that in light of the established procedures as set forth in Moore, supra, and Olek, supra, the ALJ should not have granted summary decision to the Board without according him a full hearing which would provide the trier of fact with a complete record of the offense to which he pled guilty, all mitigating circumstances surrounding this offense and relevant expert opinion.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with respondent's exception arguments with respect to the requirements of Moore and Olek in reaching a determination as to whether an individual has forfeited his public employment pursuant to N.J.S.A. 2C:51-2(a)(2). Consequently, the Commissioner reverses the recommended decision of

the Office of Administrative Law and remands this matter for a hearing wherein respondent shall be permitted to present proof relating to all of the relevant circumstances surrounding the crime for which he was convicted. Only after carefully considering and evaluating all of these circumstances can this forum justly determine whether respondent's conduct touched and concerned his employment.

Accordingly, the Commissioner remands this matter for further proceedings in accordance with this decision in order to determine whether respondent forfeited his public employment pursuant to N.J.S.A. 2C:51-2(a)(2). The Commissioner further directs that in the event that it is concluded on remand that respondent did not forfeit his employment, this matter should then proceed to hearing on the merits of the outstanding tenure charges filed against him by the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 24, 1994

DATE OF MAILING - JUNE 27, 1994

171-94

RICHARD HOROWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 27, 1994

OAL DKT. NO. EDU 6173-93

RICHARD HOROWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

JUNE 27, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - JUNE 28, 1994

172-94

WILLIAM SCHRAER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 27, 1994

OAL DKT. NO. EDU 6838-93

WILLIAM SCHRAER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 27, 1994

DATE OF MAILING - JUNE 28, 1994

173-94

IN THE MATTER OF THE ANNUAL	:	COMMISSIONER OF EDUCATION
SCHOOL ELECTION HELD IN THE	:	DECISION
SCHOOL DISTRICT OF THE	:	
BOROUGH OF RIDGEFIELD PARK,	:	
BERGEN COUNTY.	:	
	:	

SYNOPSIS

Petitioner, defeated candidate for membership on the Board, sought inquiry into alleged violations/irregularities in school election proceedings. Petitioner specifically alleged the voting machine in her district of residence had completely malfunctioned.

ALJ found that even though the machine had malfunctioned, to set aside the election, petitioner would have had to prove that the malfunction was so serious an irregularity as to interfere with the free expression of the electorate's will. The Board's expert witness testified that the chance of petitioner not being elected was 73.8 percent. Thus, the likelihood of petitioner's success being about one out of four, petitioner failed to sustain her burden of proof and the petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JUNE 27, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3998-93
AGENCY DKT. NO. 106-4/93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY

Lorraine DiArchangel, *pro se*

Lester Aron, Esq., for respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Robert Thiemann, *pro se*, participating pursuant to *N.J.A.C.* 1:1-16.6

Record Closed: April 29, 1994 Decided: May 20, 1994

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This is a school election case which the Department of Education transmitted to the Office of Administrative Law on April 30, 1993, as a result of a request made by petitioner, Lorraine DiArchangel, pursuant to *N.J.S.A.* 18A:14-63.12 and *N.J.A.C.* 6:24-6.1 to -6.5. The appeal concerns the annual school election held in Ridgefield Park on April 20, 1993, in which petitioner was a defeated candidate. Specifically, DiArchangel

alleged that a voting machine in district 8, her own district of residence, had malfunctioned completely since a tally of the votes from that machine revealed with respect to her candidacy that no votes were registered for her. DiArchangel maintained that this malfunction was so egregious as to require a new election.

A telephone prehearing conference was conducted on July 12, 1993, during which it was agreed that the following issue had to be resolved: "Were there any violations of statutorily proscribed procedures at the April 20, 1993 school board election held in Ridgefield Park and, if so, to what relief, if any, is petitioner entitled?" In the interim, on May 24, 1993, the Commissioner of Education (Commissioner) had determined following a recount at DiArchangel's request that of six candidates for three Board of Education (Board) positions, DiArchangel received 309 votes and came in fifth. The top three candidates obtained 527, 461 and 441 votes respectively, and the person who came in fourth received 391 votes. Finally, the Commissioner noted that DiArchangel's allegation regarding the consequences of the malfunctioning machine in district 8 was pending before the Office of Administrative Law.

Following a series of adjournments, I heard the matter on March 9, 1994. Testimony was received on that date from the petitioner and two witnesses for the Board. Also present at the hearing was the candidate who came in third, Robert Thiemann; previously he had been admitted as a "participant" pursuant to *N.J.A.C.* 1:1-16.6.

TESTIMONY FOR PETITIONER

Petitioner is a resident of school election district 8 in Ridgefield Park and she was a candidate for the board of education in April 1993. Shortly after 9 p.m. on April 20, 1993, the date of the annual school election, she learned that the machine in district 8 (indeed, the one which she actually used) failed to reflect the casting of even a single vote for her candidacy. DiArchangel knew this constituted a serious malfunction since she had voted that day in favor of her own candidacy and assumed that her husband did so as well. Thus, a serious problem obviously had occurred

which she claimed impinged upon the exercise of her own and of the electorate's will, thereby violating her rights as a candidate and requiring a new election either in her district or the entire school district.

TESTIMONY FOR RESPONDENT

Two persons testified on behalf of the Board. The first, Ronald Weber, is the Secretary/School Business Administrator and responsible for overseeing the conduct of annual school elections. According to Weber, the voting machines used in the district are rented from the Bergen County Board of Elections and following the election the poll workers tally the votes cast on each machine for each candidate and then deliver the results to him for public posting in the Board offices.

Weber then identified a variety of documents pertaining to the April 20, 1993 school election. They included the following: (a) a packet containing the statement of results of the election which displayed the count for each candidate at each polling district and on each machine, together with a total tally (Exhibit R-1); (b) a letter from the Superintendent of the County Board of Elections to Board counsel explaining that a malfunction had occurred in the machine used in district 8 on April 20, 1993 (Exhibit R-2); and (c) a packet of documents containing the tally of annual school elections for the seven-year period between 1986 and 1992 which had been provided to a statistician hired by the Board in connection with its preparation for this case (Exhibit R-3).

The Board's second witness, Dr. Javier Cabrera, is a professor of statistics at Rutgers University and holds both Masters and Ph.D degrees from Princeton. Based upon his curriculum vitae (Exhibit R-4) and his own foundation testimony concerning his education and experience, Cabrera was qualified over petitioner's objection as an expert witness in statistics.

Cabrera was employed by the Board in December 1993 to examine the statistical consequences surrounding the machine malfunction in district 8 as it impacted specifically upon DiArchangel's candidacy. He identified a detailed report

which he prepared wherein he described the method he followed in order to determine the probability that the malfunction resulted in a failure of petitioner to be elected (Exhibit R-5). Cabrera explained that his formal statistical analysis was designed to "estimate the probability, under certain assumptions, that [DiArchangel] would have obtained a sufficient number of votes in the 1993 annual school election to have won a position on the [Board]." In his analysis Cabrera noted that to achieve the objective of estimating the probability that petitioner would have finished third out of all six candidates (and thereby been elected) he had to construct a model involving an estimate of the number of "unaccounted votes" in each district or polling place. Both in his testimony and in his report he explained that "unaccounted" has reference to the number of potential votes that were not cast for any candidate or, in other words, "unexercised" votes.

Following his statistical model, and based upon certain assumptions, Cabrera determined that in order to have been elected petitioner would have needed 132 or more votes in district 8. To determine the probability of DiArchangel not being elected the witness also calculated that the number of unaccounted votes in her district would have been greater than 62. In performing that computation he used a "binomial probability distribution" approach which involves application of a formula to the numbers of votes and the total votes cast for other candidates in the other seven districts. Also, in light of the fact that different numbers of persons cast votes at the various polling places, a "weighted average" was used in order to provide even more reliability. Ultimately, based upon his computations, Cabrera concluded for the reasons set forth in his report that the chance that petitioner was not elected was 73.8 percent. In other words, the "odds" against her being elected were approximately three out of four. To check the validity of this result based upon the 1993 voting numbers the witness used two other models involving data from the 1986 to 1992 elections for the combined districts 6 and 8 (Exhibit R-3), and for the three of those years in which DiArchangel was a candidate (1986, 1989 and 1990). Although Cabrera acknowledged that neither of those other two models were as "realistic" as the initial model; nevertheless, the results of both confirmed his essential conclusion that the most

realistic estimate of the chances that Ms. DiArchangel was not elected was at least 73.8 percent.

On cross-examination the witness indicated that the particular method he used was a standard procedure often used, for example, in polls of candidate popularity and he denied that he had been engaged by the Board as its "hired gun." He insisted that when he was employed and asked to make a statistical analysis he was given no preconceived direction with respect to the outcome.

FINDINGS OF FACT

In light of the testimony and the documentary evidence I herewith make the following findings of fact:

1. The 1993 annual school election in the Borough of Ridgefield Park was conducted on April 20, 1993.

2. Six candidates vied for three positions and the total number of votes cast (both at the polls and absentee) for the six candidates was as follows: (1) Joseph Piccone--527 votes; (2) Raymond J. Dwyer, Jr.--461 votes; (3) Robert Thiemann [the participant]--441 votes; (4) Maryanne Foldi--391 votes; (5) Lorraine DiArchangel [the petitioner]--309 votes; and (6) Thomas A. Blumenthal--238 votes. Thus, Piccone, Dwyer and Thiemann were the successful candidates.

3. A tally of the votes cast in district 8, DiArchangel's "home district," revealed that with respect to the voting machine used in that district (machine no. 93726), no votes were registered for DiArchangel.

4. Following the election the machine in question was examined by a mechanic for the Bergen County Board of Elections. In a letter dated August 25, 1993, to Board counsel from Eileen C. Feldner,

Superintendent of Elections, it was noted that the inspection revealed that part of the shifter plate appeared to have been misaligned. Thus, persons attempting to vote for DiArchangel could not engage the "X" wheel and, as a result and unknown to them, no votes for DiArchangel registered on the machine.

5. A statistical report authored by Rutgers University Professor Dr. Javier Cabrera, an expert witness qualified in statistics, revealed that the chance of petitioner not being elected was 73.8 percent, or three out of four. Cabrera's analysis involved the application of a particular model based upon the number of voters at each machine at each polling place, and the fact that each voter in the school board election could cast up to three votes.

6. Dr. Cabrera checked the validity of his result by employing two other models in which he used the results of school board elections for the years 1986 through 1992. Those models confirmed his finding that the chance of petitioner not being elected in the 1993 election was 73.8 percent.

DISCUSSION

The importance of properly registering votes cast at school board elections cannot be overstated. As the New Jersey State Board of Education noted in a 1979 decision involving, in part, a malfunction in voting machines, "[m]embers of boards of education play a dominant role in the governance of local school districts and in determining the quality of the education of our young people. They expend more public funds per capita than any other state or local body. It is of vital importance that board members be properly elected and that they enjoy the support of the majority of the electorate." *See, In the Matter of the Annual School Election Held in the District of the Borough of Tinton Falls, Monmouth County,* 1979 *S.L.D.* 872, 875.

By the same token, however, setting aside any election, not only a school election, requires a high level of proof that the irregularities constituted so major a factor as to nullify the free expression of the voters. *See, e.g., In Re Wene,* 26 *N.J. Super.* 363, 383 (Law Div. 1953); *Sharrock v. Keansburg*, 15 *N.J. Super.* 11, 19-20 (App. Div. 1951). To put it another way, every effort should be made to give effect wherever possible to the results of elections and even proven irregularities and deviations do not provide sufficient ground to void an election if, despite those problems, the free will of the people has been fairly exposed and determined and has not been thwarted. *See, In Re Livingston*, 83 *N.J. Super.* 98, 107 (App. Div. 1964). Moreover, in analyzing challenges to school board elections it must be stressed that the burden of proof to demonstrate that the free will of the people has been thwarted rests upon the petitioner. It is not enough merely to speculate that had the irregular condition not occurred the result would have been different. *See, e.g., In the Matter of the Annual School Election held in the Matawan-Aberdeen Regional School District*, 1987 *S.L.D.* 1140, aff'd. N.J. State Bd. of Ed., 1987 *S.L.D.* 1146; *In the Matter of the Annual School Board Election held in the Newark School District*, 93 *N.J.A.R.* 2d (Vol. 4B) 645 (Dept. of Education).

A review of the testimony, documentary evidence and decisional authorities leads to the inescapable conclusion that despite the unfortunate malfunction which occurred at the April 20, 1993 school board election, which ironically involved the very machine upon which candidate DiArchangel voted, she nevertheless has failed to demonstrate that the machine malfunction was so serious an irregularity as to interfere with the free expression of the electorate's will. I reach this conclusion based not upon "mere speculation," but upon the report and the testimony of the Board's expert witness in statistics, Dr. Cabrera. His analysis, which was not seriously challenged on cross-examination, clearly demonstrated how the unaccounted votes likely were cast and not one of the three formulas which he used produced a result that DiArchangel's likelihood of success was any better than about one out of four. Thus, in light of the petitioner's failure to sustain her burden of proof by a preponderance of the credible evidence, her

challenge to the results of the 1993 school election held in Ridgefield Park must be rejected and her petition is **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 20, 1994
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

5/24/94
DATE

Hope R Blackman
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

amr

WITNESS LIST

For Petitioner:

Lorraine DiArchangel
Ronald Weber
Javier Cabrera

EXHIBIT LIST

R-1 Statement of results of annual school election, Ridgefield Park, 1993

R-2 Letter dated August 25, 1993 from Eileen C. Feldner, Superintendent of Elections, Bergen County, to Elissa T. Sorrell, Esq., with attachment

R-3 Statement of results of annual school elections held in Ridgefield Park, 1986 through 1992

R-4 Curriculum vitae of Dr. Javier Cabrera

R-5 Statistical analysis of Ridgefield Park school board election results--April 20, 1993, prepared by Dr. Javier Cabrera

OAL DKT. NO. EDU 3998-93

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that petitioner did not meet her burden of proof in this matter, as she was unable to show that a voting machine malfunction, which served as the basis of her complaint, sufficiently affected the outcome of the election so as to thwart the will of the voters.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 27, 1994

DATE OF MAILING - JUNE 28, 1994

174-94

DARREN RESSLER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

RESPONDENT,

AND

MARIO ALIA AND HELEN HYMANSON,

INTERVENORS.

COMMISSIONER OF EDUCATION

DARREN RESSLER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

RESPONDENT,

AND

MARIO ALIA AND HOWARD SCHUMAN,

INTERVENORS.

DECISION

SYNOPSIS

Petitioning physical education teacher contended Board violated his seniority and tenure rights by reducing his employment from full to part-time for a portion of the 1991-92 academic year and by abolishing his position for the 1992-93 academic year. Matters were consolidated. Petitioner contended that an athletic director improperly "bumped" him from a full-time teaching position and that nontenured staff were employed in positions for which he was certified.

ALJ concluded Board violated petitioner's rights by failing to recognize his greater seniority in the elementary category. Board, however, properly reduced hours of petitioner, who had least seniority of all physical education teachers at the secondary level. Board was ordered to pay petitioner mitigated compensation arising from its failure to offer him the fourth, fifth and sixth-grade physical education classes assigned to intervenors for the 1991-92 and the 1992-93 academic years.

Commissioner concurred with findings and conclusions of the ALJ and directed payment of the mitigated compensation.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0705-92

AGENCY DKT. NO.12-1/92

DARREN RESSLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK,

Respondent,

and

MARIO ALIA and HELEN HYMANSON,

Intervenors.

OAL DKT. NO. EDU 5018-92

AGENCY DKT. NO. 262-06/92

DARREN RESSLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK,

Respondent,

and

MARIO ALIA and HOWARD SCHUMAN,

Intervenors.

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

George J. Sokalski, Esq., for respondent

Randi Donner, Esq., for intervenor Mario Alia
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Harold N. Springstead, Esq., for intervenor Helen Hymanson
(Springstead & Maurice, attorneys)

Robert A. Fagella, Esq., for intervenor Howard Schuman
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: October 4, 1993 Decided: May 13, 1994

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

Statement of the Case

These are consolidated appeals by a physical education teacher who contends that the board of education violated his seniority rights by reducing his employment from full to part-time for a portion of the 1991-92 academic year and by abolishing his position for the 1992-93 academic year. Three issues are raised: First, whether an athletic director who voluntarily resigned from his directorship has preference over petitioner for a full-time teaching position. Second, whether petitioner has greater seniority entitlement than other tenured teachers to an assignment at the fourth, fifth and sixth grade levels. In turn, resolution of this question depends on whether seniority should be determined in the elementary or secondary category. And, third, whether petitioner has any additional tenure rights by virtue of an after-acquired teaching certificate.

For the reasons which follow, petitioner's rights are subordinate to those of the athletic director but superior to other teachers with fewer years of service in the elementary category. Petitioner does not gain any additional rights resulting from a

teaching certificate obtained after the date of the school board's decision to abolish his position.

Procedural History

On January 16, 1992, petitioner Darren Ressler ("Ressler") filed a verified petition of appeal with the Commissioner of Education ("Commissioner") from the 1991-92 action of the Saddle Brook Board of Education ("Board"). Subsequently, on January 27, 1991, the Commissioner transferred the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Mario Alia and Helen Hymanson, two teachers whose interests might be adversely affected by the outcome, were allowed to intervene as parties in this case. The OAL scheduled a hearing for December 15, 1992. At the hearing, the parties entered into a stipulation of all facts.

Meanwhile, on June 10, 1992, Ressler filed a second appeal with the Commissioner from the 1992-93 action of the Board. On July 1, 1992, the Commissioner sent this matter to the OAL for possible consolidation with the earlier appeal. Howard Schuman, another teacher whose interests might be affected, was joined as an intervenor. A second hearing was scheduled for March 1, 1993. Again, the parties agreed to stipulate all facts without offering any testimony. By mutual agreement, both cases were consolidated for disposition together.

Later, on September 27, 1993, the OAL granted Ressler's motion to supplement the record by adding the transcript of pertinent testimony in a case entitled *Hayden v. Saddlebrook Bd. of Educ.*, OAL Dkt. No. EDU 3390-92. The record closed on October 4, 1993.

Findings of Fact

All of the relevant facts are undisputed. **I FIND**:

(1) General Background Facts Regarding Petitioner's Service

Darren Ressler started working in the district in March 1976 and has attained tenure as a teacher.[1] At all relevant times, Ressler has held an instructional certificate with endorsements as teacher of health and physical education.[2] Throughout most of his career, he was assigned as a full-time high school teacher of grades nine to twelve. Beginning in 1989-90, however, he taught physical education at the sixth grade level as well as the upper grades. Ressler contends, therefore, that his seniority in the elementary category started accruing in September 1989. In the following year, 1990-91, he resumed his prior assignment as a full-time teacher of grades nine to twelve.

At the outset of 1991-92, Ressler initially had a full-time teaching assignment of students in grades four to ten. On December 5, 1991, Ressler received written notice that Mario Alia would be taking over his seventh-period class for ninth graders and his eighth-period class for tenth graders. Thereafter, on December 11, 1991, the Board adopted a formal resolution reducing Ressler's employment to a .6 position, effective February 12, 1992, and proportionately reducing his annual salary from $48,420 to $29,052. During the sixty-day interim, Ressler was temporarily assigned to nonteaching duties for the seventh and eighth periods. Finally, on April 4, 1992, the Board adopted a second resolution abolishing Ressler's remaining part-time position at the end of 1991-92 "due to declining student enrollment and [for] reasons of economy." Consequently, Ressler was placed on a preferred eligibility list "for recall in the event a vacancy develops."

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[1]Although petitioner and the Board disagree on whether Ressler's service from March to June 1976 counted toward obtaining tenure, that dispute has no bearing on the legal issues involved here.

[2]This endorsement authorizes its holder "to teach health and physical education in *all* public schools." *N.J.A.C.* 6:11-6.2(a)(17). (Emphasis added.)

After the board had abolished his position but prior to his last day of employment, Ressler obtained an additional endorsement as an elementary school teacher, issued by the State Board of Examiners in June 1992.

(2) Resignation of the Athletic Director

Mario Alia has been a physical education teacher in the district continuously since 1958-59, and unquestionably has greater seniority in the secondary category.[3] He too holds an endorsement as teacher of physical education and health. Since 1970-71, Alia has served as athletic director, described by the parties as "a stipended position [and] not a teaching position."[4] Thus, for 1991-92, Alia had a reduced teaching load and devoted the seventh and eighth periods to his responsibilities as athletic director.

One month into the 1991-92 academic year, on October 2, 1991, Alia voluntarily submitted his resignation as athletic director, explaining that, "Due to the constant pressures of the position and my increased work load, I find that I can no longer . . . function efficiently under these conditions." A week later, on October 9, 1991, the Board accepted his resignation, "with regret," effective December 1, 1991. On October 9, 1991, the Board also abolished the title of athletic director and created a new title known as "supervisor of athletics."[5] As noted, Alia replaced Ressler as teacher of the seventh and eighth period physical education classes at the high school.

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[3]Alia has been teaching at the high school level since 1960-61. In addition to more years of service in the district than Ressler, Alia also is entitled to two years of seniority credit for military service. *N.J.S.A.* 18A:28-12.

[4]Evidently the job-function was not regarded as administrative or supervisory, since Alia does not possess any administrative certificate. See *N.J.A.C.* 6:11-9.1. The Board analogizes it to any duty period regularly assigned to a teacher, such as lunch duty.

[5]The record does not reveal whether this was essentially the same job with a new title or a different job with increased supervisory responsibilities.

(3) Seniority Among Tenured Physical Education Teachers

Both of the other two teachers over whom Ressler claims seniority hold health and physical education endorsements and have been employed by the district longer than Ressler. Helen Hymanson began teaching in February 1975 and, except for an unpaid leave of absence in 1977-78, had been a full-time high school teacher until 1990-91. In that last year, her schedule consisted of grades nine through twelve in the morning and grades four through eight in the afternoon. Indisputably, she has greater seniority than Ressler in the secondary category. But Ressler asserts that he has greater seniority in the elementary category, because he started teaching sixth-grade physical education in 1989-90, whereas Hymanson did not teach elementary physical education until two years later in 1991-92.

Howard Shuman has been a physical education teacher in the district since January 1971. For each year until 1992-93, he taught physical education at the ninth to twelfth grade level. In 1992-93, his schedule was split among grades four to eight in the morning and grades nine to eleven in the afternoon. Again, Ressler acknowledges that Schuman has greater seniority in the secondary category, but maintains that Schuman had no seniority in the elementary category at the time that Ressler's position was abolished.

Disposition of the seniority issue depends on whether or not the lower and middle grades in the district are "departmentalized." Originally, the parties had stipulated in conclusive language that "Grades 7 and 8 in respondent's district are departmentalized." At the second hearing, however, the parties revised their stipulation to say that "certain grades" in respondent's school district are "modified departmentalized." Further, they clarified that,

> By modified departmentalized, the respondent means that 5th, 6th, 7th & 8th grades in respondent's district are structured so that each class moves from classroom to classroom for different academic subjects.At times more than one subject may be taught by the same teacher and some classes may move as few as two (2) times per day, depending upon the staffing of a particular school.

In a subsequent litigated matter, however, Dr. Edward Price, superintendent of schools of the Saddle Brook school district, retracted the earlier characterization of

the fifth to eighth grades as a "modified departmentalized" program, admitting that he had previously been "under a misconception of what you meant by that." (T31-8 to T31-16).[6] Instead, the Board took the contrary position that its elementary grades should be considered "nondepartmentalized." Regardless of the descriptive label, the underlying facts developed in that other case are consistent with what the parties have stipulated here. Dr. Price testified that,

> On the elementary level, meaning grades K through eight, the children are in elementary classrooms. Now, in grades five, six, seven and eight, the teachers teach two of the core subjects. The core subjects would be English, social studies, science, mathematics. So, every teacher teaches two of the core subjects. And which ones of those they teach will vary year by year, depending upon the number of sections we have in each building. (T12-20 to T13-2).

In the course of his testimony, Dr. Price elaborated that every teacher at the elementary level is required to hold an elementary teaching certificate (T14-18); that instruction at the elementary school is "in essence, a self-contained program" (16T-6); that the elementary teachers have the "flexibility" to extend a class beyond the end of a scheduled period if the children happen to be engaged in a particularly interesting project (T25-1 to 12); and, that elementary students are "block scheduled by class" so that the entire class stays together as a unit (26T-20). He contrasted this type of arrangement to the high school, where each student is scheduled "individually," and the scheduling structure is "far more rigid," so that Suzie and Freddie may have English together during one period and, "next period, Suzie could have gym and Freddie could have mathematics." (T26-6 to 20). Likewise, he distinguished the situation from "team teaching," where two teachers work together to teach an interdisciplinary subject as, for example, an English teacher and a social studies teacher collaborate on a course in American literature. (32T16 to 33T2).

Insofar as the record discloses, the Board would not have encountered any significant scheduling conflict in 1991-92 if Ressler had been given Hymanson's

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[6]The reference is to the page and line numbers of the transcript of a hearing on June 2, 1993 in *Hayden v. Saddlebrook Bd. of Educ.*, OAL Dkt. No. EDU 3390-92.

elementary schedule. Ressler's three morning classes were held at the Smith or Long elementary schools between the hours of 9:10 a.m. to 11:15 p.m. and Hymanson's three afternoon classes were held at the Franklin or Washington elementary schools between the hours of 12:50 p.m. and 2:53 p.m. Similarly, there would be no scheduling conflict in 1992-93 if Ressler had been assigned Schuman's three morning classes at the Long or Smith elementary schools.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board violated Ressler's rights by failing to recognize his greater seniority in the elementary category.

N.J.S.A. 18A:28-9 empowers a local school board to reduce the size of its teaching staff "whenever 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." Such "reduction in force," however, "shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." *N.J.S.A.* 18A:28-10. Seniority is a mechanism for ranking all tenured teaching staff members so that reductions in force can be effected in an equitable fashion and in accord with sound educational policies. *Lichtman v. Ridgewood Bd. of Educ.*, 93 *N.J.* 362, 368, n. 4 (1983); *Ellicott v. Bd. of Educ.*, 251 *N.J. Super.* 342, 349 (App. Div. 1991).

State regulations prescribe that "[s]eniority shall be determined according to the number of academic or calendar years of employment . . . in specific categories." *N.J.A.C.* 6:3-5.1. *Capodilupo v. West Orange Bd. of Educ.*, 218 *N.J. Super.* 510, 514 (App. Div. 1987), *certif. den.* 109 *N.J.* 514 (1987). Ressler acknowledges, as he must, that Mario Alia has more years of service and, hence, greater seniority at the secondary level. Nonetheless, Ressler argues that the mere "transfer of duties" occasioned by Alia's resignation as athletic director is not a "reduction in force" necessary to trigger Alia's seniority rights under the statute. Under this view, Ressler's work was simply "given" to Alia, without any actual reduction in the number of physical education classes. Since Alia voluntarily made a "choice" to

relinquish his full-time job, Ressler contends that seniority rights do not come into play.

What Ressler's analysis overlooks is that there has indeed been a reduction in the total number of person-hours now that Alia has been relieved of his extra duties. Alia's responsibilities as athletic director were performed under his instructional certificate. *Dennery v. Passaic Cty. Reg. High Sch. Dist. #1 Bd. of Educ.*, 131 *N.J.* 626, 633 (1993). Prior to his resignation, Alia had to spend two periods per day on nonteaching responsibilities. When that time became available for teaching, the district no longer needed as many full-time teaching positions and someone on staff had to bear the loss of hours. Reduction in hours of employment is considered a reduction in force. *Klinger v. Cranbury Twp. Bd. of Educ.*, 190 *N.J. Super.* 354, 357 (App. Div. 1982). *Accord, Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239, 240 (App. Div. 1987). Confronted with this business necessity, the Board properly reduced the hours of Ressler, who had the least seniority of all physical education teachers at the secondary level.

Cases cited by Ressler in support of his position are distinguishable. For example, *Benson v. Rockaway Bd. of Educ.*, 92 *N.J.A.R.* 2d (EDU Vol. 4) 15 (Comm'r Nov. 20, 1991), aff'd 92 *N.J.A.R.* 2d (EDU Vol. 4) (St. Bd. May 8, 1992) dealt with the preferred eligibility list for rehiring previously-terminated teachers rather than with the seniority list for reducing the employment of current teachers. Unlike Alia who had worked full-time as a teacher, the senior teacher in *Benson* ordinarily worked in a part-time assignment and, thus, had no reasonable expectation of a full-time position. Likewise, in *Baruffi v. Morris Hills Reg. High Sch. Bd. of Educ.*, 1990 *S.L.D.* 702 (Comm'r), two teachers whose positions had been abolished were recognized as having preference for a new vacancy over a more senior teacher whose continuing employment was not directly threatened. Here too, the situation involved application of the standards governing preferred eligibility rather than seniority.

In *Savarese v. Bernardsville Bd. of Educ.*, 1990 *S.L.D.* 1541 (Comm'r Nov. 15, 1990), the Commissioner never reached the issue of seniority, except to determine that family life is not a separate seniority category. Instead, the Commissioner remanded the matter for "the sole and limited purpose of determining if the Board took formal action . . . to reduce the actual number of family life positions or if there was merely a transfer of petitioner's family life duties to another staff member

which does not constitute a reduction in force." 1990 *S.L.D.* at 1561. In contrast, the present case involves a reduction of hours, which clearly constitutes a reduction in force. *Lachman v. Cherry Hill Bd. of Educ.*, 1985 *S.L.D.* 1756 (Comm'r Dec. 11, 1985) involved a teacher who forfeited her seniority credit by voluntarily resigning from all employment in the district. On the other hand, Alia never resigned his teaching position, but merely relinquished his extra-duty assignment to devote more time to his teaching responsibilities.

Apart from the logic of the cases, there are also strong policy considerations in favor of the result reached here. Teachers who assume additional assignments beyond their regular classroom duties should not suffer for their spirit of cooperation. If taking on extra responsibilities means that a teacher will lose seniority protection, then boards of education may have difficulty finding people willing to assume such risks. *Cf. Lammers v. Point Pleasant Bd. of Educ.*, 134 *N.J.* 264, 274 (1993) (tenured teacher should be able to take a one-year maternity leave without facing the risk of forfeiting her position to her replacement.)

More troublesome is the question of whether the comparison of seniority among Ressler, Hymanson and Schuman should be made in the elementary or the secondary category. At all relevant times, *N.J.A.C* 6:3-1.10(l)(19) defined the category of "secondary" as including "grades nine through 12 in all high schools, grades seven and eight in junior high schools and *grades seven and eight in elementary schools having departmental instruction*." (Emphasis Added.) *N.J.A.C.* 6:3-1.10(l)(20) defined the category of "elementary" as including "Kindergarten, grades one through six and *grades seven and eight without departmental instruction*." (Emphasis added.)[7] Teachers acquire seniority only in the subject area and only at the particular level (elementary or secondary) at which

[7]Recently, the regulations establishing seniority standards were recodified and now appear at *N.J.A.C.* 6:3-5.1. 25 *N.J.R.* 1095(a) (March 15, 1993). 25 *N.J.R.* 2249(a) (June 7, 1993). No substantive changes were made in the definitions of secondary and elementary.

they have actually taught. *N.J.A.C.* 6:3-1.10(l)(19)(i) and (20)(ii). *See also*, REVISION OF SENIORITY REGULATIONS: A POSITION STATEMENT OF THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, at 3 (June 1983). Persons serving on a district-wide basis acquire seniority on a district-wide basis. *N.J.A.C.* 6:3-1.10(f).

On its face, the regulation is clear and unambiguous. Read literally, any service at sixth grade or below must be counted in the elementary category. It is only at the seventh and eighth-grade levels that inquiry is made as to whether or not the class structure is departmentalized. But intervenor Schuman points to two decisions by the Commissioner which expand the definition of secondary to cover a departmentalized sixth grade. In *Unterberger v. Metuchen Bd. of Educ.*, 93 *N.J.A.R.* 2d (Vol. 4A) 59 (Comm'r Jan. 1992), involving a seniority dispute over which teacher was entitled to teach an "interdisciplinary" course for sixth and seventh graders, the parties stipulated that the class in question was departmentalized. Recognizing that the regulation did not strictly apply, the Commissioner adopted an equitable approach:

> Hence, an anomaly exists: a departmentalized 6th grade is not provided for in the seniority regulations. Because the elementary category precludes departmentalization and, given that the secondary category includes two elementary grades that are departmentalized, *i.e.*, grades 7 and 8, and based upon the fact that the Board admits that the 6th grade classes at Edgar school are departmentalized, the Commissioner finds and determines that the instruction provided therein falls under the secondary category for seniority purposes. *Unterberger*, at 65-66.

In reaching this result, the Commissioner did not consider himself bound by the elementary or secondary label which the district itself attached to the class, but instead looked at the underlying realities of the situation. Significantly, the particular class was a combined sixth and seventh-grade course. Therefore, the rationale would not necessarily apply to an exclusively sixth-grade setting. Moreover, it is uncertain whether the Commissioner would have extended the same reasoning to a departmentalized fifth, fourth or lower-grade class.

Unterberger was followed by *McGlynn v. Sea Girt Bd. of Educ.*, 93 *N.J.A.R.* 2d (Vol. 4A) 438, 445 (Comm'r July 2, 1992), where the Commissioner held that a social studies teacher "in a departmentalized organization, with assignments in grades six, seven and eight" accrued seniority in the secondary rather than the elementary

category. In support of this outcome, the Commissioner emphasized that "petitioner never served in a self-contained classroom." *McGlynn*, at 445. Similarly, the Commissioner held that a science teacher, who had "served exclusively in a departmentalized setting for grades six, seven and eight" also acquired tenure in the secondary category. Although the three grades are lumped together, the case suggests that a departmentalized sixth grade falls into the secondary category. Again, however, the case provides no direct guidance on how to treat a departmentalized organization in the lower grades.

Our own facts are notably different from *Unterberger* and *McGlynn,* and more closely resemble the classic elementary-school pattern. Most importantly, the children in grades five through eight remain together as a group and, thus, the cohort is essentially "self-contained." This structure is less fragmented than at the high school level, where each child selects his or her own schedule of specialized course offerings. Classroom teachers in these lower grades are required by the district to hold elementary endorsements. They teach multiple related-subjects, such as English and social studies or science and math. Typically, teachers at the secondary level teach a more limited subject area to more frequently changing classes of students. Another obvious difference is that Ressler's claim extends to fourth and fifth grades, which traditionally have been regarded as part of elementary school as distinguished from middle or junior high school. Basically, the Saddle Brook district has assigned more than one teacher to serve in an elementary setting. Thus, the experience of teaching at grades four, five or six in this district must be credited in the elementary category.[8]

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[8]It might equally be argued that seventh and eighth grades in the district are nondepartmentalized, but Ressler does not press such claim. Acceptance of such an argument would also be grossly unfair to Helen Hymanson, who justifiably relied on the original stipulation that "Grades 7 and 8 in respondent's district are departmentalized." (Paragraph 15.)

Since Ressler started teaching at the elementary level earlier than either Hymanson or Schuman, he has greater seniority in this category, even though the other two have been teaching longer in the district. See *Small v. Schadt*, 1987 *S.L.D.* 2706 (St. Bd. Aug. 5, 1987) (physical education teacher has greater seniority in the secondary category than another physical education teacher with more years of service in the elementary category). It is immaterial whether the Board could have properly assigned Alia, who admittedly has greater seniority than Ressler in the elementary category, to the fourth, fifth and sixth-grade classes that went to Hymanson in 1991-92 or to Schuman in 1992-93. What matters is that the teachers with less seniority than Ressler were given assignments that should have gone to him. Furthermore, Board has not presented any valid educationally-based reasons for its staffing pattern or shown that its educational program would have been seriously disrupted by recognition of Ressler's seniority rights. See *Fox v. Morris Sch. Dist.*, 93 *N.J.A.R.* 2d (Vol. 4A) 139, 141 (Comm'r Jan. 11, 1993). Insofar as the evidence discloses, there was no scheduling impediment to assigning the fourth, fifth and sixth grade classes to Ressler. *Compare Polo v. Bergen Cty. Vo-Tech. Schs.*, 92 *N.J.A.R.* 2d (Vol. 4) 230, 233 (Comm'r Jan. 30, 1992), *modified* 92 *N.J.A.R.* 2d (Vol. 4A) 459 (St. Bd. Aug. 5, 1992), *appeal docketed*, No. A256-92-T2 (N.J. App. Div. Sept. 18, 1992) where the board of education had the goal of scheduling afternoon classes for shared students at two separate locations.

Lastly, Ressler urges that he has priority over nontenured teachers by virtue of an elementary endorsement issued to him after the Board had already abolished his position.[9] It is settled law, however, that teachers have tenure entitlement only to those positions for which they were properly certified on the date of the reduction in force. The crucial time is the date on which the Board adopted its resolution and not a teacher's last date of employment. *Francey v. Salem Bd. of Educ.*, 92 *N.J.A.R.* 2d (Vol. 4A) 449 (Comm'r July 22, 1992). *Accord, Johnstone v. Cinnaminson Bd. of Educ.*, 92 *N.J.A.R.* 2d (Vol. 4A) 506 (Comm'r Aug. 12, 1992). Ressler himself tacitly acknowledges this point when he argues in his initial brief that

[9]Ressler never served any notice of the pendency of this matter on the nontenured teachers over whom he claims superior tenure rights.

seniority rights are fixed "at the time the Board voted to reduce his position." School boards must be able to rely on the information available when they act. Otherwise, it would cause havoc in planning for the upcoming academic year. Although the staffing needs of the district may be known by April or even earlier, boards would be forced to defer hiring decisions until the start of summer vacation. Such an unreasonable administrative burden would "lead to the amassing of endorsements" by teachers subject to layoff, would "reduce to chaos any attempt by a district to ascertain its legal responsibilities upon the arising of a vacancy" and would prevent boards from "choosing the most qualified staff for open positions." *Francey*, 92 *N.J.A.R.* 2d at 453.

Order

It is **ORDERED** that the Board of Education of Saddle Brook promptly pay to Ressler the lost salary and other lost benefits arising from its failure to offer him the fourth, fifth and sixth-grade physical education classes assigned to Hymanson for the 1991-92 academic year and to Schuman for the 1992-93 academic year; provided, however, that the amount of lost salary shall be mitigated by any earned income which Ressler would not have otherwise received.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 13, 1994
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Hope R Blackburn

5/16/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 17 1994
Date

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
J-1	Copy of a letter of resignation to the Saddle Brook Board of Education from Mario Alia, dated October 2, 1991
J-2	Copy of an excerpt of the minutes of the Saddle Brook Board of Education for a meeting on October 9, 1991
J-3	Copy of a memorandum to all supervisory/certificated staff members from Jane Moffet, dated October 10, 1991
J-4	Copy of changes in the master schedule for Mario Alia and Darren Ressler, dated December 5, 1991
J-5	Copy of the elementary school schedule for Darren Ressler (top) and Helen Hymanson (bottom) for the 1991-92 school year, undated
J-6	Copy of an excerpt from the minutes of a meeting of the Saddle Brook Board of Education on April 7, 1992
J-7	Copy of an excerpt of the minutes of the Saddle Brook Board of Education for a meeting on December 11, 1991
J-8	Stipulation of facts, dated December 5, 1992
J-9	Copy of instructional certificate of Darren Ressler endorsed as teacher of health and physical education and teacher of driver education, issued April 1976
J-10	Copy of an instructional certificate of Mario J. Alia endorsed as teacher of physical education and health and as teacher of driver education, issued April 29, 1961

J-11 Copy of an instructional certificate of Helen S. Hymanson endorsed as teacher of health and physical education, issued December 1973

J-12 Copy of the assignment schedule of Darren Ressler for the remainder of the 1991-92 school year after February 12, 1992

2J-1 Same as J-1

2J-2 Same as J-2

2J-3 Same as J-9

2J-4 Copy of an instructional certificate of Darren J. Ressler endorsed as elementary school teacher, issued June 1992

2J-5 Same as J-10

2J-6 Same as J-6

2J-7 Copy of instructional certificate of Howard Schuman endorsed as teacher of driver education, teacher of health education and teacher of physical education, issued in January 1971 and March 1972

2J-8 Copy of an administrative certification of Howard Schuman endorsed as principal/supervisor, issued in August 1981

2J-9 Copy of the scores of Darren Ressler on the National Teachers Examination, dated May 2, 1992

2J-10 Same as J-10

2J-11 Stipulation of facts, dated March 1, 1993

2J-12 Copy of the teaching schedule of Howard Schuman for the 1992-93 school year

P-1 Transcript of hearing in the matter entitled *Hayden v. Saddlebrook Bd. of Educ.*, OAL Dkt. No. EDU 3390-92, dated June 2, 1993

DARREN RESSLER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

RESPONDENT,

AND

MARIO ALIA AND HELEN HYMANSON,

INTERVENORS.

DARREN RESSLER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

RESPONDENT,

AND

MARIO ALIA AND HOWARD SCHUMAN,

INTERVENORS.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4. The Commissioner determines that such exceptions raise no arguments or issues not considered by the Administrative Law Judge in the initial decision and need not be herein reiterated.

Upon a careful and independent review of the record before him, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons articulated by him in the initial decision.

Accordingly, the Board of Education of the Township of Saddle Brook is directed to pay petitioner lost salary and benefits arising from its failure to offer him the fourth, fifth and sixth-grade physical education classes assigned to Intervenor Hymanson for the 1991-92 school year and those assigned to Intervenor Schuman for the 1992-93 school year. Such lost salary shall be mitigated by any earned income which petitioner would not have otherwise received.

COMMISSIONER OF EDUCATION

JUNE 27, 1994

DATE OF MAILING - JUNE 28, 1994

174-94

EDU #705-92 and #5018-92 (consolidated)
C #174-94
SB # 35-94

DARREN RESSLER, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWN-: SHIP OF SADDLE BROOK, BERGEN COUNTY, :

RESPONDENT-RESPONDENT, :

AND :

MARIO ALIA AND HELEN HYMANSON, :

INTERVENORS, : STATE BOARD OF EDUCATION

AND : DECISION

DARREN RESSLER, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWN-: SHIP OF SADDLE BROOK, BERGEN COUNTY, :

RESPONDENT-RESPONDENT, :

AND :

MARIO ALIA AND HOWARD SCHUMAN, :

INTERVENORS. :

10/1/97

Decided by the Commissioner of Education, June 27, 1994

For the Petitioner-Appellant, Bucceri & Pincus (Louis Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Anthony N. Gallina, Esq.

For Intervenor Mario Alia, Balk, Oxfeld, Mandell & Cohen (Randi Doner, Esq., of Counsel)

For Intervenor Helen Hymanson, Springstead & Maurice (Harold N. Springstead, Esq., of Counsel)

For Intervenor Howard Schuman, Zazzali, Zazzali, Fagella & Nowak (Robert A. Fagella, Esq., of Counsel)

Darren Ressler (hereinafter "petitioner"), a tenured teaching staff member, filed a petition with the Commissioner of Education alleging that the Board of Education of the Township of Saddle Brook (hereinafter "Board") had violated his tenure and seniority rights when it reduced his employment to part-time during the 1991-92 school year. He subsequently filed a second petition challenging the Board's action abolishing his part-time position at the end of that school year. Those petitions were later consolidated in the Office of Administrative Law.

Petitioner, who held an instructional certification in health and physical education, commenced his employment in the district in 1976 as a full-time physical education teacher in grades nine through twelve. In 1989-90, his assignment was expanded to encompass grades six through twelve. In 1990-91, petitioner resumed his prior assignment in grades nine through twelve, and in 1991-92, he was assigned to teach physical education in grades four through ten.

Intervenor Mario Alia, who also held a teaching certification in health and physical education, had been employed in the district as a teacher since 1958 and also had served as athletic director since 1970. In 1991-92, Alia had performed his responsibilities as athletic director during the seventh and eighth periods of each school day. On October 2, 1991, Alia submitted his resignation as athletic director, effective December 1, 1991, which the Board accepted on October 9, 1991.

On December 5, 1991, petitioner was notified that Alia was being assigned his seventh-period physical education class for ninth graders and his eighth-period class for tenth graders. Thereafter, on December 11, the Board took formal action to reduce petitioner's employment to a .6 position effective February 12, 1992. Then, on April 7, 1992, the Board abolished petitioner's part-time position effective June 30, 1992. In June, prior to the effective date of that reduction in force ("RIF"), petitioner obtained an instructional certification in elementary education.

The issues in this case, as identified by the Administrative Law Judge ("ALJ"), were: 1) whether Intervenor Alia, who had voluntarily resigned from his position as athletic director, had preference over petitioner to a full-time teaching position, 2) whether petitioner had greater seniority than two other tenured teachers, Intervenors Helen Hymanson and Howard Schuman, to an assignment teaching elementary physical education, and 3) whether petitioner had any additional tenure rights by virtue of the elementary education certification he acquired after the Board had acted to reduce its staff.

The ALJ rejected petitioner's contention that the Board had violated his tenure rights when it assigned Intervenor Alia to teach two of his classes during the 1991-92

This is not a case in which the Board acted under its authority pursuant to N.J.S.A. 18A:28-9 to reduce its staff by abolishing the athletic director's position.[3] Rather, the reduction in Alia's employment resulted from his voluntary relinquishment of that position, and we reject the Board's contention that such action by Alia effectuated a reduction in force which entitled the Board to apply the appropriate seniority standards. The RIF in this instance was not the reduction in Alia's hours of employment caused by his resignation as athletic director, but the resultant action taken by the Board to reduce petitioner's position. Since Alia was not subject to a reduction in force under N.J.S.A. 18A:28-9, his tenure rights were not triggered so as to provide him with an entitlement to a portion of petitioner's assignment by virtue of his superior seniority teaching physical education at the secondary level.

We note that it is not contended that the Board reduced petitioner's employment for reasons of economy or because of a decline in the number of students. Indeed, there was no reduction in the number of physical education classes being taught in the district. Nor is there any indication that the Board altered its physical education program or was acting pursuant to a change in the administrative or supervisory organization of the district. The Board simply provided Alia with a full-time teaching position following his resignation as athletic director at the expense of petitioner. Under these circumstances, we conclude that the Board's action did not constitute a proper exercise of its authority under N.J.S.A. 18A:28-9, and that such action violated petitioner's tenure rights.

[3] We note that, although the Board did abolish the title of "athletic director" and replace it with the title "supervisor of athletics," it took such action only after Alia had submitted his resignation from that position, and, as pointed out by the ALJ, there is no indication in the record that the nature or responsibilities of the position changed.

We also reverse the Commissioner's determination to limit petitioner's seniority entitlement as a teacher of elementary physical education to grades six and below. There is no dispute on appeal that petitioner had greater seniority than both Hymanson and Schuman in the applicable category. Hence, the only issues before us are whether petitioner made a sufficient claim to the seventh- and eighth-grade physical education assignments held by Hymanson and Schuman in 1991-92 and 1992-93, respectively, and, if so, whether seventh and eighth grade were departmentalized in this district so as to bring them within the scope of petitioner's seniority. See N.J.A.C. 6:3-5.1(l)(18) ("The word 'elementary' shall include kindergarten, grades one through six and grades seven and eight without departmental instruction").

In his petition of appeal to the Commissioner, the petitioner expressly claimed entitlement to elementary physical education assignments held by teachers with less seniority than he. His claim was not limited to K-6. Although petitioner subsequently stipulated that grades seven and eight were departmentalized, Stipulation of Facts dated December 5, 1992, exhibit J-8, in evidence, or "modified departmentalized," Stipulation of Facts dated March 1, 1993, exhibit 2J-11, in evidence, he later moved to reopen the record so as to include a transcript of the June 2, 1993 testimony of Dr. Edward Price, the Board's superintendent of schools, in Hayden v. Board of Education of the Township of Saddle Brook, OAL Dkt. No. EDU 3390-92. Petitioner explained in his motion that he had entered into the stipulation in reliance upon Dr. Price's representation that grades seven and eight were "modified departmentalized," but that Price had subsequently recanted such representation in Hayden and testified that the district's elementary schools, K-8, were not departmentalized.

However, following the abolishment of petitioner's position at the end of the 1991-92 school year, he was entitled to the elementary physical education assignment, including grades seven and eight, given to Intervenor Schuman in 1992-93. Again, we stress that it is not disputed on appeal that petitioner had superior seniority as a teacher of elementary physical education than Schuman, whose previous experience had been limited to grades nine through twelve.

Finally, we affirm the Commissioner's determination that petitioner had no entitlement to reinstatement as an elementary school teacher as a result of the endorsement he acquired in June 1992. The scope of petitioner's tenured position was determined in April 1992, when the Board acted under N.J.S.A. 18A:28-9 to reduce its staff, thereby triggering petitioner's tenure rights, and his subsequent acquisition of an elementary education endorsement did not operate to enlarge the tenure rights he had achieved pursuant to the Tenure Act during and as a result of his employment in the district. Francey, supra. Nor is it of any moment that petitioner obtained his elementary endorsement prior to the effective date of that RIF. Johnstone, supra.

Accordingly, for the reasons stated herein, we affirm in part and reverse in part the decision of the Commissioner on the points of appeal currently before us. In summary, we find that the Board violated petitioner's tenure rights when it reassigned two of his physical education classes to Intervenor Alia during the 1991-92 school year and reduced petitioner to part-time status, and that petitioner's seniority rights to the elementary physical education assignment held by Intervenor Schuman in 1992-93

included grades seven and eight.[4] We therefore direct the Board to compensate petitioner for his back pay and other emoluments, less mitigation, in accordance with the terms of our decision.

Attorney exceptions are noted.

October 1, 1997

Date of mailing OCT 03 1997

[4] An appeal filed by petitioner claiming violation of his tenure rights in school years subsequent to 1992-93 is currently pending before the State Board.

175-94

HISAKO LEE AND MICHAEL BRONZINO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning citizens challenged the Board's approval process for a Family Life Curriculum for grades K-3 alleging that it violated the consultation and participation requirements of N.J.S.A. 6:29-4.2 and they sought to stop implementation of the program during current school year.

Having considered the record and the testimony of witnesses, ALJ found that Board did not violate N.J.A.C. 6:29-4.2 and that it further did not act in an arbitrary, capricious or unreasonable manner in the process by which it undertook to review and incorporate a portion of the Learning About Family Life materials into its Family Life Curriculum. ALJ found no basis to overturn the Board's action. Petition was dismissed.

Commissioner adopted findings and determination in the initial decision as his own.

JUNE 27, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12019-93S
AGENCY DKT. NO. 377-11/93

HISAKO LEE and MICHAEL BRONZINO,

Petitioners,

v.

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT,

Respondent.

Hisako Lee and Michael Bronzino, petitioners, *pro se*

Russell Weiss, Jr., Esq., for respondent (Carroll & Weiss attorneys)

Record Closed: April 20, 1994 Decided: May 17, 1994

BEFORE **JAYNEE LaVECCHIA**, CHIEF ALJ:

STATEMENT OF THE CASE

Petitioners are challenging the respondent's approval process for a family life curriculum for grades K-3. As a result of a motion for summary decision and a motion to dismiss at the close of petitioners' case, the only issue to be addressed is whether

the Board violated *N.J.A.C.* 6:29-4.2 when it voted on June 22, 1993 to authorize participation in a pilot project using materials from the *Learning About Family Life* curriculum.

PROCEDURAL HISTORY

At the prehearing conference, four issues were established as the basis of the challenge. First, what were the functions or duties of the Parent Advisory Committee and is it exempt from the Open Public Meetings Act as an advisory body pursuant to *N.J.S.A.* 10:4-7? Second, is an advisory committee mandated by *N.J.A.C.* 6:29-4.2? Third, was the Board action to approve the use of materials in violation of *N.J.A.C.* 6:29-4.2? If so, what remedy is appropriate? Finally, did the Board violate its own textbook adoption policy? Respondent indicated at the prehearing conference that a motion for summary judgment might be forthcoming. The undersigned advised the parties that any motions should be submitted along a timeframe that would not interfere with the scheduled hearing dates of April 18, 19, and 20, 1994.

On March 22, 1994 the undersigned received respondent's motion for summary decision. Respondent argued that all the issues identified in the prehearing order were ripe for summary decision because the controversy embraced only legal matters, not factual issues. On April 5, 1994 the undersigned received petitioners' response to the respondent's motion for summary decision. Petitioners argued that the case involved some factual issues that could only be resolved at an evidentiary hearing. Respondent's reply brief was received on April 8, 1994.

An order granting partial summary decision was delivered to the parties on April 12, 1994. The order granted summary decision on the issues of the Board's obligation to follow the recommendations of the advisory committee and on the inapplicability of the Open Public Meetings Act to the meetings of the advisory committee. See Order Granting Partial Summary Decision of April 11, 1994, at 7. As a result of the

aforementioned order, three issues required an evidentiary hearing. First, did the respondent adopt a curriculum at its June 22, 1993 meeting before the consultation and participation of community members had occurred, in violation of *N.J.A.C.* 6:29-4.2. Second, did the degree of clergy involvement in the review process violate *N.J.A.C.* 6:29-4.2(b). Finally, was the respondent obligated to follow its own textbook adoption policy in regard to the review and approval of the family life curriculum changes.

The evidentiary hearing commenced on April 18, 1994 at the Trenton site of the Office of Administrative Law. At the close of petitioners' evidence on April 18th, respondent moved to dismiss for petitioners' failure to meet their burden of proof on all three issues. The proceedings scheduled for the following day were adjourned in order to allow time to review the motion and issue a decision. In an order granting in part the motion to dismiss, the undersigned found that in fact the petitioners' had not met their burden of proof on the issues of the degree of clergy involvement and whether the respondent was obligated to follow its textbook adoption policy. See Order Granting in Part Motion to Dismiss of April 19, 1994, at 11. The parties were directed to return to the hearing on Wednesday April 20,1994 and respondent was ordered to proceed with its case on the sole remaining issue in this matter--whether the Board adopted a curriculum at its June 22, 1993 meeting before the required consultation and participation of community members had commenced, in violation of *N.J.A.C.* 6:29-4.2(b). Thus, that is the only issue to be addressed in this decision.

FACTUAL DISCUSSION

When the proceeding reconvened respondent presented four witnesses. All four witnesses presented testimony as to their understanding of the requirements of *N.J.A.C.* 6:29-4.2 and explained their role in fostering the district's compliance with that regulation. Petitioners did not present rebuttal witnesses.

Janice Bartolini, Coordinator of Health Services for the district was respondent's first witness. Ms. Bartolini testified that she became aware of the New Jersey Network for Family Life (Network) curriculum in the 1992-1993 school year. The Network is a coalition of nonprofit and profit organizations whose purpose is to provide resources and assistance to New Jersey schools to fulfill their family life mandate. She has been associated with the Network since the early 1980's and discovered that the Network would provide funding to ten New Jersey school districts to implement the curriculum on three campuses. Ms. Bartolini was interested in the curriculum because she felt it would "plug holes" in the district's current curriculum. Specifically, she felt it would be useful because it was the first family life education material for grades K-3 to use anatomically correct terminology for body parts.

Ms. Bartolini also testified as to the steps she took to present the curriculum to school administrators and the Board. She first spoke with the Assistant Superintendent, Dr. Katims, who suggested that because of the sensitive subject matter that she present the material to the elementary school principals to receive their initial reaction and to exercise a "right of first refusal" before approaching the Board. She stated that she was well aware of the consultation and participation requirements of *N.J.A.C.* 6:29-4.2 when she first discussed the matter with Dr. Katims. She testified that the Board was approached in June 1993 in order to get their approval to begin to review the materials. As she understood the process, even if the Board gave its approval to review the materials, if after the review process the district felt that the materials were inappropriate, the district did not have an obligation to the Network to use the materials. She further testified that although the language of the Board minutes(Exhibit J-2) states that the Board voted to "authorize participation in a pilot project using the curriculum materials *Learning About Family Life,*" the term "pilot project" was the language used by the Network and was not meant to encompass normal district use of the term "pilot project." Ms. Bartolini also testified that the August 16, 1993 letter (Exhibit J-7) she received from the Network Program Manager, Susan Saravalli, thanking her for her efforts in presenting the curriculum to her district and for participating in the program was simply an overstatement by the Network and did not require a response.

Because the June 1993 Board meeting was only a few days before the end of the school year and most district employees are ten month employees, the only review procedure implemented before the start of the 1993-94 school year was to hold a three day meeting in August of elementary school nurses and other staff who would be using the material if it were approved. The staff in attendance discussed revisions to the curriculum and also drafted a letter to be sent to parents inviting them to participate in the review process. The first meeting of the parent advisory committee was held on September 14, 1993.

Respondent's second witness, Dr. Michael Katims, is the district's Assistant Superintendent and supervisor of the various district coordinators. His testimony completely supported Ms. Bartolini's testimony. He first became aware of the curriculum in May 1993 when Ms. Bartolini raised it with him. At the time he was not familiar with the requirements of *N.J.A.C.* 6:29-4.2. In the course of Ms. Bartolini's presentation to him she informed him of the requirements of the regulation. His motivation in pursuing approval of the curriculum was simply to provide a better instructional program for grades K-3 health education. He was concerned, however, with the nature of the district's obligation to the Network if the materials were ultimately approved for use in the district. In order to clarify that relationship he spoke to a contact person from the Network. As a result of the conversation he was assured that all decision making would reside with the district, the district's reporting obligation to the Network would only involve oral, informal reports, and the district would have free access to any of the curriculum teaching materials it would like to use. Despite the language of the Network's project description (Exhibit J-1), Dr. Katims stated that the district did not have an obligation to meet the deadlines or the objectives established by the Network based on his understanding gleaned from his conversation with a Network representative.

His understanding of the Board's resolution at the June 22, 1993 meeting was that the health educators were given approval to begin the review process. Given the limited resources available for summer curriculum projects, Dr. Katims did not want the health educators to begin reviewing materials if the Board was completely opposed to considering

them for use. He understood that prior to introduction in the classroom of any of the curriculum materials under consideration, the consultation and participation requirements of the regulation would have to be met and the Board would have to vote its final approval of the curriculum.

Dr. Katims testimony was also supported by a question and answer paper (Exhibit R-3) he prepared after the last parent advisory committee meeting on October 11, 1993, which was distributed before the October 19, 1993 Board meeting. The paper explains the nature of the materials, the review process and revisions made to the materials as a result of the review process.

Dr. Raymond J. Bandlow was the respondent's third witness. Dr. Bandlow, the district superintendent, first became aware of the materials through Dr. Katims. Dr. Katims also explained to him the formal review requirements of *N.J.A.C.* 6:29-4.2. Dr. Bandlow and Dr. Katims discussed plans to present the materials to elementary school principals and then present them to the Board. Dr. Bandlow wanted clear communication and understanding with the Board before proceeding with formal review procedures. Dr. Bandlow understood that after the review process involving community members, parents and teachers the Board would have to vote again to grant final approval for introduction of the curriculum into the classroom. He felt that the district could reject the material at any stage and any feedback given to the Network by the district in regards to the materials would be appreciated, regardless of whether the district ultimately decided to use the materials in the classroom.

The respondent's final witness was Mrs. Lynn Thornton, President of the Board. She too was aware of the regulations requiring community consultation and participation. She stated that she understood the June 22, 1993 meeting to be a starting point for the review process, it was not the final Board approval and the district could withdraw at anytime. Mrs. Thornton's testimony was supported by the introduction of the minutes of the Board's September 21, 1993 meeting. Exhibit R-2. In the minutes of the meeting it is noted that Mrs. Thornton initiated a public discussion of the review process currently underway. She stated

that she broached the subject at that time to reassure the community that nothing had been implemented and the review process was ongoing.

Mr. Bronzino was petitioners' only witness on the issue of whether the Board adopted the curriculum materials at its June 22, 1993 meeting in violation of the regulations. Mr. Bronzino stated that he was not present at the June 22, 1993 Board meeting. However, he stated that it was his impression from a review of the Board's minutes(Exhibit J-2) that the Board had decided to use the materials before the consultation and participation requirements of the regulation had been observed. Mr. Bronzino also stated that when he received exhibits J-1(Network program description) and J-7 (Saravalli letter), through the discovery process after filing the petition in this matter, these documents in conjunction with the June 22 Board minutes strengthened his opinion that the Board had decided to use the curriculum materials prior to implementing the review process required by the regulation.

Mr. Bronzino further testified that he was a member of the parent advisory committee that reviewed the curriculum materials. The committee met on three occasions, September 14 and 23, and October 11, 1993. During the first two meetings the committee reviewed the curriculum materials "line by line" and suggested deletions and modifications. At the third meeting on October 11, 1993, instead of continuing the "line by line" review, representatives from the Network gave the advisory committee a presentation on the materials. At the end of the meeting the members of the committee were asked to forward further suggestions in regard to the curriculum to Ms. Bartolini.

Having had an opportunity to observe the witnesses whose testimony is described above, I find no reason to question the credibility of their testimony or its reliability. Indeed, most of the evidence presented by each side was not controverted, only the conclusions to be drawn from what did occur. It is painfully obvious that what we have here is a question of interpretation of the unfortunate language used in the Board's June 22, 1993 minutes. Petitioners, who clearly are at odds with the Board on the substance of the family life curriculum materials that lie at the heart of this matter, seek a literal interpretation of the

poorly worded resolution from June 22 that would support a finding that the process used was flawed.

LEGAL ANALYSIS AND CONCLUSIONS

Notwithstanding the underlying concern about the substance of these curriculum materials, this case is about process, the process used by the Board to incorporate the K-3 family life materials into its curriculum. Therefore, the focus of any analysis of the Board's actions or those of its agents, must be squarely on whether the actions taken support the intent of the Board in its June 22 resolution, as that intent has been described in the testimony of the Board's witnesses.

The regulation central to this matter, *N.J.A.C.* 6:29-4.2(b), provides that:

> The family life education curriculum shall be developed through appropriate consultation and participation of teachers, school administrators, parents and guardians, pupils in grades 9 through 12, physicians, members of the clergy and representative members of the community. The district board of education shall demonstrate prior to the initiation of any district board of education program that such consultation and participation have taken place. The process of consultation shall be continued as the program is revised in future years.

In order to prevail in this matter, petitioners must prove that at the June 22, 1993 meeting, the Board approved the use of the *Learning About Family Life* materials in the classroom before the district had undertaken the appropriate degree of consultation and participation with the various community groups required by *N.J.A.C.* 6:29-4.2(b). The petitioners can not sustain their burden of proof unless they can show that the Board acted in an arbitrary, unreasonable or capricious manner in failing to comply with this required process for approval of these curriculum materials. *Bd. of Ed. E. Brunswick v. E. Brunswick Twp.*, 91 *N.J. Super.* 20, 26 (Ch. Div. 1966).

Petitioners argue that the documentary evidence, taken as a whole, suggests that the Board fully intended to proceed with the implementation of the materials in the classroom in the Fall of 1993 without the requisite community participation and consultation and it was only after the Board became aware of community concern regarding the materials in question that the Board initiated the consultation and participation requirements of *N.J.A.C.* 6:29-4.2(b). Specifically, petitioners point to exhibits J-1, J-2 and J-7 to support their argument.

Exhibit J-1 is a June 1, 1993 memorandum from Dr. Katims to Dr. Bandlow and all Board members informing them of Ms. Bartolini's upcoming presentation to the Board and the district's desire to participate in the project.. The memorandum includes a description, produced by the Network, of the *Learning About Family Life* curriculum. Petitioners argue that "[t]here is no indication in J-1 to suggest that the Board was being asked to do anything than to approve the entire project as described in total."

Petitioners' argument however, fails to take into account the credible evidence offered by the testimony of respondent's four witnesses. Each witness was at this Board meeting and testified to an understood awareness of the requirements of the regulation before the June 22, 1993 Board meeting and vote. Each witness indicated that the June 22, 1993 vote was merely Board authorization to initiate the review procedures. Significantly, petitioners offered no testimony from themselves or any other of their witnesses who was present at the June 22 Board meeting to contest the respondent's testimony.

Furthermore, as Dr. Bandlow testified, due to the sensitive subject matter, it was important to school administrators to have the approval of the Board to even begin the process of reviewing the family life materials. Dr. Katims testified that there are limited funds to undertake any summer action on curriculum matters and if the Board was at all resistant to the idea of reviewing the family life materials, school administrators would not pursue their approval.

Exhibit J-2 is a copy of the Board's minutes from the June 22, 1993 meeting. The minutes indicate that the board approved the following action: "to authorize participation in a pilot project using the curriculum materials *Learning About Family Life* to support the district instructional program in meeting the state requirement for family life education in Grades K-3." Although respondent concedes that the resolution could have been worded better in hindsight, it is clear from the testimony of the witnesses that the intent of the Board was not to approve the classroom use of the materials before the appropriate review and consultation procedures had been observed. The specific regulatory requirements were not discussed at the meeting, because as Dr. Bandlow testified, it was simply understood by all involved that the regulatory requirements would have to be followed.

I find insufficient evidence in the record to suggest that the Board bought in "wholesale" to the curriculum materials "Learning About Family Life" provided to it by the Network when it passed its resolution on June 22. Indeed, the uncontradicted testimony is that the Board's action permitted some ten month employees, health educators, to begin a review and revision of the materials during the summer months before the school year began in September. Without the Board's authorization in June 1993, these employees could not have been employed for this purpose during August.

As testified to by Ms. Bartolini, the only review procedure that took place before the beginning of the 1993-1994 school year was a meeting in August of faculty and staff who would be presenting the material in the classroom if it were ultimately approved by the Board. At that meeting the participants suggested revisions to the curriculum, they rejected, wholesale, certain portions of the curriculum from any consideration, and they drafted a letter to parents inviting their participation on an advisory committee to review the materials. The committee was to meet once school began in September. The curriculum was not introduced into the classroom before the Board's October 26, 1993 vote to approve the curriculum.

The testimony of both petitioner, Michael Bronzino, and Board witnesses clearly indicated that, for the most part, the curriculum materials were reviewed "line by line" and

were changed, deleted or approved as the case called for. This review was comprehensive and provides strong support for inferring from this record that no adoption of the curriculum materials occurred before the presentation of the thoroughly discussed and revised materials to the Board at its October 1993 meeting and the Board's vote of approval at that time. Nor were they implemented before the Board's October action. Indeed, it was still possible before the October 26th Board vote for the materials, even in their revised and restricted version, to be rejected entirely. That did not occur, but the possibility of complete rejection up to that point is a factor in the resolution of this dispute. It is noteworthy that at the October meeting the Board had several courses of action presented to it, and only one was successfully approved by the Board vote.

Petitioners' next point to the August 16, 1993 letter from Susan Saravalli(Exhibit J-7), of the Network congratulating the District for participating in the Network's pilot project on the "Learning About Family Life" curriculum materials, as evidence that the Board had approved the use of the materials at its June 22, 1993 meeting. Petitioners' emphasize the language employed in this letter and contend that it supports their literal reading of the Board's June 22 resolution.

The petitioners' assertion on this point is not persuasive. The Network Executive Director is not an employee or agent of the Board. She has no capacity to bind the Board by her choice of words. She is not their agent legally, nor does she have any apparent authority to bind the Board notwithstanding that no Board representative ever responded to her letter. Ms. Bartolini, who was in closest touch with the Network, testified that she ascribed no significance to this letter and saw no need to respond to it. Buttressing this analysis of the letter's significance is the testimony of Dr. Katims, who stated that he personally spoke with a representative of the Network before the June 22 Board meeting to satisfy himself as to the district's responsibilities and relationship with the Network, making sure that there was no capacity for misinterpretation by the Network that decision making on the use, or not, of all or a portion of the curriculum materials rested exclusively with the Board. *M. Dean Kaufman, Inc. v. American Machinery & Foundry Co.*, 102 *N.J. Super* 1, 11-

12 (App. Div. 1968). (holding absence of an agency relationship where principal specifically refused to enter into such a relationship with alleged agent). This testimony was particularly persuasive to the undersigned, and supports the inferences I have chosen to ascribe to the testimony and documentary evidence in the record as described in this opinion.

Finally, in their reply to respondent's closing argument, petitioners argue that the parol evidence rule prevents the Board from supplementing or contradicting the minutes of its meetings. *Campbell v. Hackensack*, 115 *N.J.L.* 209, 211-212 (E. & A. 1935). *Campbell* involved a claim to establish, by parol evidence, the terms of an employment contract between a city council and an employee. The employee claimed that the city council had passed a resolution establishing the manner in which he was to be compensated for his services. The minutes of the city council meetings were, however, silent as to any employment matters between the employee and the city council. The court stated that "the established general rule is that these records[municipal minutes], or duly authenticated copies thereof, are the only competent evidence of the official actions of the council and they cannot, as a rule, be enlarged or restricted by parol testimony." *Id.* at 215 (citations omitted).

Campbell, however, is clearly distinguishable from the matter at hand. The matter in issue in this case merely involves interpreting the ambiguous language of a resolution concerning Board and district activity in light of subsequent actions of the Board and district personnel. This matter does not involve interpreting, or even establishing the existence of a contract. Furthermore, the rule in *Campbell* has not been applied to restrict a court from looking "to evidence establishing fraud, bad faith or the abuse of discretion by municipal governing bodies resulting in the injury or oppression of the citizen." *Anschelewitz v. Belmar*, 137 *N.J.L.* 617, 622 (1948) (citation omitted). The evidence beyond the literal language of the resolution in this proceeding was introduced specifically to consider allegations of bad faith and abuse of discretion by the local board. The holding in *Campbell* does not stand as a bar to this inquiry beyond the literal language of the minutes.

Based on the foregoing, I hereby **FIND** that respondent did not violate the consultation and participation requirements of *N.J.A.C.* 6:29-4.2. Moreover, I find that the respondent did not act in an arbitrary, capricious or unreasonable manner in the process by which it undertook to review and ultimately incorporate a portion of the *Learning About Family Life* materials into its Family Life Curriculum for Grades K-3. I find no basis in the regulation to conclude that the Board was required to confer a "veto like" authority on the consultants or to permit the consultants to be the initiators of locating the curriculum materials to be considered and reviewed for inclusion. *See Smith v. Ricci*, 89 *N.J.* 514, 524 (1982). In interpreting the regulation's requirement for "consultation" in this manner, I am mindful of the restrictive approach I am applying. However, the setting of policy and curriculum in our public schools is squarely placed on the local elected boards of education. *See Jenkins v. Twp. of Morris School District & Bd. of Ed.*, 58 *N.J.* 483, 492 (1971). Although the family life program spells out, more than other programs, how a board of education is to attempt to be in tune with the sentiment of the community, the regulation does not alter the basic governance structure of our schools. Communities which are dissatisfied with the policy choices of the elected board members have a ready avenue of relief in the annual school elections. As the Commissioner of Education has stated:

> [I]t is axiomatic that the members of the local boards of education are responsible for the wisdom of their actions to the people who elect them and not to the Commissioner of Education. As the Commissioner recited the law as a frame of reference in *Cecelia 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:
>
> [a]s long as . . . a board of education . . . acts within the authority conferred on . . . it by law courts are without power to, or will not, interfere with, control, or review . . . its action and decision in matters involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed. 78 *C.J.S.* 920.
>
> In absence of clear abuse of the discretionary power of the Board, the Commissioner will not interfere. It was held in *Boult v. Board of Education of Passaic*, 136 *N.J.L.* 521 (E. & A. 1948), concerning the authority of the Commissioner and State Board of Education under *R.S.* 18:3-14 and 15:

> Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board.
>
> The wisdom and effectiveness of a board of education's administrative decisions is a matter for the constituent citizenry to determine.
>
> *[McMillan v. Board of Education of South Orange-Maplewood School District*, 1977 *S.L.D.* 137, 139-40].

In this matter, I **FIND** that the Board did consult with required representatives suggested in the regulation before proceeding with implementation of its new K-3 Family Life Curriculum. I **FIND** the consultation which did occur met the requirements of *N.J.A.C.* 6:29-4.2. After thoroughly considering all of petitioners' proofs and the presentation by the Board's witnesses, I **CONCLUDE** that there is no basis to overturn the Board's action. Petitioners' action is dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exception with the **COMMISSIONER, Department of Education, 225 East State St., CN 500, Trenton, New Jersey 08625**,

marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 17, 1994
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

5/19/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/dmc

EXHIBIT LIST

J-1	Memorandum from Michael Katims to Ray J. Bandlow dated June 1, 1993
J-2	Minutes of Regular Meeting Held June 22, 1993
J-3	Memorandum from Michael Katims to Ray J. Bandlow dated October 15, 1993
J-4	Minutes of Agenda Meeting Held October 19, 1993
J-5	Minutes of Regular Meeting Held October 26, 1993
J-6	Textbook Selection Procedures
J-7	Letter from Susan K. Saravalli, Ph.D. of Rutgers Network for Family Life Education to Ms. Janice Bartolini, School Nurse, West Windsor - Plainsboro High School dated August 16, 1993
J-8	1st set of answers to Interrogatories dated January 31, 1994
J-9	Letter to the Board of Education from Floyd W. Churn of the First Presbyterian Church of Dutch Neck dated October 19, 1993
J-10	Memorandum from Michael Katims to Ray J. Bandlow dated October 25, 1993
R-1	Highlighted portion of the Health, Safety and Physical Education regulations

R-2 Minutes of Agenda Meeting held September 21, 1993

R-3 Questions and answers about use of Learning About Family Life handout provided

HISAKO LEE AND MICHAEL BRONZINO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners filed exceptions on June 6, 1994, in response to an initial decision mailed on May 25, 1994. By letter dated June 15, 1994, and faxed to the Bureau of Controversies and Disputes on that date, counsel for the Board advised that he had not been served with a copy of such exceptions and only learned of their existence on June 14, 1994 from a newspaper article. The Commissioner finds and determines that since petitioners' exceptions were not filed in accordance with the dictates of N.J.A.C. 1:1-18.4(a), which specifically requires that a copy of exceptions be served on all other parties and the judge, such exceptions will not be herein considered. Further, the petitioners cannot rely on their pro se status to claim ignorance of the requirement that other parties are to be served when the initial decision contains an explicit directive to that effect on page 15.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by her in the initial decision.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JUNE 27, 1994

DATE OF MAILING - JUNE 28, 1994

176-94

176-94

ARLA USHER, on behalf of her son, EDWARD S. USHER, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
RESPONDENT.	:	

JUNE 24, 1994

ARLA USHER, on behalf of her son, EDWARD S. USHER, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
RESPONDENT.	:	

For Petitioner, Arla Usher, Pro Se

For Respondent, David B. Rand, Esq. (Rand, Algeier, Tosti & Woodruff)

This matter was opened before the Commissioner by way of a petition of appeal with request for emergent relief filed on Friday, June 24, 1994, wherein petitioner sought a determination that her son be allowed to participate in graduation exercises on Friday, June 24, 1994, pending resolution of a dispute concerning the Board's action denying Edward S. Usher, III the privilege of participating in graduation ceremonies on June 21, 1994, based on the finding that he violated the Board's substance abuse policies and the Senior Prom Contract by consuming alcohol before the senior prom.

Pursuant to N.J.S.A. 18A:4-34, Assistant Commissioner Win L. Tillery was designated to decide this matter and a hearing was conducted via telephonic conference on June 24, 1994.

Upon consideration of the information obtained from the parties during the telephonic hearing, the Assistant Commissioner

determines that petitioner has failed to demonstrate those standards for extraordinary relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). In so deciding, the Assistant Commissioner finds that petitioner was afforded the opportunity to be heard by the Board. He expressly finds that petitioner does not deny that her son consumed alcohol. Consequently, the Assistant Commissioner finds that petitioner has not, at this juncture, shown the likelihood that she will prevail on the underlying merits of her claim that the Board's action in suspending Edward S. Usher, III, and prohibiting him from attending graduation ceremonies pursuant to Board Policy 5530R and the Senior Prom Contract upon a finding that he consumed alcohol in a limosine before the prom was arbitrary, capricious or unreasonable action. In the instant matter the Board has exercised its discretionary authority to impose what it considers an appropriate penalty pursuant to N.J.S.A. 18A:37-2.1.

The Commissioner will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the Board's exercise of its discretion constituted an arbitrary, capricious or unreasonable action. Thomas v. Board of Education of the Township of Morris, 89 N.J. Super. 327, 328 (App. Div. 1965), aff'd 46 N.J. 581 (1966) The Commissioner finds no evidence of an abuse of discretion in the matter herein. Nothing was brought to the record with respect to the blood alcohol tests taken at a hospital. Therefore, the Assistant Commissioner makes no determination in that regard.

Similarly, absent a showing of abuse of Board discretion concerning this underlying claim, petitioner was unable to show irreparable harm in the denial of the privilege of attendance at the

graduation ceremonies. Petitioner is not being denied a diploma in this matter. See, James Kenngott v. Lower Camden County Regional Board of Education, Camden County, 1975 S.L.D. 489

Accordingly, the Motion for Emergent Relief is DENIED, and the matter is to move forward for an expedited hearing at the Office of Administrative Law on the underlying merits of petitioner's claims.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 24, 1994

DATE OF MAILING - JUNE 24, 1994

177-94

RICHARD BYANK, on behalf of his son, MICHAEL BYANK,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
RESPONDENT.	:	

JUNE 24, 1994

RICHARD BYANK, on behalf of his son, MICHAEL BYANK,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
RESPONDENT.	:	

For Petitioner, Richard Byank, Pro Se

For Respondent, David B. Rand, Esq. (Rand, Algeier, Tosti & Woodruff)

This matter was opened before the Commissioner by way of a petition of appeal with request for emergent relief filed on Friday, June 24, 1994, wherein petitioner sought a determination that her son be allowed to participate in graduation exercises on Friday, June 24, 1994, pending resolution of a dispute concerning the Board's action denying Michael Byank the privilege of particiting in graduation ceremonies on June 21, 1994, based upon the determination that he violated the Board's substance abuse policies and the senior prom contract by consuming alcohol before the senior prom.

Pursuant to N.J.S.A. 18A:4-34, Assistant Commissioner Win L. Tillery was designated to decide this matter and a hearing was conducted via telephonic conference on June 24, 1994.

Upon consideration of the information obtained from the parties during the telephonic hearing, the Assistant Commissioner

determines that petitioner has failed to demonstrate those standards for extraordinary relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). In so deciding, the Assistant Commissioner finds that petitioner was afforded the opportunity to be heard by the Board. He expressly finds petitioner does not deny that his son consumed alcohol, only that none was found in his system as a result of a blood test done at some subsequent time. Consequently, the Assistant Commissioner finds that petitioner has not, at this juncture, shown the likelihood that he will prevail on the underlying merits of his claim that the Board's action in suspending Michael Byank and prohibiting him from attending graduation ceremonies pursuant to Board Policy 5530R and the Senior Prom Contract upon a finding that he consumed alcohol in a limosine before the prom was arbitrary, capricious or unreasonable action. In the instant matter the Board has exercised its discretionary authority to impose what it considers an appropriate penalty pursuant to N.J.S.A. 18A:37-2.1.

The Commissioner will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the Board's exercise of its discretion constituted an arbitrary, capricious or unreasonable action. Thomas v. Board of Education of the Township of Morris, 89 N.J. Super. 327, 328 (App. Div. 1965), aff'd 46 N.J. 581 (1966) The Commissioner finds no evidence of an abuse of discretion in the matter herein. Nothing was brought to the record with respect to the blood alcohol tests taken at a hospital. Therefore, the Assistant Commissioner makes no determination in that regard.

Similarly, absent a showing of abuse of Board discretion concerning this underlying claim, petitioner was unable to show

irreparable harm in the denial of the privilege of attendance at the graduation ceremonies. Petitioner is not being denied a diploma in this matter. See, James Kenngott v. Lower Camden County Regional Board of Education, Camden County, 1975 S.L.D. 489

Accordingly, the Motion for Emergent Relief is DENIED, and the matter is to move forward for an expedited hearing at the Office of Administrative Law on the underlying merits of petitioner's claims.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 24, 1994

DATE OF MAILING - JUNE 24, 1994

178-94E

178-94E

ANTHONY W. IPPOLITO AND IRIS G. IPPOLITO, on behalf of their son, ANTHONY W. IPPOLITO, JR.

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JUNE 28, 1994

ANTHONY W. IPPOLITO AND IRIS G. IPPOLITO, on behalf of their son, ANTHONY W. IPPOLITO, JR.

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For Petitioners, Iris G. Ippolito, Pro Se

For Respondent, Popovitch & Popovitch (Daniel S. Popovitch, Esq.)

This matter was opened before the Commissioner by way of a petition of appeal with request for emergent relief filed on Friday, June 24, 1994, wherein petitioners sought a determination that their son be allowed to participate in graduation exercises on Tuesday, June 28, 1994, pending resolution of a dispute concerning the action of the Superintendent and High School Principal determining that Anthony W. Ippolito, Jr. had failed to provide appropriate medical excuses to support his having been excused by the librarian and the gym teacher from participation in physical education classes from December 1993 to May 1994.

Pursuant to N.J.S.A. 18A:4-34, Assistant Commissioner Win L. Tillery was designated to decide this matter and a hearing was conducted via telephonic conference on June 27, 1994.

Upon consideration of the information obtained from the parties during the telephonic hearing, the Assistant Commissioner

determines that petitioners have demonstrated the standards for extraordinary relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). Testimony on behalf of the Board established that petitioners' son was consistently authorized to be excused from gym class by district staff members upon the statement by petitioners' son that a medical note would be provided. Petitioners have submitted two physician statements which have been deemed not to be sufficient to excuse absences for the final marking period. One note has, however, been determined sufficient to excuse petitioner's son from gym during summer school. The Assistant Commissioner finds based upon the specific facts herein that petitioners have preliminarily established a likelihood of success on the underlying merits of their claim that the District's action prohibiting their son from attending graduation ceremonies upon a finding that the doctors' notes submitted were not sufficient may constitute an arbitrary or unreasonable action on behalf of the District in that the policy submitted on behalf of the Board refers to both "unauthorized or unexcused absence from class."

Ordinarily, the Commissioner will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the Board's exercise of its discretion constituted an arbitrary, capricious or unreasonable action. Thomas v. Board of Education of the Township of Morris, 89 N.J. Super. 327, 328 (App. Div. 1965), aff'd 46 N.J. 581 (1966)

In applying the Crowe standards in the instant matter, petitioners have shown the balance of the equities in their behalf in permitting their son the privilege of attendance at the

graduation ceremonies. Petitioners' son is not being denied a diploma in this matter, based on a determination that he has submitted a doctor's note establishing that he is not capable of participating in physical education classes for the next four weeks or the majority of the summer school term.

Accordingly, the Motion for Emergent Relief is GRANTED, and the matter is to move forward for an expedited hearing at the Office of Administrative Law on the underlying merits of petitioners' claims.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 28, 1994

DATE OF MAILING - JUNE 28, 1994

179-94

179-94

HAROLD SIMON,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured principal, challenged the Board's action in withholding his salary increments for the 1992-93 school year due to alleged lack of effective leadership and contended such action was without factual basis, arbitrary, capricious and unreasonable.

Having considered both testimony and documentary evidence, ALJ concluded that the evaluations on which petitioner's withholding was based were unbiased and procedurally sound, and evinced no significant deviations from Board policy. Thus, the Board's determination to withhold was not arbitrary, capricious or unreasonable, nor was it without good cause. (Kopera) Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JUNE 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9074-92
AGENCY DKT. NO. 449-9/92

HAROLD SIMON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY
Respondent.

Robert M. Schwartz, Esq., for petitioner (Lake & Schwartz, attorneys)

David W. Carroll, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: March 31, 1994 Decided: May 16, 1994

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

On or about September 23, 1992, petitioner, Harold Simon, appealed to the Commissioner of Education alleging that respondent's action in withholding his salary increment was without factual basis, arbitrary, capricious and unreasonable. He requested that the Commissioner reinstate his increment for the 1992-93 school term. Respondent filed an answer on November 6, 1992, denying certain of the allegations and contending that the State district superintendent acted with good cause to withhold petitioner's increment. On November 19, 1992, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13, and assigned to the undersigned judge on December 21, 1992

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A telephone prehearing conference was held on January 19, 1993. At that time, the issues were isolated and a hearing was scheduled for May 18, 24, 25, and 28, 1993, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. As a result of certain scheduling conflicts, the hearing proceeded on May 26, August 3, 5, and 9, and September 22, and 24, 1993. The record closed on March 31, 1994, the extended date for filing briefs in this matter. Witnesses who testified and exhibits admitted into evidence are listed in the attached appendix.

ISSUES

The issues in this matter are as follows:

1. Was respondent's action in withholding petitioner's salary and adjustment increments for the 1992-93 school year arbitrary, capricious and/or unreasonable?

   (a) Did respondent evaluate petitioner in accordance with the criteria set forth in the *New Jersey Administrative Code* (*N.J.A.C.* 6:7-2.2) and the performance factors as adopted by respondent?

2. If so, to what relief is petitioner entitled?

FACTS

The following facts are stipulated:

1. On August 7, 1991, the State Board of Education abolished the Paterson City Board of Education and thereby created the State-Operated School District of the City of Paterson (the District), pursuant to *N.J.S.A.* 18A:7A-34 *et seq*.

2. The State Board of Education appointed Dr. Leval S. Wilson as the State district superintendent, pursuant to *N.J.S.A.* 18A:7A-35.

3. Pursuant to *N.J.S.A.* 18A:7A-45, Dr. Wilson prepared an evaluation process for all building principals. Several assessment unit evaluators, including Greta Shepherd and Dr. Benjamin Veal, were hired to conduct the evaluations of principals.

4. Petitioner Harold Simon has been employed by respondent as a school principal since September 1, 1970. During the 1991-92 school year, petitioner was principal of Public School No. 24. Presently, petitioner is the principal at the Norman S. Weier School.

5. On November 13, 1991, all district principals, including petitioner, attended a meeting. During the meeting, Dr. Wilson and Dr. Arthur Russomano, project manager, reviewed the principal evaluation process.

6. Petitioner Simon received the following memos from his assistant superintendent, Ms. Emilie Renna, relevant to the evaluation process:

   (a) A memo dated November 6, 1991, scheduling a meeting for all principals on Wednesday, November 13, 1991, and indicating that the agenda would include a review of the principal assessment process (J-1, Exhibit A).

   (b) A memo dated January 6, 1992, to all principals regarding the principal evaluation process (J-1, Exhibit B).

   (c) A memo dated January 8, 1992, regarding the principal evaluation process (J-1, Exhibit C).

7. The State assessment unit coordinator, Jack McGee, issued two memos to assistant superintendents relevant to the principal evaluation process: February 5, 1992 (J-1, Exhibit D) and February 28, 1992 (J-1, Exhibit E).

   (a) On January 24, 1992, petitioner objected to the evaluation by Dr. Benjamin Veal, based upon an alleged conflict between himself and Dr. Veal (J-1, Exhibit F).

8. In response to petitioner's January 24, 1992 letter, the District, on February 13, 1992, assigned evaluator Greta Shepherd to perform the remaining three evaluations of petitioner (J-1, Exhibit G).

9. On February 13, 1992, Jack McGee provided school principals with a copy of the criteria and indicators (J-1, Exhibit H).

10. On March 18, 1992, petitioner had a conference with Dr. Wilson and Jack McGee to discuss his February 5, 1992 summative evaluation (Phase I) (J-1, Exhibit I), by Dr. Veal.

11. Ms. Shepherd performed three summative evaluations on petitioner: April 28, 1992 (Phase II) (J-1, Exhibit J); May 22, 1992 (Phase III) (J-1, Exhibit K); June 30, 1992 (Phase IV) (J-1, Exhibit L).

12. By letter on June 30, 1992, Dr. Benjamin Williams, State district assistant superintendent, and Dr. Wilson acted to withhold petitioner's salary increment (J-1, Exhibit M). The letter indicated that it was for the following reasons:

    (1) You have not demonstrated a consistent and effective leadership role as a principal.

    (2) You have not demonstrated consistent and effective leadership in the areas of curriculum/program, supervision of instruction and staff development.

    (3) You have not improved in areas identified in your developmental action plans.

13. In regard to the first evaluation by Benjamin Veal of petitioner dated March 6, 1992 (J-1, Exhibit I), petitioner received an overall unsatisfactory rating. His rating for Phase I was as follows:

EVALUATION CRITERIA	RATING SCALE	
Curriculum/Program	Unsatisfactory	15
Supervision of Instruction	Fair	20
Staff Development	Unsatisfactory	15
Assessment of Pupil Progress	Unsatisfactory	19
Community Relations	Fair	20
School Climate	Fair	20

14. For Phase II of the evaluation process, petitioner was evaluated by Greta Shepherd. The summative evaluation dated April 29, 1992, (J-1, Exhibit J) revealed an overall fair rating. Petitioner received the following:

EVALUATION CRITERIA	RATING SCALE	
Curriculum/Program	Fair	30
Supervision of Instruction	Fair	32
Staff Development	Fair	30
Assessment of Pupil Progress	Fair	33
Community Relations	Competent	36
School Climate	Competent	37

15. For Phase III of the evaluation process, petitioner received a summative evaluation by evaluator Greta Shepherd dated May 22, 1992 (J-1, Exhibit K). Petitioner received an overall fair rating. He received the following:

EVALUATION CRITERIA	RATING SCALE	
Curriculum/Program	Fair	32
Supervision of Instruction	Fair	32
Staff Development	Fair	32
Assessment of Pupil Progress	Competent	35
Community Relations	Competent	36
School Climate	Competent	37

16. For Phase IV of the evaluation process, petitioner received a summative evaluation by evaluator Greta Shepherd dated July 9, 1992 (J-1, Exhibit L). Petitioner received an overall fair rating. Petitioner's ratings were as follows:

EVALUATION CRITERIA	RATING SCALE	
Curriculum/Program	Fair	32
Supervision of Instruction	Fair	32
Staff Development	Fair	33
Assessment of Pupil Progress	Competent	35
Community Relations	Competent	36
School Climate	Competent	39

TESTIMONY

First to testify on behalf of respondent was Jack Allan McGee, employed as State assessment unit coordinator for respondent since November 1, 1991. He was hired to coordinate the evaluation process for the central office. The evaluation process and principal evaluation process was required by the State takeover. During mid-October 1991, the administrative team met to determine how the two evaluation processes would be accomplished. On November 13, 1991, a meeting was held which all principals were directed to attend, at which the evaluation process was explained. Petitioner was present at the meeting. The District hired six outside evaluators. Greta Shepherd and Dr. Benjamin Veal were two of those selected. There were two initial training sessions for the principal evaluation team. McGee explained that Dr. Wilson made remarks regarding the mandatory evaluation and gave the principals an overview of the six areas of the evaluation. Dr. Russomano, a consultant, indicated the evaluation team members and the criteria. He referred to the principal evaluation cycle, as represented in R-1, and explained the process. The evaluators were assigned at random to six principals and were to remain with those principals for each of the four phases.

McGee explained that Dr. John Krewer, an assistant superintendent in Pennsylvania and a consultant to the District, put together the evaluation process, designed the forms and fleshed out the criteria. McGee's memo dated February 5, 1992, to Emmajean Stepherson, Emilie Renna and Burt Vasquez was prompted by the fact that the principals had requested the indicators. The indicators, independently accomplished by the local school district, were distributed between Phase I and Phase II of the evaluation process.

McGee explained that the purpose of the process was to be in compliance with the state code. The process was to allow principals to present themselves in the best light and to ensure that they were evaluated fairly. McGee explained that his job was to assist the evaluators to ensure they had everything they needed to do the job. The evaluator prepared a handwritten copy of the evaluation which was placed into the computer. After the document was agreed to, the final copy was signed.

McGee revealed that there was a problem with the Phase I evaluation of Simon. Dr. Veal improperly gave petitioner a copy of the handwritten form. This

was premature and missed a step in the process. The assistant superintendent had not seen it; it had to incorporate the assistant superintendent's input.

McGee recalled that Simon called him, angry and upset at the handwritten copy. Simon wanted to submit documentation. McGee went to Public School No. 24 to talk to Simon. Apparently, Simon had known Dr. Veal prior to the evaluation, when Dr. Veal was a principal in Wayne and petitioner was on the Board of Education. McGee was uncomfortable that one of the evaluators knew the principal he was assigned to, and it was agreed that the evaluator should have no previous relationship with the principal. McGee sent a letter to the evaluation team members, asking if they had previously worked with any of the principals. The only connection was between Dr. Veal and Mr. Simon. All agreed that the evaluator should be changed (J-1, Exhibit G). Greta Shepherd volunteered to switch a principal with Dr. Veal and was assigned to Simon. McGee received a letter from Simon expressing his displeasure with Dr. Veal's evaluation (J-1, Exhibit F). McGee noted that Dr. Veal was assigned to petitioner in mid-December 1991 and met with Mr. Simon in early January 1992. McGee had received no notification from Simon that he had a problem with Dr. Veal evaluating him. He found out about the problem after the evaluation.

McGee recalled that Dr. Wilson asked to meet with any principal (there were six or seven) rated "fair" or "unsatisfactory" during Phase I. Wilson wanted all principals to score "competent" or above. Fair or unsatisfactory was not acceptable. There was a clear message from the beginning that unsatisfactory performance would not be tolerated. McGee took personal notes of the conference with Dr. Wilson and Simon (R-2). In March 1992, he and Simon had a cordial relationship. He did not recall Simon remarking that the administration was "out to get him." McGee indicated that Simon was given a number of opportunities to talk about the evaluation and his performance. Simon was pleased with the change from Veal to Shepherd. He was satisfied that Shepherd was clear as to what she expected from him. McGee recalled that Simon said he had not received indicators during Phase I and that a couple of other principals had received them. McGee corrected Simon; he knew that the indicators did not go out until after Phase I, but prior to any part of Phase II being conducted. He noted that the evaluators were to use the indicators as guidelines to determine if the criteria were met. Dr. Wilson determined that he would decide whether to use the Phase I evaluation for Simon. He maintained the

rights over the use of it. McGee did not hear anything about Dr. Veal being unfair with Simon.

On cross-examination, McGee indicated that his role was to assist Russomano and coordinate the paperwork for the evaluation process. He did not believe that Dr. Krewer had completed the process by November 13, 1991, nor was he sure if the principal evaluation cycle (R-1) was completed by that date. The list of the six criteria was passed out. He could not recall if all of the evaluators had principalship experience and was not sure if this was a criteria. McGee was not involved in choosing the six people on the team, nor did he know how the evaluators were picked. The evaluation process was presented to the evaluators and explanations and training were given. He was present at the training but did not conduct it. He could not recall if R-1 was presented to them. There was training review in late December, early January, after the performance indicators were completed. The indicators (J-1, Exhibit H) were distributed and discussed, and the evaluators were advised to use them.

McGee indicated that P-1 was developed by Krewer and distributed at the training session. He could not recall a discussion not to give weight to one indicator over another. The principals were advised of the six criteria and the manner in which these performance criteria would be assessed. The evaluators were to tell the principals what was expected. There was no thought given to sending out the indicators. He agreed that the criteria are general and that indicators define them. It was his recommendation not to list the indicators until Phase I was over. His recommendation was accepted and the indicators were not distributed until Phase II.

McGee did not know if Dr. Veal interviewed petitioner or what he asked of him. He noted that the post-observation conference with the principal is an opportunity for both parties to review what the evaluator has found. The evaluator may ask for additional documentation, and the evaluatee may provide it. The evaluator could make an additional on-site monitoring visit. McGee stated that he was told that this took place between Veal and Simon. Simon told him he showed the documentation to Veal and tried to provide it to him, but Veal was not interested in the additional documentation. Dr. Veal said he did not need all the documentation and asked for certain pieces. McGee could not recall Dr. Veal's response to what Simon had told him. McGee noted that it is not necessarily a

violation of the process for Dr. Veal to refrain from accepting documentation. The issue is whether the materials are germane.

McGee explained that the evaluation process required the evaluator to go over the evaluation with the assistant superintendent. The evaluator is bound by the criteria and the indicators; the indicators bring objectivity to the process. The assistant superintendent is not necessarily bound by the criteria and the indicators. Judgment is a factor which adds depth to the indicators. McGee indicated that based on Exhibit I (*see* J-1) he could not determine how the evaluator reached the conclusion that Simon was unsatisfactory. He opined, however, that it is not necessarily true that the evaluator should have outlined the principal's particular weaknesses in the evaluation. The evaluation may have been explained to Simon. McGee indicated that in the summative evaluation, Shepherd rated Simon a 32 in supervision of instruction. He did not know how Shepherd came up with that number. The numerical score is based on the judgment of the evaluator. On redirect examination, McGee explained that some indicators carry greater weight. The evaluator could look at some indicators during one phase and others during another. There is no correlation between the indicators and the score. Shepherd relied on and was knowledgeable of the indicators.

McGee agreed that the evaluation for Public School No. 34 was satisfactory and that one of the indicators was instructional leadership. He did not believe, however, that there was a correlation between the school evaluation and the principal's evaluation. McGee indicated that Dr. Krewer put together the school effectiveness document. He was not part of the team. The school effectiveness questionnaire in May of 1992 was to spark discussion among the superintendent's cabinet members; it was not connected to the principal's evaluation and the cabinet members did not have access to Simon's evaluation. The outside evaluators and the cluster assistant superintendent filled out the school effectiveness questionnaire. The cabinet and the principal evaluation team (the same team of outside evaluators who did the principals' evaluations) discussed the ratings and one rating for the school was arrived at. McGee could not recall if a principal was satisfactory and the school unsatisfactory, or vice versa. On recross examination, the witness noted that there were meetings each month with the evaluators.

Benjamin Veal holds a master's degree from Seton Hall University and a doctorate in education from Rutgers University. He retired from the Wayne public schools on July 1, 1991, where he was employed for twenty-nine years. He served as a teacher, an affirmative action officer, and a principal of two elementary schools for twenty-five years. He is certified in social studies, physical education and health, elementary education K-8, and science, and has a principal's certificate and a school administrator's certificate.

Dr. Veal was contacted to become an evaluator in December 1991. In January 1992, there was an all-day training session regarding the evaluation of the building principals. The superintendent of schools spoke about the goals. The evaluators were told to inform the building principals of the process. Veal had a long list of what he was looking for. The model was performance criteria and Veal had indicators during the training session.

Veal testified that he has known Simon for fifty-five years. Simon graduated high school with Veal's wife. His first of four meetings with Simon occurred in January 1992, for half a day. He spoke about the process and what Simon should produce in the future. He asked for seventeen items of documentation (R-3). Simon alleged that he was not required to do what was asked of him and he complained. No portfolio of documents was given to Veal. Simon gave him a school improvement plan for 1990 which was one piece of paper and one year old and Veal gave it back to him. At the second meeting, on January 19, 1992, Veal asked Simon for a plan book, and Simon did not have one. Veal also asked for the school improvement plan. Veal indicated that he spent half a day asking for dates of in-service meetings, dates of staff meetings, agendas, etc. He went through a standard list of about forty to fifty questions. Simon responded and gave him the documents he had. At the end of this meeting Veal had five documents. The third meeting in January 1992 was a co-observation meeting. Veal observed the teacher conference and spent the remainder of the afternoon going over the same questions for documentation. At the fourth meeting, Veal reviewed what had been submitted and asked for material again. Simon indicated that some of what was asked for had not been asked for before and he had difficulty producing it. Veal filled out the summative evaluation; the rating was unsatisfactory.

The last meeting was the post-observation conference. He discussed Simon's strengths and weaknesses. Simon told him that he did not blame him but that he would tell the central office what he thought of the entire process.

Veal received a call from McGee in late January or early February informing him that Simon had said there was a problem because Veal was principal when Simon was on the Board of Education. Veal stated that Simon was not on the Board of Education when he was made principal. Exhibit I (see J-1) was prepared after the meeting with Simon. Veal admitted, however, that he gave Simon a handwritten copy when he met with him. McGee told Veal that Simon said that he had offered Veal documentation that Veal refused to take. Veal disagreed that Simon had tried to give him documents that he refused to look at. Veal alleged that he had great difficulty getting documents from Simon.

On cross-examination, Veal could not recall if Simon showed him P-4, which he admitted could serve as documentation regarding a mission statement. The parties stipulated that Veal had not seen P-5a, b and c, which would serve as documentation of communication between principal and staff. Veal admitted that he saw copies of newsletters to parents (P-6) and noted this in the evaluation. However, this was insufficient for purposes of communication with the parents; he was looking for notes or letters to parents regarding activities of the children at school. There was no such documentation. Referring to P-7, Veal did not recall seeing documents regarding corrective action and assessments. He also did not recall seeing P-7, P-8, P-9 or P-10. Of import, Simon presented goals for 1990-91, which was not the appropriate year. He did not present documentation for the appropriate year, which Simon indicated would be completed later in the year.

Veal admitted that there was a requirement to obtain input from the assistant superintendent before he gave Simon the evaluation. He was supposed to talk to the assistant superintendent and then type up the evaluation. The post-observation conference was to be held after discussion with the cluster superintendent. The cluster superintendent would sign the evaluation, McGee would receive the evaluation, and then the evaluator would confer with the building principal (J-1, Exhibit C, par. 3). He admitted that he had a post-observation conference with Simon before conferring with the cluster superintendent. This was not in accord with the procedures.

Veal concluded there was an unsatisfactory rating after the observations that were required. Veal admitted that Simon observed teachers frequently, but indicated that he had no documentation to determine the quality of those observations. He could not find evidence of institutional goals and objectives. In regard to supervision of instruction, he only observed that Simon completed paragraph A (J-1, Exhibit H).

Veal indicated that from the beginning of Phase I to the beginning of Phase II he observed Simon four times; pre-observation conference, all-day shadowing, evaluation in school, post-observation conference. The post-observation conference occurred when the evaluation was signed on January 21, 1992. He admitted that there was no indication of weakness in school climate. He did not indicate in the evaluation that Simon did not attend meetings and conferences held outside the school district (one of the requirements of school climate). Veal stated that he knew Simon did not attend because Simon told him so. He rated Simon fair in community relationships because he did only minimal things in that category and provided no documentation as to what he did.

Veal admitted that there was a conflict between himself and the Wayne Board of Education when he was a principal, which developed after Simon was on the Board (1978). He admitted that he had not told the administration that he had known Simon for fifty-five years or that he was a principal in Wayne when Simon was on the Board of Education. He admitted that there was no documentation regarding his first meeting with Simon; he did not keep the calendar. However, each day he observed Simon there would be a voucher for payment. He admitted that he had the criteria in January (J-1, Exhibit H), but had not shared it with Simon.

On redirect examination, Veal pointed out that he used the indicators. He explained that he listed the development of the monthly newsletter as a strength, and parent communication as a weakness because the newsletter did not cover all areas of parent communication. He could not recall if he was shown P-8, nor did he have knowledge that P-4 was given to him. He outlined the evaluation and did not believe he had to write down everything. On January 21, 1992, he had reached a conclusion. Simon was rated unsatisfactory because of a lack of documentation.

Veal indicated that Simon had the opportunity to submit such documentation and that he never rejected one piece of paper that Simon offered.

Greta D. Shepherd, a retired educator who serves as a private consultant, was assigned to evaluate Simon on or about February 1992. There is no dispute that she was qualified to serve as an evaluator. Shepherd evaluated Simon and, on April 28, 1992, rated him fair. She discussed the process and assessed him against other principals she had worked with. Testifying with particularity, Shepherd opined that she could not tell from the mission statement what the school would do to have an effective program for students. Referring to R-6, she indicated that the conference Simon held on March 3, 1992, was too brief and that he did not use good administration skills and did not help instruction. She opined that P-7 was not a strongly written PIP, since it did not relate specifically to what the school was working on. Referring to Phase III (J-1, Exhibit K), supervision of instruction, she indicated that Simon did not give specific feedback and was not consistent in recording behavior. He did not record at the beginning of the lesson and did not have clinical observation skill. In Phase IV, the quality of the post-observation conferences did not improve enough. She could not say that Simon had the skills of the other principals.

Shepherd indicated that after each evaluation she had a discussion with Emilie Renna. Referring to R-8, she indicated she had not seen the attached observation forms used by Simon. The agendas should have been prepared and not handwritten. She and Renna had a conversation regarding a handwritten agenda that was undated. She opined that there was a lack of organization in presenting and organizing material. Shepherd noted that No. 1 on the improvement plan was the use of binders. Moreover, Shepherd wanted a staff development program developed. She called Charlotte Welling, staff development officer, Paterson School District, to help Simon design a staff development program. Shepherd wanted it running for the next school year. Shepherd could not indicate whether she saw P-5a. She asserted that the numbers assessed reflected her professional judgment based on the principals she had seen and worked with over the years. Shepherd prides herself on trying to lessen confusion and thought there was a clarity of understanding.

On cross-examination, she indicated that she used performance criteria for all the evaluations. She pointed out the most significant areas of weakness and noted that there was no requirement to indicate strengths, unless in the upper range, or comment on each area. There was no scale; she gave Simon a 30 based on her best professional judgment.

In further testimony, Shepherd expounded on her allegation that there was no identifiable staff development program. Use of the *Master Teacher* magazine itself is not staff development; a commercial program must be discretely related to it. She admitted that she did not speak to the chairperson of the staff development committee. Shepherd opined that P-11 (which she had reviewed) was not satisfactory and did not represent a year's work. It was a reconstruction by the teachers and not specific enough to meet the needs of the child. Shepherd indicated that she had no problem with the format of the individual professional improvement plan worksheet by staff member Mikardos (R-7), but she did have problems with the content. She reviewed it with Simon. Shepherd could not recall if she had reviewed the classroom visitation/observation reports (P-12).

Shepherd indicated that the most important role for the principal is supervision of instruction and opined that there are schools that work well despite the principal. Renna evaluated Public School No. 24. Shepherd had no information of Renna's evaluation, and had not seen the school effectiveness questionnaire (P-13) before. She was not aware of the results and not involved in the process of evaluating the school.

Shepherd indicated on cross-examination that she had been advised of the evaluation process and shown how to use the rating scale. There were occasions when she did not record what occurred during her meetings with Simon and may or may not have written down the dates of the meetings. She did not know if she had post-observation conferences with Simon and had nothing to demonstrate whether she had them for cycles 2, 3 and 4. Of import, Shepherd did not recall P-14 in evidence. She admitted, however, that she completed the school effectiveness questionnaire for Public School No. 24. She had not seen it since she handed it in. Each evaluator completed a school effectiveness questionnaire for each school with which he or she was involved. She was not sure how she rated Public School No. 24 and believed that she gave her evaluation to Mr. McGee. She stated that there was a

general discussion of the school effectiveness questionnaire at that time with the superintendent, cabinet and all evaluators. Shepherd opined that Simon's overall performance did not improve significantly over a period of evaluations. She admitted that Simon was in the upper range of fair, and could make changes to come within the competent range. She advised Renna of this.

On redirect examination, Shepherd indicated that Simon did not have a discrete review of test data. She rated him competent for assessment of pupil progress and asserted that the fact that he had not looked at the data required that he be moved down to fair. Shepherd met with Renna regarding Simon's evaluation for the third cycle. Renna asked her to change the fair to competent. Shepherd indicated that she had to call it as she saw it and saw no reason to change the rating. There was no disagreement as to how she arrived at the rating. She showed Renna examples and felt there was an agreement. On recross examination, Shepherd stated that she had not indicated to Simon that certain information should be in folders not binders. She believed that P-11 asked in May what had been done all year, did not collect the requisite data and was not discretely developed for above-average learners.

Herbert Benjamin Williams, State assistant superintendent since August 16, 1991, is familiar with Harold Simon. Delegated by Dr. Wilson to play a role, he helped conceptualize the task of the evaluator, select Krewer and select the evaluators. He recalled the meeting of November 13, 1991, with all principals present and the conference with Simon to review his performance (R-2). The superintendent said he would only support principals that had, at minimum, satisfactory evaluations and wanted to meet with those rated less than satisfactory early in the process. The focus of his comments was the fact that Simon was not satisfactory. Williams indicated that he did not get the impression from the meeting that Simon did not understand what was expected of him. Simon opined that Veal had not been clear with him and felt it would be different with Greta Shepherd.

Williams worked with McGee to put a reporting system in place so he could receive information on the evaluations and monitor the principal's performance. Noting that the evaluation process was comprehensive, Williams stated that he reviewed documents and records which formed the basis for the summative evaluation. He reviewed Shepherd's evaluations. He established a relationship with

the evaluators and concluded they were competent. Williams indicated that he had four evaluations when he determined to withhold the increment. The standard of acceptance was satisfactory. Fair or unsatisfactory was below the standard. Since Simon's performance in certain areas was less than satisfactory, Simon did not demonstrate consistent and effective leadership. Williams indicated that Renna tried to increase Simon's probability of success by the improvement plan for Simon (R-8). Williams was familiar with the school effectiveness questionnaire (P-13). He met with Krewer and requested an instrument to collect data that could be used for conclusions on the efficacy of the school. Williams opined that the school questionnaire was not related to the principal evaluation process. Noting that this was not the intent of the instrument (it was not designed to measure a principal's effectiveness), he took steps to maintain it as a private document (unavailable to the public) so that no judgment would be made from it on the individual principals.

On cross-examination, Williams explained that he and the superintendent determined to move a principal based on an assessment of the data collected. The increment denial was based on his and the superintendent's judgement. It did not arise from the cluster assistant superintendent.

Williams met with Simon on one occasion; it was not after Veal's evaluation. He believed that Leval Wilson met with Simon, but did not know the number of meetings. Williams reviewed the evaluations and Shepherd's notes (R-6).

Williams was aware of Veal's summative evaluation and Simon's concerns. He spoke to McGee regarding a change of evaluators. McGee told him that Simon knew Veal from a previous relationship and felt Veal was not fair or objective. Williams recalled that McGee alerted him to the fact that Veal worked in the school district when Simon was a member of the Board of Education. It had been alleged by Simon that Veal would not accept documents. McGee indicated that Simon showed him the documents he made available to Veal. Williams accepted as valid petitioner's concerns, and switched evaluators to respond to Simon's concerns. He did not recommend that Shepherd be the evaluator. Evaluators had not been asked if they knew the person they were evaluating.

Of import, Williams testified that Renna confirmed that she had not had input into the evaluation. There was a departure from the procedure. The input of the

cluster superintendent was lacking. Williams considered this to be a minor procedural flaw when considering the entire process. Williams explained that the reason for the outside evaluators was to have a balanced perspective, minimize arbitrariness, maintain objectivity and fairness and relieve the burden from those that had established a close relationship with the principal. Williams admitted that he took into account Veal's evaluation, but contended that "it might not have weighed heavily."

Williams said that based on his knowledge of the process, he believed that Shepherd had post-observation conferences with Simon. He saw four evaluations and Shepherd's notes when he made a determination on June 30. Referring to the school effectiveness questionnaire, Williams admitted that instructional leadership refers to the principal of the school and, according to Renna's evaluation, the leadership of Public School No. 24 was average. Williams indicated, however, that he did not take this into account because this was not the evaluation of the principal. The document was designed to look at the variables of organizational directives. The building principal evaluation was different and contained six particular criteria. Although he admitted that some of the indicators in the school effectiveness questionnaire are similar or identical to those in the principal evaluation process criteria (J-1, Exhibit H), he opined that one can report on the institution without an in-depth performance review. Referring to P-13 (No. 9 of Instructional leadership), he did not believe that there was a disagreement between Renna's and Shepherd's evaluations. He recalled that there was an extensive discussion with Dr. Krewer, and they concurred that the school effectiveness questionnaire was not designed to evaluate individual performance. He admitted that the same people were involved in the process of school evaluation as in the principals' evaluations. Williams was not sure he was present at the meeting at which Simon's increment was denied, nor was he sure he was present at a meeting at which Dr. Wilson said he wanted Simon to leave the District. He did not discuss this with Dr. Wilson.

Williams agreed that the Norman L. Weier School is rated below average. Although he participated in the decision to transfer Simon, he did not tell Simon he was transferred to help turn that school around. He transferred seventeen principals in an effort to create better matches. He looked at Simon's time in Public School No. 24 and the Norman L. Weier School and transferred Simon because he thought it was

a better match. He looked at the amount of time a principal was at a single location and the benefit of reassigning the principal. He believed it was the right decision to transfer Simon. He did not transfer Simon to Weier because of his leadership abilities or improvements of Public School No. 24. Williams had no knowledge of performance history and Simon's performance had nothing to do with his transfer.

On redirect examination, Williams indicated that eighteen people participated in the rating of the schools, the cabinet shared its perception and a consensus was arrived at. He said that Simon's transfer occurred after June 30, 1992, and prior to the opening of school.

Kathy Ann Poshkus, employed by Paterson for approximately ten years, testified for petitioner. Presently on child-care leave, she taught at Public School No. 24 for nine years. She taught there for eight years while Simon was principal. In 1991-92, Simon conducted four formal observations of her. She recalled that in May, Shepherd and Simon observed her for fifty minutes. At the end of the lesson, Simon spoke to the children regarding the lesson. He told the children that it was a good lesson. The children loved it and answered him. He did not interrupt the lesson. He followed the same procedure on other evaluations. The post-observation conference took place later the same day. Shepherd was there for the twenty-five-minute conference. Simon discussed the lesson. He began in a positive vein and then made suggestions for improvement. He discussed working with different-level children. He spoke to the witness regarding working with gifted and talented students. He believed the lesson was a little too easy for bright children. Shepherd said nothing during the conference. At the end of the observation, Shepherd thanked Poshkus. She gave her a note thanking her for letting her observe the lesson and noting that it was a wonderful lesson. Poshkus opined that all Simon's post-observation conferences were the same and that he always helped the teacher.

On cross-examination, Pushkus could not recall the exact day of the lesson she had testified about. She indicated that Shepherd's notes (R-6) were incorrect, and that Shepherd and Simon came at 9:00, the door was shut, and they left at 10:10.

Poshkus had no notes of the evaluation and contended that she had not discussed her recollections with Simon. Although she admitted that she knew Simon needed her testimony, she was subpoenaed. She understood Shepherd was there to

observe Simon and was told the morning of the evaluation that they were coming to her classroom.

On redirect examination, she indicated that she did not know Simon was followed. She had the impression that she was being observed as part of a process to determine why the State took over Paterson. She believed they were checking out all of the teachers.

On questioning by this judge, Poshkus referred to Ms. Shepherd's notes. Referring to the entries on page 9, she indicated that the entries at 9:24, 9:27, 9:30 and 9:35 did not occur.

Next to testify was Robin Lynn Chmiel, employed by respondent as a third-grade teacher. Presently in her third year of teaching, she began teaching in September 1991 in Public School No. 24, where Simon was principal. In 1991-92, she was observed by Simon the proper number of times. She also met with him informally every day to communicate and to make sure she was developing her lessons properly. Simon had an open-door policy and everyone went to him in the morning and before they left. There was often a line to speak with him.

In March of 1992, she was observed by Shepherd and Simon for a full forty-minute period. She did not recall that Simon made comments during the observation or interrupted her lesson. She had a post-observation conference after school on the same day, at which Shepherd was present. Because she had another engagement, she could only stay ten minutes, and the post-observation conference was continued the next morning for an additional fifteen to twenty minutes. Shepherd made no comments during the evaluation. Shepherd thanked her and wished her luck in teaching. Simon made comments regarding the lesson.

On cross-examination, Chmiel indicated that she volunteered to be observed. She opined that Shepherd's notes (R-6, pages 3, 4, and 6) accurately described what occurred. She did not believe that Ms. Shepherd was present for the conversation during which it was discussed whether she could stay after school. Chmiel noted that there was a faculty meeting once a month.

On redirect examination, Chmiel recalled that in regard to Shepherd's notation at 9:31, she did not recall Simon picking up paper or taking notes; neither did she recall the actions noted at 9:20, 9:27, or 9:45. She not recall the specifics of what Simon did during the period.

Janice Notte, employed by respondent for nineteen years, has been at Public School No. 24 for eighteen years. She was there for fourteen years when Simon was principal. The staff development committee was formed in December 1991. Notte, a basic skills instructor (BSI), was the chairman of the committee, which had ten teachers on it. (Simon sent a questionnaire to the staff to determine their interest in committees. Apparently, there were at least two other committees, school climate and testing.) Notte indicated that there were five meetings of the staff development committee at which Simon was present. In January, the committee met to determine what to do. At Simon's suggestion, Charlotte Welling, State staff development specialist, met with them for an hour to an hour and a half in February to determine different techniques. She advised them about the national staff development committee and different workshops. She was to return, but did not. The April meeting was canceled, but in May there was a meeting to discuss an all-day workshop that Simon had planned for June, at which the different committees would meet. Shepherd was present at the May meeting. They came up with several goals for the school; intra-school contact, peer group for teachers, out-of-school visits, and workshops for the following year. Although they began implementing these, since Simon was not principal in 1992-93, they were not carried out. There was no staff development committee in 1992-93 (the principal showed no interest).

Notte believed that the manner of addressing different ability levels was discussed in a committee. She believed that the 1991-92 curriculum was geared to all three levels and that a teacher would also address this in the classroom. In 1991-92, there was departmentalization according to ability. When Simon was principal, the sixth and eighth grades were departmentalized. The seventh-grade teachers did not want to departmentalize, but there was individual instruction in the classroom. In 1993-94, there was a directive from the State to departmentalize all grades.

On cross-examination, Notte indicated that Simon is a friend and a colleague. They do not socialize outside school and Notte has no stake in this case. Referred to P-24 and P-31, Notte indicated that the meeting with Ms. Welling apparently

occurred April 14, 1992. Notte opined that the staff development committee was a good idea.

On redirect examination, Notte further indicated that there were staff development activities in prior years and, in addition to the committee in 1991-92, for as long as she could remember Simon had given each teacher a *Master Teacher* pamphlet, which was discussed at faculty meetings. She and the other teachers discussed the benefit of the pamphlets and the *Master Teacher* ideas. She did not continue to receive the pamphlet in 1992-93.

Patricia Chapman, employed by respondent for fifteen years, taught in Public School No. 24 during most of those years. A math teacher for ten years, she taught sixth grade in 1991-92. In 1991-92, not only was there individual instruction but math was grouped according to high, middle and low ability. This was accomplished by Chapman and Simon in accordance with standardized tests and tests that Chapman developed about ten years ago. She indicated that reading and language were also grouped according to ability in 1991-92, based on performance criteria. In 1992-93 and 1993-94, the subjects were departmentalized, but not grouped as to ability levels. The last time it was grouped according to ability level was when Simon was there. She noted that the higher performance group also worked cooperatively on special projects. There was also a gifted and talented program and a computer program. For the lower performers, there was cooperative learning. The BSI would work as a team teacher. The students would break up into cooperative groups, with one brighter student and three less motivated. Middle-performing groups would work at a regular pace. This program was for all core curriculums in 1991-92.

On cross-examination, Chapman recalled that she piloted the eighth-grade program when it was expanded to the eighth grade. This program was not implemented in the lower grades. On questioning by this judge, Chapman indicated that individualization is going on in the seventh grade, but it is not departmentalized. In seventh grade, one teacher teaches math, language arts, and English in a self-contained classroom. Within that classroom, students are divided into groups. On redirect examination, Chapman opined that grouping occurred K-5; there is no other way to teach.

Emilie Renna, employed by respondent for thirty-eight years, has served as a principal, vice-principal and teacher. In March of 1991, she was assistant superintendent in charge of school operations. She was in charge of twelve schools, including the high school and Public School No. 24, and was to assist principals as a troubleshooter, accountable for all that occurs on the school level. She helped the principals evaluate teachers and in areas of operation.

Renna indicated that she had a secondary role in the evaluation process. She observed the principal pre- and post-observation conferences. She met with the outside assessors and went over the principal's assessment. She spoke to the principal in regard to improvement based on the original evaluation.

Renna testified that Veal's initial evaluation in January 1992 was supposed to be a joint evaluation and shared with her before it was given to Simon. It was not. She conferred with Shepherd regarding her first evaluation of Simon, and she took notes. Renna said that she also found poor organization skills, and that staff development and curriculum development were weak. School climate was satisfactory. Renna could not recall the details. During the fourth evaluation, they discussed competency. Some areas had not improved.

Renna had been at the school and observed this. Noting that staff development involved the focus of a principal actively assisting staff to learn by positive action, she concluded that Simon was not doing that. There was no staff development committee at the outset of the year. It was established in response to criticism and was not part of the district-wide effort. Although Welling was on board early in the year and asked Simon if he wanted to take advantage of the district-wide effort, Simon did not until April. By April, other schools had done full workshops and were on the second round. In addition, Simon could not document staff development in the prior years. Renna noted that the *Master Teacher* publication was placed in the teachers' mailboxes, but not selected regarding staff development. There was no documentation of *Master Teacher* at staff meetings until the negative evaluation.

Renna sent a letter of support for Simon for a Dodge Foundation grant (P-32) in November 1991. She opined that although her statements were true, this was not an evaluation. She chose him and no one else because she believed that Simon was

vocal and interested in site-based management. She picked an interested principal, not the best principal.

Renna filled out the school effectiveness questionnaire and concluded that the school was average (P-13). She believed her rating was accurate. Although she alleged the summary sheet (page 4 of P-13) was accurate, she admitted that in regard to expectations for students' success, she provided an overall summative rating of average, but rated it below average on the summary sheet. In regard to community relations, she provided an overall summative rating of average, but rated it below average on the summary sheet. She admitted that the summary was based on the rating sheet. She agreed that instructional leadership was marked average. In her group, all but two schools were rated average; two were rated above average. Only Simon received an increment denial. She did not know how many schools were rated above average in which a principal received an increment denial.

In regard to Shepherd's rating of supervision of instruction as fair, Renna did not recall discussing the score and was not sure if she asked Shepherd to raise that score. She did ask her to raise the scores in some areas. She admitted that supervision of instruction is the same as instructional leadership, in which Simon was rated average. Although she agreed that Shepherd's rating could be wrong, she indicated that Shepherd had clear documentation which Renna could not refute. She worked with Simon for many years and tried to help him. She issued various improvement plans for Simon, but they were not all carried out. Referring to her initial recommendations for improvement (R-8), she indicated that Nos. 5, 6, 9, 13 and 15 were not carried out. Staff development was not carried out or properly documented. Renna discussed the second improvement plan, dated April 27, 1992, with Simon. She explained that Simon had finally put item No. 1 in writing, but did not set up binders until later. In regard to No. 2, since Simon could not provide evidence of pre- and post-observation conferences, Renna gave him evaluation forms to overcome this. Renna observed that some of what was in the plan was done. Item Nos. 3, 4, 5, 6, 7, 9 and 10 were accomplished; Renna could not recall seeing No. 8 and was not sure if No. 11 was done. Simon did not set up binders and some of the items were not accomplished in the manner in which it was expected they would be. She referred to a memo to Simon dated June 3, 1992, and the improvement plan dated July 9, 1992, for those items not rated satisfactory.

On cross-examination, Renna opined that the principal evaluation process was fair. It made sense to use outside evaluators since it was hard to evaluate a principal if one worked with that principal. She believed Shepherd's evaluation of Simon was objective and professional. There was no undue bias or influence or any indication that Shepherd misrepresented the data she collected. Renna received Veal's typed evaluation of Simon, eventually discussed it with Veal, and signed off on it. Noting that she challenged all evaluations, she indicated that she was satisfied with Veal's and Shepherd's evaluations. She signed off on them because she agreed with them.

More particularly, she believed the curriculum and program were not individualized to meet the needs of high-, middle-, and lower-level students. There was no evidence in the plan book to indicate different levels in the class. She opined that Simon's mission statement (P-4) was not elaborate enough to meet the specific objective for the school. Further, it did not meet her recommendation for improvement (No. 6 of R-8).

Referring to her recommendations for improvement to Simon, Renna alleged that it should not have been necessary to state some of those items to a competent principal. (Number 1 was routine, No. 5 appropriate for all principals in Paterson, and No. 9 required of a competent principal and the key to a successful school.)

On redirect examination, Renna noted that although there was no directive from the central office requiring this, the mission statement should be formulated prior to the onset of the school year. Renna believed that she asked each school for a mission statement around December. Simon's, which came out in January, was an inadequate response. She agreed that Shepherd could have found the mission statement satisfactory in March.

Harold Simon was employed by respondent for thirty-seven years. He served as a teacher, a vice-principal and a principal of grades K-8 since 1967. He served in Public School No. 24 for thirteen years. He has a bachelor's degree, and a master's degree in educational administration, and he has completed his coursework for his doctorate. He had never received a less than satisfactory evaluation until the instant increment withholding. Simon clarified that in 1990-91, Renna was not assistant superintendent in charge of Public School No. 24 and had not evaluated him. The

school district became State-operated in September of 1991 and he was informed of the principal evaluation plan in late November or December. A meeting was held on November 13, 1991, at which the six criteria for evaluation were reviewed (he received the evaluation procedure), and the process implemented. The principals were not informed of the performance factors. The evaluation process was to begin in January.

Simon first met Veal in or about the spring of 1945 when he was a freshman in high school. Veal was a senior and a star baseball player when Simon, a freshman, made the varsity team. They attended the same college, but did not maintain contact after college. Simon served on the Wayne Township Board of Education for three years beginning around February 1968, when Veal was employed by Wayne as a principal. When Simon was advised that Veal would be his evaluator, he advised Renna that he knew Veal. He told Renna that if Veal did not have a problem with conducting the evaluation, he did not have a problem. He did not discuss a conflict between Veal and himself with Renna, because he had forgotten the possible "conflict." He discussed a conflict on January 21, 1992, with McGee. Although Simon would not testify as to particular objectionable behavior on the part of Veal, he alleged that when he was a Board member, the Board members found certain behavior on Veal's part to be unacceptable. He communicated this to McGee but was not sure if McGee communicated this to Veal.

Simon recalled that when he met with Veal on January 8, 1992, Veal asked him if he was still working and said, "You haven't retired yet?" Simon opined that this was painful; Veal was five years older. They discussed the "old days," and towards the end of the morning discussed the six criteria and the relevant documents (Veal was with Simon from 9:00 to 11:10 and they discussed the six criteria for five to ten minutes.) Simon said he was putting the documents together. He wanted Veal to see "the program" but Veal had to leave.

On January 14, 1992, a full day of shadowing, Veal observed Simon's performance as a principal from 9:00 to 2:40. At approximately 2:20, Simon pulled out a thick folder of documents and Veal pulled out his list. Simon thought that he would open a file, go over the documents with Veal and fit them into the criteria. Simon pulled out the wrong document. Veal advised him to have the documents ready when he returned for his next visit, and Simon said he would. Veal called on

January 20, asked if the documents had been prepared and requested that they be ready on January 21. On January 21, Veal arrived at 9:00 a.m. Simon had the documents available and separated. He gave Veal the mission statement (P-4) which had been prepared prior to January 21 (the January 27, 1992 date referred to distribution to the staff). In addition, Simon stated that P-4 through P-10, P-16 through P-23, and documents prepared prior to January 1992 were available to Veal on January 21 (P-5a and P-6 were apparently included later). Simon expected to be advised of the strengths and weaknesses noted during the full-day observation, and he expected that Veal would take the documents. Neither occurred. Veal opened up his folder and handed Simon his evaluation. Simon stated that he was dumbfounded when he saw the evaluation (P-2) and asked Veal if he knew what he was doing to him. He asked him whether he had to "go to the bottom of the evaluation" and not even rate him "fair." Veal said, "Si, I am not trying to hurt you." Simon believed that he would improve and then pass. He signed the document because he knew that he "had to sign." Simon noted that signing it did not mean approval; he did not want to deviate from the rule. Veal told Simon that he did not need the documents that were on the table. Veal did not explain the evaluation. The meeting on January 21 was at most twenty minutes. Simon called the payroll department to check Veal's billing. Veal billed for three visits: January 8, 14, and 21 (thirty minutes), the day after his testimony.

On January 21, Simon spoke to McGee and advised him that Veal was not interested in the documents and had handed him the evaluation. When McGee met with Simon one hour later, Simon pointed to the documents and McGee looked through the folder. McGee shook his head, made notations and left. Simon felt abused. He indicated to McGee that there was a past relationship and a possible conflict. Simon could only think of the one incident twenty years ago which might have affected Veal's objectivity and opined that he "is still not sure." Simon stated that he did not have a conversation with McGee that related to something Veal had said about Jewish board members. Simon wrote a letter to Renna dated January 24 objecting to the evaluation (J-1, Exhibit F).

In February 1992, Simon met with Dr. Williams, Dr. Wilson, and McGee. The superintendent indicated that McGee had said that there could be a conflict between Simon and Veal. He agreed to change Simon's evaluator to Shepherd, but reserved the right to use Veal's evaluation. He asked Simon to sign the evaluation.

On February 28, 1992, Simon met with Shepherd from 9:00 to 11:15 or 11:30 a.m. The performance indicators were available. She advised him that the indicators were critical and that the documents should reflect the indicator. He felt that she was clear.

On March 3, 1992, Shepherd shadowed him from 9:00 a.m. to 2:30 p.m. Simon indicated that he observed Ms. Chmiel for forty-five minutes on that date. He did not meet with Shepherd on March 6. He met with her on May 7 and for one-half day on May 8, June 9 and June 10. The notes (R-6) reflect those dates.

Simon claimed that he had no post-observation conference with Shepherd. He had a conversation with Shepherd after he received the Phase II evaluation. Shepherd noted an improvement over the first evaluation. She indicated, however, that he must change his mindset, and train differently to be rated competent. Simon accepted this. Simon stated that there was no post-observation conference on May 22. The conference was after the evaluation. Simon asked why he did not move up a few points. Shepherd advised him to maintain confidence and provide more documentation, and he would be competent in the future. Simon pointed out that there was no post-observation conference for Phase IV (J-1, Exhibit L) and he did not discuss the evaluation with Shepherd.

Referring to the evaluation of May 22, 1992 (J-1, Exhibit K), Simon opined that the weaknesses noted under staff development were actually strengths. He contended that in 1991-92 there was a staff development program in place. *Master Teacher*, an outstanding publication, was distributed each week to the classroom teacher. There was at least one faculty meeting per month (which Shepherd did not attend) at which one of the topics in the weekly publication was discussed. He developed a staff development committee in December and took a survey of staff needs. He noted that he had a few morning meetings with the staff development committee and that they planned for a half-day staff development meeting on June 10, 1992.

On June 10, Shepherd saw five committees in place. The staff had been divided into five committees and Charlotte Welling, district staff development specialist, was present. Simon stated that he had called Welling on his own and not at Shepherd's

suggestion. Simon did not talk to Shepherd regarding the staff development committee in May or suggest to her that she speak to various members of the staff development committee. She became aware of it on June 10.

Simon used classroom results for staff development needs. Noting that it was not possible to separate staff development from pupil assessment, he indicated that he received an analysis of test results, by grade level. He received this document in May, sent a copy of it to the parents, and at the first staff meeting in September focused on the area of instruction that the test indicated was a weakness. Simon contended that he had programs in place for lower, average and above-average students. In support of his contention that enrichment activities were provided for above-average learners, he pointed to a memo to teachers regarding individualizing instruction (P-11), prepared in response to the evaluation.

In regard to supervision of instruction, Simon indicated that he created a sample classroom visitation/observation report, which Shepherd found "very nice." He completed the observations of tenured and non-tenured staff as required and on time. Referring to Shepherd's allegation that his post-observation conferences were too brief, Simon indicated that it is the quality of the conference that is important. He pointed out what was commendable and what required growth. The following day he spoke to the teacher for thirty minutes. The post-observation conference is only the beginning.

Simon was familiar with the improvement plan outlined by Emilie Renna (R-8) and he contended that he complied with it. Renna told him that she was not certain what Shepherd wanted, but if he followed the plan it would satisfy Shepherd. Renna told him to duplicate the work if necessary, and to use certain forms and binders. Simon alleged that Shepherd told him that she was sick of binders and that he should put the documents into files. Simon was not sure if Renna and Shepherd spoke to each other.

Simon recalled that he was advised on July 8, 1992, that his increment would be withheld. He testified that this was a horrendous experience as a professional. The superintendent threw the final evaluation on the table and told him that he did not want principals like this in the District. Williams gave him the June 30 letter denying his increment. Simon asked if the assistant superintendent agreed and Renna came

in. Simon excused himself, believing it was unfair to Renna. The following day he received a registered letter from Williams. There was another meeting, on July 10, 1992, in which he was asked if he wished to resign from the District. He stated that he was not interested. He was told that he was being removed from Public School No. 24 and transferred to the Norman J. Weier school because that school had problems. He was not advised as to why he was being transferred. Simon was at the Norman Weier school for the 1992-93 school year. A different evaluator was assigned to him.

Referring to the evaluation dated April 29, 1992, Simon indicated that the statements under assessment of pupil progress were not correct. He always had meetings with teachers to discuss the progress of individual students, reviewed everything that impacted on a child's progress, reviewed evidence of performance, and noted that each child had an upgraded portfolio.

Simon recalled that on June 24, 1992, the last day of the school year, with one hour left in the day, Dr. Wilson and another administrator were touring the building. Simon indicated that he had been president of the Paterson principals association for six years as of 1991-92. He sat at the table during negotiations in 1991-92. In June of 1992, he indicated that he did not want to be president.

On cross-examination, Simon said that he first saw the results of the school effectiveness questionnaire in the newspaper and did not recall seeing P-14. Mr. McGee informed him in June that the school was rated average. Four schools were below average, six schools above average, and the rest were average. Simon stated he did not agree with any of the weaknesses identified on any of the evaluations. Referring to Exhibit J of J-1 under curriculum program, Simon contended that there was no documentation he could provide as evidence that annual schoolwide goals had been translated to classroom objectives by teachers. Shepherd would be required to talk to teachers and look at plan books to see this. However, she refused to review plan books to see if this was being implemented. He admitted, however, that she reviewed six plan books. Referring to the individualization of curriculum and program (Exhibit J of J-1), Simon indicated that Shepherd did not need documentation; she felt this was not in place. He gave her P-11 to demonstrate that it was. Referring to supervision of instruction, Simon indicated that the conference he held with Chmiel did not last four minutes, and he recalled that she could not stay

late on the day of the observation. Simon opined that he could not provide documentation for what he did not understand. He admitted that he had not called Renna regarding the performance criteria for supervision of instruction. Referring to staff development (improvement of performance), Simon alleged that he met with a group of teachers in December 1992 to develop committees. The best thing he could do was the *Master Teacher* program. Although he admitted that he had not developed goals and objectives for staff development by September 1991, he alleged that he was not required to. He did not agree that this was an area of weakness. Staff development was on every agenda at faculty meetings. He developed committees for an in-depth program of staff development. He and the committee put together a staff development management plan which was completed in March 1992. The committee met with and without him three or four times. He invited Welling after a number of meetings. In March 1992, he distributed a staff development plan. Although there were no written goals until March, from September to December there was a goal, *i.e.,* to improve performance. Nobody advised him that he needed a written goal by September 1991.

Simon alleged that prior to the Phase II evaluation he had no idea that Shepherd was unfair or biased to him. She did not meet with him March 5 and 6, or May 5 and 19. Although Simon agreed that Renna signed the evaluations, he believed that she disagreed with the ratings. Every time he met with her she disagreed with the evaluation. Although she wanted him to please Shepherd, she did not consider Simon weak in instruction or disorganized.

On redirect examination, Simon indicated that Shepherd did not make comments regarding the plan books she reviewed or ask for evidence of low-, middle- or high-level students until the evaluation. He took a survey of faculty interest in staff development topics (P-24). Developed by himself and the committee and dated February, it resulted in staff-selected priority needs (P-25) and meetings to discuss the topics (P-25). On April 7, they selected a group for the committee and invited members who had that priority listed (P-26). Meetings in regard to different topics were also held with those who listed that topic and members of the committee (P-27, P-28 and P-29). Welling sat in on the meeting on April 14 (P-30). Simon believed he showed Greta Shepherd this documentation, as he was proud of

this direction. Simon indicated he developed the professional improvement plan (R-7) in October and began observations for the year in January.

On recross-examination, Simon noted that Greta Shepherd did not ask for documentation on students who were not basic skills. There is no documentation for middle-level learners. On questioning by this judge, Simon said he had the impression that he could not please Greta Shepherd. He was not aware that his increment would be withheld, and believed that the evaluation cycle was for twelve months and would end in October.

Greta Shepherd, testifying on rebuttal, indicated that she filled out the chronology for the principal's evaluation process, Phases II, III and IV (R-5a, b, and c) as it occurred and turned it in to Jack McGee. Her evaluation was typed, it was given to Assistant Superintendent Renna, and she then met with the assistant superintendent. She noted that there are a couple of dates in the chronologies for which she does not have notes. She prepared the scheduling of Phases III and IV in May (R-11) and the calendar for March (R-12) and May 5 (R-13). She received R-14 as part of the materials developed as training for assessors. She said that the times listed were suggested, not mandatory. For Phases II, III, and IV, there were no pre-observation conferences. She made certain judgments in Phase I and returned during the next phase to confirm what she had seen and to receive additional information. Each cycle began with a discussion of her findings during the preceding cycle. She discussed the numerical ratings she had given and asked for the requisite materials. Simon provided additional information, and in binders, as suggested by Renna. The format did not matter; the organization of materials was important. She indicated that the additional evaluations could include all or some of the components described in the first evaluation (J-1, Exhibit C).

Referring to Simon's evaluation of Ms. Chmiel, Shepherd contended that Simon's conference with Chmiel was from 2:40 to 2:44 p.m. The time was selected by the principal and the teacher. Chmiel did not state that she had to be someplace else or that the conference had to be continued. She believed the conference concluded at that point and opined that if it had been continued, she would have attended it.

On cross-examination, Shepherd referred to her notes. She agreed that March 3, 1991, was not a correct date, that her notes did not indicate a post-observation conference on March 6 (she has no notes of that day), and that she had no notes for May 19. Shepherd opined, however, that she observed Simon on May 19, and that shadowing and the post-observation conference (which need not be a separate visit) was on March 6. Noting that the post-observation conference was an opportunity to collect data, she testified that if she collected material during the post-observation conference, it would not be reflected. Explaining that her notes reflect her judgment as to what she feels is important to remember, she noted that she did not memorialize the post-observation conference. The conference was an opportunity for the assessor to get materials in order to come to a conclusion. It was not to advise the principal about the cycle; the assessor spoke to the principal after the cycle. Referring to J-1, Exhibit C (page 3), Shepherd maintained that the post-observation conference was not an opportunity to share with the principal. It was an opportunity for her to ask questions or get additional information. It did not require that she reveal the rating. Referring to R-11, Shepherd admitted that it indicated next to Number 19, "Simon one half a.m. post conference." Her notes, which were not handed in, indicated a conference. However, the Phase III chronology (R-5b), which she handed in, omitted any notation of a post-observation conference. She asserted that her notes are accurate.

Finally, Shepherd contended that she never told Simon that she did not like the binders and that he should put the information in something else.

DISCUSSION

First to be addressed is whether petitioner's increment was withheld for good cause. *N.J.S.A.* 18A:29-14 authorizes a local board of education (here the State school superintendent) to withhold the salary increment of a teaching staff member for "inefficiency or other good cause." The case law, as summarized by the Supreme Court, stresses the overwhelming importance of this discretionary power as an educationally based, non-negotiable management prerogative. *Probst v. Haddonfield Borough Bd. of Ed.,* 127 *N.J.* 518 (1992).

Although increment withholdings are appealable to the Commissioner, clearly, the standard of review is a limited one. The local board's decision is a discretionary one that may not be upset unless found to be arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Bd. of Ed.,* 60 *N.J. Super.* 288 (App. Div. 1960). As stated in *Kopera*:

> . . . the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion.
>
> [60 *N.J. Super.* at 295]

The law is clear that the burden of proof is on petitioner.

On August 7, 1991, the New Jersey State Board of Education abolished the Paterson Board of Education and created the State-Operated School District of the City of Paterson. The State Board determined that the Paterson Board had failed to assure a thorough and efficient system of education and appointed Dr. Leval S. Wilson as the new State district superintendent. There is no dispute that for purposes of the increment withholding statute, the State district superintendent effectively replaces the local board of education. There is no dispute that the law mandated the reorganization of administrative staff by Dr. Wilson within six months of the takeover, *N.J.S.A.* 18A:7A-44, and, of import here, comprehensive evaluations of all sitting principals during the six-month period following the central administrative reorganization, *N.J.S.A.* 18A:7A-45.

Petitioner asserts that his increment was improperly withheld. More particularly, petitioner contends that neither Dr. Veal nor Ms. Shepherd followed the process devised by Dr. Krewer. Dr. Veal did not share his evaluation with the cluster assistant superintendent as was required. Moreover, he never informed anyone associated with respondent that he had known petitioner for about fifty-five years and that a conflict had once existed between the two of them. Ms. Shepherd did not hold post-observation conferences with petitioner as was required by the principal evaluation cycle. Moreover, neither one of them applied the performance indicators in their evaluations as required. Both relied on their "best

judgment" in reaching their conclusions and their ratings. Both Dr. Veal and Ms. Shepherd stayed within a limited range of the rating scale, even though the document entitled "Rating Scale" cautioned against this tendency (P-1). Both allowed their rating in one area to affect their rating in another area, as is evident by the similarity in the ratings given for each of the criteria. Petitioner further asserts that neither Dr. Veal nor Ms. Shepherd could explain or provide documentation to substantiate how they arrived at their respective ratings of petitioner in all six criteria.

Respondent does not agree. Respondent contends that the District had good cause to withhold Simon's increment. The uniform assessment of every evaluator was that petitioner was weak in many areas that the Commissioner and State Board identified as critical to successful performance as a building principal. *N.J.A.C.* 6:7-2.2.

I have considered the testimony and evidence adduced at the hearing, as well as the arguments of counsel, and must agree with the position espoused by respondent. As pointed out by respondent, there were a number of key areas in which the evaluators determined that petitioner was weak. As noted by respondent, one of the keys to a successful school is that the administrator have goals and objectives for the school year. There is a need to involve the faculty in the development and implementation of those goals, and to translate schoolwide goals into classroom objectives that directly impact on instruction. As pointed out by respondent, the only evidence petitioner could present to the evaluators of such an effort was a two-sentence mission statement (R-4). The evaluators opined that this document was too general to have any real impact on classroom instruction. Further, the document was apparently distributed to the staff halfway through the school year. That being so, respondent correctly asserts that the record supports Shepherd's conclusion that "there is no evidence that annual school wide goals had been translated to classroom objectives by teachers" (J-1, Exhibit J, p. 3).

There was much testimony adduced in regard to whether petitioner had an adequate staff development program. As pointed out by respondent, the evidence adduced demonstrates that petitioner was weak in this area. The evidence demonstrates that by April 1992, petitioner had only managed to complete a staff survey of topics for staff development. The in-depth, in-service activities had not yet

begun. Clearly, staff development was undertaken late in the year with no real benefit to the staff during the school year. As noted by Renna, who concurred with Shepherd's conclusion in this regard, it was very late in the year before petitioner even attempted to utilize the services of Charlotte Welling, the District's expert in staff development. Renna pointed out that Welling was already on her second round of staff development in many of the other schools.

Although petitioner claimed that his distribution of a weekly pamphlet called *Master Teacher* and his scheduling of monthly faculty meetings to discuss same amounted to a staff development program, this was not Shepherd's view of a proper staff development program. As Shepherd indicated, use of *Master Teacher* was not in and of itself a staff development program. She found that there was no systemwide, written-down, identifiable staff development program for Public School No. 24. Moreover, apparently the monthly faculty meetings are mandated by the District's collective bargaining contract.

There was considerable testimony adduced in regard to respondent's contention that petitioner's performance with respect to the observation and evaluation of teachers was weak. In fact, there was much testimony as to how long the various observations and post-observation conferences lasted. The evaluators testified as to their recollections. Simon testified as to his recollections and certain teachers testified as to their recollections. Whether the times listed in Shepherd's notes are completely accurate or not, it is clear that Shepherd observed petitioner during his observation of Robin Chmiel, as well as other teachers, and concluded that petitioner had not taken notes of his observations of the teachers, had interrupted the teacher's work with students, and had held post-observation conferences that were too brief. Shepherd, as the evaluator, opined based on her observation of petitioner that his classroom observations were not related to "individual teacher performance" and provided only "general, rather than specific feedback to improve instruction" (J-1, Exhibit J, p. 4, Exhibit K, p. 3).

As pointed out by respondent, Veal also rated petitioner as poor in the area of supervision of instruction. Veal found that petitioner demonstrated little as far as the quality of his observations and submitted no documentation that he had satisfied any of the indicators of quality listed in the District's document explaining the criteria for evaluation of principals (J-1, Exhibit H, p. 3).

In addition, and as pointed out by respondent, documentation was critical to the evaluation process. The burden was on petitioner to submit documentation that he was carrying out his responsibilities in the six criteria areas of curriculum, supervision, staff development, assessment, community relations and school climate. And, as pointed out by respondent, although petitioner claimed that Veal was biased against him and/or was unclear in what he wanted of Simon, he believed that Greta Shepherd was clear and that he understood from her what he should provide. However, apparently, even after the fourth evaluation, petitioner still could not provide the evaluator with proper documentation that he was carrying out his responsibilities in the three areas still rated as fair: curriculum and program, supervision of instruction, and staff development.

Testimony was further adduced as to weakness by petitioner in the area of lesson plans and meeting the needs of all levels of students. Petitioner seems to believe that there really was no possibility to present the requisite information to substantiate that the needs of all levels of students were being met. Petitioner opined that P-11 in evidence, in addition to teacher plan books, was all that was required to demonstrate that the needs of all levels of students were being met. Although petitioner apparently asserted that Shepherd would not review the plan books, he admitted that Shepherd took certain plan books, reviewed them, and then returned them. Clearly, Shepherd reviewed lesson plan books kept by teachers, and in her opinion, found no evidence that instruction was individualized for high-, middle- and low-level students.

Further, Shepherd did not believe that P-11 supported petitioner's position that instruction was so individualized. In fact, P-11 consisted of teacher responses to a memo sent out by petitioner on May 27, 1992, asking them to provide information as to how they had individualized instruction that year. According to Shepherd, it did not constitute proper educational planning, but rather was an attempt to reconstruct something after the fact. Shepherd also criticized the adequacy of this late documentation. The documents dealt only with the needs of above-average students and only listed general activities performed by the teacher. There was no indication in the documents as to how this differed from the regular curriculum; it was not specific enough.

Clearly, Shepherd considered what had been provided to her by Simon and concluded that he had not provided the requisite information to demonstrate that the needs of all levels of students were being met. Whether the needs of all students were in fact being met is not the issue. Rather, what is germane is that in Shepherd's opinion and as supported by the evidence, there was no adequate demonstration that instruction was individualized for high-, middle- and low-level students.

Petitioner would have this tribunal find that not only was Veal unfair and biased against him, but that in fact Greta Shepherd also formulated an unjust opinion of him and unfairly evaluated him. Petitioner believes that Emilie Renna, whom he called to testify, did not agree with the evaluations that were submitted to her. He suggests in some loose manner that Renna signed these evaluations despite the fact that she did not agree with their conclusions. This is contrary to Renna's testimony. Clearly, Renna, who had known and worked with petitioner, did not want petitioner to receive a poor evaluation and tried to help him. It is further true, as pointed out by respondent, that her role in the evaluation process was to observe the principal, conduct pre- and post-observation conferences with the principal, and meet with the outside assessor to review his/her evaluations of the principal to be sure that they were accurate. She testified that she challenged the conclusions of all of the evaluators, but if they produced documentation that she could not refute, she would agree with and sign off on the evaluation. According to Renna, with respect to petitioner Shepherd had clear documentation of everything that she did and Renna could not refute it. It was apparently Renna's belief, and she so testified, that these evaluations had been professionally carried out by the outside evaluators, that they were well documented and that the evaluators had been objective in their assessments. In fact, she agreed with the conclusions contained in the evaluations and felt that they were borne out by her own observations.

Of particular import to the instant controversy, and which must be stressed here, is the fact that it is not for me to determine whether petitioner was actually unsatisfactory as a principal during the 1992-93 school year and his increment therefore withheld. It is not for me to substitute my judgment for that of the State school superintendent. Instead, my determination must simply be whether the State school superintendent had a reasonable basis for his factual conclusion. The local board's decision (here, the State school superintendent's) may not be upset unless found to be arbitrary, without rational basis, or induced by improper motives. The

evidence, which I have considered, does not support petitioner's view that the conclusion reached by the District that his performance as a principal during the 1991-92 school year had significant weaknesses in key areas was without rational basis or induced by improper motives. The "fair" rating, supported as it is by the evaluations and the record, indicates less than minimum acceptable performance. As noted by respondent, that necessarily constitutes "good cause" under the statute. In sum, petitioner has not met his burden of establishing that the District's action was arbitrary, capricious, or unreasonable.

I am compelled at this juncture to address petitioner's argument that the process was procedurally defective and thus must be overturned. More particularly, petitioner contends that the process was defective because Veal shared his evaluation with petitioner before reviewing it with Renna. There is no doubt that this occurred and was improper. However, I must agree with respondent that this was a minor deviation from the procedures outlined by the District. In fact, in the general scheme of the evaluation process, it was insignificant because Renna later reviewed Veal's Phase I evaluation of petitioner and concurred with it fully.

In addition, petitioner asserts that Veal improperly evaluated him in light of the fact that Veal had known him for fifty-five years, and he asserts that based on their interaction when Veal was a principal in the Wayne School District and petitioner was a board member, Veal was biased against him. I have considered this argument and cannot agree with petitioner's assertion. It is clear that Dr. Veal was originally assigned to evaluate petitioner based on a random assignment. Apparently, at some point prior to the evaluation, petitioner told Renna that he knew Veal. He indicated that if Veal had no problem evaluating him, he had no problem with it. In fact, petitioner voiced no objection to Dr. Veal evaluating him to Veal or to any of the administrators. It was only after receiving his first evaluation from Dr. Veal on January 21, 1992, that petitioner called McGee and demanded that a different evaluator be assigned and that Dr. Veal's evaluation be removed from his file. Apparently, there was a meeting and the District agreed that a different evaluator would be assigned. In fact, Greta Shepherd was assigned to conduct the remaining evaluations. With respect to Veal's evaluation, McGee indicated, as did Dr. Williams, that the District reserved the right to utilize that evaluation in the manner it deemed appropriate. Clearly, the District moved quickly in an effort to make sure that the process was fair and equitable. Thus, petitioner was evaluated by

Greta Shepherd for Phases II, III, and IV. Perhaps petitioner's argument would be more compelling if Shepherd had evaluated him competent in all areas and the District withheld his increment based on Veal's evaluation of him. In fact, this was not the case. In actuality, Shepherd's evaluation did not find petitioner competent in all areas and clearly served as the basis for the superintendent's action in withholding petitioner's increment. That being so, the fact of Veal's evaluation is of no great moment in this matter.

Petitioner next points out that the alleged failure of Shepherd to hold a post-observation conference with petitioner after each phase was in violation of district procedures and fatal to the entire evaluation process. As pointed out by respondent, the key document is Exhibit C, a memorandum to all principals dated January 8, 1992, attached to J-1. That memorandum sets forth a process for assessing the criteria and describes three components to that process in Phase I: a pre-observation conference, a shadow and a post-observation conference. The next paragraph then states that three more shadowings are to occur for each principal in Phases II, III and IV. The final paragraph states that a total of four summary evaluations must be made. As pointed out by respondent, that paragraph states that "the additional evaluations may include all or some of the components described above for the first evaluation." Respondent asserts that even if Shepherd did not hold a post-observation conference each time, there was no violation of district procedure. I must agree with respondent's position. Not only does respondent's analysis of the requisites of the process seem accurate, but more to the point, petitioner had ample input and feedback throughout the entire period from Veal, Shepherd and Renna. He met with Renna to go over his improvement plan at the end of each phase (R-8).

Petitioner also asserts that the ratings were flawed because the evaluators did not utilize the performance indicators in their evaluations, relied on their "best judgment" in reaching their conclusions and ratings, and improperly stayed within a limited range of the rating scale. I cannot agree with petitioner's argument. While it is true that Shepherd relied on her "best judgment" in reaching her conclusions, it is also true that her best judgment was arrived at by utilizing objective observation and review of documentation. Moreover, while it is true that the evaluation training materials cautioned against letting general impressions dictate identical ratings on all attributes, the materials do not preclude an evaluator from finding a

principal to be ranked exactly the same in all six areas. Further, and as pointed out by respondent, petitioner's ratings over a six-month period ranged from unsatisfactory to competent. The testimony adduced at the hearing indicates that the evaluators looked to objective documentation and observations to support their findings. I therefore **CONCLUDE** that the evaluations of petitioner were procedurally sound. There were no significant deviations from policy such that the process was unfair or arbitrary. Petitioner was objectively and fairly evaluated.

Based upon the above discussion, I **CONCLUDE** that respondent's determination to withhold petitioner's 1992-93 salary and adjustment increments was not arbitrary, capricious or unreasonable, either procedurally or substantively. Petitioner did not satisfy his burden of demonstrating that respondent's action in withholding his increment for unsatisfactory performance was without good cause.

ORDER

Based upon the above conclusions, it is hereby **ORDERED** that petitioner's petition should be **DISMISSED** and his appeal **DENIED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 10, 1994
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/18/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1994
Date

OFFICE OF ADMINISTRATIVE LAW

dgi

APPENDIX

LIST OF WITNESSES

For Petitioner:

Harold Simon
Kathy Ann Poshkus
Robyn Lynn Chmiel
Janice Notte
Patricia Chapman
Emilie Renna

For Respondent:

Jack McGee
Benjamin Veal
Greta D. Shepherd
Herbert Benjamin Williams

LIST OF EXHIBITS

Joint:

J-1	Stipulation of Facts dated May 7, 1993, with attachments A through M
J-2	List of petitioner's positions with respondent

For Petitioner:

P-1	Performance Criteria for Evaluation of Building Principals of the Paterson Public Schools, the rating scale
P-2	Performance Criteria for Evaluation of Building Principals of the Paterson Public Schools, summative evaluation for H. Simon, School No. 24
P-3	Respondent's answers to petitioner's interrogatories (15 pages)
P-4	Statement: School mission and school vision, dated January 27, 1992

P-5(a) Staff communication, faculty meeting Wednesday January 7, a.m., agenda

P-5(b) Memo to BSI, Staff and at-risk teacher from H. Simon, dated January 21, 1992

P-5(c) Handwritten note dated January 31, 1992

P-6 Newsletters to parents (12 pages)

P-7 Documentation regarding corrective action and assessment (11 pages)

P-8 Memo to parents of honor roll students regarding honor roll students from Harold Simon, principal, dated January 8, 1991

P-9 A teacher decision (4 pages)

P-10 Curriculum/program management plan School 24, 1991-1992 (7 pages)

P-11 Memo to teachers regarding individualizing instructions from H. Simon, dated May 27, 1992: for Hewitt, Hoch, Brown, Goddard, Chmiel, Estrada, Rheen, Rittenberg, Mikardos, Stenson, Chapman, Harbatkin, Polizzotto, Malone, Pugatch, Clark (16 pages)

P-12 Classroom visitation/observation report for various teachers (10), (1992)

P-13 School Effectiveness Questionnaire, Professional Evaluation by Renna

P-14 Memo to Dr Wilson from Jack McGee subject School Effectiveness Questionnaire Results dated June 24, 1992 (3 pages)

P-15 School Effectiveness Questionnaire Professional Evaluation by Greta D. Shepherd

P-16 Memorandum to all principals from the Office of Funded Programs regarding special election of BSIP school representative dated September 4, 1991

P-17 Memo regarding Serving School 24's PTA/AHC from Harold Simon, principal, dated September 30, 1991 (2 pages)

P-18 Memo to parents of children in the basic skills program from H. Simon, principal, dated November 18, 1991

P-19 Letter dated November 22, 1991, from Mary Willis, Joseph Heitzman, and Rosalind Ellerbee

P-20 Memo to Mrs. Dessus, Mr. Lara, Mr. Porter, Mrs. DeFenza, regarding PTA/HSC service from H. Simon, principal, dated October 2, 1991

P-21 Memo to Estimados padres from Harold Simon (1991)

P-22 Orientation meeting, parents,, dated September 26, 1991 (3 pages)

P-23 Notice of improved progress form (2 pages)

P-24 Staff development topics (2 pages)

P-25 Calendar for scheduling meetings, beginning April 7, interpersonal communication
P-26 Roster of teachers at the meeting Tuesday April 7, 1992, time 8:00 a.m.
P-27 Roster of teachers at the meeting April 8, 1992, 8:00 a.m.
P-28 Roster of teachers at the meeting April 9, 1992, 8:00 a.m.
P-29 Roster of teachers at the meeting April 10, 1992, 8:00 a.m.
P-30 Calendar for scheduling meetings, beginning April 14, pupil self-esteem
P-31 Roster of teachers at the meeting April 14, 1992, 8:00 a.m.
P-32 Letter of support for Mr. Harold Simon from Emilie Renna
P-33 Calendar for June

For Respondent:

R-1 Principal Evaluation Cycle (2 pages)
R-2 Conference with Harold Simon March 18, 1992
R-3 Checklist
R-4 Resumé of Greta D. Shepherd (8 pages)
R-5(a) Principals' Evaluation Process Phase II Chronology
R-5(b) Principals' Evaluation Process Phase III Chronology
R-5(c) Principals' Evaluation Process Phase IV Chronology
R-6 Greta Shepherd's handwritten notes February 28, 1992, March 3, 1991, March 13, 1992, March 3, 1992, May 7, 1992, May 8, 1992, June 9, and June 10 (12 pages)
R-7 Individual professional Improvement Plan Workshop M. Mikardos, dated March 23, 1992
R-8 Memorandum to Harold Simon, Principal, from Emilie Renna, dated March 20, 1992 (16 pages)
R-9 Summative Evaluation History of Harold Simon
R-10 Office of the State district superintendent Paterson Public Schools Paterson, New Jersey, circular No. 1991-42 (Amended) September 1991, (3 pages)
R-11 Cycle III handwritten notes
R-12 Calendar of G. Shepherd, March 1992
R-13 Tuesday May 5, Cycle III preconference
R-14 Phase I (January), Phase II (February), Phase III (March-mid-April), Phase IV (mid-April-May)

OAL DKT. NO. EDU 9074-92

HAROLD SIMON,	:	
PETITIONER,	:	
		COMMISSIONER OF EDUCATION
V.	:	
		DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4 and 1:1-18.8, and a reply was duly filed by the State-Operated District ("District").

In his exceptions, petitioner essentially renews his arguments before the ALJ, again contending that evaluators Veal and Shepherd either did not understand, or chose not to follow, the District's established evaluation process, thereby tainting the basis on which the State Superintendent elected to withhold petitioner's increment.

This contention, petitioner reiterates, is evidenced by the evaluators' inability to justify their ratings, their ignoring of specific evaluation indicators in favor of generalized judgments, their disregard for cautionary directives about having all ratings in a similar range and letting judgments about one performance area impact on judgments about others, their laxity in following the procedural rules of the evaluation cycle, and their

failure to apprise petitioner of the criteria by which they were evaluating him; moreover, a 55-year relationship and one-time personal conflict inappropriately colored Veal's judgment. Petitioner also renews his objection to the District's failure to take into account a School Effectiveness Questionnaire which found the instructional supervision in his school to have been adequate, and to place proper weight on the differing opinions of evaluator Shepherd and "cluster" assistant superintendent Renna.

In reply, the District urges the Commissioner to accept the ALJ's findings and conclusions regarding petitioner's allegations and her discussion of the burden of proof and standard of review to be applied in this matter.

Upon careful review of the record and the parties' filings on exception, the Commissioner holds the ALJ, at pp. 32 - 40 above, to have fully and fairly addressed the issues raised by petitioner.* The Commissioner further holds the ALJ's findings and conclusions regarding those issues to be fully supported by the weight of both testimony (transcripts of which are included in the record) and documentary evidence. The Commissioner

*While the discussion cited here does not specifically mention petitioner's contention regarding the Effective Schools Questionnaires, the Commissioner's review of this issue is consonant with the general findings of the ALJ. As accurately summarized in the initial decision, the testimony of Assistant Superintendent Williams clearly indicates that these questionnaires were neither designed nor used to evaluate individual staff performance, notwithstanding references to building principals within them. Moreover, while the documents themselves (Exhibits P-13 and P-15) do in fact show differences of opinion between Shepherd and Renna as to the overall quality of instructional leadership at petitioner's school, Shepherd's questionnaire (P-15) is consistent with her individual evaluation of petitioner as ultimately accepted by Renna.

determines, therefore, for the reasons stated by the ALJ, that the District's withholding of petitioner's increment cannot be found to have been arbitrary, capricious or unreasonable, either procedurally or substantively, nor was it induced by improper motives or tainted by animus on the part of any evaluator. This being so, the action of the District must be sustained. Kopera, supra.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 29, 1994

DATE OF MAILING - JUNE 29, 1994

Exhibit J-2 is a copy of the Board's minutes from the June 22, 1993 meeting. The minutes indicate that the board approved the following action: "to authorize participation in a pilot project using the curriculum materials *Learning About Family Life* to support the district instructional program in meeting the state requirement for family life education in Grades K-3." Although respondent concedes that the resolution could have been worded better in hindsight, it is clear from the testimony of the witnesses that the intent of the Board was not to approve the classroom use of the materials before the appropriate review and consultation procedures had been observed. The specific regulatory requirements were not discussed at the meeting, because as Dr. Bandlow testified, it was simply understood by all involved that the regulatory requirements would have to be followed.

I find insufficient evidence in the record to suggest that the Board bought in "wholesale" to the curriculum materials "Learning About Family Life" provided to it by the Network when it passed its resolution on June 22. Indeed, the uncontradicted testimony is that the Board's action permitted some ten month employees, health educators, to begin a review and revision of the materials during the summer months before the school year began in September. Without the Board's authorization in June 1993, these employees could not have been employed for this purpose during August.

As testified to by Ms. Bartolini, the only review procedure that took place before the beginning of the 1993-1994 school year was a meeting in August of faculty and staff who would be presenting the material in the classroom if it were ultimately approved by the Board. At that meeting the participants suggested revisions to the curriculum, they rejected, wholesale, certain portions of the curriculum from any consideration, and they drafted a letter to parents inviting their participation on an advisory committee to review the materials. The committee was to meet once school began in September. The curriculum was not introduced into the classroom before the Board's October 26, 1993 vote to approve the curriculum.

The testimony of both petitioner, Michael Bronzino, and Board witnesses clearly indicated that, for the most part, the curriculum materials were reviewed "line by line" and

were changed, deleted or approved as the case called for. This review was comprehensive and provides strong support for inferring from this record that no adoption of the curriculum materials occurred before the presentation of the thoroughly discussed and revised materials to the Board at its October 1993 meeting and the Board's vote of approval at that time. Nor were they implemented before the Board's October action. Indeed, it was still possible before the October 26th Board vote for the materials, even in their revised and restricted version, to be rejected entirely. That did not occur, but the possibility of complete rejection up to that point is a factor in the resolution of this dispute. It is noteworthy that at the October meeting the Board had several courses of action presented to it, and only one was successfully approved by the Board vote.

Petitioners' next point to the August 16, 1993 letter from Susan Saravalli(Exhibit J-7), of the Network congratulating the District for participating in the Network's pilot project on the "Learning About Family Life" curriculum materials, as evidence that the Board had approved the use of the materials at its June 22, 1993 meeting. Petitioners' emphasize the language employed in this letter and contend that it supports their literal reading of the Board's June 22 resolution.

The petitioners' assertion on this point is not persuasive. The Network Executive Director is not an employee or agent of the Board. She has no capacity to bind the Board by her choice of words. She is not their agent legally, nor does she have any apparent authority to bind the Board notwithstanding that no Board representative ever responded to her letter. Ms. Bartolini, who was in closest touch with the Network, testified that she ascribed no significance to this letter and saw no need to respond to it. Buttressing this analysis of the letter's significance is the testimony of Dr. Katims, who stated that he personally spoke with a representative of the Network before the June 22 Board meeting to satisfy himself as to the district's responsibilities and relationship with the Network, making sure that there was no capacity for misinterpretation by the Network that decision making on the use, or not, of all or a portion of the curriculum materials rested exclusively with the Board. *M. Dean Kaufman, Inc. v. American Machinery & Foundry Co.*, 102 *N.J. Super* 1, 11-

12 (App. Div. 1968). (holding absence of an agency relationship where principal specifically refused to enter into such a relationship with alleged agent). This testimony was particularly persuasive to the undersigned, and supports the inferences I have chosen to ascribe to the testimony and documentary evidence in the record as described in this opinion.

Finally, in their reply to respondent's closing argument, petitioners argue that the parol evidence rule prevents the Board from supplementing or contradicting the minutes of its meetings. *Campbell v. Hackensack*, 115 *N.J.L.* 209, 211-212 (E. & A. 1935). *Campbell* involved a claim to establish, by parol evidence, the terms of an employment contract between a city council and an employee. The employee claimed that the city council had passed a resolution establishing the manner in which he was to be compensated for his services. The minutes of the city council meetings were, however, silent as to any employment matters between the employee and the city council. The court stated that "the established general rule is that these records[municipal minutes], or duly authenticated copies thereof, are the only competent evidence of the official actions of the council and they cannot, as a rule, be enlarged or restricted by parol testimony." *Id.* at 215 (citations omitted).

Campbell, however, is clearly distinguishable from the matter at hand. The matter in issue in this case merely involves interpreting the ambiguous language of a resolution concerning Board and district activity in light of subsequent actions of the Board and district personnel. This matter does not involve interpreting, or even establishing the existence of a contract. Furthermore, the rule in *Campbell* has not been applied to restrict a court from looking "to evidence establishing fraud, bad faith or the abuse of discretion by municipal governing bodies resulting in the injury or oppression of the citizen." *Anschelewitz v. Belmar*, 137 *N.J.L.* 617, 622 (1948) (citation omitted). The evidence beyond the literal language of the resolution in this proceeding was introduced specifically to consider allegations of bad faith and abuse of discretion by the local board. The holding in *Campbell* does not stand as a bar to this inquiry beyond the literal language of the minutes.

Based on the foregoing, I hereby **FIND** that respondent did not violate the consultation and participation requirements of *N.J.A.C.* 6:29-4.2. Moreover, I find that the respondent did not act in an arbitrary, capricious or unreasonable manner in the process by which it undertook to review and ultimately incorporate a portion of the *Learning About Family Life* materials into its Family Life Curriculum for Grades K-3. I find no basis in the regulation to conclude that the Board was required to confer a "veto like" authority on the consultants or to permit the consultants to be the initiators of locating the curriculum materials to be considered and reviewed for inclusion. *See Smith v. Ricci*, 89 *N.J.* 514, 524 (1982). In interpreting the regulation's requirement for "consultation" in this manner, I am mindful of the restrictive approach I am applying. However, the setting of policy and curriculum in our public schools is squarely placed on the local elected boards of education. *See Jenkins v. Twp. of Morris School District & Bd. of Ed.*, 58 *N.J.* 483, 492 (1971). Although the family life program spells out, more than other programs, how a board of education is to attempt to be in tune with the sentiment of the community, the regulation does not alter the basic governance structure of our schools. Communities which are dissatisfied with the policy choices of the elected board members have a ready avenue of relief in the annual school elections. As the Commissioner of Education has stated:

> [I]t is axiomatic that the members of the local boards of education are responsible for the wisdom of their actions to the people who elect them and not to the Commissioner of Education. As the Commissioner recited the law as a frame of reference in *Cecelia 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:
>
> [a]s long as . . . a board of education . . . acts within the authority conferred on . . . it by law courts are without power to, or will not, interfere with, control, or review . . . its action and decision in matters involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed. 78 *C.J.S.* 920.
>
> In absence of clear abuse of the discretionary power of the Board, the Commissioner will not interfere. It was held in *Boult v. Board of Education of Passaic*, 136 *N.J.L.* 521 (E. & A. 1948), concerning the authority of the Commissioner and State Board of Education under *R.S.* 18:3-14 and 15:

> Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board.
>
> The wisdom and effectiveness of a board of education's administrative decisions is a matter for the constituent citizenry to determine.
>
> *[McMillan v. Board of Education of South Orange-Maplewood School District*, 1977 *S.L.D.* 137, 139-40].

In this matter, I **FIND** that the Board did consult with required representatives suggested in the regulation before proceeding with implementation of its new K-3 Family Life Curriculum. I **FIND** the consultation which did occur met the requirements of *N.J.A.C.* 6:29-4.2. After thoroughly considering all of petitioners' proofs and the presentation by the Board's witnesses, I **CONCLUDE** that there is no basis to overturn the Board's action. Petitioners' action is dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exception with the **COMMISSIONER, Department of Education, 225 East State St., CN 500, Trenton, New Jersey 08625**.

marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 17, 1994
Date

JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

5/19/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 1994
Date

OFFICE OF ADMINISTRATIVE LAW

/dmc

EXHIBIT LIST

J-1	Memorandum from Michael Katims to Ray J. Bandlow dated June 1, 1993
J-2	Minutes of Regular Meeting Held June 22, 1993
J-3	Memorandum from Michael Katims to Ray J. Bandlow dated October 15, 1993
J-4	Minutes of Agenda Meeting Held October 19, 1993
J-5	Minutes of Regular Meeting Held October 26, 1993
J-6	Textbook Selection Procedures
J-7	Letter from Susan K. Saravalli, Ph.D. of Rutgers Network for Family Life Education to Ms. Janice Bartolini, School Nurse, West Windsor - Plainsboro High School dated August 16, 1993
J-8	1st set of answers to Interrogatories dated January 31, 1994
J-9	Letter to the Board of Education from Floyd W. Churn of the First Presbyterian Church of Dutch Neck dated October 19, 1993
J-10	Memorandum from Michael Katims to Ray J. Bandlow dated October 25, 1993
R-1	Highlighted portion of the Health, Safety and Physical Education regulations

R-2 Minutes of Agenda Meeting held September 21, 1993

R-3 Questions and answers about use of Learning About Family Life handout provided

OAL DKT. NO. EDU 12019-93S

HISAKO LEE AND MICHAEL BRONZINO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners filed exceptions on June 6, 1994, in response to an initial decision mailed on May 25, 1994. By letter dated June 15, 1994, and faxed to the Bureau of Controversies and Disputes on that date, counsel for the Board advised that he had not been served with a copy of such exceptions and only learned of their existence on June 14, 1994 from a newspaper article. The Commissioner finds and determines that since petitioners' exceptions were not filed in accordance with the dictates of N.J.A.C. 1:1-18.4(a), which specifically requires that a copy of exceptions be served on all other parties and the judge, such exceptions will not be herein considered. Further, the petitioners cannot rely on their pro se status to claim ignorance of the requirement that other parties are to be served when the initial decision contains an explicit directive to that effect on page 15.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by her in the initial decision.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JUNE 27, 1994

DATE OF MAILING - JUNE 28, 1994

180-94

ROBERT A. MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

JULY 8, 1994

OAL DKT. NO. EDU 1643-94

ROBERT A. MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 8, 1994

DATE OF MAILING - JULY 8, 1994

181-94

181-94

GEORGE HARTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 8, 1994

OAL DKT. NO. EDU 4709-92

GEORGE HARTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 8, 1994

DATE OF MAILING - JULY 8, 1994

182-94

182-94

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SUSANNE MISKIEWICZ,	:	DECISION
RESPONDENT.	:	
	:	

JULY 8, 1994

OAL DKT. NO. EDU 1642-92

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SUSANNE MISKIEWICZ,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 8, 1994

DATE OF MAILING - JULY 8, 1994

183-94

183-94

BRUCE STEAD,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JULY 8, 1994

OAL DKT. NO. EDU 2822-93

BRUCE STEAD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 8, 1994

DATE OF MAILING - JULY 8, 1994

184-94

184-94

RONALD FREDERICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 8, 1994

OAL DKT. NO. EDU 4646-93

RONALD FREDERICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

JULY 8, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - JULY 8, 1994

185-94

E. DOROTHY DANIEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JACK DE TALVO, CARMEN FERNANDEZ, DAVID B. RAND, ANTONIO CRUZ AND THE BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESONDENTS.	:	

JULY 8, 1994

OAL DKT. NO. EDU 12018-93

E. DOROTHY DANIEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JACK DE TALVO, CARMEN FERNANDEZ, DAVID B. RAND, ANTONIO CRUZ AND THE BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
RESONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 8, 1994

DATE OF MAILING - JULY 8, 1994

LOUIS J. PLOSKONKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, BOARD OF TRUSTEES, TEACHERS PENSION AND ANNUITY FUND,	:	DECISION
RESPONDENTS.	:	

JULY 8, 1994

OAL DKT. NO. EDU 8677-93

LOUIS J. PLOSKONKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, BOARD OF TRUSTEES, TEACHERS PENSION AND ANNUITY FUND,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 8, 1994

DATE OF MAILING - JULY 8, 1994

187-94

MARK DENNIS GORSKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged Board's grading policy of utilizing letters instead of numerical averages. Petitioner also sought alteration of his daughter's final exam grade in keyboarding.

ALJ dismissed petition finding that the grading practice at issue did not violate any law, rule or regulation, nor was it arbitrary or unreasonable. Therefore, there was no basis for the Commissioner to alter the Board's decision.

Commissioner adopted findings and determination in initial decision as his own.

JULY 8, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1666-94

AGENCY DKT. NO. 403-12/93

MARK DENNIS GORSKY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,

Respondent.

Mark Dennis Gorsky, petitioner pro se

Walter L. Marshall, Jr., Esquire, for respondent

Record Closed: May 16, 1994 Decided: May 25, 1994

BEFORE **JOSEPH E. KANE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

After several unsuccessful meetings with school administration, the petitioner on behalf of his daughter, requested that this matter be transmitted to the Office of

Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was conducted at the Atlantic City OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on May 16, 1994, after which the record was closed. A decision was rendered on May 25, 1994.

ISSUE

WHETHER RESPONDENT'S GRADING PRACTICE OF USING LETTER GRADES DEPRIVES STUDENTS OF KNOWING THEIR TRUE GRADE POINT AVERAGE.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner brings this action on behalf of his daughter and all other students of Williamstown High School (hereinafter referred to as the School).

Petitioner claims that the School's grading practice of using letters deprives students of knowing their true grade point average. As such, petitioner argues that students are deprived of relevant knowledge upon which a determination can be made as to which subjects need additional emphasis or study.

Petitioner also claims that the School's policy of not requiring seniors to take final exams when the student has achieved a straight A average for the four prior grading periods, should be extended to the freshman through junior years.

The School counters that its grading practice is fair and has been based upon a system which has been utilized for at least the last 30 years. Under this current system, the School contends that a student at any time has access to his or her grade point average, and that the relief requested by the petitioner should be dismissed.

Petitioner's attack on respondent's grading practice began at the close of the 1993 school year when his daughter received a final grade of B in keyboarding. The School has five marking periods. Petitioner's daughter had received four A's during the

School has five marking periods. Petitioner's daughter had received four A's during the year and a C on the final exam which reduced her overall grade point average to B. The identical set of facts occurred for a second course, English, except here, she received an A for her final course grade.

Petitioner argues that this set of facts illustrates the unfairness in the School's grading policy. He states that he cannot understand how his daughter could receive two different letter grades in the fifth semester when the four previous marking periods had the same letter grades. He also argues that when a student receives a letter grade on a report card, the student does not know the true grade point average. Without this knowledge, petitioner feels that during exam time, the student is deprived of valuable information upon which a decision can be made whether to study harder for one subject or another.

Mr. James Greezek is the current Principal at the School. He has been involved in teaching, counseling and administration at the School for the last 30 years. During this time, he testified that the School grading practice has been the same.

Mr. Greezek explained that the School has five marking periods. A student receives a report card containing letter grades. These letters, A, B, C., etc., correspond to a numerical grade. This information is set forth on the report card as follow:

93 - 100 = A - Superior
85 - 92 = B - Above Average
77 - 84 = C - Average
70 - 76 = D - Below Average
Below 69 = F - Failure

Depending on the course selected, and the curriculum taught by the teacher, a marking period grade may depend upon various factors such as homework, class participation, special projects completed and test scores. Mr. Greezek testified that the

teachers are required to keep the students grade point average in a book which is turned into the principal's office at the conclusion of the school year.

At the conclusion of each marking period, the teacher equates the grade point average to a letter grade which appears on the report card. At the conclusion of the school year, the grade points for each of the five marking periods are added together and divided by five in order to ascertain the overall grade point average. This in turn is converted into a letter grade when is then placed on the report card.

Mr. Greezek testified that if a student receives an A on his or her report card and wants to know exactly what his or her grade point is at that time, the student may request this information from the teacher. Mr. Greezek found that when he taught college preparatory courses, many students regularly kept track of their grade point average rather than relying upon the letter grade which appeared in the report card. He opined that the discrepancy which petitioner feels occurred in the keyboarding and English course could be explained as follows: If petitioner's daughter received four A's in keyboarding which were at the lower end of the A scale and then received a C on the final exam which also equated to the lower end of the C scale, the average of the five grades could produce a B. Conversely, in the English course if the A's were high grades, a C in the final exam would not necessarily convert the four previous grades to a B.

Petitioner wanted to challenge the results of the C received in the final exam of the keyboarding course, however, the teacher had already disposed of the exam papers. In response to this problem, Mr. Greezek has since sent a memo to his staff recommending that exam papers should be retained for a 30 day period.

Finally, petitioner argues that the policy not requiring seniors to participate in final exams when the four previous marking periods have produced grades of A, should be extended to the freshman, sophomore and junior classes. Petitioner claims that to a student who has received all A's during the previous four grading periods, a final exam grade can only serve to damage rather than help the student.

Mr. Greezek testified that there is no written policy advising the teachers how to compute grades, however, the grading practice in effect at the school has been utilized for the last 30 years. The staff, 90 percent of which is now tenured, has been using the practice of assigning 20 percent of the grade for five marking periods and thereafter averaging the five grades and assigning a corresponding letter grade. Mr. Greezek testified that the students are advised by each individual teacher of the grading practice including that individual teacher's apportionment of the grade between class participation, homework assignments, special projects and exam scores. In the 30 years that he has been associated with the school, Mr. Greezek has not encountered a challenge to the grading practice as argued by the petitioner.

Based upon the **FACTS** set forth herein, I herein **DISMISS** the within petition.

Petitioner argues that the grading practice is arbitrary and capricious. I **FIND** that the grading practice is understandable and extremely workable in its simplicity. A final grade is obtained by taking the average of five marking periods. Thereafter, that grade point average is equated to a letter designation.

A student receiving an A can assume that the grade fell somewhere between 93 and 100. It is true that the report card does not, with specificity, advise the student of his or her exact grade point average, however, the student may discover this information simply by making a request of the teacher.

It can be argued that for the sake of clarity, the report card should have the actual grade point average in addition to a letter grade, however, there is no administrative regulation or statute requiring that this information be disclosed. Nor is it the prerogative of this tribunal to dictate policy to the school board where the grading practice does not constitute a violation of any law, rule or regulation.

The decision on the part of the school board to eliminate final exams for seniors is a policy decision which can only be extended to the other grades with the consent of

the board. This is an area which unless applied in a discriminatory or unlawful fashion, is a prerogative left to the discretion of the school board.

At this point, it is impossible to review the results of petitioner's daughter's final exam grade of a C in keyboarding because the exam no longer exists. There is no rule or regulation requiring teachers to maintain exam papers for any period of time. Since this incident, however, the school is now recommending that teachers maintain final exams for a period of 30 days.

Without the existence of the exam, it is impossible for this tribunal to determine whether a change of grade is in order.

Accordingly, for the reasons set forth above, petitioner's petition is herein **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 25, 1994
DATE

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

6/1/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 0 6 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

psa

WITNESSES

FOR PETITIONER:

MARK DENNIS GORSKY

FOR RESPONDENT:

JAMES GREEZEK

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 LETTER DATED AUGUST 31, 1993

P-2 AMENDED PETITION DATED MAY 13, 1994

P-3 RESPONSE TO PETITION

P-4 REQUEST FOR DISCOVERY AND RESPONSE

P-5 STUDENT FOLDERS

P-6 REQUEST FOR DISCOVERY AND RESPONSE

P-7 SENIOR EXAM POLICY

FOR RESPONDENTS:

R-1 WILLIAMSTOWN HIGH SCHOOL REPORT CARD

R-2 GRADING POLICY

R-3 REGULATION GRADING SYSTEM

R-4 POLICY REPORTING PUPIL PROGRESS

R-5 POLICY CLASS RANK

OAL DKT. NO. EDU 1666-94

MARK DENNIS GORSKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that the grading practice at issue in this matter is not arbitrary, capricious or unreasonable, so that there is no basis on which the Commissioner would have grounds to grant petitioner the relief sought.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

JULY 8, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - JULY 8, 1994

188-94

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
SEQUNDO CELI AND SEQUNDA CELI,	:	
RESPONDENTS.	:	

JULY 8, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4121-93
AGENCY DKT. NO. 68-4/93

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Petitioner,
v.
SEQUNDO CELI AND SEQUNDA CELI,
Respondents.

Anthony V. D'Elia, Esq., for petitioner

Robert Wachtel, for respondent (Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, attorneys)

Record Closed: May 31, 1994 Decided: June 1, 1994

BEFORE **EDITH KLINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 5, 1993, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled on September 15, 1993.

On September 14, 1993, petitioner's attorney advised the undersigned that the matter could be settled and the September 15 hearing date was adjourned. On October 6, 1993, petitioner's attorney advised that the matter had settled and settlement papers would be sent.

On May 4, 1994, a letter was sent to the parties indicating that because no settlement papers had been received, a hearing would be scheduled. Prior to the scheduled hearing date on June 28, 1994, the attached Settlement Agreement was submitted indicating the terms of settlement which are fully incorporated herein,

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 1, 1994
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

6/3/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 07 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

md

SETTLEMENT AGREEMENT

WHEREAS, the Clifton Board of Education, on or about April 21, 1993, filed a Complaint against the respondents, Sequndo and Sequnda Celi with the State of New Jersey Department of Education seeking reimbursement of tuition charges for a period of time when respondent's child, Estela Celi, was enrolled in the Clifton School District while not being a resident of the City of Clifton, and

WHEREAS, the Respondents hereby admit that their child, Estela Celi was not a resident of the City of Clifton between September of 1990 and February of 1993 and

WHEREAS, all tuition charges for the period referenced above total $13,230.08 and

WHEREAS, it is the intent of the parties to amicably settle this matter,

IT IS STIPULATED AND AGREED by and between the parties that the captioned matter be settled for the sum of $13,230.08 payable in installments of $100.00 per month commencing on January 1, 1994, and every month thereafter, and

IT IS FURTHER AGREED that if the Respondent defaults in payments as set forth above, and after a grace period of 30 days, Petitioner will be permitted to enter Judgment against the Respondents for $13,230.08, plus interest from August 1, 1993 and costs of suit, credits to be given for any payments made prior to the default. Petitioner is specifically permitted to enter Judgment against Respondents in this amount in the Superior Court of New Jersey. Judgment may be entered by Affidavit of the attorney for the Petitioner without notice to the Respondents, and

IT IS FURTHER AGREED by and between the parties that the Respondents shall be prohibited from disclosing the terms of this settlement to any third party and that if Respondents do so disclose the substance of this Settlement Agreement to any third party, the Petitioner will be permitted to enter Judgment against the Respondents under the terms set forth in the previous paragraph and

IT IS FURTHER STIPULATED AND AGREED that both parties consent to an Order being entered by this Court sealing the record in this matter.

Anthony V. D'Elia, Esq.
Attorney for Petitioner
Clifton Board of Education

Matthew Cohen, Esq.
Attorney for Respondents
Sequndo and Sequnda Celi

X _____

X _____

_____

OAL DKT. NO. EDU 4121-93

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
SEQUNDO CELI AND SEQUNDA CELI, RESPONDENTS.	:	

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

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

COMMISSIONER OF EDUCATION

JULY 8, 1994

DATE OF MAILING - JULY 8, 1994

190-94

190-94E

INSTITUTIONAL SYSTEMS SERVICES CORPORATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY AND METRO FIRE AND COMMUNICATIONS SYSTEMS,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

JULY 11, 1994

MAY 13 2 01 PM '94

LOVE & RANDALL, ESQS.
57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
(201)674-6000
ATTORNEY(S) FOR RESONDENT,
EAST ORANGE BOARD OF EDUCATION

INSTITUTIONAL SYSTEMS SERVICES CORP.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	DOCKET NO.: EDU-3315-94
vs.	**ORDER**
EAST ORANGE BOARD OF EDUCATION and METRO FIRE AND COMMUNICATION SYSTEMS, INC.	
Respondent,	

THIS MATTER having been opened to the Court by Robert Lawless, Esq., attorney for petitioner, Institutional Systems Services Corp., and Melvin C. Randall, Esq., appearing for Respondent, East Orange Board of Education and Thomas J. Gallahue, Jr. Esq., appearing for Respondent, Metro Fire and Communication Systems; and the Court having read and considered the moving papers; and having heard the argument(s) of counsel, and good and sufficient cause having been shown; and for the reasons expressed on the record on May 6, 1994,

IT IS on this 9th day of May, 1994;

ORDERED, that Petitioner's request for a STAY and for SUMMARY JUDGEMENT herein is hereby denied; and it is further

ORDERED, that a copy of this Order shall be served upon all parties within 7 days of the date hereof.

Elinor R. Reiner.

HON. ELINOR REINER, J~~.S.C.~~

OAL DKT. NO. EDU 3315-94

INSTITUTIONAL SYSTEMS SERVICES CORPORATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY AND METRO FIRE AND COMMUNICATIONS SYSTEMS,	:	DECISION ON MOTION
RESPONDENTS.	:	

For the Petitioner, Hedinger & Lawless (Robert T. Lawless, Esq.)

For the Respondent Board of Education, Love and Randall (Melvin Randall, Esq.)

For the Respondent Metro Fire and Communications Systems, Thomas Gallahue, Jr., Esq.

The initial decision of the Office of Administrative Law on motions for stay and for summary judgment have been reviewed. Exceptions and replys thereto have been filed. The exceptions reargue the matters addressed in the initial decision.

The Commissioner concurs that petitioner has failed to meet the standards for stay set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and has failed to meet the standards for summary judgment set forth in Judson v. Peoples Bank and Trust Company, 25 N.J. 17 (1957).

The initial decision specifically determined that the Board declared an emergency which was supported by the local fire department pursuant to N.J.S.A. 18A:18A-7, and requested and

obtained authorization from the Essex County Superintendent of Schools to solicit invited bids from a minimum of four vendors. Moreover, the initial decision found that there was an emergency affecting health and safety as required by N.J.S.A. 18A:18A-7.

The initial decision of the Office of Administrative Law denying the motions for stay and for summary judgment is affirmed, and the matter should proceed for hearing on the merits.

COMMISSIONER OF EDUCATION

JULY 11, 1994

DATE OF MAILING - JULY 11, 1994

193-94

193-94E

LOTT CONSTRUCTORS, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

JULY 12, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORAL ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 6321-94
AGENCY DKT. NO. 258-6/94

LOTT CONSTRUCTORS, INC.,
Petitioner,
v.
MONROE TOWNSHIP BOARD OF EDUCATION,
Respondent.

Lawrence S. Coburn, Esq., member of the Pennsylvania Bar, admitted pro hac vice, for the petitioner (Pepper, Hamilton and Scheetz, attorneys). Attorney of Record: **Patricia A. Smith**, Esq. (Pepper, Hamilton and Scheetz, attorneys)

Walter L. Marshall, Jr., Esq., for the respondent (Hannold, Marshall and Becker, attorneys)

Albert G. Kroll, Esq., for the participant (Kroll and Gaechter, attorney)

Record Closed: July 1, 1994 Decided: July 5, 1994

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

Lott Constructors, Inc., the petitioner filed a petition with the Commissioner of Education on June 27, 1994 requesting that a requirement contained in the bid specification (bid spec) issued by the respondent, Monroe Township Board of Education be declared to be null and void. The bid spec in issue requires the bidders for the contract to agree to a project agreement, an agreement which require the use of union workers in the construction of the new high school. The petitioner, who is a merit shop contractor, employees non-union workers and alleges that it is being precluded

from submitting a bid. The petitioner argued that the project agreement requirement is inappropriate and is a violation of the public school contract law and should be declared null and void. In addition, the petitioner request a temporary injunction to prevent the bids for said contract from being received and opened pending a final decision in this matter.

The respondent filed an answer on June 30, 1994 in which it denied any violation of the public school contract law and also alleged that the petitioner is not entitled to any emergent relief.

The matter was referred to the Office of Administrative Law on June 30, 1994 and the parties were notified that I would be hearing oral arguments as to the motion for emergent relief on July 1, 1994.

On June 30, 1994, I received a request from Albert G. Kroll, Esq., on behalf of United Building and Construction Trades Council of Camden City and Vicinity, AFL-CIO, that the Council be permitted to participate in this matter pursuant to N.J.A.C. 1:1-16.6. The parties did not oppose this request and I ordered that the Council be allowed to participate in the matter and the Council has the right to present oral arguments, file statements or briefs and file exceptions to the initial decision with the Commissioner of Education.

Prior to filing this matter with the Commissioner of Education, the petitioner initiated a case in the Superior Court, Dkt. No. L-1288-94. On June 29, 1994, Judge Samuel G. DiSimone issued an order denying the request for temporary relief and ordering the petitioner to pursue its administrative remedies before the Commissioner of Education. The parties represented to me that Judge DiSimone's decision was limited to a determination that there was no exhaustion of administrative remedies and that he did not rule on the merits of whether the petitioner is entitled to emergency relief.

As a matter of law, it has been established that emergent relief is an extraordinary equitable remedy and that the burden of proof is on the petitioner to show (1) that there is a threat of immediate and irreparable harm, (2) that there is a probability that the petitioner can eventually succeed on the merits, and (3) that the inconvenience or lost to the Board will be minimum. See, Crowe v. Degiolia, 90 N.J. 126 (1982), N.J. Bar Assocation v. North New Jersey Mortgage Assocation, 22 N.J. 184 (1956).

I also recognize that case law in this State has clearly established that local boards of education are vested with the responsibility for the management of public schools and that the actions of the boards are entitled to a presumption of correctness. See, Stratton v. Berkeley Heights Board of Education, 1966 S.L.D. 73, Thomas v. Board of Education of Morris County, 89 N.J. Super. 324 (App. Div. 1965). Further, it has been established that the Commissioner may not substitute his discretion for that of the local board and that the local board's decision should not be upset unless there is an affirmative showing that it was arbitrary, capricious or unreasonable. See, Boult v. Board of Education of Passaic, 136 N.J.L. 521 (E&A 1974), also the Thomas case.

In this matter, I find that the pertinent facts are not in dispute and the facts pertinent to the motion are as follows:

1. On January 12, 1993, the voters of the Monroe Township School District approved a referendum for $31 million to construct a new high school.

2. Monroe Township is concerned that said project be completed in a timely manner to meet the educational needs of the school district and to avoid any delay which might result in an increase in the cost of the project.

3. The respondent published a notice of intent to receive bids for the contract to build the high school on May 17, 1994.

4. The bid spec required the successful bidder, and all subcontrators, to agree to a project agreement with the applicable county AFL-CIO Building Trades Council.

5. The petitioner has successfully completed public school projects in New Jersey which did not require such a project agreement.

6. The bids are scheduled to be opened on July 6, 1994.

In support of its motion for emergency relief, the petitioner argued that there is a good probability that it will eventually succeed on the merits. The petitioner argued that the requirement for a project agreement is in violation of the public school contract law which mandates that the bid spec be drafted in a manner to encourage free, open and competitive bidding, N.J.S.A. 18A:18A-15, since this requirement will discourage a number of contractors from submitting a bid.

Also, the petitioner argued that this requirement will violate the public school contract law because it imposes a restriction which is not directly related to the purpose, function or activity for which the contract is to be issued, N.J.S.A. 18A:18A-15(a) since union affiliation is not directly related to the activity of building a public school. According to the petitioner, non-union contractors have in the past successfully built many public schools to the complete satisfaction of the school district and without any labor unrest. The petitioner argued that there is no reasonable relationship between the bid spec and the work to be done and cited the case of Waszen v. Atlantic City, 1 N.J. 272 (1949).

Also, the petitioner argued that this bid spec violates the public school contract law because it precludes the award of the contract to the lowest responsible bidder, N.J.S.A. 18A:18A-18 since potential contractors will be discouraged from bidding. The petitioner noted that case law has established that a non-union contractor can be held to be the lowest responsible bidder since labor relations is not an appropriate factor to

be considered on the issue of responsibility and cited the case of Wittie Electrical Co. v. State, 139 N.J. Super. 529 (App. Div. 1976).

In addition, the petitioner argued that the requirement of a project labor agreement is in effect a pre-qualification which in violation of N.J.S.A. 18A:18A-27.

In its brief, the petitioner recognized that in a recent decision of the Appellate Division of the New Jersey Superior Court, the court upheld a bid spec of the New Jersey Turnpike Authority which requires a project agreement, George Harms Construction Company v. NJ Turnpike Authority, Dkt. No. A-385-93T2 (September 29, 1993). The petitioner argued that the decision in this matter is distinguishable on the facts since in the Harms case there was no involvement of a contract to be governed by the public school contract law. The petitioner also noted that the Harms case is currently on appeal in the New Jersey Supreme Court.

As to the decision in Building and Construction Trades Council of the Metropolitan District et al. v. Associated Builders and Contractors of Massachusetts/Rhode Island et al, 507 N.J. ____, 122 L. Ed 2d 565 (1993)(Boston Harber), the petitioner argued that this decision is not applicable since it only held that the National Labor Relations Act doe not preclude a public entity from requiring a project agreement. The parties did recognize during the oral argument that there is dicta in this case suggesting that state law cannot prohibit the use of project agreements. As to the decision in Lott Construction Company v. Camden County Board of Chosen Freeholders, F. 93-5636 (N.J.D.C. 1984) (Lott Federal case), the petitioner argued that the decision was wrong and is under appeal. In that case, the court did hold that the County's decision to require a project agreement was not unreasonable and was within the latitude given to local bodies. Petitioner also alleges that the reasons for the project agreement given in the Superintendent's affidavit are factually wrong and that there is no reason to believe that a contract awarded without a project agreement requirement would not result in the timely construction of the high school. Further, the petitioner alleged that its loss of an opportunity to bid on the contract would cause irreparable harm and further the petitioner alleged that the

Board's allegation of harm due to the delay in the awarding of the contract is outweighed by the possible harm to the public, which will result in the award of the contract without the benefit of the open-competitive bidding process.

In response, the respondent argued that the project agreement does not violate the public school contract law. Respondent noted that approxmiately 70 potential bidders have expressed an interest in the project and that only petitioner has formally objected to the requirement. Also, the respondent argued that the requirements does not prevent the petitioner from filing a bid.

The respondent stated that the school district is concerned with the timely construction of the high school, with the quality of the work, with the relationship between subcontractors, with delays due to labor problems and that any delay would possibly result in a financial impact and prevent the construction within the time and the amount authorized by the electorate. The respondent argued that the concerns of the school district are similar to those of the New Jersey Turnpike Authority cited in the Harms case and that case clearly established that a project agreement can be part of the bid specifications for a public project. Although the statutes are not similar or the same, the respondent argued that the law governing contracts by the New Jersey Turnpike Authority required an award to the lowest responsible bidder and that the facts are analogous to the facts in this matter.

Additionally, the respondent stated that in the Federal Lott case, the court reviewed the contract under the public bidding statute and held that it was within the discretion of the local entity to require a project agreement.

The respondent further argued that the burden is on the petitioner and that the petitioner has not met its burden, has not shown a reasonable probability of success nor any irreparable harm since it can still submits a bid.

Mr. Kroll, on behalf of the Council, argued that the arguments in this matter are not new and have in fact been considered and rejected by the Court in the Harms case

and the Federal Lott case, and Mr. Kroll stated that there is no proof that the projects using union labor are more costly, and that the courts have recognized that public bodies have the discretion to require project agreements. Further, Mr. Kroll argued that there is no statutory provision in New Jersey which prevents the use of this type of provision and indicated that Governor Whitman has issued an order identified as Executive Order No. 11, allowing the state departments to use project agreements.

Mr. Kroll argued that the petitioner has not presented a reasonable likelihood of success and has not shown irreparable harm.

Lastly, Mr. Kroll argued that in the Harms case , the court denied a similar request for temporary relief. Further, Mr. Kroll stated that the decision of delaying the opening of the bid in the case of Utility and Transportation Contractors Ass'n of New Jersey et al v. Camden County, Superior Court Dkt. No. L 0346-94 is not persuasive since the county agreed to postpone the case. Also, the respondent noted in Utility and Transportation Contractors Ass'n of New Jersey v. Bergen County, Superior Court Dkt. No. BER-L-0001-94, the court denied a similar request for interlocutory relief and that the decision denying interlocutory relief was affirmed on appeal by both the Appellate Division and the State Supreme Court.

As I stated there are three factors which must be considered in deciding whether the petitioner is entitled to emergent relief.

Having reviewed the record and the arguments of the parties, I **CONCLUDE** that the petitioner has shown irreparable harm, since the petitioner will not be submitting a bid for the project because of the project agreement requirement. I agree with the petitioner's argument that the fact that the petitioner could submit a bid is not a realistic alternative since the petitioner would have to completely change how it operates. However, I **CONCLUDE** that the petitioner has not shown a probability that it will eventually succeed on the merits. Although there is a difference in the statutory language, all public entities in New Jersey strive for free, open and competitive bidding

and will award the contract to the lowest responsible bidder. I also accept the argument of the respondent and the Council that there is nothing in the public school law to prohibit the use of project agreements. For purposes of this motion, I **CONCLUDE** that the reasoning in both the Harms and the Federal Lott cases, appear to be equally applicable in this matter. I recognize that there has been no prior decision regarding the use of project agreement by school district and that there will be a hearing in this matter, at which time this legal argument will be fully explored.

As to the last factor to be considered, I recognize that general case law has established that it is appropriate for the Commissioner of Education to consider questions of the legality of bid specifications prior to the opening of bids. DiAnnunzo Bros. Inc. v. N.J. Transit Corp., 245 N.J. Super. 527 (App. Div. 1991). However, in this matter the school district has made a convincing presentation of the educational need for the high school and the problems that can be caused by a delay. Therefore, the respondent has present more than a minimum inconvenience or loss if the motion were granted. The petitioner has not meet its burden as to this factor.

Since the petitioner has not sustained its burden of proof as to the three factors set forth above, I **ORDER** that the petitioner's request for interim emergency relief be **DENIED**.

This decision is subject to review by the Commissioner and I will send a copy of the tape with the arguments as well as my oral decision to the Commissioner as soon as possible.

This recommended order on application for emergent relief may be adopted, modified or rejected by the **COMMISSIONER OF THE BOARD OF EDUCATION,** who by law is empowered to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days from entry of this order. If the **COMMISSIONER OF THE BOARD OF EDUCATION** does not so act in forty-five days, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 1, 1994
DATE

BEATRICE S. TYLUTKI, ALJ

/cad/cae

LOTT CONSTRUCTORS, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The decision on motion for emergent relief of the Office of Administrative Law has been reviewed. Timely exceptions were filed by petitioner and timely replies thereto were filed by the respondent and participant.

In addressing the standard to be met for granting interim relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982), the Administrative Law Judge concluded that the petitioner has shown irreparable harm, but that the petitioner has not demonstrated a probability of success on the merits. The ALJ's decision was based upon two findings, that there is nothing in the public school law that prohibits the use of project agreements which require union workers in school construction projects and that the case of George Harms Construction Company v. New Jersey Turnpike Authority, Dkt. NO. A-385-93T2 (September 29, 1993), then on appeal to the New Jersey Supreme Court, was controlling.

The initial decision on motion was transmitted to the Commissioner for his consideration on Tuesday, July 5, 1994. On

Thursday, July 7, 1994, the New Jersey Supreme Court issued a ruling in Harms reversing the Appellate Division decision (A-113/114-93). Petitioner submitted the Harms decision to the Commissioner by way of reply exceptions on July 8, 1994. On July 11, 1994, respondent and participant were directed to submit replies thereto, if any, by the close of business July 11, 1994. Counsel for respondent submitted a reply on July 11, 1994. Counsel for intervenor notified the Acting Director of the Bureau of Controversies and Disputes telephonically that no reply would be forthcoming.

The Commissioner temporarily grants the requested injunctive relief pursuant to N.J.A.C. 1:1-12.6 and remands this matter to the Office of Administrative Law for an emergent reconsideration of the motion in light of the Supreme Court decision in Harms.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 12, 1994
DATE OF MAILING - JULY 12, 1994

194-94

194-94

LUCILLE WALSH,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON,

RESPONDENTS.

GAIL HUNTINGTON,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON,

RESPONDENTS.

JOSEPH KAYAL,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

WILLIAM KOPCHO, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, :

RESPONDENTS. :

RALPH RUDNICK, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, :

RESPONDENTS. :

MARY BALDWIN, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, :

RESPONDENTS. :

JULY 12, 1994

RAYMOND LEOPIZZI,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON,

RESPONDENTS.

SYNOPSIS

Petitioners, seven former central administrative or supervisory staff, alleged that the State-operated School District's failure to appoint them to supervisory positions violated state antidiscrimination statutes, primarily the Law Against Discrimination, N.J.S.A. 10:5-4 to -12.

ALJ determined there was no reasonable basis to conclude that the District's actions with respect to employment determinations regarding petitioners were taken for impermissible discriminatory reasons.

Commissioner adopted findings and determination in initial decision dismissing the Petitions of Appeal.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

LUCILLE WALSH,
Petitioner
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON and LAVAL S. WILSON, Ph.D, STATE DISTRICT SUPERINTENDENT OF PATERSON,
Respondents.

OAL DKT. NO. EDU 5278-92
AGENCY DKT. NO. 163-4/92

GAIL HUNTINGTON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON and LAVAL S. WILSON, Ph.D, STATE DISTRICT SUPERINTENDENT OF PATERSON,
Respondents.

OAL DKT. NO. EDU 5279-92
AGENCY DKT. NO. 162-4/92

JOSEPH KAYAL,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON and LAVAL S. WILSON, Ph.D, STATE DISTRICT SUPERINTENDENT OF PATERSON,
Respondents.

OAL DKT. NO. EDU 5280-92
AGENCY DKT. NO. 168-4/92

WILLIAM KOPCHO,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON and LAVAL S. WILSON, Ph.D, STATE DISTRICT SUPERINTENDENT OF PATERSON,
Respondents.

OAL DKT. NO. EDU 5281-92
AGENCY DKT. NO. 165-4/92

RALPH RUDNICK,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON and LAVAL S. WILSON, Ph.D, STATE DISTRICT SUPERINTENDENT OF PATERSON,
Respondents.

OAL DKT. NO. EDU 5282-92
AGENCY DKT. NO. 164-4/92

MARY BALDWIN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON and LAVAL S. WILSON, Ph.D, STATE DISTRICT SUPERINTENDENT OF PATERSON,
Respondents.

OAL DKT. NO. EDU 5283-92
AGENCY DKT. NO. 167-4/92

RAYMOND LEOPIZZI,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, and LAVAL S. WILSON, Ph.D, STATE DISTRICT SUPERINTENDENT OF PATERSON,
Respondents.

OAL DKT. NO. EDU 5284-92
AGENCY DKT. NO. 166-4/92

James V. Segreto, Esq. for petitioners Mary Baldwin, Gail Huntington, Joseph Kayal, William Kopcho, Raymond Leopizzi, Ralph Rudnick and Lucille Walsh
(Segreto & Segreto, attorneys)

Gregory G. Johnson, Esq. for respondent
(Carroll & Weiss, attorneys)

Record Closed: September 14, 1993 Decided: April 28, 1994

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

Statement of the Case

These seven consolidated appeals involve challenges by school administrators to the abolition of their respective positions in connection with the reorganization of the State-Operated School District of the City of Paterson ("Paterson" or "District") under *N.J.S.A.* 18A:7A-34 to 52. Previously, under the caption *Cirasa v. State-Operated -School District*, OAL DKT. EDU 5277-92 (May 14, 1993), *adopted*, (Comm'r June 28, 1993), *aff'd* (St. Bd. Dec. 3, 1993), *appeal docketed*, No. A2408-93-T2 (N.J. App. Div. Jan. 14, 1994), the Commissioner of Education ruled that petitioners held positions as "central administrative and supervisory staff" and, therefore, that they were subject to the mandatory reorganization which must be implemented within six months after the State takeover of a local school district. *N.J.S.A.* 18:7A-44(b). Additionally, the Commissioner determined that she lacked subject matter jurisdiction over petitioner's federal civil rights claims. There remains, however, petitioners' contention that Paterson's failure to appoint them to supervisory positions violates state antidiscrimination statutes, primarily the Law Against Discrimination ("LAD"), *N.J.S.A* 10:5-4 to -12.

Specifically, petitioners allege that the selection process utilized by the State district superintendent was based upon standards which invidiously discriminate on the basis of race, gender, or age. Petitioners pursue a broad shot-gun approach. Six petitioners, who are white, charge "reverse discrimination" based on their race. One of the petitioners, who is black, also charges discrimination because of race. Four males charge "reverse discrimination" due to gender. Three females charge gender discrimination as well. Five petitioners, who are 50 years or older, charge discrimination based on age.

The main thrust of petitioners' attack focuses on the State district superintendent's public statements about affirmative action and minority hiring, which are claimed to be contrary to the District's own written policies and unsupported by competent proof of past discriminatory practices. Further, petitioners attempt to prove discriminatory intent indirectly by showing that Paterson retained other supervisors with poorer evaluations and hired replacement supervisors with fewer qualifications; that the decision not to retain petitioners was already made before they had any meaningful opportunity to respond to their evaluations; and that petitioners overheard comments suggestive of bias. Lastly,

petitioners rely on statistics purportedly showing that the District discriminated against older white males.

Paterson denies that improper considerations played any part in its deliberations and asserts that its determination was solely "based upon the evaluation of the individual and the staffing needs of the reorganized district" in accordance with *N.J.S.A.* 18A:7A-44(c). Moreover, Paterson contends that petitioners have blurred the fundamental distinction between the effect of the reorganization on existing personnel and the district's affirmative action plan applicable to hiring of new staff. Finally, Paterson presents its own statistics to show that the ratio of white to black employees in the central office remained unchanged after the reorganization.

For the reasons which follow, petitioners' discrimination complaints are groundless and must be dismissed.

Procedural History

On April 28, 1992, petitioners filed separate but similarly-worded petitions with the Commissioner. Thereafter, on June 18, 1992, petitioners filed an amendment to their petitions. On or about July 1, 1992, Paterson filed its answer. Subsequently, on July 14, 1992, the Commissioner transmitted all seven cases to the Office of Administrative Law ("OAL") for hearings. By consent order entered on September 21, 1992, the OAL consolidated all of them for hearing together.

Prior to commencement of the hearing, the OAL granted partial summary decision dismissing all of petitioners' claims except for discrimination claims under state law. *See Cirasa, supra.* The OAL held fifteen days of hearings commencing on May 14, 1993. Witnesses and exhibits are listed in the appendix. At the close of petitioner's direct case on May 28, 1993, the OAL dismissed the gender-discrimination claims of Lucille Walsh, Mary Baldwin and Gail Huntington for lack of proof. The hearings concluded on July 28, 1993. Both parties filed post-hearing briefs by August 31, 1993 and reply briefs by September 14, 1993. Time for preparation of an initial decision has been extended to April 28, 1994.

Findings of Fact

(1) Overview of the Evaluation Process

Much of the background information has already been fully detailed in the *Cirasa* decision and need not be repeated here. Citing a long history of educational failure and endemic mismanagement, the State Board of Education ordered the state takeover of the local Paterson school district on August 7, 1991 and appointed Dr. Laval Wilson to a five-year term as the state district superintendent. In turn, Dr. Wilson appointed Dr. Clarence Hoover, with whom he had previously worked in the Boston school system, as an assistant superintendent and put him in charge of revitalizing the Division of Curriculum and Instruction. Since the reorganization of the entire central office had to be completed within six months, the new administration operated under strict time pressures. A total of 59 individuals had to be evaluated, at least 22 of whom, including all seven petitioners, were located in the Division of Curriculum and Instruction under Dr. Hoover's supervision.

One important component of the decision-making process was a formal written evaluation prepared by an outside consultant. Greta Shepherd, a retired county superintendent who served as one of the independent evaluators, describes the procedure as "a snapshot view" of a person's performance. Every evaluator followed a uniform three-step format. First, the evaluator conducted a pre-observation interview, in which the individual was asked to submit a limited portfolio of his or her best materials for review. According to Shepherd, the samples which the individual selects reveal much about that person's abilities and priorities. Second, the evaluator "shadowed" or observed the individual at an activity of his or her own choosing. Again, this exercise offers an opportunity for the individual to present him or herself in the best possible light. Third, the evaluator conducted a post-observation conference to gather additional information. Shepherd liked to ask open-ended questions and to encourage the individual to express his or her own ideas. Then the evaluator filled out a standard evaluation form, rating the individual's performance in various categories on a five-point scale, from "distinguished" to "unsatisfactory." In the end, the evaluator assigned a composite or "summative" rating, which represents an overall impression of performance.

A majority of the petitioners, five out of seven, received a summative rating of "competent," which is the middle or average score reserved for employees whose "behavior is fully satisfactory and sufficient." None of these persons did terrible work, but none were especially outstanding either. Lucille Walsh received a "commendable" rating, the next-to-the-highest score for performance which demonstrates "unusual proficiency" and "exceeds expectations." Ralph Rudnick, however, received only a "fair" rating, the next-to-lowest score for performance "somewhat less than adequate." Although Dr. Wilson and Dr. Hoover signed the evaluation forms, their signatures did not signify uncritical acceptance. Both of them emphasized that a supervisor with a favorable rating might still not possess the type of skills needed in the reorganized district.

Besides the formal evaluations, Dr. Wilson relied heavily on the recommendations of Dr. Hoover, a seasoned school administrator who assumed direct responsibility for restructuring the Division of Curriculum and Instruction. When Dr. Hoover took over in late August 1991, he encountered an organization which was "lacking definition and clarity." Over the course of six months, Dr. Hoover interacted personally with his staff in their respective areas of programming and received additional input from bi-monthly reports which he required of every supervisor. He regularly met with petitioners at monthly staff meetings and saw most of them individually as the need arose. Ultimately, Dr. Wilson accepted Dr. Hoover's exercise of professional judgment on who would be best suited to become part of his new management team.

In one respect, petitioners make a valid criticism of the evaluation process. Petitioners, accompanied by a labor representative, were notified of Dr. Hoover's recommendation at separate meetings on February 3, 1992 in office of the District's personnel director. At those meetings, they were each handed two letters: one informing them that Dr. Hoover had "made a recommendation to the State District Superintendent of Schools to not appoint you to a position within the reorganized administrative and supervisory staff" and advising them of their bumping rights; and another enclosing their written evaluation and telling them that any written response to the evaluation must be submitted "by 4:00 p.m. on Wednesday, February 5, 1992." Technically, Dr. Wilson did not adopt Dr. Hoover's recommendation until February 6, 1992, when he sent petitioners a notice of his final decision. As a practical matter, however, Dr. Wilson had already reached his

decision on January 30, 1992, when he met with Dr. Hoover to discuss his recommendations. Certainly it would have been fairer if petitioners had been allowed to respond to their evaluations before the crucial meeting between Dr. Wilson and Dr. Hoover.[1] But this structural defect in the evaluation system does not detract from the underlying soundness of Dr. Hoover's recommendations.

None of the petitioners were terminated from employment as a result of the reorganization. Instead, the District continued to pay them at their old salaries for sixty days and offered them the opportunity to revert to any prior position in which they had achieved tenure or seniority. All of petitioners chose to revert to their former teaching or other positions, except for Lucille Walsh who submitted her resignation. Thus, petitioners incurred a reduction in salary but not a loss of their jobs.

(2) Nondiscriminatory Reasons for Not Retaining Petitioners

(A) Mary Baldwin

Mary Baldwin, a black female, age fifty-five, was a supervisor of home economics.[2] She had held that position in the district for nearly twenty-four years. Her nonretention as a supervisor had little to do with her job performance, but rather was the result of the restructuring of the division. As early as mid-December, Dr. Hoover made plans to combine the two positions of supervisor of home economics and supervisor of industrial arts to create a single new position known as supervisor of practical arts. Similarly, he also decided to combine the supervisor of music with the supervisor of art. A soft-spoken and thoughtful witness, Dr. Hoover explained that such merging of related functions was a common practice in other

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[1]Only one of the petitioners, Gail Huntington, actually did submit a response. Thus, none of the others can rightfully claim any genuine harm.

[2]Petitioners' ages are given as of February 7, 1992, the date on which the reorganization was implemented.

districts in which he had worked, notably Boston and Montclair. Past experience taught him "that this combination worked well."

In choosing the head of the new consolidated practical arts department, Dr. Hoover wanted an administrator "who could gain the respect of both staffs," someone "who understood both areas" and "could talk to shop teachers with confidence." While Baldwin had extensive experience in home economics, she has no background in industrial arts. Baldwin never even applied for the new job, although she was not precluded from doing so. Dr. Hoover assigned the task of interviewing prospective candidates to a committee chaired by Dr. Beulah Adams, the newly-appointed director of instructional services. Based on Dr. Adams' recommendation, on September 1, 1992 the District Superintendent chose Gabrielle Duffy, a white female, age forty-four, for the new post. Both Baldwin and Duffy have comparable master's degrees and both hold home economics and supervisor's certificates. In addition, however, Duffy, holds dual certification as a coordinator of cooperative industrial education.[3] Moreover, Duffy has practical experience performing construction work in her own home. Another advantage is that Duffy worked for nineteen years in the district as a teacher and coordinator of home economics, so she is thoroughly familiar with the staff.

Unlike the other petitioners who claim that they were discriminated against because they are white, Baldwin claims that she was discriminated against because she is black. The only support on the record for her accusation are alleged statements she attributes to persons connected with the incoming administration. Thus, Baldwin told of a private conversation in December 1991, in which evaluator Greta Shepherd had supposedly commented that an unspecified "they," presumably the new Administration, would not let a black become supervisor of practical arts. In rebuttal, Shepherd emphatically denied making such a remark, saying it was "inconsistent with [her] belief and experience." Furthermore, Shepherd's role was limited to preparing the written evaluation, and she did not participate in deciding whether to appoint Baldwin to a supervisory position.

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[3]This endorsement qualifies Duffy to serve as a "teacher and coordinator of part-time cooperative vocational education in skilled trade, industrial and/or service occupations" and "to teach related vocational subjects." *N.J.A.C.* 6:11-11.3.

Baldwin also stated that Dr. Dorothy Dallah, the executive assistant to Dr. Wilson, had assured her, during a telephone conversation in January 1992 to confirm arrangements for a meeting with black sororities, that, "You people don't have to worry, you might not like the positions you get but you're not going back into the classroom." Although Dallah recalled one instance in which Baldwin had "whispered" to her that they both belonged to the same black sorority, she did not recall the particular telephone conversation. Dallah is certain, however, that she never talked to Baldwin about her supervisory position and that she never used the words which Baldwin attributed to her.

I FIND that Baldwin was not appointed because her former position had been eliminated and replaced by a new position which combined home economics and industrial arts. Race and age were not a factor in this decision. Neither Greta Shepherd nor Dorothy Dallah made any comments to Baldwin which might be taken otherwise. Gabrielle Duffy was chosen as the supervisor of practical arts because of her dual certification and her familiarity with industrial art.

(G) Gail Huntington

Gail Huntington, a white female, age fifty, was the coordinator of the gifted and talented program. She had been in the district more than nineteen years, having previously worked as a teacher of English as a Second Language. As a supervisor, her primary duties included developing and coordinating a program for gifted and talented students, visiting classrooms for supervisory purposes, and instituting an in-service training program for staff. Paterson has an extensive enrichment program consisting of self-contained "challenge classes" for children identified as high achieving and a "pull-out program" or special classroom activities for schools where challenge classes are unavailable.

Soon after the takeover, the new Administration began holding information-gathering sessions with parents and other community groups. Dr. Hoover attended one such public forum on October 23, 1991, where numerous parents voiced concerns about Huntington's lack of leadership and the perceived inadequacies of the existing gifted and talented program. Members of a parents' organization known as the Paterson Association for Gifted Education ("PAGE") had prepared a list

of proposals for improvement, such as uniform standards for testing and evaluation of eligible students, upgraded curriculum, greater exposure to scientific, artistic and cultural environments, limited class size, and increased parental involvement in the formulation of district policies and procedures. While some of these ideas might require additional expenditure of money (e.g., smaller class size), others could be implemented at little or no extra cost (e.g., uniform testing standards, more efficient use of existing staff, and creation of a parent's advisory committee).

James Gist, the father of three children presently enrolled in the public school system and the president of PAGE, is a particularly outspoken critic of the present program for gifted children. Testifying at the administrative hearing, Mr. Gist emphasized that his group was not necessarily demanding more money, but instead "looking for a change in thinking." Although he liked Ms. Huntington personally, he felt that she was "wishy-washy when it came to fighting for our kids." From his perspective, the real problem was Huntington's uninspired leadership and her inability to communicate what she was doing. Significantly, the session on October 23, 1991 was the first night meeting of parents that Huntington had ever attended, even though she had an open invitation to come to the regular monthly PAGE meetings. Many of the interested parents work to earn a living and have difficulty visiting the school during the day.

Aside from important input from parents, Hoover also formed his own impressions of Huntington's capabilities based on his dealings with her. Despite her evident knowledge of the inner workings of the gifted and talented program in her own district, Huntington did not have sufficient "depth and breadth of knowledge" about innovative programs in comparable school districts. Since Dr. Hoover had experience with similar programs in Montclair and elsewhere, he realized the narrowness of her approach.

Outside evaluator Greata Shepherd rated Huntington's overall performance as competent, although Shepherd expressed reservations about Huntington's ability to engage in "consistent" as opposed to "accidental" planning and the absence of any mechanism for obtaining feedback from her staff. Relying on samples of work which Huntington had chosen as representative, Shepherd could find no evidence of any systematic planning efforts or any institutionalized channels for reaching out to staff. Good management techniques, Shepherd reasoned, involve establishment of

a monitoring system "which flows in both directions." Even though Shepherd observed only two rather than the customary three "shadowing" activities, she believed that she had enough data to draw meaningful conclusions. Indeed, Huntington does not genuinely dispute the accuracy of Shepherd's observations, although she complained that she was not given an adequate opportunity to respond to her evaluation. (See footnote 1, *supra.*)

In September 1992, the District hired Sandra Mickens, a thirty-four year old African-American female, to replace Huntington as supervisor of the gifted and talented program. Like the other newly hired administrators, Mickens had been screened and recommended by the selection committee headed by Dr. Beulah Adams. Not only did Mickens possess a master's degree and a background as a teacher in the district's own gifted and talented program, but also she was currently working on her doctorate. Her teaching experience provided valuable insight into the District's need for including more students in the gifted and talented program and for furnishing better training to the teachers assigned to accelerated classes. At the hearing, Mickens came across as a forceful and dynamic leader with a clear vision of what she hopes to accomplish. She was particularly articulate in outlining her future plans for revising the entry requirements into the program and for meeting the needs of a culturally-diverse student population. As Mickens described herself, she can be "aggressive and overbearing when it comes to the education of our children."

By comparison, Ms. Huntington, who also testified at the hearing, displayed a defeatist attitude. She had a tendency to blame all the shortcomings in the current program on the lack of funds or the inaction of others, which only succeeded in making her appear weak and ineffectual. In her early contacts with Dr. Hoover, she presented him with a long list of problem areas, financial constraints and deficiencies. It is easy to appreciate why the new Administration might prefer the forward-looking leadership of Mickens to the helpless hand-wringing of Huntington, without any regard to racial or age differences.

I **FIND** that Gail Huntington was not retained as a supervisor because of her strained relationship with parent groups, her noncollaborative management style and her unenthusiastic outlook. The decision to hire the well-qualified Sandra

Mickens was based solely on her merit as someone better suited to the challenging task of revitalizing the stagnant gifted and talented program.

(C) Joseph Kayal

Joseph Kayal, a white fifty-seven year old male, held the title of supervisor of physical education. He had served the district for thirty-five years and had worked his way up the ranks from elementary school teacher. Notwithstanding the title, his area of responsibility extended to health and driver's education as well as physical education. In his supervisory capacity, he evaluated physical education and health teachers, developed curricula and assisted in preparing the budget for his department.

Kayal got off to an inauspicious start in early September 1991 by complaining that he had too many duties and asking Dr. Hoover to relieve him of responsibility for health education.[4] Shortly thereafter, Kayal committed another blunder by approving the distribution of an incorrect Spanish translation of a letter about the family life curriculum. As a result, the District had to recall some 20,000 copies of the letter to redo the translation. In and of itself, the error does not seem particularly serious. Kayal had merely borrowed an earlier form used by his predecessor without bothering to check its accuracy. Coming at the beginning of the probationary period, however, this mistake was viewed as an indication that Kayal was careless and inattentive to detail. Dr. Hoover faulted Kayal for not asking one of the bilingual supervisors to review the text of the letter before it went out.

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[4]Until the year before, Kayal had not had oversight authority over the health program at the elementary level. Apparently, Kayal thought that it was too difficult for one person to handle the whole department. Dr. Hoover gave due consideration to Kayal's request to lessen his workload, but decided against granting it.

Basically, Kayal received good but not great marks for his management skills. Greta Shepherd, who has a long and distinguished career in public education, criticized Kayal's departmental goals as lacking "specific targets, timeliness and monitorable objectives." Consequently, there was no method for measuring whether or not the objectives were being accomplished. Dr. Hoover agreed that Kayal's curriculum documents failed to include "tangible outcomes for students" and were "just a simple listing" of activities. Moreover, Shepherd opined that the physical education curriculum lacked creativity and originality. Only the "Can Do" program, designed to raise students' self-esteem, could be regarded as innovative. The rest of the physical education curriculum was very "traditional." In particular, Shepherd saw no evidence of any effort to adapt physical education instruction to the special needs of handicapped students, to accommodate the different traditions of a multicultural community, or to promote physical education for life-long use. While Kayal insisted that these types of initiatives were occurring anyway, none were reflected in the curriculum documents which he supplied for review. Shepherd commented that teachers are required to adhere to the written curriculum and are not allowed to follow informal guidelines.[5]

As of May 3, 1993, Paterson had not appointed anyone else to the position of supervisor of physical education.

I **FIND** that Kayal was not offered a supervisory position because of his reluctance to assume responsibility for health education, his lackluster performance in setting goals and objectives, and his unimaginative approach to the physical education program. Kayal's race, gender or age were not considered.

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[5]Since the District raised it at the hearing, this decision will address the charge that Kayal was responsible for a deficit in the athletic department budget for 1991-92. Some of the testimony suggests that athletic directors at the high school level may have overspent their authorized appropriations that year by $90,000. Dr. Hoover acknowledged that he was unaware of Kayal's alleged involvement until after the decision not to rehire him had already been reached. Proofs failed to substantiate that the deficit, if any ever existed, was incurred while Kayal still had a measure of control over the athletic budget.

(D) William Kopcho

William Kopcho, a white male, age forty-eight, was the supervisor of special education. He had been employed in the district for thirty-four years, having worked as a school psychologist before becoming a supervisor. It is difficult to determine the exact nature and scope of Kopcho's job duties from the record. Kopcho testified that his main job was to observe the delivery of special education services to ensure that each eligible child was receiving an appropriate special education and that teachers were complying with mandated procedures. However, he did not evaluate teacher performance for tenure or increment withholding purposes. By his own description, Kopcho assumed responsibility for "overseeing" development of the curriculum for use in special education. His personal resume summarized his duties in terms of "curriculum development and instructional methodology guide development at all levels of Special Services." During his testimony, however, Kopcho backed away from such an expansive definition of his former duties, saying that he did not actually "devise, develop or implement" curriculum, but simply coordinated and reviewed the work done by others. Lines of responsibility between Kopcho and the other supervisory staff were vague and blurred. Under the organizational chart prior to the takeover, the supervisor of special education, the position occupied by Kopcho, nominally reported to an assistant director. In reality, however, state monitors reported that the job description of the assistant director was "weak and ambiguous" and that Kopcho actually had greater responsibility. So-called "coordinators" also exercised "more substantial" responsibility than the assistant director, but their role appeared confusingly similar and overlapping with Kopcho's function.

Against a backdrop of gross mismanagement, Dr. Hoover moved quickly to revamp the administrative structure and to increase the accountability of his staff.[6] Early in 1991-92 academic year, Dr. Hoover conferred with Kopcho about certain curriculum documents which Kopcho had been preparing. The two participants gave differing accounts of what transpired at this meeting. Dr. Hoover understood that the curriculum documents were immediately "ready to distribute to staff." Kopcho, on the other hand, testified that documents were drafts in their beginning stages. If Kopcho's version were true, one wonders why he would have submitted the documents to his new boss before they had been carefully edited and thoroughly checked for accuracy.

Both witnesses agree that Kopcho delivered a box filled with over a thousand pages of material. After reviewing six or seven samples, Dr. Hoover returned the voluminous set to Kopcho with instructions to rewrite all of them. Those documents which Dr. Hoover had the opportunity to read were poorly written and professionally unacceptable. For example, the proposed curriculum guide for health was riddled with grammatical errors, outdated references, inconsistencies and illogical sequencing. Although Kopcho concedes that the draft of the health curriculum was inadequate, he insists that the mistakes were largely typographical rather than substantive. Instead of accepting full responsibility, he sought to shift the blame to the teachers who helped prepare the documents and to his own secretary. But only Kopcho's name is printed on the title page of the health curriculum document. Notwithstanding Dr. Hoover's clear directions, Kopcho never resubmitted any revised curriculum for further review.

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[6]State investigators issued a Level III review report in March 1990, citing numerous serious deficiencies in the operation of the special education department, including: lack of agreement between central office and building administrators regarding who is responsible for the special education program; delays in placement of children identified as eligible for services; lack of a consistent format for preparing individual educational programs; and insufficient parental involvement in planning for their children's special education.

Meanwhile, Kopcho was being independently evaluated by Dr. Angelo Tomaso, who followed the same standard format as Greta Shepherd. Unfortunately, Dr. Tomaso died prior to the hearing. Dr. Tomaso's written evaluation of Kopcho is highly laudatory, describing him a competent manager who "churns out much product, especially in the areas of curriculum[.]" In one important area, however, Dr. Tomaso's views coincide fully with Dr. Hoover's. Commenting on Kopcho's communication style, Dr. Tomaso remarked that, "[H]e needs to either get a word speller/corrector for his secretary or needs to proofread more, i.e., 'rational' instead of 'rationale,': 'Haldon' instead of 'Haldol,' 'ambuds instead of 'ombudsman.' This occurred too often."

When deciding whom to recommend for a supervisory position in the sensitive area of special education, Dr. Hoover was greatly influenced by his familiarity with Kopcho's weakness in curriculum development. Of the three district employees invited to remain as supervisors of special services, two were white (Valerie LeBlanc and Joan Tahan) and all three were over forty years of age (Mary Cornish, age 47; Valerie LeBlanc, age 49; and Joan Tahan, age 52) No one in particular was hired to fill the position vacated by Kopcho. Without providing supporting details, Kopcho asserts that his replacement was Mary Cornish, the only one of the three who happens to be black.

I **FIND** that Kopcho was not kept as a supervisor because of his deficiencies in the area of curriculum development and the need to establish clearer lines of responsibility. Irrelevant factors such as race, age or gender did not play any part in this determination.

(E) Raymond Leopizzi

Raymond Leopizzi, a white male, age forty-one, was a coordinator of basic skills. As a teacher and later as a supervisor, he had worked in the district for eighteen years. Once more, it is tricky to pin down Leopizzi's exact duties. Erline Holmes, a retired urban school administrator who evaluated Leopizzi's performance, commented on the unreliability of the job descriptions used by the old district. Instead, she had to rely "on what people told us they were doing."

For the most part, Leopizzi was responsible for monitoring the delivery of funded programs in nonpublic schools.[7] Acting as liaison for the district, he spent a great deal of time visiting the sites of private and parochial schools throughout the city and neighboring communities. Since the educational services were furnished by private contracting agencies, Leopizzi had no supervisory authority over any of the teachers or service providers. Although other basic skills coordinators in the district were involved with in-service training for staff, Leopizzi did not perform this function since the private contractors provided their own training. Moreover, Leopizzi's role was limited to monitoring the programmatic as distinguished from the fiscal aspects.[8] Other district employees, notably the director of funded programs, had responsibility for financial control. While Leopizzi monitored compliance with legal requirements, he "had no say as to how much [money] was allocated to private schools."

Maggie Carillo, a member of the state transition team who was hired by the District to head the special projects department, questioned whether Leopizzi had enough work to justify a full-time position. Carillo had experience implementing

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[7]Funding for these programs is derived from a variety of federal and state sources. Chapter 1 of the Elementary and Secondary Education Act of 1965, as amended in 1988, provides federal funds for basic skills improvement programs. 20 *U.S.C.A.* §§2701 to 3386. Chapter 2 provides block grants for training and professional development, acquisition of educational materials, and innovative projects. 20 *U.S.C.A.* §§2911 to 1976. Chapter 192 of the Laws of 1977, codified at *N.J.S.A.* 18A:46A-1, provides auxiliary educational services for children in private and parochial schools. The Dwight D. Eisenhower Mathematics and Science Education Act, 20 *U.S.C.A.* §§2981 to 2993, provides grants to encourage teachers in the technical and scientific fields.

[8]Even here, his role was necessarily restricted. Pervasive monitoring by public authorities in sectarian schools infringes precisely those values at the root of the constitutional prohibition against excessive entanglement with religion. *Aguilar v. Felton,* 473 *U.S.* 402, 105 *S. CT.* 3232, 87 *L. Ed.* 2D 290 (1985).

funded programs in another district. After conferring with others, Carillo determined that the private contractors were adequately supervising their own staff as part of their contractual agreement. Therefore, she recommended to Dr. Hoover that Leopizzi's position was unnecessary and could be eliminated.[9]

Independently, Erline Holmes, the outside evaluator, arrived at the same conclusion. She too questioned why Leopizzi's full-time job was need when the district was already paying a private contractor to perform many of the same services. In her final written evaluation, she noted as a weakness Leopizzi's "duplication of tasks delegated to the contacted agencies." Recognizing Leopizzi's talents in dealing with people, Holmes nonetheless rated him low in leadership ability because the other coordinators employed a better information-gathering system. Holmes also rated Leopizzi as comparatively weak in creativity. She explained that Leopizzi made little use of the information which he collected. A creative supervisor, in her view, would have analyzed the data and offered suggestions for improvements.

As evidence of improper motive, Leopizzi relied on an off-hand comment by Jack McGee, state assessment unit coordinator, uttered in the context of an obvious effort to express human sympathy. During a chance encounter shortly after announcement of the decision not to reappoint him, McGee inquired how he was feeling and Leopizzi replied, "Lousy." To which McGee responded to the effect, "Don't internalize, it's not you." Leopizzi chose to interpret these innocent words as implying that mysterious other factors were involved. But the words are fully consistent with the District's position that Leopizzi's job function was nonessential and that his talents could be put to better use in a nonsupervisory capacity.

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[9]Carillo consulted extensively with Joseph Heitzman, former director of funded services in the district, and James Polumbo of Educational In-Roads, one of the private contractors. At the hearing, petitioner's counsel objected that Carillo's conclusions improperly rested on hearsay. But the controlling issue is not whether it is literally true that Leopizzi's duties were duplicative of the work done by others. What matters is that decision-makers in the reorganized District sincerely believed it to be true and, therefore, were motivated by a genuine desire to improve efficiency.

Eventually, Carillo, the newly appointed head of special projects, assumed Leopizzi's supervisory duties as a small part of her general responsibilities. It takes her only about six hours per week to do what Leopizzi devoted his full time doing. Four of the five other basic skills coordinators in the district were retained as supervisors in different departments. Two of the four are white (Ruthann Hilferty and Nancy Forsberg). All four were over forty years old (Ruthann Hilferty, age 44; Mary Dawson, age 53; Nancy Forsberg, age 48; and Griselle Hernandez, age 41). Recently, the District hired four new employees as supervisors in the department of special programs. Three of the four are white (Mary Kildow, Gloria Hagopian, and Anthony Campisi), including one male (Campisi). Two were older than forty (Sandra Reynolds, age 51; Gloria Hagopian, age 45).

I **FIND** that Leopizzi was not appointed as a supervisor because his job duties overlapped activities performed by private contractors and did not necessitate a full-time position. In addition, he was weak in the areas of leadership and creativity. The decision had nothing to do with his race, gender or age.

(F) Ralph Rudnick

Ralph Rudnick, a white male, age sixty-one, was the supervisor of social studies. He started working in the district thirty-seven years ago as a teacher. Chief among his supervisory duties was responsibility to "develop, implement, and coordinate curriculum in social studies to provide rich and varied experiences." Shortly after taking over, Dr. Hoover, who has his doctorate in the development of social studies curriculum, reviewed the social study guides and found them to be seriously wanting. In his testimony, he described the curriculum documents as "outdated," as nothing more than a "content outline," and as devoid of "student outcomes." Similarly, he characterized a desegregation project which Rudnick had prepared as a "skeletal" document which gave little guidance to teachers. Compared to related work by two other supervisors, Rudnick's contribution was "the weakest of the three."

Greta Shepherd, who performed the outside evaluation, shared Dr. Hoover's poor opinion of the quality of Rudnick's work. Like Dr. Hoover, she was especially disapproving of curriculum materials which had no "benchmark" for measuring

progress and no "targets or timeliness." Although Rudnick accused Shepherd of not asking for the right documents, that excuse does not square with the known facts. Not only did Shepherd look at the material which Rudnick himself selected, but Dr. Hoover made nearly identical observations. Besides giving him bad grades in curriculum, Shepherd also panned Rudnick's ability to set department priorities and allocate resources. In addition, she noted his "reluctance to deviate from past practices" by exploring new ideas. Her final assessment of Rudnick's performance, based on all these factors, was "fair," the lowest rating of the seven petitioners.

Implying that racial motives were involved, Rudnick related a conversation in which Dr. Hoover told him, "You don't fit into the mix." Dr. Hoover remembers the conversation, but denies the connotation which Rudnick seeks to put on his words. Instead, Dr. Hoover explained it was his way of softening the message that Rudnick did not possess the necessary leadership skills. Evidently, Rudnick realized that he could not handle the job. On an earlier occasion, when he first learned that he would not be reappointed, Rudnick admitted that he could not produce what was needed in the new district. At the time of the hearing, no one had been hired to replace Rudnick. This state of affairs is more consistent with the District searching for the best person to do the job than it is with the District removing a white man to clear the way for a black man.

I **FIND** that Rudnick was not retained as a supervisor because of weaknesses in curriculum development, goal-setting and receptivity to new ideas. Improper considerations of race, gender or age did not enter into the decision.

(G) Lucille Walsh

Lucille Walsh, a sixty-year old white female, was the substance abuse coordinator. She came to the district nearly thirty-nine years ago as a nurse. Notwithstanding her narrow title, she had supervisory authority over delivery of drug and alcohol awareness services in the district. Walsh's credentials on paper are excellent. She not only has the required certifications, but is a registered nurse as well. But the critical problem was that children suspected of drug or alcohol abuse were not being tested. Eileen Shafer, Walsh's successor, attributed the bottleneck to the absence of clear-cut procedures. While Walsh was in charge, there was confusion regarding which hospitals would do testing, transportation arrangements

were uncertain, and staff members did not know how to get a child tested. Vice principal Aurea Rios, a member of the intervention team at Eastside High School, testified that she never received instructions on how to handle students under the influence of drugs or alcohol. Between August 1991 and February 1992, virtually no student in the district was screened for drug or alcohol use. After Walsh was relieved of her command, the District tested 111 students in a comparable time period.

During the evaluation period, Dr. Hoover formed a negative impression of Ms. Walsh. On one occasions, he had to reprimand her for bypassing normal channels in submitting grant papers directly to Dr. Wilson. On another, a principal complained that Walsh had not consulted him before scheduling a training session. Therefore, Dr. Hoover was surprised when Dr. Tomaso initially rated her as "distinguished." In accordance with the evaluation process, Dr. Hoover discussed his reservations with Dr. Tomaso and persuaded him to lower the rating to "commendable." Nevertheless, Dr. Hoover was guided by his own insights when it came time to make his recommendations to Dr. Wilson.

Eileen Shafer, age thirty-four, who succeeded Walsh, had valuable experience administering a drug prevention program in a large urban district. Since the person who replaced her is a white female, it is difficult for Walsh to claim that her removal was due to racial or gender bias. Walsh's tenuous charge of age discrimination rests on a supposed statement by Dr. Dallah that she "tried to get them to understand that older people have a great deal of expertise to offer." Dr. Dallah, executive assistant to Dr. Wilson, has no recollection of making such a statement. At best, the statement is ambiguous and could easily be interpreted as an endorsement for hiring older people.

I **FIND** that Walsh was not retained because of her failure to implement an effective drug and alcohol screening program and her poor interaction with other administrators in the district. Her age was not the reason for her removal.

(3) Affirmative Action and Demographic Data

Petitioners concentrate their attack on the District's minority hiring goals, which are alleged to have tainted the reorganization process. When Dr. Laval Wilson took over as state district superintendent, he inherited an affirmative action

policy statement written by the prior administration.[10] Under that statement, which has remained changed, the Paterson district reaffirmed,

> . . . its policy to insure equal employment opportunity for all persons and to prohibit discrimination in employment because of sex, race, color, creed, religion, national origin, age, domicile, marital status, or non-job related handicap or disability and to have equal access to all categories of employment in the public education system of the school district. An intensive affirmative action program shall be an integral part of every aspect of employment not limited to but including upgrading, demotion or transfer, recruitment advertising, layoff or termination, rates of pay, or other forms of compensation including fringe benefits, employment selection for training and apprenticeships, promotion or tenure.

The District's affirmative action plan further provides for tabulation of data with respect to race and sex of professional and nonprofessional staff, collection of information on opportunities for career advancement, and active recruitment of minorities and women. At the same time, the plan emphasizes the importance of hiring only qualified individuals. Referring to guidelines developed under federal civil rights legislation, the plan acknowledges that, "In short, the act does not command that any person be hired simply because he/she is a member of a minority group." Rather, the purpose is "the removal of artificial, arbitrary and unnecessary barriers to employment" which individiously discriminate on the basis of racial or other impermissible classifications. Without challenging the validity of the plan itself, petitioners contend that the District violated its own standards by using race as the selection factor for employment decisions.

During his first six months in office, Dr. Wilson held a series of meetings to gauge public sentiment since, as he put it, "the community didn't volunteer to

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[10]State regulations require that every local school district in New Jersey develop an affirmative action program or plan covering employment and contract practices. Such plan "shall include timetables for corrective action to overcome the effects of any previous patterns of discrimination which may exist and a systematic internal monitoring procedure to ensure continuing compliance." *N.J.A.C.* 6:4-1.3(a)(2). See Also, *N.J.A.C.* 6:4-1.6.

become state-operated." He met with a wide variety of different interest groups, ranging from the Chamber of Commerce to the NAACP. In the course of these sessions, one of the dominant themes which emerged was the feeling by minority representatives that their constituents had been deprived of employment opportunities in the past. African-American leaders complained that there were not enough black principals and administrators. Hispanic leaders, in particular, protested that they had no voice in the top management of the school system. Student enrollment in the district is predominantly minority. Hispanic students constitute the largest contingent, roughly 49 percent, with African-American students a close second, approximately 43 percent. Only about eight percent of the students are white or other. Yet only 42 percent of all employees in the district are Hispanic or black.

Dr. Wilson made no secret of his desire to achieve a better racial balance by increasing the number of minority employees.[11] His strong commitment to affirmative action is reflected in his Mission Statement, which states:

> Monitoring the racial and gender composition of our staff at school sites, as well as in the central office, will remain a high priority of the Superintendent's office. As we strive to find the best people to provide services for the school system, we must continue to appoint staff who are representative of the various groups of students who are in our schools.

Petitioners, however, distort Dr. Wilson's true views by claiming that he wants the staff in the district "to replicate the demographic character of the student population." In the first place, affirmative action considerations were never used in evaluating the performance of existing staff, but apply only to attracting people to fill vacancies or newly-created positions. Every District witness involved in the

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[11] *N.J.S.A.* 18A:7A-35(h) obligates the State district superintendent to "ensure that the district is in compliance with all federal and State laws, rules and regulations relating to equal employment opportunities, affirmative action and minority business opportunities."

evaluation process, from Dr. Wilson on down, confirmed that race, gender and age were not taken into account in determining which supervisors to retain. Thus, petitioners would have lost their supervisory positions anyway, regardless of whether the District happened to have an affirmative action program. Secondly, there was no quota in the sense of achieving a fixed percentage of racial or ethnic representation among the employees. The goal was a much more generalized one of searching for qualified black and Hispanic applicants. Thirdly, Dr. Wilson expressly disavowed any intent of creating an all black and Hispanic staff. What he hoped to accomplish was a fairer system where no member of the multicultural community felt left out.

As part of his reform, Dr. Wilson sought ways to include the Hispanic community. In public statements and an official newsletter, Dr. Wilson announced the creation of an ombudsman position and his intention "to increase interaction with the Spanish-speaking community by filling the position with a Puerto Rican candidate." Taking this statement out of context, petitioners use it as evidence of a general inclination by Dr. Wilson to prefer minority candidates. While Dr. Wilson's reference to a particular ethnic origin is reprehensible, it is undoubtedly true that anyone qualified for this particular position would have to be conversant in Spanish and Hispanic culture. In any event, the incident is irrelevant to petitioners' specific complaints. Nowhere is there any indication that any petitioner was interested in the position or had been turned down for the job.

Demographic data also fail to substantiate petitioners' claims that whites were disfavored in the selection process. Before the reorganization, the central-office whites outnumbered non-whites 41 to 18 or a ratio of slightly more than two-to-one. After the reorganization, the two-to-one ratio remained unchanged, 18 to 9. In the Division of Curriculum and Instruction, 16 persons were reappointed: 9 whites, 3 blacks and 4 Hispanics. (Exhibit P-73). With respect to newly-hired central office staff, there are 13 whites and 13 non-whites, maintaining the two-to-one relationship. Of the 11 newly-hired persons in the Division of Curriculum and Instruction, 5 are white and 6 are black, again pretty evenly split. (Exhibit P-74).

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that respondents did not unlawfully discriminate against petitioners on the basis of race, gender or age.

At the outset, it should be emphasized that the abolition of petitioners' positions came about as a result of the general reorganization of central administrative and supervisory staff in the state-operated school district. *N.J.S.A.* 18A:7A-44(c). This occurred by operation of law rather than by any affirmative actions of Dr. Wilson or his assistants. Although the state district superintendent "may hire an individual whose position is abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district," petitioners have no legal entitlement to retain their supervisory positions. Their rights are limited by statute to receipt of sixty-days' pay and to exercise of any tenure or seniority claims they may have to lesser positions. *Cirasa, supra.*

Courts have approached large-scale reorganizations differently from situations where one person is removed from employment. In *Wachstein v. Slocum*, 265 *N.J. Super.* 6, 14 (App. Div. 1993), a "reverse discrimination" claim by a white male demoted from a supervisory position, the record left "no doubt that plaintiff's removal from his position resulted from [a] management reorganization process." Viewed in this broader context, the Appellate Division could discern no basis in the record for finding that plaintiff's removal from his management position was racially motivated. Similarly, in *Dennery v. Passaic Cty. Reg. High Sch. Dist.,* 131 *N.J.* 626, 642 (1993), a tenure dispute, the New Jersey Supreme Court was unable to ascribe improper motives to a school district which abolished petitioner's position "as part of an overall reorganization based on legitimate educational policy rather than as part of a direct attempt to remove her from the District." These comments are particularly pertinent in the context of a state takeover of a failing school district, where the State district superintendent has a broad mandate to make sweeping changes. In order to succeed, the State district superintendent must be able to appoint fresh talent who owe allegiance to the new administration. See *Wachstein,* at 14, where the newly-appointed Public Advocate instituted management changes to introduce a "breath of new life."

Of course, the occurrence of a state takeover does not mean that a school district may engage in illegal employment discrimination. Petitioners allege that the State district superintendent violated *N.J.S.A.* 10:5-12(a), which makes it unlawful for an employer to refuse to hire or to discharge an employee because of race, age or sex, *N.J.S.A.* 10:5-12(a), as well as *N.J.S.A.* 18A:6-6, which prohibits discriminationbased on sex "pertaining to the employment of teachers in any school."[12] State courts have "borrowed procedures developed in litigation under federalantidiscrimination statutes" *Fuchilla v. Layman,* 109 *N.J.* 319, 345 (Handler, concurring). See *Peper v. Princeton Univ. Bd. of Trustees,* 77 *N.J.* 55, 84 (1978), adapting the test set forth in *McDonnell-Douglas Corp. v. Green,* 411 *U.S.* 792, 93 *S.Ct.* 1817, 36 *L.Ed.* 2d 668 (1973). Usually, the allocation of burdens follows a three-tier approach. Typically, in a wrongful discharge case, the complainant must first carry the burden of establishing that he belongs to a protected class, that he was performing his job at a level which met his employer's legitimate expectations, that he was nevertheless fired, and that the employer sought someone to perform the same work after he left. In a reverse discrimination case, however, the rationale supporting the rebuttable presumption accorded to historical victims of discrimination does not apply. Thus, when a complainant is not a member of the minority, courts have generally modified the first prong of the McDonnell Douglas standard to require the plaintiff to show that he has been victimized by an "unusual employer who discriminates against the majority." *Erickson v. Marsh & McLennan Co.,* 117 *N.J.* 539, 551 (1990). If that level is met, then the burden shifts to the employer "to come forward with a legitimate nondiscriminatory reason for the employee's rejection." Finally, the complainant is "is permitted to come forward with evidence indicating that the nondiscriminatory reason was no more than a pretext to hide discriminatory activity or was discriminatorily applied." No single

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[12]Arguably, petitioners were not "teachers" while employed as supervisors or administrators. But the distinction is not particularly helpful here, where petitioners are clearly covered under LAD's prohibition against gender discrimination.

formula automatically applies to all situations, however, and the test must be molded to fit the circumstances. *Peper*, at 83.

For purposes of this analysis, it will be assumed that petitioners have made out the minimum requisites of a *prima facie* case. *Cirasa, supra.*[13] Consequently, the inquiry will proceed directly to the question of whether, on the record as a whole, the evidence shows that respondents were motivated by improper considerations of race, sex or age. As detailed in the factual findings, the District has produced persuasive proof that each decision was fully supported by legitimate job-related reasons. Insofar as the outcome depends on weighing of credibility, the District witnesses were reputable school administrators who offered cogent and well-considered explanations for their choices. It is not the role of judges to supplant educators in running the school system. Courts will not interfere with the judgments of professionals in the field of public education, "unless those judgments are palpably arbitrary or depart from governing law." *Dennery*, at 643.. *Accord, Flucker v. Fox Chapel Area Sch. Dist,* 461 *F. Supp.* 1203 (W.D. Pa., 1978) (mere bad judgment in selection of a school employee does not amount to sex discrimination).

Petitioners failed to demonstrate that the stated reasons for the personnel actions were pretext to conceal some ulterior motive. They miss the point when they argue that all should be retained because of their greater experience in the district. It is precisely their long association with the prior administration which made them less attractive to the new leadership seeking a clean break with the past. Nor is it surprising that many of petitioners were middle age or older, when the purpose of the reorganization was to remove the firmly entrenched bureaucracy which had mismanaged the district for years. It would have been exceedingly difficult to accomplish this task without displacing some older administrators. Of the 59 staff members included in the central office evaluation process, only six were younger

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[13]Apart from the fact that many of the retained supervisors happen to be women, however, there is no corroborating evidence that the District is the "unusual employer" which favors females over males.

than forty years old. (Exhibit P-73) By the same token, the evaluators should not have to offer gratuitous advice on what the experienced administrators were doing wrong. The six-month probationary period was not an orientation period for new employees, but a procedure for evaluating how well the incumbents were performing their current responsibilities.

Likewise, petitioners failed in their endeavor to show that the independent evaluations were a sham. Contrary to petitioners' assertions, the District did not retain a large number of supervisors with poorer ratings. Petitioners point to only one such example, an assistant supervisor of bilingual education who was retained despite an overall rating of "fair" (Exhibit P-95). Uncontradicted testimony, however, indicates that his particular individual was ill during the evaluation process and that Dr. Hoover did not believe the evaluation measured her actual abilities. Other individuals with "fair" ratings were terminated or retired, including a black assistant director of funded programs (Exhibit P-107) and a white supervisor of music (Exhibit P-109). Petitioners' ratings (except for Mrs. Walsh) were not the highest of the group. Several other supervisors with "commendable" ratings were retained. (Exhibits P-110; P-111; P-112; and P-113).[14] Perhaps the underlying fallacy in petitioners' reasoning is the assumption that everyone with a "competent" rating must be retained as supervisors. Even if Drs. Wilson and Hoover concur with the evaluator's rating of competent, it does not necessarily mean that an individual is best suited for the job. Dr. Wilson and his advisors are still entitled to exercise their independent judgment as to whether a particular person will work well with the new management team.

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[14]Petitioners regard it as suspicious that one of the evaluations is missing the evaluator's signature and appears to have been changed from "competent" to "commendable." (Exhibit P-97). Yet Dr. Hoover was never confronted with the exhibit and afforded an opportunity to explain. Dr. Wilson suggested that this particular exhibit might be a preliminary draft rather than the final version.

Affirmative action is a false issue injected into this case to divert attention from the real dynamics. Dr. Wilson's reaching out to segments of the community who feel excluded and his goal of expanding equal employment opportunities can hardly be regarded as indicative of discriminatory intent. "If an employer's statements that he planned to combat discrimination and to pursue affirmative action goals were held to be an adequate basis for a finding of discrimination against a white employee, anti-discrimination laws would be turned on their head and transformed into a device for preservation of the racial status quo in the workforce." *Wachstein,* at 18.

In a case properly raising the issue, the particular means adopted by Dr. Wilson to achieve his laudable ends might be subject to legal challenge. New Jersey has clearly rejected race-conscious remedies designed to redress general societal wrongs when the effect is to deny jobs to more qualified applicants. *Lige v. Town of Montclair,* 72 *N.J.* 5 (1976). Recently, the federal district court in New Jersey invalidated a school district's reliance on its affirmative action plan as a means of breaking a tie in a layoff dispute. *United States v. Piscataway Bd. of Educ.,* 832 *F. Supp.* 836 (D.N.J. 1993). Seeking to litigate the validity of Paterson's affirmative action program, petitioners allude to a number of possible deficiencies in its formulation, including the failure to make a statistical comparison to the relevant labor market and the purported absence of convincing evidence of past discriminatory practices. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 *U.S.* 469, 109 *S.Ct.* 706, 102 *L.Ed.* 2d 854 (1989); *Hazelwood Sch. Dist. v. United* States, 433 *U.S.* 299, 97 *S. Ct.* 1736, 53 *L.Ed.* 2d 768 (1977); *Wygant v. Jackson Bd. of Educ.*, 476 *U.S.* 267, 106 *S. Ct.* 1842, 90 *L.Ed.* 2d 260 (1986). But it would be premature to address these sensitive issues in the present factual setting, where no connection has been established between petitioners' nonretention as supervisors and the District's affirmative action program. On the record in this case, the overwhelming weight of the evidence shows that affirmative action had nothing whatsoever to do with outcome of the reorganization. Compare the *Piscataway case*, where it was undisputed that the employment decision was made solely for affirmative action considerations. 832 *F. Supp.* at 840.

In short, the State district superintendent picked those individuals whom he sincerely believed were best qualified to fulfill the staffing needs of the district. Regardless of whether or not one personally agrees with his particular choices, his exercise of professional judgment must be respected.

Order

It is **ORDERED** that the relief requested by petitioners is denied.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 28, 1994
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/29/94
Date

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 09 1994
Date

Jayne L. Vecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Lucille Walsh, former coordinator of substance abuse, Paterson State-Operated School District

2. Mary Baldwin, former supervisor of Home Economics, Paterson State-Operated School District

3. Gail Huntington, former coordinator of gifted and talented, Paterson State-Operated School District

4. Ralph Rudnick, former supervisor of social studies, Paterson State-Operated School District

5. William Kopcho, former supervisor of special services, Paterson State-Operated School District

6. Joseph Kayal, former supervisor of physical education, Paterson State-Operated School District

7. Raymond Leopizzi, former coordinator of basic skills, Paterson State-Operated School District

8. Maglys Carrillo, director of special programs, Paterson State-Operated School District

9. Aurea Rios, secondary school vice principal

10. Eileen Shafer, supervisor of substance awareness, Paterson State-Operated school district

11. James Gist, president of Paterson Association for Gifted Education

12. Sandra Mickens, supervisor of the gifted and talented program, Paterson State-Operated school district

13. Greta Shepherd, private educational consultant, NC Educational Consultant Services

14. Dr. Dorothy Dallah, executive assistant to the superintendent of schools, Paterson State-Operated School District

15. Dr. John Nolan, personnel director, Paterson State-Operated School District

16. Erline Holmes, private educational consultant

17. Dr. Clarence Hoover, assistant superintendent for curriculum and instruction, Paterson State-Operated School District

18. Dr. Laval S. Wilson, state district superintendent, Paterson State-Operated School District

List of Exhibits

No.	Description	In Evidence	Marked for Identification
C-1	Key to summative evaluations (sealed)	7/28/93	7/28/83
P-1	Copy of provisional elementary teacher's certificate of Lucille Walsh, issued November 26, 1967	5/14/93	5/14/93
P-2	Copy of educational services certificate of Lucille Walsh endorsed in student personnel services, issued April 1969	5/14/93	5/14/93

No.	Description	In Evidence	Marked for Identification
P-3	Copy of instructional certificate of Lucille Walsh endorsed as teacher of health education, issued April 1969	5/14/93	5/14/93
P-4	Copy of administrative certificate of Lucille Walsh endorsed as supervisor, issued October 1976	5/14/93	5/14/93
P-5	Copy of limited certificate for school nurses of Lucille Walsh, issued January 31, 1963	5/14/93	5/14/93
P-6	Copy of permanent certificate for school nurses of Lucille Walsh, issued November 30, 1967	5/14/93	5/14/93
P-7	Copy of educational services certificate of Lucille Walsh endorsed as substance awareness coordinator, issued in November 1988 and renewed in September 1990	5/14/93	5/14/93
P-8	Copy of letter to Dr. John Nolan from Lucille Walsh, dated March 23, 1992	5/14/93	5/14/93
P-9	Copy of commendation of Lucille Walsh by the General Assembly of the State of New Jersey, dated June 24, 1992	5/14/93	5/14/93
P-10	Copy of commendation of Lucille Walsh by the County of Passaic, dated June 12, 1992	5/14/93	5/14/93

No.	Description	In Evidence	Marked for Identification
P-11	Copy of commendation of Lucille Walsh by the Mayor of Paterson, dated June 3, 1992	5/14/93	5/14/93
P-12 (a)	Copy of letter to Dr. Laval S. Wilson, from Dr. Luis J. Salgado, dated February 3, 1992	5/14/93	5/14/93
(b)	Copy of district site visit report, dated January 22, 1992	5/14/93	5/14/93
(c)	Copy of district site visit report, dated January 22, 1992	5/14/93	5/14/93
P-13	Copy of letter to Lucille Walsh from Dr. Clarence Hoover, dated January 30, 1992	5/14/93	5/14/93
P-14	Copy of letter to Lucille Walsh from Dr. Clarence C. Hoover, dated February 3, 1992	5/14/93	5/14/93
P-15	Copy of letter to Lucille Walsh from Dr. Clarence Hoover, dated February 3, 1992	5/14/93	5/14/93
P-16	Copy of letter to Jack McGee from Lucille Walsh, dated February 5, 1992	5/14/93	5/14/93
P-17	Copy of letter to Lucille Walsh from Dr. Laval Wilson, dated February 6, 1992	5/14/93	5/14/93
P-18	Copy of letter to Lucille Walsh from Dr. John A. Nolan, dated February 14, 1992	5/14/93	5/14/93

No.	Description	In Evidence	Marked for Identification
P-19	Copy of summative evaluation of Lucille Walsh, dated February 3, 1992	5/14/93	5/14/93
P-20	Copy of letter to Lucille Walsh from Dr. John Nolan, dated April 2, 1992	5/14/93	5/14/93
P-21	Copy of letter to Lucille Walsh from Dr. John Nolan, dated April 13, 1992	5/14/93	5/14/93
P-22	Copy of letter addressed To Whom It May Concern from Deborah Bohannon, dated August 5, 1992	5/14/93	5/14/93
P-23	Copy of letter to Mary Baldwin from Dr. Laval S. Wilson, dated November 6, 1991	5/17/93	5/17/93
P-24	Copy of memorandum addressed to All Central Office Staff from Dr. Laval S. Wilson, dated November 7,1 991	5/17/93	5/17/93
P-25	Copy of memorandum to Dr. Clarence C. Hoover, dated January 30, 1992	5/17/93	5/17/93
P-26	Copy of letter to Mary Baldwin from Dr. Clarence C. Hoover, dated February 3, 1993	5/17/93	5/17/93
P-27	Copy of letter to Mary Baldwin from Dr. Clarence C. Hoover, dated February 3, 1992	5/17/93	5/17/93

No.	Description	In Evidence	Marked for Identification
P-28	Copy of letter to Jack McGee from Mary A. Baldwin, dated February 4, 1992	5/17/93	5/17/93
P-29	Copy of letter to Mary Baldwin from Dr. Laval S. Wilson, dated February 6, 1992	5/17/93	5/17/93
P-30	Copy of letter to Mary Baldwin from Dr. John A. Nolan, dated February 14, 1992	5/17/93	5/17/93
P-31	Copy of letter to Mary Baldwin from Dr. John A. Nolan, dated April 2, 1992	5/17/93	5/17/93
P-32	Copy of list of salaries of Mary Baldwin for the 1991-92, 1990-91 and 1989-1990 school years	5/17/93	5/17/93
P-33	Copy of administrative certificate of Mary Baldwin with endorsement as supervisor/principal, issued September 1977	5/17/93	5/17/93
P-34 id.	Administrative certificate of Mary Baldwin endorsed as supervisor of home economics		5/17/93
P-35	Copy of master's degree of Mary Baldwin from Montclair State College, dated June 3, 1964	5/17/93	5/17/93
P-36	Copy of summative evaluation of Mary Baldwin, dated February 3, 1992	5/17/93	5/17/93

No.	Description	In Evidence	Marked for Identification
P-37 id.	Copy of handwritten notes of Greta Shepard regarding evaluation of Mary Baldwin, dated December 20, 1991		5/17/93
P-38 Id.	Appointment book of Mary Baldwin for July 1991 through August 1992		5/17/93
P-39 (a)	Copy of letter to Maggie Carrillo from Lucille V. Walsh, dated August 26, 1991	5/18/93	5/18/93
(b)	Copy of draft of substance awareness policy and procedures, undated	5/18/93	5/18/93
P-40	Copy of job description for supervisor of practical arts, undated	5/18/93	5/18/93
P-41	Copy of letter to Gail Huntington from Dr. Laval S. Wilson, dated November 6, 1991	5/18/93	5/18/93
P-42	Copy of letter to Gail Huntington from Dr. Clarence C. Hoover, dated February 3, 1992	5/18/93	5/18/93
P-43	Copy of letter to Gail Huntington from Dr. Clarence C. Hoover, dated February 3, 1992	5/18/93	5/18/93
P-44	Copy of letter to Jack McGee from Gail Huntington, dated February 3, 1992	5/18/93	5/18/93
P-45	Copy of letter to Jack McGee from Gail Huntington, dated February 5, 1992	5/18/93	5/18/93

No.	Description	In Evidence	Marked for Identification
P-46	Copy of letter to Gail Huntington from Dr. Laval S. Wilson, dated February 6, 1992	5/18/93	5/18/93
P-47	Copy of letter to Gail Huntington from Dr. John A. Nolan, dated February 14, 1992	5/18/93	5/18/93
P-48	Copy of letter to Gail Huntington from Dr. John A. Nolan, dated April 2, 1992	5/18/93	5/18/93
P-49	Copy of Paterson Public Schools action form, dated May 6, 1992	5/18/93	5/18/93
P-50	Copy of summative evaluation of Gail Huntington, dated February 3, 1993	5/18/93	5/18/93
P-51 Id.	Copy of affidavit of Gail Huntington, dated March 26, 1993		5/18/93
P-52 (a)	Bound booklet entitled Gifted and Talented Program Report and Operational Plan, dated Spring 1991	5/19/93	5/19/93
(b)Id.	Yellow folder captioned Correspondence to Hoover		5/19/93
(c)Id.	Yellow folder captioned Timeline - Mikens - Monitoring Citation		5/19/93
(d)Id.	Yellow folder captioned Evaluation Model		5/19/93
(e)Id.	Yellow folder captioned Samples of Future Evaluation Questionnaires		5/19/93

No.	Description	In Evidence	Marked for Identification
	(f)Id. Yellow folder captioned Parent Orientation		5/19/93
	(g)Id. Yellow folder captioned Planning-Need for Approval at All Times		5/19/93
	(h) Copies of monthly reports by Gail Huntington from September 13, 1991 through January 24, 1992	5/19/93	5/19/93
P-53	Copy of memorandum to Dr. Clarence C. Hoover from Gail Huntington, dated October 9, 1991	5/19/93	5/19/93
P-54	Copies of miscellaneous undated documents prepared by Gail Huntington	5/19/93	5/19/93
P-55	Copy of letter to Jack McGee from Ralph Rudnick, dated February 3, 1992	5/19/93	5/19/93
P-56	Copy of letter to Ralph Rudnick from Dr. John A. Nolan, dated February 14, 1992	5/19/93	5/19/93
P-57	Copy of summative evaluation of Ralph Rudnick, dated February 3, 1992	5/19/93	5/19/93
P-58	Copy of desegregation program for 1991-92	5/27/93	5/19/93
P-59	Manila folder with handwritten notations	5/27/93	5/19/93

No.	Description	In Evidence	Marked for Identification
P-60 (a)	Handwritten notes of Greta Shepherd regarding evaluation of Ralph Rudnick, dated November 21, 1991	5/27/93	5/19/93
(b)	Handwritten notes of Greta Shepherd regarding evaluation of Ralph Rudnick, dated December 4, 1991	5/27/93	5/19/93
(c)	Copy of job description for supervisor of social studies, undated	5/27/93	5/19/93
(d)	Handwritten notes of Greta Shepherd regarding evaluation of Ralph Rudnick, dated December 4	5/27/93	5/19/93
P-61	Post observation conference sheet for Ralph Rudnick, undated	5/27/93	5/19/93
P-62	Draft of summative evaluation of Ralph Rudnick, dated December 20, 1991	5/27/93	5/19/93
P-63	Copy of handwritten notes of Dr. Greta Shepherd regarding Ralph Rudnick, dated December 20, 1991	6/23/93	5/24/93
P-64	Copy of summative evaluation of William Kopcho, dated February 3, 1993	5/24/93	5/24/93
P-65	Copy of letter to Jack McGee from William R. Kopcho, dated February 4, 1992	5/24/93	5/24/93

No.	Description	In Evidence	Marked for Identification
P-66	Copy of letter to William Kopcho from Dr. John A. Nolan, dated February 14, 1992	5/24/93	5/24/93
P-67 Id.	Copy of award by the Public Employees Relations Commission in the matter entitled *Paterson Board of Education and Paterson Administrators Association* (William Kopcho), Dkt. No. AR-91-240, dated May 18, 1992		5/24/93
P-68	Copy of memorandum to Dr. Clarence Hoover from Connie McCabe, dated September 13, 1991	5/27/93	5/24/93
P-69 Id.	Bound volume entitled Multiply Handicapped Curriculum Guide, undated	5/24/92	
P-70 Id.	Copy of report to Reginald T. Brown from William R. Kopcho, dated May 8, 1991, with miscellaneous attachments		5/24/93
P-71	Copy of affirmative action philosophy and plan, undated	5/24/93	5/24/93
P-72	Copy of chart of demographic data of the 59 employees subject to reorganization (showing sex, age, race and date of hire)	5/24/93	5/24/93
P-73	Copy of chart of demographic data on 59 employees subject to reorganization (showing sex, age, race and position)	5/24/93	5/24/93

No.	Description	In Evidence	Marked for Identification
P-74	Copy of chart of demographic data regarding new hires during the period February 7, 1992 thru May 3, 1993	5/24/93	5/24/93
P-75 Id.	Copy of chart of demographic data regarding transfers or promotions of 17 employees		5/24/93
P-76	Copy of memorandum to Dr. John Nolan from Debra Bohannon, dated January 28, 1992	5/24/93	5/24/93
P-77	Copy of excerpt from the Level III Review Report, dated March 15, 1990, pages 98-100	5/24/93	5/24/93
P-78	Copy of letter to Dr. Laval B. Wilson from Melindo A. Persi, stamped December 5, 1991, with attachments	5/24/93	5/24/93
P-79	Copy of Newsletter of the Paterson Public Schools, Volume I, No. 6 (March 1992)	5/25/93	5/25/93
P-80 (a)	Copy of performance criteria for central office administrators	5/25/93	5/25/93
(b)	Copy of the rating scale	5/25/93	5/25/93
(c)	Copy of blank summative evaluation form	5/25/93	5/25/93
(d)	Copy of post observation conference sheet	5/25/93	5/25/93

No.	Description	In Evidence	Marked for Identification
(e)	Copy of performance attributes	5/25/93	5/25/93
(f)	Copy of guidelines for completing the summative evaluation	5/25/93	5/25/93
(g)	Copy of chart entitled evaluation cycle and timeline	5/25/93	5/25/93
(h)	Copy of conferencing guide	5/25/93	5/25/93
(i)	Copy of example summative evaluation	5/25/93	5/25/93
P-81	Copy of summative evaluation of Joseph Kayal, dated February 3, 1993	5/25/93	5/25/93
P-81 (a)	Copy of curriculum supervisor's report by Joseph R Kayal, dated November 15, 1991	5/25/93	5/25/93
P-82	Copy of curriculum supervisor's report by Joseph R. Kayal, dated September 13, 1991	5/25/93	5/25/93
P-83	Copy of curriculum supervisor's report by Joseph R. Kayal, dated September 27, 1991	5/25/93	5/25/93
P-84	Copy of memorandum to all physical education curriculum members from Joseph R. Kayal, dated November 30, 1991	5/25/93	5/25/93
P-85	Copy of summative evaluation of Raymond Leopizzi, dated February 3, 1992	5/27/93	5/27/93

No.	Description	In Evidence	Marked for Identification
P-86 Id.	Contents of the file of Erline Holmes regarding evaluation of Raymond Leopizzi		5/27/93
(a)	Copy of memo to Dr. Clarence C. Hoover fromJoseph Heitzman, dated September 18, 1991	5/27/93	5/27/93
P-87	Excerpt of the minutes of a meeting of the Advisory Board on February 26, 1992, page six	5/27/83	5/27/93
P-88 Id.	Copy of affidavit of Jack McGee, dated March 4, 1993		5/27/93
P-89	Copy of job description of supervisor of special projects, undated	5/27/93	5/27/93
P-90	Excerpt from the five-year plan, undated, pages 57 and 58	5/27/93	5/27/93
P-91	Copy of affidavit of John A. Nolan, dated March 5, 1993		5/28/93
P-92	Copy of summative evaluation no. 1 for supervisor of industrial arts, dated February 3, 1992	5/28/93	5/28/93
P-93	Copy of summative evaluation No. 2 for coordinator of basic skills instruction, dated February 3, 1992	5/28/93	5/28/93

No.	Description	In Evidence	Marked for Identification
P-94	Copy of summative evaluation No. 3 for supervisor of bilingual/ESL, dated February 3, 1992	5/28/93	5/28/93
P-95	Copy of summative evaluation No. 4 for assistant supervisor of bilingual/ESL, dated February 4, 1992	5/28/93	5/28/93
P-96	Copy of summative evaluation No. 5 for coordinator of basic skills instruction, dated February 4, 1992	5/28/93	5/28/93
P-97	Copy of summative evaluation No. 6 for coordinator of special services, dated February 4, 1992	5/28/93	5/28/93
P-98	Copy of summative evaluation No. 7 for coordinator of basic skills instruction, dated February 4, 1992	5/28/93	5/28/93
P-99	Copy of summative evaluation No. 8 for assistant director of special services, dated February 4, 1992	5/28/93	5/28/93
P-100	Copy of summative evaluation No. 9 for coordinator of basic skills instruction, dated February 4, 1992	5/28/93	5/28/93
P-101	Copy of summative evaluation No. 10 for supervisor of mathematics, dated February 4, 1992	5/28/93	5/28/93

No.	Description	In Evidence	Marked for Identification
P-102	Copy of summative evaluation No. 11 for supervisor of science, dated February 4, 1992	5/28/93	5/28/93
P-103	Copy of summative evaluation No. 12 for coordinator of career development, dated February 3, 1992	5/28/93	5/28/93
P-104	Copy of summative evaluation No. 13 for supervisor of language arts, dated February 4, 1992	5/28/93	5/28/93
P-105	Copy of summative evaluation No. 14 for coordinator of testing, dated February 3, 1992	5/28/93	5/28/93
P-106	Copy of summative evaluation No. 15 for director of funded programs, dated February 3, 1992	5/28/93	5/28/93
P-107	Copy of summative evaluation No. 16 for assistant director of funded programs, dated February 3, 1992	5/28/93	5/28/93
P-108	Copy of summative evaluation No. 17 for coordinator of dental clinic, dated February 4, 1992	5/28/93	5/28/93
P-109	Copy of summative evaluation No. 18 for supervisor of music, dated February 3, 1992	5/28/93	5/28/93

No.	Description	In Evidence	Marked for Identification
P-110	Copy of summative evaluation No. 19 for coordinator of eductional media, dated February 4, 1992	5/28/93	5/28/93
P-111	Copy of summative evaluation No.20 for coordinator of special services, dated February 4, 1992	5/28/93	5/28/93
P-112	Copy of summative evaluation No. 21 for coordinator of basic skills instruction, dated February 3, 1992	5/28/93	5/28/93
P-113	Copy of summative evaluation No. 22 for supervisor of nurses, dated February 3, 1992	5/28/93	5/28/93
P-114	Chart entitled analysis of impact of administrative reorganization, dated February 1992	5/28/93	5/28/93
P-115	Copies of newspaper advertisements seeking applications for appointments to vacancies, for the period February 16, 1992 to October 18, 1992	5/28/93	5/28/93
P-116	Copies of posted notices seeking applications or appointments to vacancies	5/28/93	5/28/93

No.	Description	In Evidence	Marked for Identification
P-117	Excerpts from the transcript of the deposition of Laval S. Wilson, Vol. I, dated March 17, 1993 Page 37, lines 13 to 19 Page 56, lines 11 to 23 Page 68, lines 6 to 15 Page 71, lines 11 to 14 Page 82, lines 16 to 25 Page 83, lines 1 to 7 Page 171, lines 8 to 25 Page 172, lines 1 to 24 Page 186, lines 10 to 25 Page 187, lines 1 to 21	5/28/93	5/28/93
P-118	Excerpts from the transcript of the deposition of Laval S. Wilson, Vol. II, dated March 18, 1993 Page 14, lines 11 to 24 Page 18, lines 5 to 25 Page 19, lines 1 to 25 Page 20, lines 1 to 23 Page 22, lines 10 to 25 Page 23, lines 1 to 25 Page 24, lines 1 to 23 Page29, lines 11 to 25 Page 30, lines 1 to 2 Page 37, lines 16 to 25 Page 38, lines 1 to 6 Page 41, lines 8 to 25 Page 42, lines 1 to 2 Page 43, lines 13 to 25 Page 44, lines 1 to 25 Page 45, lines 1 to 10 Page 46, lines 2 to 8 Page 57, lines 13 to 24 Page 58, lines 20 to 25 Page 59, lines 1 to 4 Page 64, lines 15 to 25 Page 65, lines 1 to 2 Page 89, lines 19 to 24 Page 91, lines 16 to 23	5/28/93	5/28/93

No.	Description	In Evidence	Marked for Identification
P-119 Id.	Copy of note by Sandra D. Mickens, dated February 10, 1993		6/22/93
P-120	Handwritten notes of Greta Shepherd regarding evaluation of Mary Baldwin, dated 11/21/91	7/28/93	6/23/93
P-121 Id.	Document entitled Goal of the Social of the Social Studies Program, undated		6/25/93
P-122	Copy of Social Studies agenda, dated February 8, 1991	7/28/93	6/25/93
P-123	Copy of a memorandum to Committee from Ralph Rudnick, undated	7/28/93	6/25/93
P-124	Copy of minutes for social studies committeemeeting, dated May 30, 1991	7/28/93	6/25/93
P-125	Copy of curriculum supervisor's report by Ralph Rudnick, dated October 11, 1991	7/28/93	6/25/93
P-126	Copy of curriculum supervisor's report by Ralph Rudnick, dated October 25, 1991	7/28/93	6/25/93
P-127	Copy of a memorandum to Charles Colliganfrom Ralph Rudnick, dated September 26, 1991	7/28/93	6/25/93
P-128	Copy of curriculum supervisor's report byJoseph R. Kayal, dated November 25, 1991	7/28/93	6/25/93

No.	Description	In Evidence	Marked for Identification
P-129	Copy of curriculum supervisor's report by Joseph R. Kayal, dated September 27,1 991	7/28/93	6/25/93
P-130 Id.	Copy of curriculum supervisor's report by Joseph R. Kayal, dated September 13, 1991		6/25/93
P-131(a)	Copy of memorandum to all physical education curriculum members from Joseph R. Kayal, dated November 13, 1991	7/28/93	6/25/93
(b)	Copy of mission statement of the physical education department, undated	7/28/93	6/25/93
P-132	Excerpt from Paterson Public School District audit report for the year ended June 30, 1992	7/27/93	7/27/93
P-133 Id.	Respondent's answers to petitioner's interrogatories certified by Dr. Clarence Hoover, dated January 18, 1993		7/27/93
P-134 Id.	Copy of curriculum and instruction staff meeting minutes, dated November 27, 1991		7/27/93
P-135	Copy of affidavit of Laval S. Wilson, dated March 5, 1993		7/28/93
P-136 Id.	Transcript of deposition of Laval S. Wilson, Vol. I, dated March 17, 1993		7/28/93

No.	Description	In Evidence	Marked for Identification
P-137 Id.	Transcript of the depositon of Laval S. Wilson, Vol. II, dated March 18, 1993		7/28/93
R-1	Copy of drug/alcohol policies and procedures of the Paterson Board of Education, revised on June 4, 1987	5/17/93	6/22/93
R-2	Copy of substance awareness policy and procedures of the State-Operated School District of Paterson, revised January 18, 1993	6/22/93	5/17/93
R-3	Copy of procedures for dealing with students under the influence of drugs and/or alcohol during school hours, undated	6/22/93	5/17/93
R-4 Id.	Copy of memorandum on the substance awareness department by Eileen F. Shafer, dated April 1, 1993		5/17/93
R-5	Copy of list of substance abuse incidences, September to March 1992	6/22/93	5/17/93
R-6	Copy of job description for substance abuse coordinator, undated	6/22/93	5/17/93
R-7 Id.	Copy of *N.J.A.C.* 6:3-6.1 to -6.6		5/17/93
R-8 Id.	Copy of *N.J.A.C.* 6:29-6.1 to -6.6		5/17/93
R-9 Id.	Copy of job description for department chairperson, revised in 1988		5/17/93

No.	Description	In Evidence	Marked for Identification
R-10	Copy of educational services certificate of Gabriele Duffy endorsed as coordinator of cooperative industrial education, issued December 1979	7/28/93	5/17/93
R-11 Id.	Copy of petition in the matter entitled *Mary A. Baldwin v. State-Operated Sch. Dist. of the City of Paterson*, certified April 27, 1992		5/18/93
R-12 Id.	Copy of affidavit of Mary Baldwin, dated March 24, 1993		5/18/93
R-13	Portfolio of papers submitted by Gail Huntington to Greta Shepherd	7/28/93	5/19/93
R-14	Copy of document entitled A Picture of the Paterson Community's Perceptions Regarding Issues and Concerns About Paterson Public Schools, dated February 19, 1992	6/22/93	5/19/93
R-15	Copy of the title page and table of contents of the Social Studies Curriculum Guide for Grades Nine Through Twelve, revised 1990-91	7/28/93	5/19/93
R-16 Id.	Copy of petition in the matter entitled *Ralph Rudnick v. State-Operated School District of the City of Paterson*, certified on April 24, 1992		5/24/93

No.	Description	In Evidence	Marked for Identification
R-17 (a)Id.	Notebook entitled Social Studies Curriculum Guide for Elementary School, dated 1987		5/24/93
(b)Id.	Notebook entitled Social Studies Curriculum Guide for Secondary School, dated 1988		5/24/93
R-18	Excerpt from the Level III Review Report, dated March 15, 1990, pages 49 -51	7/26/93	5/24/93
R-19	Portion of the Comprehensive Compliance Investigation Report, Vol. I, dated April 1991, page 42	7/26/93	5/24/93
R-20	Proposed curriculum guide for Health I, II, III and IV, dated 1992, with handwritten notations	7/28/93	5/24/93
R-21 Id.	Copy of petition in the matter entitled *William R. Kopcho v. State-Operated School District of the City of Paterson*, certified April 23, 1992		5/25/93
R-22 Id.	Copy of notice of charge of discrimination filed with the Equal Employment Opportunity Commission, dated December 24, 1992		5/25/93
R-23 Id.	Copy of determination by the Equal Employment Opportunity Commission, dated January 29, 1993		5/25/93

No.	Description	In Evidence	Marked for Identification
R-24	Copy of job description for physical education supervisor, undated	7/26/93	5/25/93
R-25 Id.	Copy of budget development form submitted by Joseph R. Kayal covering nonsalary items (Acct. No. 1020) for 1992-93	5/25/93	
R-26 Id.	Copy of budget development form submitted by Joseph R. Kayal covering nonsalary items (Acct. No. 1010) for 1992-93		5/25/93
R-27 Id.	Looseleaf notebook entitled 4th-8th physical education curriculum, dated 1983		5/25/93
R-28	Copy of an agreement between Independent Child Study Teams, Inc. and the Board of Education of the City of Paterson, dated July 1, 1989	7/28/93	5/27/93
R-29	Copy of agreement between Educational In-Roads and the Board of Education of the City of Paterson, dated May 29, 1989	7/28/93	5/27/93
R-30	Organizational charts for the district reorganization, dated February 7, 1992	7/28/93	5/27/93
R-31 Id.	Copy of job description for coordinator-basic skills improvement program, undated		5/27/93

No.	Description	In Evidence	Marked for Identification
R-32	Copy of job description for director of special programs, undated	5/28/93	5/28/93
R-33	Copy of job description for supervisor of funded projects, undated	5/28/93	5/28/93
R-34 Id.	Copy of Exhibit R-5 with breakdown by high schools	6/21/93	
R-35	Resume of Eileen F. Shafer	6/21/93	6/21/93
R-36 (a)	Copy of instructional certificate of Eileen F. Shafer endorsed as teacher of health and physical education, issued October 1981	6/21/93	6/21/193
(b)	Copy of instructional certificate of Eileen Shafer endorsed as teacher of driver education, issued in November 1982	6/21/93	6/21/93
(c)	Copy of administrative certificate of Eileen Shafer endorsed as principal/ supervisor, issued in August 1984	6/21/93	6/21/93
(d)	Copy of certificate of eligibility with advanced standing of Eileen Shafer, issued in October 1992	6/21/93	6/21/93

No.	Description	In Evidence	Marked for Identification
(d)	Copy of provisional educational services certificate of Eileen F. Shafer endorsed as substance awareness coordinator, issued in February 1993	6/21/93	6/21/93
R-37	Copy of job description for coordinator of substance awareness, undated	6/22/93	6/21/93
R-38	Copy of statement of Drug-Free Schools and Communities Act revenues and expenditures, dated June 30, 1992	6/22/93	6/21/93
R-39	Copy of substance abuse code district policy deficiency checklist, dated October 4, 1991	6/22/93	6/21/93
R-40	Document entitled Brief History of PAGE, undated	7/28/93	6/22/93
R-41	Copy of resume of Sandra D. Mickens	6/22/93	6/22/93
R-42 (a)	Copy of instructional certificate of Sandra D. Mickens endorsed as elementary school teacher, issued September 1983	6/22/93	6/22/93
(b)	Copy of administrative certificate of Sandra D. Mickens endorsed as supervisor, issued in November 1990	6/22/93	6/22/93
(c)	Copy of statement of eligibility of Sandra Mickens for employment as a principal, issued on April 5, 1991	6/22/93	6/22/93

No.	Description	In Evidence	Marked for Identification
R-43	Copy of job description for supervisor of gifted and talented program, undated	6/22/93	6/22/93
R-44	Paterson schedule of Greta Shepherd for November and December 1991 and January 1992	7/28/93	6/23/93
R-45	Copy of list of evaluatees assigned to Greta Shephed, undated	6/23/93	6/23/93
R-46	Handwritten notes of Greta Shepherd regarding evaluation of Gail Huntington, dated December 12, December 18 and December 19, 1991	7/28/93	6/23/93
R-47	Handwritten notes of Greta Shepherd regarding evaluation of Joseph Kayal, dated November 21 and December 3, 1991	7/28/93	6/23/93
R-48	Resume of Greta D. Shepherd	6/25/93	6/25/93
R-49	Resume of John Andrew Nolan	6/25/93	6/25/93
R-50	Outline for reorganization/evaluation conferences, undated	6/25/093	6/25/93
R-51	Resume of Erline M. Holmes	6/25/93	6/25/93
R-52	Resume of Clarence C. Hoover, III	7/26/93	7/26/93

No.	Description	In Evidence	Marked for Identification
R-53	Copy of administrative staff roster, dated November 1991	7/28/93	7/26/93
R-54	Copy of grant application submitted by Lucille Walsh, dated December 5, 1991	7/26/93	7/26/93
R-55	Copy of a memorandum to Chief school administrators from Luis J. Salgado, dated September 24, 1991	7/26/93	7/26/93
R-56	Chart of reasons for recommendation not to appoint petitioners	7/28/93	7/26/93
R-57 (a)	Resume of Gabriele A. Storermer-Duffy	7/26/93	7/26/93
(b)	Copy of administrative certificate of Gabriele A. Duffy with endorsement as principal/supervisor, issued July 1984	7/26/93	7/26/93
(c)	Copy of administrative certificate of Gabriele A. Duffy endorsed as supervisor, issued May 1984	7/26/93	7/26/93
(d)	Copy of educational services certificate endorsed as Teacher Coordinator Cooperative Vocational Technical Education Programs: Home Economics, issued October 1987	7/26/93	7/26/93
(e)	Copy of instructional certificate of Gabrielle A. Duffy, endorsed as Teacher of Home Economics and Teacher of Art, issued August 1973	7/26/93	7/26/93

No.	Description	In Evidence	Marked for Identification
R-58	Copy of personal improvement plan of Joseph R. Kayal, dated November 12, 1991	7/26/93	7/26/93
R-59	Resume of William R. Kopcho	7/26/93	7/26/93
R-60	Schedule of reorganization conferences, dated February 3 and 4, 1992	7/28/93	7/26/93
R-61	Copy of document entitled Cabinet Meeting Pending Action, dated January 6, January 13 and January 20, 1992	7/26/93	7/26/93
R-62	Paterson Public School District Audit Report for the year ended June 30, 1992 prepared by Lerch, Vinci & Higgins	7/28/93	7/26/93
R-63 Id.	Copy of employment contraqct between Laval S. Wilson and the State Board of Education and Commissioner of Education, dated August 1991		7/28/93
R-64	Copy of a letter to Dr. John Ellis from Laval S. Wilson, dated Janaury 31, 1992	7/28/93	7/28/93
R-65 Id.	Chart showing demographic characteristics of the Curriculum and Instruction Division		7/28/93
R-66 Id.	Chart showing demographic characteristics of the central office administrative and supervisory staff		7/28/93

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, New Jersey 07102
(201) 648-6054

July 11, 1994

MEMORANDUM TO: File--Walsh v. State-Operated Sch. Dist. of Paterson
OAL Dkt. No. EDU 5278-92
Agency Dkt. No. 163-4/92

FROM: Ken R. Springer, ALJ KS

RE: Correction to Decision Rendered on April 28, 1994

Please be advised that the above-noted decision contained an error. Set forth below is the relevant portion of the decision; the underlined material should be part of the decision and the bracketed material should be omitted.

Pg. 15, 1st paragraph, 2nd sentence: "He had been employed in the district for twenty-four [thirty-four] years having worked as a school psychologist before becoming a supervisor."

njf

OAL DKT. NOS. EDU 5278-92, EDU 5279-92, EDU 5280-92, EDU 5281-92, EDU 5282-92, EDU 5283-92 AND EDU 5284-92 (CONSOLIDATED)

LUCILLE WALSH, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, RESPONDENTS.	:	
GAIL HUNTINGTON, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION
JOSEPH KAYAL, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, RESPONDENTS.	:	

WILLIAM KOPCHO, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, :

RESPONDENTS. :

RALPH RUDNICK, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, :

RESPONDENTS. :

MARY BALDWIN, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, :

RESPONDENTS. :

RAYMOND LEOPIZZI, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND LAVAL S. WILSON, PH.D., STATE DISTRICT SUPERINTENDENT OF PATERSON, :

RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and respondents' reply thereto were timely filed, on May 23, 1994 and June 2, 1994 respectively, in accordance with N.J.A.C. 1:1-18.4. By letter dated June 15, 1994, petitioners sought to advise of their intent to order transcripts of the hearings in this matter. Respondents by letter dated June 20, 1994 objected to such late date intent. Petitioners were notified by the Acting Director of the Bureau of Controversies and Disputes on June 27, 1994 that, because the exception period in this matter had long passed and hearing transcripts were not even ordered until their absence was objected to by their adversary in reply exceptions, no further material would be admitted to the record.

Petitioners' lengthy exceptions, which contain extensive reference to trial testimony, essentially recast and reargue issues which the Commissioner finds were fully and fairly considered and addressed by the Administrative Law Judge in his initial decision and will not be herein reiterated.

Upon a careful and independent review of the record in this matter, which, as previously noted, did not include transcripts of hearings (see In re Morrison, 216 N.J. Super. 143, 157-158 (App.

Div. 1987), the Commissioner concurs with the findings and conclusions of the ALJ that there is no reasonable basis to conclude that the District's actions with respect to petitioners were taken for impermissible discriminatory reasons.

Accordingly, for the reasons well expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the within Petitions of Appeal.

ACTING COMMISSIONER OF EDUCATION
RICHARD A. DI PATRI

JULY 12, 1994

DATE OF MAILING - JULY 13, 1994

194-94

EDU #5278-92, 5279-92, 5280-92, 5281-92, 5282-92,
5283-92, 5284-92 (consolidated)
C # 194-94
SB # 37-94

LUCILLE WALSH, ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY AND LAVAL S. WILSON, PH.D., STATE SUPERINTENDENT OF PATERSON,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, July 12, 1994

For the Petitioners-Appellants, Segreto & Segreto (James V. Segreto, Esq., of Counsel)

For the Respondents-Appellants, Carroll & Weiss (John E. Collins, Esq., of Counsel)

The State Board affirms the Commissioner's decision, substantially for the reasons expressed therein. In so doing, we stress that all transcripts of any proceedings in this matter were included in the record on appeal before the State Board. N.J.A.C. 6:2-1.8(a). Consequently, it was not necessary that we decide appellants' motion to supplement the record with such transcripts in order to consider them. Review of those transcripts has reinforced our conclusion.

April 5, 1995

Date of mailing APR 07 1995

195-94

195-94

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, PASSAIC COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Pursuant to N.J.S.A. 18A:38-13, petitioning Board sought judgment of Commissioner terminating the sending/receiving relationship existing between petitioner Bloomingdale and respondent Butler since 1963 alleging dissatisfaction with present relationship. Bloomingdale asserted that its proposed new relationship with another district would be superior and that there would be an absence of any substantial negative impact. Butler countered that there would be substantial negative educational and financial impact on all affected parties.

Having considered testimony, documentary evidence and arguments of the parties, ALJ concluded termination of the sending-receiving relationship by and between the Boards would visit substantial negative educational and financial impact on the quality of education received by pupils in both communities under criteria of N.J.S.A. 18A:38-13. Petition was dismissed.

Citing Court decisions in Englewood, Commissioner adopted findings and determination in initial decision, noting that notwithstanding a number of positive impacts that would accrue to Bloomingdale if severance of this relationship were to be granted in this matter, severance cannot be granted where a substantial negative impact has been found. The Court has explicitly held that positive impacts cannot be balanced against or serve to outweigh substantial negative impact.

JULY 18, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3626-92

AGENCY DKT. NO. 68-3/92

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, PASSAIC COUNTY, AND BOARD OF EDUCATION OF TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

Respondents.

James S. Rothschild, Jr., Esq., for Board of Education of the Borough of Bloomingdale
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

David W. Carroll, Esq., for Board of Education of the Borough of Butler
(Carroll & Weiss, attorneys)

Anthony P. Sciarrillo, Esq., for Board of Education of the Township of Pequannock

Record Closed: December 16, 1993 Decided: February 28, 1994

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

Since 1963, high school age students of the Borough of Bloomingdale, Passaic County, have been educated in a sending/receiving relationship by the Board of

Education of the Borough of Butler, Passaic County, the agreement having continued since then on settlement by the parties of annual tuition amounts. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on March 17, 1992, the Bloomingdale Board sought judgment of the Commissioner of the Department of Education terminating the sending/receiving relationship and approving in its place a new sending/receiving relationship between Bloomingdale and the Board of Education of the Township of Pequannock, Passaic County. The petition alleged dissatisfaction with the present relationship, asserted the proposed new relationship with Pequannock would be superior, and alleged absence of any substantial negative economic or racial balance impact. Pursuant to *N.J.S.A.* 18A:38-13, the Bloomingdale Board sought judgment of the Commissioner so determining and approving. The Butler Board in answer acknowledged the longstanding sending/receiving relationship but denied there would be no substantial negative financial impact for Butler should termination be approved; it sought judgment of the Commissioner ordering the existing sending/receiving relationship between Butler and Bloomingdale continued and a determination the requested change would result in a substantial negative impact on all affected parties, thus requiring disapproval of the present petition. The Pequannock Board of Education in its answer sought dismissal of the petition as to it, claiming the petition failed to state a claim upon which relief could be granted against it. The matter was transmitted to the Office of Administrative Law on May 15, 1992 for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

The matter came on for prehearing conference in the Office of Administrative Law and an order was entered on November 6, 1992. At issue, it was established, is whether in accordance with *N.J.S.A.* 18A:38-13 petitioner shall have established by a preponderance of the credible evidence that termination of the existing Bloomingdale/Butler sending/receiving relationship and establishment of new sending/receiving relationship between Butler and Pequannock would have no substantial negative impact on the parties and whether, if so, the relief sought should be granted.

Seven hearing days were conducted, April 19, 20, 21, 22, 26, 27 and 28, 1993. Following post-hearing submissions, the record closed December 16, 1993.

EVIDENCE AT HEARING WITH PRELIMINARY FINDINGS OF FACT IN BACKGROUND

I

Some preliminary facts were not in dispute. I shall ADOPT those proposed by Bloomingdale in a post-hearing brief (at 2-8).

Butler and Bloomingdale are K-12 school districts. For over 90 years Bloomingdale has sent its high school age students (grades 9 through 12) to Butler High School (BHS) under a sending/receiving relationship. 4/26T13.[1] Actual fall enrollment at BHS for the 1992-93 school year was 537 students, of whom 297 were from Butler and 240 were from Bloomingdale. P-3, p. 14 and RB-1, p. 59.[2]

Butler and Bloomingdale are contiguous communities straddling the Morris-Passaic County line. The Borough of Butler is approximately two square miles and is a fully developed, primarily blue and white collar community. While the Borough of Bloomingdale is larger in area, the northern half of Bloomingdale is a state forest preserve. The population is heavily concentrated in the southern portion directly adjacent to Butler. See RB-11, map and 4/26T18.

The two communities are alike in terms of most socio-economic measurements. Average gross income per household is $43,709 in Bloomingdale and $43,296 in Butler. Per capita income is $14,110 in Bloomingdale, $14,132 in Butler. Similarly, the tax bases as measured by property value per pupil in each of the two

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[1] 4/26T13 refers to the transcript of April 26, page 13. All other citations to transcripts follow this same format.

[2] P-1, etc. refers to Bloomingdale's exhibits. RB-1, etc. refers to respondent Butler's exhibits.

communities are alike ($462,115 in Bloomingdale versus $458,830 in Butler). RB-1 at 9. The following represents the district factor groupings for each district as prepared by the Department of Education:

	1970 Census	1980 Census
Bloomingdale	E	F
Butler	E	G

District factor groupings are based upon a composite set of seven socio-economic indicators taken from census data. All districts in the State are then ranked from lowest to highest and divided into 10 groups for classification purposes. In the ranking, A is low and J is highest. RB-1 at 8.

Butler operates two other schools to serve its K-8 population. Aaron Decker School serves Butler's students in grades K through 4 and also houses the district's preschool handicapped program. Richard Butler School houses Butler's 5th through 8th grade students. 4/26T-73.

Bloomingdale operates three schools on its own--two K-5 schools and a 6-8 middle school, each with enrollments just over 200 students. P-3 at 5.

Pequannock Township, the would-be new receiving district for Bloomingdale, is not adjacent to either of the other two districts but rather is separated from them by the Borough of Riverdale. Pequannock is wealthier in every category (household income, per capita income, property values per pupil and district factor grouping). RB-1 at 8-9.

B. Historical Overview and Current Relationship

While the sending/receiving relationship between Butler and Bloomingdale has existed since the turn of the century, the last written agreement between them covered a period in the 1960's. 4/26T13, 24. In the fall of 1989, Bloomingdale

commissioned Guidelines, Inc., an educational consulting firm headed by Dr. Robert Savitt, to conduct a feasibility study of Bloomingdale withdrawing from Butler and sending its high school students to Pequannock High School. Guidelines' first feasibility report (P-1) concluded that Butler would be substantially impacted both financially and educationally in the event of withdrawal and recommended that Bloomingdale negotiate a contract with Butler to continue the relationship. P-1, at 40, 46 and 48.

Negotiations were conducted in the fall of 1989 and January of 1990 to develop a new written contract with Savitt serving as its negotiator. Savitt testified that a tentative agreement was reached and that he prepared a summary of the terms of agreement, and distributed it to both boards for formal ratification. 4/20T55-56; 4/26T24-25, 28-32; RB-10 in evidence. Included therein was a 5% reduction in tuition to be paid by Bloomingdale. Within a month, however, and before final ratification, Bloomingdale received a substantial tuition reduction offer from Pequannock. The Bloomingdale board declined to ratify the negotiated agreement with Butler and proceeded with steps that have resulted in this litigation to terminate the relationship with Butler.

The first step taken by Bloomingdale was to negotiate and enter into an agreement with Pequannock. It was completed in April 1990. 4/20T56; P-2, Appendix A. Terms of the agreement are similar to what had been negotiated with Butler except that the Pequannock agreement provided for substantial tuition discounts for a seven year period (assuming the relationship began in school year 1994-95). Thereafter, the agreement called for renegotiation and, if no agreement were reached, tuition should be based on the State formula contained in *N.J.A.C.* 6:20-3.1. 4/21T96-102.

Bloomingdale then commissioned Guidelines to prepare a second report which would "revisit the question of feasibility of [Bloomingdale] withdrawing its students from Butler," in "preparation" for a petition to the Commissioner. 4/19T45; 4/20T56-57. Savitt completed his second report in November 1991. P-2 in evidence. The petition was filed in March 1992.

The sending/receiving relationship has continued in the interim. With respect to the issue of how well the current relationship operates, the only witness with

direct knowledge and involvement in the relationship was Dr. Frank Stranzl, who has served as the Butler superintendent since 1981. Stranzl testified that he has had constant communication with the Bloomingdale superintendent over the years. All Butler meeting agendas and notices are sent in advance to the Bloomingdale Superintendent for distribution to his board members. Bloomingdale Board members are invited to Butler Board meetings and have attended regularly for various periods over the past 12 years. They sit with the Butler Board at such meetings, rather than in the general audience. During a recent search for a new high school principal, two members of the Bloomingdale Board sat in on the interviews and voiced their input in the selection and hiring decision. There have also been liaison meetings, as often as monthly, between the two boards over the years. 4/26T19-21.

On the more direct level of school-student and school-parent relationships, Stranzl testified and Savitt agreed that there is no discrimination or differential treatment of Butler and Bloomingdale students. 4/26T22; 4/20T22-23; 4/29T133-134. Class lists, for example, do not identify which students are from which town. A single orientation program is offered for the parents of eights grade pupils from both districts. A visitation is made to both middle schools to orient and prepare the incoming eighth grade students. 4/26T22-23.

Dr. Frank Smith, an outside expert retained by Butler, also found many indicia of a fully integrated and successful high school education program, as well as educationally significant overall community ties between the two towns. RB-1, pp. 22-38.

C. Enrollment Projections Under the Proposed Withdrawal

While there were significant differences in the enrollment projections of each party's experts as contained in reports prepared in advance of the hearing, Dr. Savitt, on the very day he testified, delivered "revised" enrollment projections in an amended P-3 report and conceded that he was now in agreement with Dr. Smith's enrollment projections. 4/20T89-90; 4/19T66-67; compare P-3 at 14 and 16 with RB-1 at 59 and 59b; 4/27T14-35 (Smith). The following table sets forth the respective

final enrollment projections of each expert for Butler, Bloomingdale, and combined Butler and Bloomingdale.

	Butler		Bloomingdale		Total BHS	
District School Year	Smith	Savitt	Smith	Savitt	Smith	Savitt
1992-93	297	297	240	240	537	537
1993-94	299	297	230	230	529	527
1994-95	289	287	237	237	526	524
1995-96	288	288	225	222	513	510
1996-97	287	290	219	219	506	509
1997-98	290	N.A.	222	N.A.	512	N.A.
1998-99	293	"	215	"	508	"
1999-2000	269	"	219	"	488	"
2000-2001	270	"	233	"	503	"
2001-2002	269	"	262	"	531	"

N.A. = Savitt made no projections for these years

The last two columns represent the projected enrollments if Bloomingdale students remain. If Bloomingdale students are withdrawn, Butler High School's enrollment will fall to only 287 students by the time the last Bloomingdale student leaves (1996-97), and will remain in the range of 270 to 290 students for many years, as shown by the first two columns above. See also RB-1 at 59.

Smith also performed projections for Pequannock High School, both with and without Bloomingdale students. See chart at RB-18 at 2. Bloomingdale and Pequannock acknowledged the projections were accurate.

The above projections were in turn used by experts on both sides to determine educational and financial impacts of withdrawal.

D. Impact on Racial Composition

While case law precludes the parties from stipulating to this issue, there is sufficient evidence in the record to support a finding that there will be no substantial negative impact on racial balance in any of the districts if Bloomingdale's withdrawal request is granted. See P-3 at 44.

II

Testimony of Bloomingdale's expert opinion witness on school district organization, Dr. Robert F. Savitt, began bravely with explanation of a seemingly contradictory conclusion about impact in his *Study of the Feasibility of Withdrawing Bloomingdale Pupils from Butler High School*, produced in the fall of 1989 (P-1). He concluded then:

> Conclusions and Recommendations
>
> A. Conclusions
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> 1. Both Pequannock and Butler provide high school programs which are compatible with the varied educational needs of Bloomingdale elementary graduates.
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> 2. There will be substantial educational and financial impact on Butler High School if Bloomingdale pupils are phased out of that school. [Emphasis added.]
>
> 3. There will be no substantial racial balance impact if Bloomingdale pupils are phased out of that school. [P-1 at 48].

In November 1991, two years later, according to Savitt, he again studied and produced a report, *A Study of the Feasibility of Withdrawing Bloomingdale Pupils from Butler High School* (P-2). His conclusions then and testimony were these:

> 1. Both Pequannock and Butler provide high school programs which are compatible with the varied educational needs of Bloomingdale elementary graduates. However, in comparison with Butler, Pequannock would provide Bloomingdale pupils with enhanced educational opportunities because of superior educational facilities, lower pupil/staff and pupil/teacher ratios, and the greater range of courses provided.

2. There will be no substantial negative educational and financial impact on Butler High School if Bloomingdale pupils are phased-out of that school. [Emphasis added.]

3. Any negative impacts on Butler would be greatly outweighed by the many and substantial educational and financial benefits Bloomingdale would receive as the result of reassigning 9-12 pupils to Pequannock, and the educational advantages Butler could receive if reorganized as the result of Bloomingdale leaving.

4. There will be no substantial negative racial impact if Bloomingdale pupils are phased-out of Butler High School. [P-2 at 45].

Savitt explained that what he meant in his 1989 report concerning "a substantial educational and financial impact upon Butler were Bloomingdale students to leave" was that there were attractive or ameliorative financial alternatives. He suggested his ability to quantify and qualify his "negative impact" opinion in 1989 was attributable to lack of cooperation from Butler administrative personnel from whom, he said, he was unable to get such data as exact numbers of Bloomingdale and Butler students in each class, like sophomore English. Lessening of impact, which he said meant alternative uses of school properties and plants, would necessarily involve reorganization in Butler so that K-6 students would be housed in a middle school and 7-12 students would be housed in the high school building, which presently houses only 9-12 students. For Butler, he said, there would be no substantial negative impact if Bloomingdale students were phased out, his assumption being that Butler's Decker School and Butler high school annex would be closed in 1993/94 and sold as commercial establishments, proceeds therefrom being gradually appropriated into future Butler budgets, beginning with 1993/94 school year, to reduce taxes to be raised. Thus, he said, there would be no significant increase in the tax ratable base in Butler over the course of withdrawal. P-2 at 43-44. While Butler would lose a significant amount of tuition revenue as the result of Bloomingdale withdrawing its pupils, there were significant offsetting cost savings to be realized and, thus, no substantial negative financial impact through potential educational benefits Butler would enjoy as a result of its being able fortuitously to reorganize the district. P-2 at 43f.

The witness expanded his studies in a February 1993 update (P-3), and again in February 1993 (P-4), urging that arguments that Butler High School could not survive

educationally or financially if Bloomingdale students left were not defensible and that rather than viewing reduction in enrollment as a problem, Butler should welcome it as an opportunity to assess needs of its own students and restructure its curriculum and school organization in a cost-effective manner along lines of a small high school such as Pt. Pleasant Beach High School [P-4 at 19]. In a final February 1993 update (P-6), he argued Butler's future could be safely approached by exploring feasibility of attracting another district on a send/receive basis or exploring the possibility of sending Butler students to some hospitable receiving district [P-6 at 17].

Savitt said there are four scenarios:

(1) Status quo, Bloomingdale remaining at Butler;
(2) Bloomingdale leaving for Pequannock, Butler going to West Milford;
(3) Bloomingdale leaving for Pequannock, Butler going to Boonton; and
(4) Bloomingdale leaving for Pequannock, Butler keeping a small high school and reorganizing as a small high school.

In descending order of wisdom, he said, scenario four was best, then scenarios two, three and, finally, one--status quo.

Losses to Bloomingdale tax payers should termination be denied and the Pequannock opportunity lost would register some $5,545,648 on a per pupil basis. P-9. This, over a projected five-year period. A one-year projected savings to Butler and Bloomingdale in 1993-94 if Bloomingdale withdraws and Butler operates alone would be expected to amount to $1,225,223 and more should Butler send its students elsewhere. P-10. A projected four-year savings to Butler and Bloomingdale for 1993-97 should Bloomingdale withdraw was projected at $4 million if Butler stayed though reduced in size but more if Butler realigned its students elsewhere. P-11; *see also* P-12, utilizing other projected figures.

A witness for Bloomingdale experienced in school business administration and finance, Vincent Yaniro, prophesied doom should Bloomingdale not prevail in this suit. P-9 is a chart concluding that given Butler tuition increases from 1993-94 through 1996-97, a time when Pequannock tuition because of existing (provisional)

contract would remain constant at $6,000 per annum per pupil, total expected loss in dollars to Bloomingdale would be some $5,500,000. P-9. The witness conceded the exhibit was a simplistic graphic representation that Bloomingdale got a pretty good deal with Pequannock. 4/21T13. He projected in P-10 a graphic illustration that if Bloomingdale withdrew from the receiving arrangement with Butler, there would be in 1993-94, for example, six figure "savings" to Bloomingdale and Butler (if Bloomingdale went to Pequannock and Butler went to Boonton); to both if Bloomingdale went to Pequannock and Butler went to West Milford; and to both if Bloomingdale went to Pequannock but Butler students remained. As to the latter, the conclusion was based on taxes to be raised by Butler if Bloomingdale remained less taxes to be raised by Butler if Bloomingdale leaves, less estimated taxes on an assumed new ownership at Decker School and Butler high school annex. A four-year savings to Butler and Bloomingdale for 1993-97 if Bloomingdale withdraws from the arrangement was represented in P-11 at some $4 million if Butler students stayed, and at more than $10 million if Butler students went to either Boonton or West Milford. The projection without considering sale of Aaron Decker School and Butler high school annex still produced a six figure total savings, in his opinion, as in P-12. His opinion depended on several assumptions, however: that state aid would not increase; that Butler would have additional revenues from surplus of between $325,000 and $250,000 annually over the years; that Butler High School be reorganized into a 7-12 grade reorganization; that Aaron Decker School would be sold commercially for $2 million; that Butler high school annex would be sold for $500,000; that the first year of implementation would be 1993-94 and completion of implementation would first be in 1996-97. 4/21T74-6. Compatible zoning for school buildings to be sold, as well, was assumed. *Id.* at 80. The witness conceded there would be some loss in tangible neighborhood middle school values that were intrinsic but not quantitatively valuable. *Id.* at 78. Ultimately, said the witness, his figures were dependent upon immediate sale of buildings, capital assets. He conceded there would be a substantial negative impact from withdrawal by Bloomingdale on the Butler tax payer should the sale of buildings not eventuate as he assumed they would. The following colloquy ensued:

> THE COURT: Mr. Yaniro, as things have been developing, you know, it occurs to me that in the financial analysis that you have been undertaking, the practicality or the ability of Butler to sell off the high school promptly and at a figure reasonably or closely approximating property appraisal becomes a critical matter and a

linchpin in the entire analysis that you've attempted; is that right?

THE WITNESS: Yes. If I could just -- it's not the high school we're talking about here. We're talking about Decker.

THE COURT: Excuse me.

THE WITNESS: That's elementary.

THE COURT: It's the elementary, right?

THE WITNESS: Yes.

THE COURT: I beg your pardon.

MR. CARROLL: And the high school annex.

THE WITNESS: And the high school annex.

THE COURT: But for all of the number crunch which one may assume for the moment is rational as you've described it, nevertheless, a critical factor that must come to fruition is the successful commercial or otherwise -- or other disposition of those --

THE WITNESS: Yes.

THE COURT: -- physical buildings?

THE WITNESS: Yes.

THE COURT: And that absent such an eventuality obviously might cause you to revise your opinions?

THE WITNESS: Yes, well the assumption is made that the buildings are sold.

THE COURT: Yes. And if the assumption fails, then your opinions likewise --

THE WITNESS: Obviously my figures are much --

THE COURT: -- would be modified --

THE WITNESS: My figures are going to change.

THE COURT: Or might, heaven forbid, even fail.

THE WITNESS: Well, the figures would change. I'm not quite --

THE COURT: Yes.
All right. It's after --

MR. CARROLL: I'm just about done. I mentioned I have one -- one or two more questions.

THE COURT: Oh, I'm sorry. Go ahead.

MR. CARROLL: I'm just following up on Your Honor's question.

BY MR. CARROLL:

Q Even if they sell the buildings, at some point they're selling off their capital assets in order to fund their current expense budget; correct?

A Well, it's being used to offset taxes.

Q Right. And if they sell those buildings and they use those for four or five years, at the end of those four or five years they're still going to need the $550,000 a year that was in that budget, aren't they?

A Well, what I had done is assumed two and a half million dollars in sales proceeds.

Q Okay. Two million from Decker and $500,000 from the annex?

A Correct. And I factored in just a million. And that produced equal average tax rates over that four year --

Q Okay.

A So there's another million and a half to be factored in.

Q Okay. And if they continue to appropriate $500,000 a year roughly thereabout from those proceeds, then they'll be gone three years after this; is that right?

A Correct.

Q And then they're going to have to get that revenue from someplace else and the only place is going to be the local tax levy; correct?

A Yeah. Of course we're talking seven years down the road. A lot of things could happen. Yes.

Q Well, if you were living in Butler, would you be concerned about what was going to happen when those capital assets proceeds were used up?

A Well, I guess it would be -- you would wonder, yes.

Q Okay. And this is also what we've calculated here, even for -- under all of your assumptions, $131. That's the impact in school year 1996/97, right?

A Yes.

Q Now, that is only the first full year of implementation; right?

A Yes.

Q And if we took the calculations out one more year for the status quo your table one -- chart one and with Bloomingdale leaving, chart two -- we get another similar differential the following year; correct?

A Well, it depends on what you factor in from the proceeds there, what you can -- there are a number of factors. I'm not sure exactly what would happen that next year.

Q But you've shown us four years.

A Yes.

Q And in three of those four years Butler is still getting tuition monies from Bloomingdale, right?

A Right.

Q And it's only in that '96/97 that they first get zero from Bloomingdale. From there on out, that row is going to be zero from Bloomingdale, right?

A Correct. [4/21T122-126]

A "limited scope appraisal" of Butler High School Annex and Aaron Decker elementary school (P-14 in evidence) advanced the opinion that as of March 1, 1993 the "preliminary estimate" of market value of Butler high school was $5,100,000, of Butler high school annex was $530,000 and of Aaron Decker elementary school was $2 million. Concededly, testimony and report were limited in scope to give preliminary indication of value based on available market data, according to Michelle Spies, M.A.I., a state-certified real estate appraiser.

II

The first Butler witness was Frank Stranzl, its school superintendent for the past 12 years. He noted Butler is a town some two square miles in area with a large

number of churches, composed of a population both blue collar and white collar in nature. Its housing stock is, perhaps, some 20 to 100 years old. The sending/receiving relationship between Bloomingdale and Butler in its 9-12 configuration is some 90 years old. RB-1; see infra at 2-5.

The witness's analysis of effects of termination on staffing, class size and curricular exigencies were detailed in RB-13, 14 and 15. His conclusions were that there would be significant negative impact on Butler should Bloomingdale withdraw. "Singletons" would likely increase, these being only single class sections available to students. From forced reduction in number of teachers, students would likely suffer because they would intangibly lose wider experience in instruction. A Savitt proposal to make Butler a K-6 district with middle school at the high school for classes 7-12 was not a good idea. In particular, he said, to have classes 7 and 8 in the same school building as classes 9-12 was not academically appropriate, in his view. The superintendent thought any proposed rearrangement that would include sending Butler students to West Milford or Boonton would be not good for educational reasons. The drive connecting the municipalities is impossible in bad weather. Boonton, for one example, is a half-hour drive away. Any termination, he felt, either all at once or over a four-year phase-out would have a devastating community and negative educational effect.

Butler retained services of a school consultant whose expertise was in school and community organizations, Dr. Frank L. Smith, a professor of educational administration at Teachers College of Columbia University since 1967. A former administrator at Ridgewood, Bergen County, high school and chairman of its English department, he served two terms on the Ridgewood Board of Education. Smith's testimony complemented his *Study of the Educational Impact of the Proposed Withdrawal of Bloomingdale Students from Butler High School*, February 10, 1993, which is RB-1. The report defined educational impact in greater depth than undertaken in other similar reports. It adopted a broader definition of educational impact. It was based both upon quantitative data such as enrollment projections and student counts, and qualitative data such as interviews of parents, students and officials. *Id.* at 7. His summary conclusion was this:

> Withdrawal of Bloomingdale students from Butler High School would have a substantial negative impact on the educational community. This negative impact results from destruction of

> social capital that has been generated over time through interaction of citizens in the two towns. Furthermore, withdrawal would so severely impact the formal curriculum of the school as to make continuation of a comprehensive high school highly unlikely if not impossible . . . [*Id.* at 3.]

Creation of a functional community by parents, teachers, civil officials, organizational leaders, clergy and lay church leaders, recreational leaders and others, Smith wrote, represents efforts of a group of adults to generate social capital and to provide meaningful education for their youth. Schools, in this perspective, are part of a social community and are more than formal organizations with sets of classes. Loss of such social capital focused the analysis. *Id.* at 14-15. He defined "substantial negative impact on education" as impact primarily on social networks and social capital generated through interaction of families and schools in Butler and Bloomingdale and secondarily on withdrawal of human capital from the formal program of the schools, that is, its academic program. His research indicated "school learning" was dependent upon social and relational aspects of community life. *Id.* at 17.

Smith's theory was posited on the notion that successful schools were successful functional communities. For Butler and Bloomingdale, as an example, there is an 80-year-old tradition of building community linkages for their youth. Involving youth in another geographic area in order to attend another school does not assure that adults will work to establish strong social networks or that existing networks among families and institutions in another school zone would be expanded to involve a new set of youth. *Id.* at 20-21.

Smith analyzed "educational impact" as involving questions like these: What sense of community exists between Butler and Bloomingdale? What social networks do the communities generate? How will such networks react to change? Do these networks create social capital and for whom? How would withdrawal disrupt the networks and reduce available social capital for use? *Id.* at 22. The study induced but one overall conclusion: Withdrawal will have a substantial negative impact on the educational community, in terms of social capital, program development,

program quality, enrollment stability and the richness of community life. It was based on the following findings [*Id.* at 76-7]:

1. The most negative impact due to withdrawal will be the loss of social capital that has provided the foundation for education in the Butler school community for several generations. This loss results when families disengage from activities involving youth. The caring, supportive community that has been established over time will be reduced by the withdrawal of Bloomingdale families.

2. As a result of withdrawal, Butler will have to redefine its high school. It will not be possible to continue the development of a comprehensive school model. The loss of students will require the discontinuation of several instructional areas currently included in the comprehensive program of studies. A large number of courses will need to be eliminated.

3. The loss of social capital from the Butler school community will be reflected in reduced activity in a variety of educational activities ranging from athletics, to music, to the celebration of educational achievement at graduation.

4. Given withdrawal, the core program of studies must be considerably reduced and teacher academic specialization and instructional competency will be reduced, due to the dispersed allocation of faculty to courses in a small school.

5. Given the fact that leadership and participation in the academic and extracurricular life of the school is shared with equity and a pattern of specialized interests, the withdrawal of human capital, represented by the students and adults of Bloomingdale, will lead to a less rich community life in and through the Butler High School.

6. Following withdrawal, should it take place, the processes of program planning and budgeting in Butler will be more difficult. The enrollment stability provided by the interplay of shifts in the number of students in from the two towns will be missing and this loss will lead to a more unstable pattern of enrollment decline, which in turn will make planning and budgeting more difficult.

7. It is neither feasible nor educationally wise to consider reconfiguring the Butler school system's grade level organization if Bloomingdale withdraws; thus, there is little way to compensate for the loss created by withdrawal.

Generally, Smith concluded, course reorganization would detract from the notion of the comprehensive high school; course reduction necessitated by

Bloomingdale withdrawal would devitalize Butler programmatic curriculum. Middle school relocation at the high school would revert to the old junior high concept of a school not quite a school, a class not quite a class.

Butler witness Vincent Calabrese investigated, reported and testified as expert in the realm of school finance. His report, *Analysis of Fiscal Impact of a Bloomingdale Withdrawal of High School Students*, February 1993, revised April 16, 1993, was RB-21. It visualized three scenarios: scenario I in which Bloomingdale students are withdrawn over a four-year period and Butler budgets its educational programs at the current level of service; scenario II in which Bloomingdale students are withdrawn and Butler budgets at projected cap limits; and scenario III in which Bloomingdale students remain and Butler Board budgets at current levels of service. In all three scenarios, he made certain assumptions: (1) there are certain restrictions on permitted yearly budget growth (CAPS); (2) state aid will remain static over term of the analysis; (3) in projected years high school expenditures will continue at the average percentage during the years 1989-92 in the total K-12 Butler budget; and (4) enrollments are accepted as from a study by Bloomingdale witness Savitt. 4/27T126-7.

Calebrese's conclusion in scenario I where Bloomingdale students remain and Butler budgets at current levels of service was that such budgetary increases would result as would constitute a substantial negative financial impact and would be catastrophic for Butler. Sale of buildings and proceeds used ostensibly to lessen tax impact, being one-time revenue windfalls, are contra-indicated and would be unavailing since even after use of funds from sales of assets expenditures would continue compounded by inflation without availability of cushion. In scenario II, if Bloomingdale students were withdrawn and Butler budgets at projected cap limits, it could not continue to function under capped budget fiscal constraints by reducing expenditures and eliminating programs. In scenario III, based on a premise that Bloomingdale does not withdraw and tuition payments continue to be part of the Butler budget, his conclusion was the scenario guarantees fiscal viability of the Butler school system and effects no significant fiscal impact on Bloomingdale in terms of reasonable tuition increases over the period studied.

Calabrese's conclusion was this:

> Statement of impact
>
> In my opinion the withdrawal of Bloomingdale from its present tuition arrangement with Butler would result in a substantial negative financial, if not a devastating, impact on the fiscal and educational viability of the remaining Butler enrollment.
>
> Fiscal viability and educational viability are inextricably connected. If funding is inadequate there is a direct impact on adequacy of the entire educational process. [RB-21 at 1-7.]

At direction of Butler, its district supervisor of buildings and grounds, who reports to the school business administrator, conducted simulated bus runs from various points on the Bloomingdale border, Morris Lakes area, Kamffe Lake area, and Macopin Road area, to Pequannock High School and return; recorded results of the runs were RB-23. Distances for the three points to Pequannock High School were between eight miles and ten miles, each taking about 30 minutes. The times did not include pick-up or drop-off of students within Bloomingdale. For an average of 250 students, five bus runs would be needed to be established, each taking about 50 students. It was estimated at least an additional 30 to 45 minutes to run the routes within Bloomingdale would be required.

III

Bloomingdale rebuttal evidence included testimony of its acting superintendent, a former business administrator/teacher, who retraced routes as shown in RB-23. Mileages and times from the three areas in question as recorded were challenged with lesser times and fewer miles through use of a trip odometer. Mileage recordings by the witness were between 5.5 and 6.5 miles from the three points; times involved ran between 10 and 12 minutes. The quantity of traffic along a common roadway, Hampton Turnpike or Route 23, was noted. See map, RB-17.

A final rebuttal witness for Bloomingdale was Dr. Roberta Kanarick, author of *High School Characteristics Related to Performance on the Scholastic Aptitude Test, the High School Proficiency Test and Other Educational Outcomes,* 1992, who is presently employed as superintendent of Somerset County Educational Services

Commission. She was offered as an expert in educational administration in New Jersey. In general, she said, her graduate dissertation (P-15) concluded small school size emerged as the most significant predictor among student performance indicators such as SAT, HSPT, attendance and drop-out rate. There was inverse relationship between smaller schools and better performance, higher test scores, better attendance and lower drop-out rates. Results of her research "underscore[d] small school size and strong academic emphasis as important facilitators of academic achievement." P-15 at iv.

IV

Bloomingdale and Butler rested. Pequannock called no witnesses in its behalf, adopting post-hearing arguments as presented by Bloomingdale.

DISCUSSION

That some impact on Butler as a receiving district will follow from termination is a proposition Bloomingdale implicitly recognized. It urged nevertheless that operative language of *N.J.S.A.* 18A:38-13 requires that the Commissioner in making an equitable determination on a petition to terminate a sending/receiving relationship shall other things remaining equal grant the requested change "if no substantial negative impact" be found to result. Bloomingdale's case as a consequence proceeded on the assumption the impact was tolerable. It was devoted to theories of damage control. Butler could, it argued, save money and improve its education if Bloomingdale left. It could choose either of two "excellent" other high schools as receiving districts (West Milford or Boonton) or it "could educate its youngsters in an intelligent, productive manner. If it favors larger high schools, it could do so. If it favors a smaller high school, it could do so." Pm at 58. Its witness, Savitt, suggested Butler close one school, convert the current middle school to a pre-K-6 facility, sell the high school annex and convert the main high school facility that remained to a combined 7-12 school. To Butler these were visionary and unworkable prospects fraught with marketing, zoning, planning and deed restriction problems.

I think the effect of termination must be balanced and judged under a scenario that Butler continue to operate its schools, middle school and high school, under a

present albeit attenuated mode, since the record is bare of any sensible basis for relying on opportunities to send its students outside Butler and become itself a sending district. Evidence suggests the scenario would occasion not only negative impact. There would be implosion of an educational district--an end by slow death to a productive 80-year-old relationship, one not otherwise challenged here as a competently worked and working comprehensive high school. The damage could not be "controlled."

I **FIND** educational impact on Butler from a Bloomingdale exodus would be negative and substantial because of drastic impact on scope and quality of curricular offerings necessitated by reduction of student population virtually in half. The comprehensive range of Butler's current curricular offerings would become distorted and shrunk. Extracurricular programming would suffer. Social capital, in words of Dr. Smith, would wither and be lost. Even assuming commercial sale of Butler district school buildings prefatory to restructuring to K-6 and 7-12 schools, speculation about liquidation of school building properties, which is problematical, is only compounded by resultant curricular and physical plant restructuring. To be sure, transmogrification of Butler High School from a comprehensive high school to a small district high school is a negative educational step. For Butler students to be sent elsewhere in new receiving relationship would entail undesirable transportation problems not now faced. In either instance intangibles of "social capital" spoken of by Smith--social networks and institutions generated through interaction of families and schools in Bloomingdale and Butler--would be lost. The credibility race between experts Savitt and Smith needs clarification. Both are wise and experienced educators. Both deserve respect. The issue is less their credibility than the extent to which their diverging opinions inspire credence in the trier of fact. There is greater comfort to be taken in those of Smith largely because of methodology, plausibility, cogency. For all Smith's concentration on intangibles of social capital, the inconstancy of Savitt's damage assessments between 1991 and 1993 is far more troubling.

CONCLUSION

Based on the foregoing, having considered testimony, documentary evidence and arguments of the parties, I **CONCLUDE** termination of the sending/receiving relationship by and between the boards of education of the Borough of Bloomingdale and the Borough of Butler will visit substantial negative educational

and financial impact on the quality of education received by pupils in both communities, under criteria of *N.J.S.A.* 18A:38-13, and should not therefore be allowed. Judgment in favor of Butler is **GRANTED**; the petition of appeal is **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 28, 1994
Date

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

March 3, 1994
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 09 1994
Date
amr

OFFICE OF ADMINISTRATIVE LAW

LIST OF EXHIBITS

FOR PETITIONER

Exhibit Number	Description
P-1	Study of the Feasibility of Withdrawing Bloomingdale Pupils from Butler High School, Fall 1989
P-2	Feasibility Study, November 1991
P-3	Study of the Feasibility of Withdrawing Bloomingdale Pupils from Butler High School, February 1993
P-3a	Revised Chart 43C of Feasibility Report
P-4	Viability of a Small High School in Butler, New Jersey, February 1993
P-5	Graphic re-comparison of Butler and Pt. Pleasant Beach school districts
P-6	An Alternative: Butler High School Students Attending Another High School in a Sending/Receiving Relationship, February 1993
P-7	(For identification) Page from Smith v. Smith report
P-8	Chart--1996-97 Savings on Phased Withdrawal
P-9	Chart--Butler's Admissions Concerning Bloomingdale's Loss if Butler Prevails
P-10	Chart--1 Year Savings to Butler and Bloomingdale 1993-94 if Bloomingdale Withdraws
P-11	Chart--4 Year Savings to Butler and Bloomingdale 1993-97 if Bloomingdale Withdraws
P-12	Chart--4 Year Savings to Butler and Bloomingdale 1993-97 if Bloomingdale Withdraws (Using Calabrese's figures and Smith's projections where available)
P-13	
P-14	Limited Scope Appraisal of Butler High School, Butler High School Annex, Bartholdi Avenue and Aaron Decker Elementary School, Decker Road, March 1, 1993
P-15	High School Characteristics Related to Performance on the Scholastic Aptitude Test, High School Proficiency Test and Other Educational Outcomes, by Roberta Kanarick, January 1992

FOR RESPONDENT BUTLER

Exhibit Number	Date Ident.	In Evidence	Description
RB-1	4/19/93	4/26/93	Educational Impact Study by Dr. Frank Smith
RB-2	4/20/93	4/26/93	Chart, Cost Savings Due to Withdrawal
RB-3	4/20/93	4/26/93	Excerpts, Savitt testimony OAL Dkt. No. EDU 06299-87, June 13, 1988, pp. 54-60
RB-4	4/20/93	4/26/93	Excerpts, Savitt testimony OAL Dkt. No. EDU 06299-87, June 13, 1988, pp. 151-152
RB-5	4/20/93	4/26/93	Excerpts, Savitt testimony OAL Dkt. No. EDU 06299-87, June 13, 1988, pp. 157, 161-162
RB-6	4/20/93	4/26/93	Excerpts, Savitt testimony OAL Dkt. No. EDU 06299-87, June 13, 1988, pp. 127-129
RB-7	4/21/93	4/26/93	Impact of Withdrawal (Yaniro Cross I)
RB-8	4/20/93	4/26/93	Abstract from 1989 ERIE Research Action Brief
RB-9	4/21/93	4/26/93	Impact of Withdrawal (Yaniro Cross II)
RB-10	4/26/93	4/26/93	1/31/90 memo (with attachment), Savitt to Butler and Bloomingdale Boards and Superintendents, Re: "Sending/Receiving Contract"
R-11	4/26/93	4/26/93	Map, Passaic County, New Jersey
R-12	4/26/93	4/26/93	Butler High School - Proposal "A" (includes "B" and "C" also)
R-13	4/26/93	4/26/93	Summary Sheet (Number of sections under "A," "B" and "C")
R-14	4/26/93	4/26/93	Courses eliminated under proposals "B" and "C"
R-15	4/26/93	4/26/93	Table, Budgetary Savings under Proposals "A," "B" and "C"
RB-16	4/26/93	4/26/93	Letter and excerpts, Butler Zoning Ordinances
RB-17	4/26/93	4/26/93	Indenture (deed and reservation of easement) dated October 4, 1965, Borough of Butler (Grantor) to Butler Bd. of Ed. (Grantee)
RB-18	4/27/93	4/27/93	Pequannock Enrollment Projections
RB-19	4/27/93	4/27/93	Comparison of Curricular Offerings - Pt. Pleasant Beach v. Butler H.S.

Exhibit Number	Date Ident.	In Evidence	Description
RB-20	4/27/93	4/27/93	New Jersey Public School Enrollment by Secondary School, Rank Order, Effective date of data, October 15, 1992
RB-21	4/27/93	4/27/93	Calabrese Financial Report
RB-21a	5/3/93		Revision of RB-21
RB-22	4/27/93	4/27/93	Table of Scenarios/Proposals Analyzing Educational and Financial Impact on Butler School District
RB-23	4/28/93	4/28/93	Bunting to Stranzl memo re simulated bus runs
RB-24	4/27/93	4/28/93	Graph, Comparison of Per Pupil Costs, BHS
RB-24a	5/3/93		Revision of RB-24
RB-25	4/27/93	4/27/93	Graph, Comparison of School Tax Rates
RB-25a	5/3/93		Revision of RB-25
RB-26	4/27/93	4/28/93	Graph, Average Butler Homeowner School Tax
RB-26a	5/3/93		Revision of RB-26
RB-27	4/27/93	4/28/93	Bar Graph, Cost of Withdrawal to Average Homeowner, Borough of Butler School District
RB-27a	5/3/93		Revision of RB-27
RB-28	4/28/93	4/28/93	Graph, Comparison of Per Pupil Costs
RB-28a	5/3/93		Revision of RB-28
RB-29			Affidavit of Vince Calabrese dated May 3, 1993

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, PASSAIC COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision of the Office of Administrative Law have been reviewed. By extension, exceptions of petitioner Board of Education of the Borough of Bloomingdale (Bloomingdale) and replies thereto of respondent Board of Education of the Borough of Butler (Butler) were timely filed in accordance with the applicable provisions of N.J.A.C. 1:1-18.4. The Commissioner determines that the exceptions essentially recast and reiterate arguments presented in post-hearing submissions which were fully and fairly considered by the Administrative Law Judge in the initial decision and, therefore, need not be herein repeated.

Upon a careful and independent review of the record, including all submissions of the parties and transcripts of the seven days of hearings at the Office of Administrative Law, the Commissioner agrees with the findings and conclusions of the ALJ that substantial negative educational and financial impact on the

quality of education received by students would ensue from severance of the Bloomingdale/Butler sending-receiving relationship essentially for those reasons set forth in the initial decision. In so deciding, the Commissioner determines that the ALJ's findings and conclusions are well-grounded in the record and such record, additionally, does not provide any cause to challenge the weight ascribed to evidence or credibility assessments made by him.

Although it is undeniable that a number of positive impacts would accrue to Bloomingdale were severance to be granted in this matter, it is clear that, notwithstanding such impacts, the controlling statute precludes the granting of severance where a substantial negative impact has also been found. (N.J.S.A. 18A:38-13) Indeed, in such situations, the Court has explicitly held that positive impacts cannot be balanced against or serve to outweigh substantial negative impact. As articulated by the Court in Englewood Cliffs v. Englewood, 257 N.J. Super. 413 (App. Div. 1992), aff'd Supreme Court June 9, 1993:

> ***N.J.S.A. 18A:38-13 is not a traditional balancing statute. In assessing an application for severance, the finding of a substantial negative impact on educational quality in one district warrants disapproval of severance, notwithstanding any number of "positive" impacts which severance would bring to the other district.*** (Englewood, at 422)

Accordingly, the Commissioner affirms the initial decision of the Office of Administrative Law and adopts it as the final decision in this matter. Bloomingdale's request for severance of its sending-receiving relationship with Butler is hereby denied.

JULY 18, 1994 ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JULY 19, 1994

195-94

EDU #3636-92
C # 195-94
SB # 36-94

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 18, 1994

For the Petitioner-Appellant, Riker, Danzig, Scherer, Hyland & Perretti (James S. Rothschild, Jr., Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Butler, Carroll & Weiss (David W. Carroll, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Pequannock, Anthony P. Sciarrillo, Esq.

The State Board of Education affirms the Commissioner's determination to deny severance of the sending-receiving relationship between the Board of Education of the Borough of Bloomingdale (Bloomingdale) and the Board of Education of the Borough of Butler (Butler), and we do so substantially for the reasons expressed in the decisions below.

Moreover, our own review of the record has eliminated any question that the fiscal impact and educational consequences to Butler that would inevitably occur were it to lose half of its

MAR. 1, 1995

student body are such as to preclude us from granting severance of this relationship. As expressed by the Administrative Law Judge (ALJ), the

> ...educational impact on Butler from a Bloomingdale exodus would be negative and substantial because of drastic impact on scope and quality of curricular offerings necessitated by reduction of student population virtually in half. The comprehensive range of Butler's current curricular offerings would become distorted and shrunk. Extracurricular programming would suffer. Social capital, in words of Dr. Smith, would wither and be lost. Even assuming commercial sale of Butler district school buildings prefatory to restructuring to K-6 and 7-12 schools, speculation about liquidation of school building properties, which is problematical, is only compounded by resultant curricular and physical plant restructuring. To be sure, transmogrification of Butler High School from a comprehensive high school to a small high school is a negative educational step. For Butler students to be sent <u>elsewhere</u> in new receiving relationship would entail undesirable transportation problems not now faced...

Initial Decision, at 21.

We recognize that it may be <u>possible</u> for Butler to drastically alter the structure and content of its educational program so as to continue to educate its students in some way. However, it should not be forced to do so under these circumstances.

Furthermore, even if Butler were to abandon educating its students in the District, the feasibility of educating them in another, as yet unidentified, district is entirely speculative, and there is nothing in the record to show that Butler could in fact sell Butler High School even if it wanted to.

New Jersey law does not permit us to force Butler to take such an extreme and uncertain course in order that Bloomingdale may be able to take advantage of the lower tuition rate being offered by

Pequannock. Further, even this "benefit" is guaranteed only for seven years. At that time, Bloomingdale might well again be in the same position it is today.

Finally, we reject any suggestion that Bloomingdale's current relationship does not provide it with the opportunity to be involved in the educational decisions affecting its students. Moreover, we take note that, as of January 12, 1995, sending districts are entitled to voting representation on a proportionate basis on the boards of their receiving districts. P.L.1995, c. 8. In this instance, such representation should be significant.

March 1, 1995

Date of mailing MAR 0 3 1995

196-94

D.S., ON BEHALF OF HIS MINOR SON, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY,	:	DECISION
RESPONDENT,	:	
AND	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,	:	
INTERVENOR.	:	

SYNOPSIS

Petitioning parent, a Tenafly school employee, sought admittance of his son (R.S.) to Tenafly High School (THS) pursuant to district policy providing for the education of district employees' children. Tenafly contended it was compelled to abide by the terms of an injunction issued by the Commissioner and upheld on appeal in connection with prior litigation that prohibits the admittance of Englewood residents to THS.

ALJ found that since R.S. was a resident of Englewood and did not satisfy the limited exception for students attending eighth grade or high school in Tenafly on April 18, 1988, the injunction precluded him from entering THS. Englewood's motion to dismiss the petition was granted.

Commissioner adopted findings and determination in initial decision as his own.

JULY 19, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.EDU 1396-94
AGENCY DKT. NO. 382-11/93

D.S., on behalf of his minor son,
R.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF TENAFLY,
Respondent,
and
BOARD OF EDUCATION OF THE
CITY OF ENGLEWOOD,
Intervenor.

D.S., *pro se*

Glenn Curving, Esq., for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Agnes I. Rymer, Esq., for intervenor
(Clapp & Eisenberg, attorneys)

Record Closed: May 27, 1994 Decided: June 2,1994

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

Statement of the Case

This is an appeal by a Tenafly school employee seeking admission of his son to Tenafly High School pursuant to local school policy. The issue is whether the injunction by the State Board of Education that prohibits the admittance of Englewood residents to Tenafly High School applies to the facts of this case.

Petitioner contends that his son has been denied process of law. Alternatively, he seeks to carve out an exception to the injunction. For the following reasons, petitioner has not shown any right to relief.

Procedural History

On July 24, 1993, the Tenafly Board of Education ("Tenafly") notified D.S. that his son R.S. would not be allowed to attend Tenafly High School for the 1993-94 school year. Nearly four months later, on November 18, 1993, D.S. filed a verified petition with the Commissioner of Education ("Commissioner").[1] Tenafly filed an answer on January 31, 1994, essentially contending that it was compelled to abide by terms of an injunction issued in connection with prior litigation. Subsequently, on February 14, 1994, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

At the direction of the OAL, Tenafly served notice of the pendency of this matter on the Board of Education of Englewood and the Board of Education of Englewood Cliffs. On May 23, 1994, the Board of Education of Englewood ("Englewood") filed moving papers, including a supporting certification and brief, seeking intervention status and summary disposition dismissing the appeal. The OAL held a hearing on

[1] *N.J.A.C.* 6:24-1.2(c) requires that an appeal be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education. . which is the subject of the requested contested case hearing." Under this rule, it would appear that the appeal is untimely. However, none of the parties raised this defense and the issue will not be addressed.

May 27, 1994. Initially, the OAL granted the application for intervention, but reserved judgment on the summary decision motion. After petitioner presented his proofs, however, the OAL granted the motion for dismissal.

Findings of Fact

In deciding a motion for involuntary dismissal at the end of petitioner's proofs, the judge must accept as true all the evidence which supports the petitioner's position, including all inferences which can reasonably and legitimately be drawn in petitioner's favor.[2] Here, it appears that all of the relevant facts are undisputed. I FIND:

D.S. has been a music teacher in the Tenafly public school district for approximately twenty years. He, his wife and son live in the City of Englewood. From kindergarten to eighth grade, R.S. attended school in Tenafly under a policy which apparently allowed the children of the school employees to attend school in that district free of charge.[3] Currently, R.S., who is fifteen years old, goes to ninth grade at Dwight Morrow High School in Englewood. Next year (1994-95), he will enter tenth grade.

One of petitioner's major complaints is that the family did not learn that R.S. would be unable to attend Tenafly High School until July 1993. Although the matter received widespread publicity and was extensively covered by the media, petitioner and his wife did not realize that the injunction applied to children of Tenafly district employees. Through no fault of the Englewood district for whose benefit the injunction was imposed, neither Tenafly officials nor the negotiating unit informed petitioner that the injunction applies to all residents of Englewood. Moreover, the family was lulled into a false sense of security by the fact that an older son, who was an eighth grade

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[2] See *R.* 4:37-2(b). *Dolson v. Anastasia*, 55 *N.J.* 2 (1969). *Accord, Bell v. Eastern Beef Co.*, 42 *N.J.* 126 (1964).

[3] On the existing record, it is unclear whether this policy was ever incorporated in a collective negotiating agreement or set forth in a policy statement approved by the school board. D.S. acknowledged that he "was not sure if the policy was written down."

student in April 1988, fell into a recognized exception and was allowed to continue at Tenafly High School.

Last September when R.S. started going to Dwight Morrow, he had already learned much of the material taught in his algebra class. His teachers quickly recognized the problem and arranged to provide him with enrichment. By January, the class had progressed to a higher level of math. Indeed R.S. testified that, "it is [his] hardest class now." In any event, the issue will soon be moot. In tenth grade, R.S. will be taking geometry, a subject which he has never had before.

R.S. is an accomplished violinist. While in Tenafly, he participated in the orchestra program for six years. He had hoped to continue with this activity in high school. According to his father, R.S. plays for fun but does not aspire to pursue music as a career. When he came to Dwight Morrow, R.S. signed up for the string ensemble offered at the middle school. But it soon became apparent that R.S. was much more advanced than the other students, most of whom were in lower grades. Thus, R.S. dropped his only music course and substituted a business elective. In the past he took private music lessons. Englewood is receptive to developing an independent study program that would allow R.S. to continue developing his musical talents.

Testimony suggest that R.S. has made a smooth adjustment and is "happy with his teachers at Dwight Morrow." Nevertheless, R.S. feels that he does not "share many common interests" with his classmates. The record further reflects, however, that R.S. grew up in the Englewood community and that he played on a Little League team with other children who are students at Dwight Morrow.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that summary judgment should be granted in favor of Englewood.

As the result of protracted litigation, on July 11, 1988 the Commissioner ordered that Tenafly "cease and desist from admitting to its high school on a tuition or other basis any students who are residents of either Englewood or Englewood Cliffs." *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ.,* 12 *N.J.A.R.* 566, 663 (Comm'r July 11, 1988). Narrow exceptions exist for "resident students from those districts who were enrolled in *and* attending either [Tenafly High School] or eighth grade in the Tenafly School District on the date of the initial decision in this matter, April 18, 1988." Although the reach of the injunction does not extend to grades below the secondary level, "no Englewood or Englewood Cliffs resident student so attending Tenafly in a grade lower than those of its high school shall be allowed to attend [Tenafly High School] when he/she reaches that level of schooling." *Id.* Afterwards, this injunction was upheld by the State Board of Education, 12 *N.J.A.R.* 663, 697 (St. Bd. April 4, 1990), by the Appellate Division, 257 *N.J. Super.* 413 (App. Div. 1992) and by the New Jersey Supreme Court, 132 *N.J.* 327 (1993).

It is undeniable that the injunction applies to the present factual situation. The State Board plainly stated that,

> . . . we have concluded that it is essential that our directives apply uniformly to all high school students from Engelwood and Englewood Cliffs so that our objective in directing the measures herein may be achieved. Accordingly, we have rejected the Intervenor's arguments that, as the ALJ recommended, all students from Englewood and Englewood Cliffs enrolled in the school district of Tenafly at the time of the initial decision, regardless of grade level, should be permitted to attend Tenafly High School. Although we recognize that our decision may require some students in the lower grade levels who are enrolled in the Tenafly district to alter their plans with respect to their high school education, such impact is not significant enough to warrant undermining our decision by exempting all such students from its terms. 12 *N.J.A.R.* at 697.

On at least two occasions, the Department of Education has issued clarifying rulings that enforce the injunction under circumstances similar to our own. In the F.N. case, an Englewood resident employed by the Tenafly school district argued that his child must be allowed to continue his education at Tenafly High School. Rejecting this

approach, the Commissioner declared that the intent of the injunction was not only "for the immediate purpose of halting the flow of Englewood and Englewood Cliffs students to Tenafly High School, but also for the long-term purpose of cleansing this tainted atmosphere." Moreover, the Commissioner agreed with the Englewood Board's position that establishing "a bright line" will curb the potential for applications which might otherwise be filed before the Commissioner on behalf of individual students seeking to be admitted to Tenafly High School. *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ.*, OAL Dkt. No. EDU 1086-86 (Comm'r Sept. 6, 1989), slip op. at 8.

Similarly, on April 4, 1990, the State Board rejected the request by the parents of A.S., a seventh grader from Englewood Cliffs, that the injunction be modified to permit her to remain at Tenafly High School. Instead, the Board noted that, "as a *seventh* grader at the time of the ALJ's initial decision, she had more than a year after the Commissioner's decision to make plans for her high school education." 12 *N.J.A.R.* at 698.

Due process does not require that every individual in the three communities whose rights may potentially be affected by the results now or in the future be joined as parties. Both the Tenafly and the Englewood Cliffs Boards of Education vigorously asserted the same interest which petitioner is now seeking to vindicate. Each of the arguments made by petitioner has already been thoroughly considered in the context of the underlying litigation. In 1985, when the original suit was filed, R.S. was only six years old. It would be totally impractical to expect that Englewood give notice not only to the parents of every student then attending Tenafly High School, but to the parents of every succeeding generation as well. Precisely for this reason, the three communities were adequately represented by their elected officials.

From the case law cited, it is clear that an administrative law judge is not at liberty to create additional exceptions to the injunction prescribed by the State Board. Even if such authority did exist, this would not be an appropriate setting for the exercise of such power. Every fact finder who reviewed the voluminous record in the earlier litigation has held that Dwight Morrow is "a *very* good school." (257 N.J. Super. at

461). Inevitably, school districts must make choices on what course selections to offer. In some areas, the program at Dwight Morrow may be superior. In others, Tenafly High School may have the better program. But R.S. is assured of receiving a good education, regardless of which district he attends. Thus, petitioner is unable to demonstrate that he will suffer substantial harm if relief is not granted.

In conclusion, the State Board drew a clear line for the purpose of avoiding continuing litigation. There is much value in finally putting to rest this hotly contested matter between neighboring communities. Since R.S. is a resident of Englewood and does not satisfy the limited exception for students attending eighth grade or high school in Tenafly on April 18, 1988, the injunction precludes him from entering high school in Tenafly now.

Order

It is **ORDERED** that Englewood's motion to dismiss the petition is granted.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 2, 1994
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/6/94
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 09 1994
DATE

Joyce A. Verdin
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. D.S., father of R.S.

2. C.S., mother of R.S.

3. R.S.

OAL DKT. NO. EDU 1396-94

D.S., ON BEHALF OF HIS MINOR SON, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY,	:	DECISION
RESPONDENT,	:	
AND	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,	:	
INTERVENOR.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the ALJ for the reasons clearly articulated in his initial decision.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

JULY 19, 1994

DATE OF MAILING - JULY 19, 1994

ACTING COMMISSIONER OF EDUCATION

197-94

DENISE SCARANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 19, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT NO.:EDU 8235-92
AGENCY REF. No. 459-9/92

DENISE SCARANO

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF BLOOMFIELD,
ESSEX COUNTY,

Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg & Kaplow, Attorneys)

Nathanya G. Simon, Esq., for respondent,
(Schwartz, Simon, Edelstein, Celso & Kessler, Attorneys)

Record Closed: June 8, 1994 Decided: June 10, 1994

BEFORE: **ARNOLD SAMUELS**, ALJ

On September 25, 1992 the petitioner, Denise Scarano, filed a verified petition with the Commissioner of Education, alleging that, after she had been subject to a reduction in force (RIF), the respondent school district violated her tenure and seniority rights by assigning nontenured and less senior persons to teach courses to which she was entitled.

The respondent filed an answer on October 14, 1992, and on October 22, 1992 the Commissioner of Education transmitted the matter to the Office of Administrative

Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A prehearing conference was held on Mary 23, 1993, and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery, and dealing with other procedural aspects of the forthcoming hearing. It was contemplated that other teaching staff members, whose positions and teaching assignments could be affected by the result in this matter, would want to intervene or participate in order to protect their rights and positions. Therefore, counsel were asked to give letter notice to such persons who were mentioned in the petition plus any others who might be affected by the result of this case.

Motions were subsequently filed by five other teaching staff members who felt that their positions might be affected, and wished to be heard. Oral argument was held on these motions on June 9, 1993. This resulted in the entry of a procedural order dated August 18, 1993, which permitted two persons, Henry P. Petite Jr. (by Louis Bucceri, Esq., Bucceri & Pincus.) and Janis Maziarski, (by Paul L. Kleinbaum, Esq., Zazzali, Zazzali Fagella & Nowak) to intervene, pursuant to *N.J.A.C.* 1:11-16.1 and 16.3(a). Rights to participate, pursuant to *N.J.A.C.* 1:1-16.6, were granted to 3 other persons, Diana Kroop, (by Stephen B. Hunter, Esq., Weinberg & Kaplow), Mary Hannon, (by Nancy Oxfeld, Esq., Balk, Oxfeld, Mandell & Cohen) and Joan A. Leicht (by Lauren McGovern, Esq., Springstead & Maurice). The order also provided for discovery to be exchanged by and between the parties, including intervenors and participants.

Additional conferences were held in the succeeding months, and a final hearing date was scheduled for May 13, 1994. During the interim, 4 of the 5 intervenors and participants withdrew from the action, because petitioner, after reviewing the discovery, advised that she did not intend to assert any claim against their positions. Only Henry P. Petite, Jr. remained as an intervenor. During this period of time, the parties continued to discuss the possibilities for settlement.

Approximately one month before the hearing, counsel for respondent advised that an offer of settlement that had been proposed by the Bloomfield Board of Education had been accepted. A written settlement agreement was then drawn and signed by the petitioner and by the Superintendent of Schools, for respondent. Since the petitioner released the Board from the claims set forth in the petition, and Ms. Scarano resigned from her position on the preferred eligibility list, in exchange for payment of a sum of money, any claim she may have had against the remaining intervenor became moot.

A copy of the settlement agreement, filed in the OAL on June 8, 1994, is attached hereto and made apart hereof.

Based on the foregoing, it is **CONCLUDED** that the dispute has been resolved, and that the parties have voluntarily and knowingly agreed to the settlement, as evidence by the attached documents. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the settlement be approved, and this matter **DISMISSED**, with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 10, 1994
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

6/13/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT, made this 29th day of February, 1994, by and between the parties, Denise Scarano, residing at 825 Riverside Road, Unit 106, Lyndhurst, New Jersey, 07071 (hereafter referred to as "Scarano") and the Bloomfield Board of Education with principal offices located at 155 Broad Street, Bloomfield, New Jersey, 07003 (hereafter referred to as "Board"),

W I T N E S S E T H :

WHEREAS, Scarano, a tenured teaching staff member, was advised of non-reemployment due to a reduction in force by the Board effective for the 1992-93 school year; and

WHEREAS, notice of non-reemployment was provided by the Board to Scarano, and

WHEREAS, a Petition of Appeal was filed by Scarano against the Board alleging that the Reduction in Force and her non-reemployment violated her tenure and seniority rights; and

WHEREAS, both the Board and Scarano desire to enter into this Agreement as full and final settlement of all claims arising between them;

NOW, THEREFORE, in consideration of the mutual promises of the parties contained herein, it is mutually agreed as follows:

1. The Board agrees to pay to Scarano the amount of $4,000.00,* [illegible]

2. Scarano agrees to execute all necessary documents for the judicial matter with Docket No. EDU-8235-92, pending before the Commissioner of Education to be dismissed with prejudice and without costs.

* This lump sum payment represents a compromise of the Petitioner's claims against the Respondent, and not back wages.

3. Scarano, being of full age, does hereby release and forever discharge the Board, its agents, servants and employees from any and all claims, demands, rights, and causes of action of any nature whatsoever, which she now has or may later have arising from or in any way connected with her employment with the Board and the facts and circumstances surrounding her non-reemployment. Scarano does hereby resign from her position on the preferred eligibility list of the Board, such that she has no further employment rights or entitlement with the Board. This release expressly includes any claims for compensatory damages, punitive damages, back or front pay claims, fringe benefits, reinstatement, and includes all attorneys fees, and any other costs and expenses incurred by Scarano.

4. It is specifically acknowledged and understood by all parties hereto that none of the parties is to be regarded as the prevailing party for any purposes. It is understood and agreed that this Settlement is the compromise of a disputed claim and is not and should not be construed as an admission by either party of any liability or the violation of law, statute, ordinance, regulation or legal or moral duty whatsoever, nor be cited as precedent, nor used in any manner by any party in the future in any judicial or administrative proceeding.

5. Scarano expressly acknowledges that she has had opportunity to consult with competent legal counsel concerning the terms and conditions of this settlement, that she knows and understands the contents of this settlement agreement and release,

and that she enters into it of her own free will and without any inducement not contained herein.

6. This Settlement Agreement and Release contains the entire agreement and understanding between the parties and constitutes full and final settlement to all claims. This Release and Settlement Agreement shall be governed by the laws of the State of New Jersey. This Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Scarano. The Board will be obligated to make no other payments or have any further employment relationship with Scarano, except as specifically set forth in this Agreement

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date first above written.

WITNESS:

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD

By: _____
DR. EDWARD GLICKMAN
SUPERINTENDENT OF SCHOOLS

WITNESS:

By: _____
DENISE SCARANO

February 28, 1994
MM:NGS\MISC\SCARANO.AGR

OAL DKT. NO. EDU 8235-92

DENISE SCARANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

ACTING COMMISSIONER OF EDUCATION

JULY 19, 1994

DATE OF MAILING - JULY 19, 1994

198-94

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY, PETITIONER, V. JOSEPHINE GALLICCHIO AND NICHOLAS GALLICCHIO, RESPONDENTS.	COMMISSIONER OF EDUCATION DECISION

JULY 19, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.EDU 9228-93
AGENCY DKT. NO. 171-6/93

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK,
Petitioner,
v.
JOSEPHINE GALLICCHIO and NICHOLAS GALLICCHIO,
Respondents.

Steven S. Glickman, Esq., for petitioner
(Ruderman & Glickman, attorneys)

Pasquale F. Giannetta, Esq., for respondents
(Goodman & Lustgarten, attorneys)

Record Closed: June 13, 1994 Decided: June13, 1994

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

This matter was transmitted to the Office of Administrative Law on September 27,1993, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/13/94
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/13/94
DATE

Roger R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 20 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

al

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK Petitioner, vs. JOSEPHENE GALLICCHIO AND NICHOLAS GALLICCHIO Respondents.	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU9228-93 Agency Dkt. No. 171-6/93 Department of Education STIPULATION OF SETTLEMENT

This matter having been opened before the Commissioner of Education of New Jersey by Ruderman & Glickman, P.C., attorneys for Petitioner, Board of Education of the Borough of Roselle Park, and this matter having been discussed by Petitioner and Respondents, Josephene Gallicchio and Nicholas Gallicchio, through their attorney, Pasquale F. Giannetta, Esq., of the firm of Goodman and Lustgarten, the parties enter into the following Stipulation of Settlement:

1. Respondent, Josephene Gallicchio, agrees to reimburse Petitioner in the amount of Two Thousand Three Hundred Fifty Dollars ($2,350.00), which represents an agreed upon percentage of the tuition due and owing to Petitioner based upon Respondent Nicholas Gallicchio's attendance at Petitioner's schools while failing to reside in Petitioner's school district. Defendant, Josephene Gallicchio, agrees to pay Petitioner the sum of Fifty Dollars ($50.00) by May 30, 1994 and One Hundred Dollars ($100.00) per month commencing June 1, 1994 until the above-referenced tuition reimbursement is paid in full.

2. Respondents agree that if Respondent, Josephene Gallicchio, fails to meet any monthly payment within seven (7) calendar days of the due date, the full tuition reimbursement shall be immediately

RUDERMAN & GLICKMAN
A PROFESSIONAL CORPORATION
58 PARK PLACE
NEWARK, NJ 07102

due and owing, and Petitioner shall have the right to enter judgment against Respondents in New Jersey Superior Court for this amount.

3. Upon execution of this Stipulation of Settlement and upon receipt of the first monthly payment, Petitioner agrees to withdraw its Petition with prejudice.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK

By: Robert J. Zglenicki
Bd Sec.

Dated: June 3, 1994

JOSEPHENE GALLICCHIO
NICHOLAS GALLICCHIO

By: Josephine Gallicchio

Dated: May 23, 1994

RUDERMAN & GLICKMAN
A PROFESSIONAL CORPORATION
56 PARK PLACE
NEWARK, NJ 07102

OAL DKT. NO. EDU 9228-93

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOSEPHINE GALLICCHIO AND NICHOLAS GALLICCHIO, RESPONDENTS.	:	DECISION

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

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

ACTING COMMISSIONER OF EDUCATION

JULY 19, 1994

DATE OF MAILING - JULY 19, 1994

200-94

IN THE MATTER OF THE TENURE HEARING OF DIANA LAWRENCE, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JULY 22, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9847-93
AGENCY DKT. NO. 318-9/93

IN THE MATTER OF THE TENURE HEARING OF DIANA LAWRENCE, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

Arnold M. Mellk, Esq., on behalf of petitioner Diana Lawrence (Murray, Murray & Corrigan, attorneys)

Karen A. Murray, Esq., on behalf of the respondent Board of Education of the City of Camden (Murray, Murray & Corrigan, attorneys)

Record Closed: June 6, 1994 Decided: June 7, 1994

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out tenure charges pursuant to *N.J.S.A.* 18A:6-11 *et seq.* The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13. The parties have now submitted a stipulation of settlement in the matter which is annexed. Having reviewed the terms of the settlement and it appearing that it fully disposes of all issues in controversy and was entered into voluntarily, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are **CONCLUDED**.

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

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

6/7/94
DATE

SOLOMON A. METZGER, ALJ

6/6/94
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 14 1994
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/cae

SETTLEMENT AGREEMENT

The Camden Board of Education and Diane Lawrence agree to settle OAL Docket No. EDU-9847-93S on the following terms:

1. The Board hereby agrees to withdraw the tenure charges filed against Ms. Lawrence upon full execution of this Agreement.

2. Ms. Lawrence agrees to render her written resignation from the Camden Board of Education, effective June 30, 1994. The resignation shall be forwarded to the Board Secretary.

3. Ms. Lawrence shall be placed on a paid leave of absence through June 30, 1994.

4. In return for her resignation and the settlement of this case, the Board shall reimburse Ms. Lawrence for 120 days wages not paid in the fall of 1993. The Board's records shall be modified to reflect a paid Leave of Absence instead of suspension for the 120 days period.

5. Upon acceptance of the Board's withdrawal request by the OAL, all records of the tenure charges shall be expunged from the Board's files on Ms. Lawrence.

6. In response to any request for information or recommendation from a prospective employer, the Board agrees to provide only dates of employment with the Board and her position.

7. Ms. Lawrence agrees not to apply for any employment with the Camden Board of Education subsequent to her resignation.

8. The Parties mutually agree that they will not file, charge, claim, sue or cause or permit to be filed, charged or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) against the other party.

9. The parties recognize that each has been represented by counsel and that each enters this Agreement voluntarily and without coercion. Additionally, Ms. Lawrence understands that the Commissioner of Education, pursuant to N.J.A.C. 6:11-3.6(A)(1) and In re Cardonick, may refer this matter to the State Board of Examiners.

10. This Settlement Agreement and Release is subject to the approval and acceptance of the Commissioner of Education. If the Commissioner of Education rejects said settlement, it becomes null and void and the parties shall be placed in their respective positions *status quo ante*.

FOR THE CAMDEN BD. OF ED.

Karen A. Murray, Esq.

Date: June 3, 1994

FOR DIANE LAWRENCE

Arnold Mellk, Esq.

Date: 6/2/94

Diane Lawrence

Date: 6/2/94

IN THE MATTER OF THE TENURE HEARING OF DIANA LAWRENCE, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

After a careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured as he cannot be satisfied by the present record that the proposed settlement meets the Cardonick standard for settlement of tenure matters. (In re Cardonick, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846)

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification State Board of

Education November 2, 1983, affirmed Superior Court January 30, 1986) The present record contains no such explanation.

The Commissioner notes that his determination in this regard was highly influenced by the serious nature of the charges, i.e., allegations of the infliction of corporal punishment on students. While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the school children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside of tenure matters as expressed in Cardonick, supra.

Further, it is noted that settlement term #6 states:

> In response to any request for information or recommendation from a prospective employer, the Board agrees to provide only dates of employment with the Board and her position.

While the Board is not specifically required to provide publicly the reasons for separation, it must make such information available upon request, pursuant to Executive Order No. 11 (1974), which states, in pertinent part, that the following information be public:

> a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving;
>
> b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released***. (emphasis added)

Moreover, the Commissioner cannot sanction terms in a settlement that would infringe in any way on the right of the Board

to be fully forthcoming in responding to any inquiries that might arise concerning respondent's employment with the Board. See, e.g., John Salsberg v. Board of Education of the Town of Boonton, Morris County, decided by the Commissioner May 11, 1989.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the Office of Administrative Law for further settlement negotiations consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing on the merits.

IT IS SO ORDERED.

Acting COMMISSIONER OF EDUCATION

JULY 22, 1994

DATE OF MAILING - JULY 22, 1994

200-94

315-94R
(200-94)

IN THE MATTER OF THE TENURE	:	
HEARING OF DIANA LAWRENCE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF CAMDEN, CAMDEN COUNTY.	:	
	:	

NOVEMBER 21, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7874-94
AGENCY DKT. NO. 318-9/93
(ON REMAND EDU 9847-93)

IN THE MATTER OF THE TENURE HEARING OF DIANA LAWRENCE, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY

Arnold M. Mellk, Esq., on behalf of petitioner (Wills, O'Neill & Mellk, attorneys)

Karen A. Murray, Esq., on behalf of respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: October 13, 1994 Decided: October 13, 1994

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of tenure charges pursuant to *N.J.S.A.* 18:6-11 *et seq.* The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The parties have now reached a settlement of the matter which is annexed. Having reviewed the terms of the settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are **CONCLUDED**.

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

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

10/13/94
DATE

SOLOMON A. METZGER, ALJ

10/18/94
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 21 1994
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

SETTLEMENT AGREEMENT
BETWEEN THE
CAMDEN BOARD OF EDUCATION
AND
DIANA LAWRENCE
OAL DOCKET NO. EDU-9847-93S

The Camden Board of Education and Diana Lawrence agree to settle OAL Docket No. EDU-9847-93S on the following terms:

1. The Board agrees to withdraw the tenure charges filed against Ms. Lawrence in return for her written resignation from the Camden Board of Education, effective June 30, 1994.

2. The Board agrees to accept Ms. Lawrence's resignation and to withdraw the charges on the basis that it is in the best interest of the students of the District, who will not have to testify in a potentially lengthy and complex hearing involving also administrators and teachers.

3. The Board shall reimburse Ms. Lawrence for 120 days wages not paid in the fall of 1993. Ms. Lawrence has been on payroll for the balance of the 93-94 year, through June 30, 1994.

4. Upon acceptance of this settlement, the Board shall remove any record of the tenure charges from Ms. Lawrence's personnel file.

5. In response to any request for information or recommendation from a prospective employer, the Board will provide the same basic data it provides in response to inquiries from any prospective employer, namely, dates of employment, position/title and reason for separation of employment, i.e.,

resignation. The Board does not provide letters of recommendation for former employees.

6. The parties' respective actions of resignation and withdrawal of the tenure charges shall not constitute any admission by either party of any alleged fact/issue raised by this case.

7. Ms. Lawrence agrees not to apply for any employment with the Camden Board of Education subsequent to her resignation.

8. The parties mutually agree that they will not file, charge, claim, sue or cause or permit to be filed, charged or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) against the other party.

9. The parties recognize that each has been represented by counsel and that each enters this Agreement voluntarily and without coercion. Additionally, Ms. Lawrence understands that the Commissioner of Education, pursuant to N.J.A.C. 6:11-3.6(A)(1) and In re Cardonick, may refer this matter to the State Board of Examiners.

10. This Settlement Agreement and Release is subject to the approval and acceptance of the Commissioner of Education. If the Commissioner of

Education rejects said settlement, it becomes null and void and the parties shall be placed in their respective positions *status quo ante.*

FOR THE CAMDEN BOARD OF EDUCATION

Karen A. Murray, Esq.

Date: Oct 11, 1994

FOR DIANA LAWRENCE

Arnold Mellk, Esq.

Date: 10/7/94

Diana Lawrence

Date: 10/5/94

2C

OAL DKT. NO. EDU 7874-94 (EDU 9847-93 ON REMAND)

IN THE MATTER OF THE TENURE	:	
HEARING OF DIANA LAWRENCE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF CAMDEN, CAMDEN COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846)* The matter is hereby dismissed, subject to compliance with the terms of the settlement.

NOVEMBER 21, 1994

DATE OF MAILING - NOVEMBER 21, 1994

COMMISSIONER OF EDUCATION

* Notwithstanding the Commissioner's acceptance of the within settlement terms, due to the serious nature of the charges in this matter, i.e., allegations of inflicting corporal punishment on students, the Commissioner is referring this matter to the State Board of Examiners for any action it deems appropriate pursuant to N.J.A.C. 6:11-3.6(a).

201-94

JOHN LICHTENBERGER, ON BEHALF OF HIS SON, PETER LICHTENBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NUTLEY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 22, 1994

OAL DKT. NO. EDU 6188-93

JOHN LICHTENBERGER, ON BEHALF OF HIS SON, PETER LICHTENBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NUTLEY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

Acting COMMISSIONER OF EDUCATION

JULY 22, 1994

DATE OF MAILING - JULY 22, 1994

BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Board appealed N.J.S.I.A.A.'s determination denying handicapped student's (S.C.) eligibility for track and field due to wheelchair use. S.C., a wheelchair athlete, sought to participate in N.J.S.I.A.A. sanctioned track events against able-bodied athletes.

Initial decision determined that S.C. was ineligible to compete in running events against able-bodied runners for his high school track team. ALJ found such denial of eligibility to compete did not violate the Rehabilitation Act because the essential nature of wheelchair racing is different from that of running and there is no conceivable reasonable accommodation. Moreover, equal protection had not been violated in that the action challenged was rationally related to the legitimate governmental interests of administering interscholastic athletics and student safety. Further, ALJ found N.J.S.I.A.A.'s action was not arbitrary, capricious or unreasonable. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JULY 28, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4445-93

AGENCY DKT. NO. 67-4/93

BOARD OF EDUCATION OF
CARLSTADT-EAST RUTHERFORD
REGIONAL HIGH SCHOOL
DISTRICT, BERGEN COUNTY,

Petitioner,

v.

NEW JERSEY STATE INTERSCHOLASTIC
ATHLETIC ASSOCIATION,

Respondent.

John L. Molinelli, Esq., for petitioner
(Maycher & Molinelli, attorneys)

Steven P. Goodell, Esq., for respondent
Picco Mack Herbert Kennedy Jaffe & Yoskin, attorneys)

Record Closed: March 29, 1994 Decided: June 21, 1994

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

On or about April 19, 1993, petitioner, Carlstadt-East Rutherford Regional Board of Education, filed a verified petition and order to show cause with the Commissioner of Education, alleging that the determination by the New Jersey State Interscholastic Athletic Association (NJSIAA) not to grant the application of S.C. declaring him eligible

for interscholastic competition in outdoor track in the 800, 1600 and 3200 meters, was arbitrary, capricious, without any foundation in fact and speculative. Petitioner further asserted that the exclusion of S.C. from participation in NJSIAA sanctioned track and field competitions on the basis of his handicap was contrary to and in fact violated the Rehabilitation Act of 1973, 29 *U.S.C.A.* §794 and federal regulations promulgated in accordance therewith. Essentially, petitioner sought a declaration that S.C. is eligible for interscholastic competition in outdoor track in the 800, 1600 and 3200 meter races. Respondent filed an answer on April 21, 1993, alleging that the petition fails to set forth a cause of action for which relief can be granted, that the relief sought in the petition seeks to materially alter the very nature of the track competition sanctioned by the NJSIAA and that the NJSIAA has done everything possible to make a "reasonable accommodation" for the handicap of S.C. and similarly situated student athletes.

On May 12, 1993, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on May 20, 1993, and a telephone prehearing conference scheduled for June 22, 1993. A prehearing conference was held on June 22, 1993 at which time the issue was isolated, and a hearing scheduled for December 20, 27, and 28, 1993 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. The parties filed a stipulation of facts on December 20, 1993, and a hearing was held on December 20, 1993, and January 19, 1994, at the Office of Administrative Law. Witnesses who testified and exhibits marked into evidence at the time of the hearing are listed in the attached appendix. The record closed on March 29, 1994, after the submission of briefs. The time in which to file the initial decision was extended until June 27, 1994, pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8.

ISSUE

The issue in this matter as stated by the parties is: Can a wheelchair athlete participate in NJSIAA sanctioned track events against able-bodied athletes?

STIPULATION OF FACTS

The parties filed a Stipulation of Facts (J-1) which is attached and incorporated herein. The stipulated facts are as follows:

1. Petitioner is a public body politic, organized under law and for the purpose of providing a free and appropriate education for eligible high school aged students residing within the boroughs of Carlstadt and East Rutherford, Bergen County, New Jersey.

2. Respondent NJSIAA is a voluntary, nonprofit association of approximately 430 public and parochial secondary schools in New Jersey. NJSIAA is a "voluntary association" within the meaning of *N.J.S.A.* 18A:11-3, and operates under a constitution, by-laws, rules and regulations which are approved by the Commissioner of Education pursuant to *N.J.S.A.* 18A:11-5. The NJSIAA administers, develops and implements interscholastic athletic competition between its member school districts.

3. Boards of Education which choose to join the NJSIAA are required to adopt the rules and regulations of the NJSIAA pursuant to *N.J.S.A.* 18A:11-3, and the rules and regulations are deemed to be the policy of each member Board of Education. The rules and regulations are enforced first through the internal procedures of the NJSIAA.

4. Petitioner Board of Education is a member of the NJSIAA, and sanctions interscholastic athletic competition through the association.

5. Petitioner has adopted the rules and procedures of the NJSIAA, as a member school district, and has agreed to abide by the associations rules and procedures as a statement of its own Board policy.

6. S.C. is a student at petitioner's high school facility, known as Henry P. Becton Regional High School, East Rutherford, New Jersey. S.C. attended ninth grade during

the 1992-93 school year, and will attend tenth grade at the High School during the 1993-94 school year.

7. S.C. has been diagnosed as having spina bifida, a disease which restricts his ability to walk. S.C. is, for the most part, compelled to ambulate with the aid of a wheelchair.

8. S.C. is a "handicapped person" within the meaning of Section 504 of the Rehabilitation Act of 1973.

9. S.C. would like to compete on the Carlstadt-East Rutherford Regional High School track team. More specifically, he would like to compete, in his wheelchair, against runners in the 800, 1600 and 3200 meter races, as well as certain field events.

10. On or about March 15, 1993, Petitioner Board of Education filed an application for an eligibility determination with the NJSIAA. The application sought a determination that S.C. was eligible to compete in outdoor track and field, limited to the 800,1600 and 3200 meter events. The application requested that the NJSIAA adopt interim rules allowing wheelchair athletes to compete against runners in the 800, 1600 and 3200 meter races (Exhibit A). The application incorporated a certification of Elaine Gomez (Exhibit B). The parties stipulated that the certification constitutes what Ms. Gomez would testify to if called to the stand. There is no stipulation that the substance of the affidavit is factual or truthful.

11. On March 17, 1993, the Eligibility Appeals Committee of the NJSIAA met to consider petitioner's application. The committee considered the application, with attachments, and the certification of Elaine Gomez.

12. On April 1, 1993, the Eligibility Appeals Committee issued a seven page written decision denying petitioner's application, ruling that it would not amend its rules to permit wheelchair athletes to compete in the same race as runners (Exhibit C).

13. On April 1, 1993, petitioner board of education appealed the decision of the NJSIAA Eligibility Appeals Committee to the Commissioner of Education (Exhibit D).

14. On April 1, 1993, the NJSIAA filed an Answer to the Board's Petition with the Commissioner of Education (Exhibit E). After reviewing the pleadings, the Commissioner transferred the matter to the Office of Administrative Law for development of a factual record.

15. On May 29, 1993, the NJSIAA held its first wheelchair track championships. The competition included 100 meter and 400 meter races for boy and girl wheelchair racers. The championships were held at the State Group Track Championships before approximately 5,000 spectators.

TESTIMONY

S.C. is a wheelchair athlete and he testified regarding his desire to participate on his high school track team. He described the out of school track and road races he participates in as a wheelchair athlete. He has competed with able-bodied runners in road races, where the wheelchair athletes start two to five minutes ahead of the able-bodied runners. He has not competed in this manner on a track. He noted that in short distance races, participants stay in single lanes. He produced his racing chair (P-1 for identification) and indicated that he would like to compete against runners in the 800, 1600 and 3200 meter races. Noting the slower start-up times for wheelchair athletes, he testified that wheelchair athletes are not competitive with able-bodied runners at short distances; wheelchair athletes do not reach comparable times with runners until approximately 800 meters. At greater distances, the racing advantage shifts to the wheelchair athlete. Thus, in the 1600 and 3200 meter races he would be competitive and therefore wants to compete for his school. Referring to Elaine Gomez's proposal, S.C. opined that the concept of segregated lanes would be feasible depending on the race.

S.C. stated that there is no high school program in New Jersey for wheelchair athletes. He does not participate in field events because there is no competition among wheelchair athletes and he has no chance of winning against able-bodied athletes. He has participated in the javelin, shot-put and discus outside of school. If there was a wheelchair program, he would participate in it. He opined that there can be no decent wheelchair program because there are simply not enough eligible people; he is the only wheelchair athlete in the high school and in the neighboring towns.

Other than a state meet in May, sponsored by the NJSIAA, he was not told of any other meets. He became aware of the NJSIAA program to which they invited wheelchair athletes two to three weeks before the state meet. The wheelchair participants had only two events, the 100 and 400 meter races, the winner of which could receive points for the team. The events were only open to wheelchair participants and five or six wheelchair athletes competed. The able-bodied athletes had all of the other track and field events. He did not apply because he had a prior engagement, but intends to sign up for the 1994 track event. Noting that the high school has nine track meets and that the county and state events are in addition, he asserted his desire to participate, if not compete with, able-bodied athletes.

On cross-examination, he stated that there is no national record for 1600 meter and 3200 meter races for wheelchair athletes. Wheelchair athletes participate in a 1500 meter race and then in a 5000 meter race, which are not standard high school events. He indicated that the average speed for a wheelchair athlete in a two-mile race is 14 mph.

S.C. stated that the track at Becton is cinder and that he has not raced on a cinder track. Since the wheels of the wheelchair would sink into the cinder, he would not be competitive on this track. The cinder would not harm the chair, but he could not train on it effectively. S.C. explained that in his wheelchair, he sits bent over, with his face two to two and one-half feet from the ground. He agreed that the cinders would be kicked up into his face and indicated that he would get a special screen to protect his face.

On redirect examination, S.C. indicated that most of the schools have a synthetic track and that he could practice elsewhere. He contended that if the cinder track were rolled flatter this would help to some degree. On recross-examination, he admitted that he does not know how many tracks are synthetic in his area and that even if the cinder track were rolled out it would be eaten up by the spikes. On questioning by this judge, S.C. indicated that the track team runs on their home track at least three or four times during the season. If he could avoid competing on a cinder track he would, but if he had to, he could compete on a cinder track. He noted that the difference between a synthetic track (in which it is common to run a wheelchair) and a cinder track is the difference between pushing on a road and pushing in sand.

S.C. has competed throughout the country; he participated in seven or eight meets last year. However, there is no sanctioned integrated competition between wheelchair athletes and foot racers. S.C. explained the concept of "drafting" *i.e.,* the lift the wheelchair racer gets from the wheelchair racing in front of him. He noted that this is an essential tactic in wheelchair racing and makes position important. In road races, wheelchair racers line up with the runners, but start first. He agreed that usually the events are judged separately. He noted that there could be an advantage for wheelchair racers depending on the equipment utilized. He admitted that during a race, the wheelchair could use many lanes of the track, not just the first lane, and agreed that there are special rules for wheelchair races regarding passing.

On the issue of safety, S.C. stated that he has never been in an accident in a wheelchair. He has seen accidents between wheelchairs, (wheelchair racers lose their balance and the chair falls over), not between wheelchairs and runners. An accident could occur if one loses control of the chair, or due to drafting. He recalled an accident at the men's 2000 meter race at the Paralympic games, which involved eight or nine of the twelve competitors. He believed this was because someone tried to draft. If one loses control of the "compensator," the wheelchair could move into another lane or towards the inside of the track. He agreed that the wheelchair could get a flat tire and that spokes sometimes become loose. Usually before every track meet or every other

track meet, the wheelchair is fully checked out by the coach or an official. He agreed that there are coaches and officials who have been specially trained by the National Wheelchair Athletic Association to know what to look for. S.C. wears a helmet because of the danger factor.

Referring to the 3200 meter race, S.C. opined that even if he had to start a lap and one-half ahead of the runners, he would believe that he was competing. He agreed that in some cases the distance would not be equalized until the last straightway. If a runner made up the stagger, that runner would be a lap and a half ahead. Although that would not be perfect competition, it would still amount to competition. S.C., one of the best wheelchair athletes in the area, contended that he is willing to deal with that competition.

S.C. explained that the National Wheelchair Athletic Association (NWAA) has certain classifications for wheelchair participants. One would have to consider how each individual wheelchair athlete could compete. It would not be fair for him to race against an amputee. He opined that the different factors could be adopted from the NWAA standard.

He admitted that he filled out a questionnaire (R-1) that he was interested in participating in the state competition, but was not aware that he was expected in the state competition. He thought the questionnaire referred to participating in high school track in general and when he filled it out he did not know of the state meet. He agreed that he has chances to compete outside of school and that it would be unrealistic for his school to have a wheelchair team since he is the only person in the school in a wheelchair.

Boyd A. Sands, Executive Director of the NJSIAA, testified for respondent. He has been employed in the public schools of New Jersey as an educator for 34 years and during that period of time also served in various capacities with the NJSIAA. He has also been associated with the NJSIAA as an interscholastic athletic official for over

30 years. He served on the executive committee of the National High School Federation.

Sands explained that the NJSIAA is a voluntary organization made up of more than 430 public, parochial and private schools in the State of New Jersey. The association provides its offices to the member schools for the governing of all of the interscholastic sports in the State, including rules and eligibility in state tournament competition. The NJSIAA sponsors over 20 sports. It provides the rulemaking process, the officials and regulations for all the contests. The member schools are not obligated to participate in all of the sports. The superintendent of schools recommends to the board of education, the activities and sports program for the respective school. The board than acts on this recommendation. Approximately 400 schools participate in track and field. New sports are developed through individual leagues and conferences and member schools. If a specific school district wants a certain sport, that district approves the sport, which comes under the auspices of the NJSIAA. The constitution and by laws of the association are adopted each year by individual boards of education as part of their policy.

Individual schools may propose a revision to the rules. This is submitted to an advisory committee which reviews the recommendation and determines whether to recommend it to the executive committee. The executive committee acts on the recommendation, with any revisions it deems appropriate. In addition, a school district could propose a rule, and if it is not accepted by the advisory committee or the executive committee, it can have the membership vote upon it by obtaining the signatures of 20 member schools. That automatically places it on the ballot at the annual meeting. At the annual meeting, all the principals or athletic directors vote on the legislation. Sands indicated that no one from either Becton Regional or the Carlstadt-East Rutherford Board of Education made any proposed rule changes which would allow a wheelchair athlete to participate in track and field events. They have not made any proposed changes to allow wheelchair athletes to participate in separate events. No rule changes have been proposed for any other sports for the disabled.

The NJSIAA is involved with leagues and conferences, to the extent that individual schools desire to enter a specific league, change a league or a nonconference school decides to enter a league. Otherwise, the NJSIAA does not have authority over leagues and conferences and has no authority to dictate to leagues or conferences what sports to recognize or the specific events the leagues and conferences will recognize. The NJSIAA has direct supervisory responsibility for state championships.

The application for eligibility for S.C. was filed by Becton Regional before the eligibility appeals committee. Eligibility questions usually go first to the eligibility committee. An appeal from the committee's determination goes to the eligibility appeals committee. In the instant matter, in order to allow for a speedy decision, the appeal went directly to the eligibility appeals committee. The eligibility appeals committee ruled that S.C. would be ineligible to race against other foot racers. That was a final decision of the NJSIAA.

Sands stated that representatives of the athletic association met with representatives of the wheelchair athletic association to bring wheelchair events into track and field competitions. Steps were taken to develop programs for youngsters involved with wheelchair athletics (R-2) and to develop the championship events that took place at the end of the last school year at the state group championships. (R-1 and R-3). The principal of Becton Regional was advised that the NJSIAA would hold an event at the state championship and that they were under the impression that S.C. was interested in participating in that event.

Sands testified that the NJSIAA is still meeting with the wheelchair association in regard to what the association can do for handicapped youngsters and to determine whether to expand the events in this year's track meet. They conducted a survey in late spring of last year, which indicated that there were only seven or eight students who would be interested in participating in wheelchair athletics. They are going to do another survey to get a better sample. Further, they are surveying other states to determine what they do in regard to creating opportunities for wheelchair athletes.

Sands surveyed the programs for wheelchair athletes in Minnesota and Louisiana (R-4 and R-5).

Sands noted that the medical advisory committee of the NJSIAA does not recommend the commingling of wheelchair athletes with foot runners in races. They have safety concerns. Sands also discussed this issue with Frank Kovaleski, assistant director of the National Federation of State High School Association, liaison to the National Federation, Track and Field Rules Committee. Kovaleski is the rules interpreter for the National Federation on track matters. He is the liaison between the federation rules committee and the State. Kovaleski wrote a letter in regard to his position (R-6). Sands noted that the national track and field rules committee must give approval to any rule changes.

Sands further indicated that there are waivers for disabled or handicapped students relative to eligibility. Waivers are issued when it does not materially alter the competition. Thus, for example, an individual may participate with a prosthesis.

Sands further indicated that if the number of handicapped athletes increased, they would then be in a position to have an enlarged program for member schools. He explained that if the member school does not individually decide to sponsor the activity than the NJSIAA cannot do it. It is an organization that works through its members. He further pointed to problems in regard to transporting handicapped youngsters to the interscholastic athletic events and the fact that track and field officials are not knowledgeable in the rules and regulations for wheelchair athletes. He noted issues in regard to finding coaches, equipment, costs of equipment and insurance. He indicated, however, that the NJSIAA is committed to having another state championship meet for wheelchair athletes and hoped that it would expand by communications to the member schools and through meetings with school people through the state involved with handicapped youngsters.

On cross-examination, Sands admitted that the rules and regulations of the NJSIAA (J-2) are subject to state and federal rules and regulations. To the best of his

knowledge, the instant case was the first that was brought by a member school to the NJSIAA. (No other member school has brought the issue of wheelchair athletes to the attention of the NJSIAA.) He indicated that the NJSIAA sanctions about 90 percent of the athletic events in the schools. He admitted that Minnesota and Louisiana both have a program for wheelchair athletes. He agreed that the NJSIAA program had consisted of one event with four races and the event scheduled for 1994 is also a one-day activity which they hoped to expand. The races are not run with the able-bodied athletes.

Referring to the American Disabilities Act, Sands agreed that it is his job to determine which activity should be sought after and to get additional sanctioning for wheelchair athletes. Furthemore, the NJSIAA was concerned with this issue prior to the instant action. He admitted that the NJSIAA never petitioned the national federation to change the rules and regulations to allow wheelchair athletes to participate in any of the 26 events that they sanction and agreed that legislation could be presented on behalf of the executive committee on its own initiative.

He indicated that there was potential danger with the wheelchair athlete and the runner competing on the track at the same time. The runner could fall, and there could be a collision between an able-bodied runner and the wheelchair. This could occur even if they were in separate lanes because runners could leave their lanes. He stated that he has seen able-bodied runners fall down and cause a pile-up, but admitted that collisions happen both with able-bodied athletes and wheelchair athletes. He opined that there is more opportunity for collisions and accidents to take place on the secondary school level than on the Olympic level.

Noting that coaches are hard to find for regular sports, he was not sure that the average high school coach would be able to inspect a wheelchair or know the aspect of drafting. (He did not believe that able-bodied track participants "draft.") Although he participated in track (he was a "field man"), he never coached it and does not know about drafting. He believed the individual school district would be concerned about the cost of equipment and insurance. While the NJSIAA maintains insurance for state tournaments and competitions, the individual school district maintains insurance for its

respective interscholastic programs. Although, he opined that an add-on is usually an increased cost, he did not specifically know the parameters of Becton's policy.

On redirect-examination, Sands confirmed that there has not been any movement by the membership to include wheelchair sports among the NJSIAA sanctioned sports. However, it has been the policy to include handicapped or disabled students wherever their inclusion would not materially alter the event (e.g. swimming and wrestling). Sands also indicated that he met with the NWAA at the end of January 1993.

Laura Schwanger competed in high school track and field events, softball, tennis, and basketball. She was on the crew team in college and on the volleyball team while in the army. Diagnosed with multiple sclerosis in 1981, she has been in a wheelchair since 1982. She became involved in wheelchair athletics in 1985 and testified to her substantial experience in that area. She was qualified as an expert in wheelchair sports.

She indicated that presently the only time wheelchair athletes and able-bodied runners are on the same surface is in a road race. According to wheelchair sports' rules, the wheelchair must yield to the able-bodied runner. Since it takes a wheelchair longer to get to top end speed, wheelchair athletes start (anywhere from one minute to 10 minutes), before the able-bodied runners. She testified to an accident she had during a road race. A runner (probably doing a six or six and half minute mile) caught up to her and on her way down the hill (she was probably going 22 mph), in order to avoid making contact with the runner, she rolled her wheelchair over; she was hospitalized. Schwanger witnessed collisions during wheelchair races. More particularly, she recalled collisions on the track at the Paralympics in 1992. Eleven chairs were involved in the crash and did not finish the race. She opined that there is probably one collision a year at the national events. There were numerous collisions at the nationals in 1990 at Hofstra, collisions in road races, and in 1986 at the Boston marathon.

Schwanger explained that there is equipment failure at all levels of competition. Spokes could become loose, the spring mechanism could collapse, and tires could blow out causing the chair to veer to the right or left. Further, there could be a chain reaction affecting the entire group. In wheelchair races, men average from 17 to 19 miles an hour and reach 24 to 25 miles an hour at sprints. She noted the concept of drafting and explained the use of the compensator. If a compensator is not set properly, one could run into the inside rail, the infield, or veer out of lane. During a race, it is difficult to change the setting of the compensator.

Schwanger agreed that accidents happen between wheelchair racers as well as between foot racers and that there is drafting among foot racers. Noting that in races over 800 meters, one can merge after the first 100 meter staggered start, she agreed that accidents happen when racers merge in and out of lanes. (In the 100 and 400 meter races one must stay in one's lane the entire race.) Schwanger opined that there is probably an equal number of accidents in elite and nonelite races and did not know whether the reasons for accidents in those races were the same. Elite racers might push or race in a pack which could increase the number of accidents. Schwanger opined, however, that chair malfunction accounts for 40 to 50 percent of the collisions. Most crashes are attributable to malfunctions of some sort, either the racer or the chair.

Schwanger indicated that if the three outside lanes were utilized for the wheelchair racers and the three inside lanes for the foot racers, that would alleviate the safety issues between the wheelchair athletes and the able-bodied runners. However, there would have to be a solid barrier between the two sets of lanes. Moreover, this would not alleviate the safety issues between the chairs. She opined that if one mixes two groups that already have collisions or safety issues, one is exacerbating the situation.

Schwanger described the cinder track as soft, thus causing the wheelchair tires to cut into the track. " It's going to throw cinders behind them and in a drafting situation, you have people directly behind you that you're throwing cinders on." She stated that the wheelchair participant is also throwing cinders into his or her own face and if

involved in a crash, would either be eating the cinders or end up with abrasions, cuts and bruises. Wheelchair racers traditionally compete on hard, solid surface tracks, rubberized track surfaces and macadam. They never compete on cinder tracks. They would be slower and less competitive on a cinder track and would not show their true abilities. The steering would not be as responsive and the chair could slide, causing a safety hazard. After the race, the track would have to be groomed for the able-bodied to run on it or for the next wheelchair race because there would be established grooves in the track. If an able-bodied runner were to run on the track with the grooves, the runner could suffer knee damage or twist an ankle. She recommended that the wheelchair participants wear glasses and noted when helmets are required. (Helmets are required for all juniors, adults participating in races 800 meters and up and in all road races.)

In addition, she noted that the purpose of the racing wheelchair is to make a disabled person a more competitive athlete; it is not designed to be a safety chair. Based on the body positioning in a racing wheelchair (the head is three feet off the ground and downward), the able-bodied runner might not see the wheelchair racer and the wheelchair racer might not see the able-bodied runner. This could cause a major collision. Although an able-bodied runner could jump out of the way, it is very hard for a wheelchair to quickly alter its path.

Schwanger noted that wheelchair racers use similar tactics to those used in bicycle races, where they run in a pack. In wheelchair racing, the racers compete against other persons with similar levels of disabilities. A wheelchair racer has a medical classification or category (made by a medical classifier) based on a medical examination and a functional section of the classification. Thus, a paraplegic would not compete against a quadriplegic.

Schwanger compared the times of wheelchair athletes with those of runners at the same distances. At the 800 meter level, the elite wheelchair racers are still a few seconds slower than the elite runners, while at the 1500 meter distance, the wheelchair racers are a few seconds faster than the able-bodied runners. She did not believe that

just because the times cross somewhere between the 800 and 1500 meter races means that those races could be competitively raced between foot runners and wheelchair racers. Schwanger stated the difference as follows:

> A person running is running with just their body. A wheelchair racer, the operative word there is the adjective, "the wheelchair." I am propelling a machine.

Referring to the Gomez affidavit, Schwanger stated that she checked the official records and that the wheelchair times in the affidavit are incorrect; they have all dropped since the initial statistics were published. Noting that Gomez took the fastest time at each distance, without referring to classification, Schwanger stated that she also did this and the fastest time actually came from paraplegic men. She noted that the 100 meter was :15.19, the 200 meter :27.09, the 400 meter :52.26, the 800 meter 1:47, the 1500 meter 3:18.71, the 5000 meter 11:30.70. The 10,000 meter road race was at 20:24..

Of import, Schwanger indicated that there is no sanctioned competition between wheelchair athletes and able-bodied runners. In fact, there are no track events in which wheelchair athletes and able-bodied runners compete at the same time on the track. Although they could both be in a road race with a waive start, there would still be no competition between wheelchair racers and able-bodied runners. If wheelchair athletes raced against able-bodied runners and there was a staggered start, the race would not be tactically competitive. The necessary jockeying for position would not occur, and the runners could use the wheelchair to help pace them. She noted that a wheelchair has an advantage at distances greater than 1500 meters.

Schwanger, who is a coach, attended the NJSIAA meet in the spring of 1993 which included wheelchair events. She had coached J.H., but she came as an observer of J.H., in the 100 and the 400 meter races in the state championship. The stands were full of spectators; there was only standing room. She indicated that it was an amazing event and opined that she saw history in the making. When asked her

opinion as to whether wheelchair racers should race against foot racers in the same race, she opined that wheelchair athletes should not run against able-bodied runners.

On cross-examination, Schwanger stated that J.H., a high school senior in the Abzagamy school district was coached for the event by her high school track coach. Schwanger went to the state meet as an interested participant. She noted that J.H. trains at the high school track with her track team and competed in dual meets during the season with her school in events for wheelchair racers. She wore the track team's uniform at the competition. J.H. received the same medals at the championships that foot racers received. She noted that there were two races (the 100 and 400 meter) in the state meet. She did not know why there were no other wheelchair races besides the 100 and 400 meters and agreed there were races for the foot racers in all divisions. She indicated that J.H. does not compete in longer races than the 400. She explained that the six wheelchair racers (three men and three women) raced together but the women competed against each other and the men competed against each other. This is frequently done in wheelchair sports to save time and because the numbers are so small. She agreed that it looked better to have them race together. She has seen the three men compete in other than the 100 or 400 meter races. She agreed that the competition offered to the wheelchair racers was not the same as the competition offered to the foot racers.

Significantly, Schwanger believed that high school wheelchair racers should be entitled to wear their school's uniform and to practice with their school's track team. The practice could be at the same time, if the wheelchair is allotted a certain lane. This would benefit the wheelchair athlete who would then be coached by the high school track coach. Schwanger did not see why a wheelchair athlete should not receive a varsity letter but believed the athlete should understand that it might not carry over into later life. Schwanger could not think of any rules or equipment changes that would allow foot racers and wheelchair racers to compete in the same competition. The fact that foot racers and wheelchair racers are on the track at the same time makes it "unacceptable"; it's not the same race.

Schwanger indicated that even if foot racers and wheelchair racers were on the same track, with a divider, competing only against each other, there would still be a major safety factor. The barrier would have to be about three feet high to keep the chair on the outside and there would not be enough lanes. (Wheelchairs use at least three to four lanes.)

Questioned as to Gomez's proposed rules, she indicated in regard to rule No. 4 that wheelchair racers should be able to break but not in only three lanes. They need four or five lanes. She opposed rule No. 1 because it allows foot racers to race with chair racers and opposed rule No. 2 because it gives an advantage to the able-bodied foot runner to be paced by the wheelchair racer and allows them to be on the track at the same time.

On redirect examination, Schwanger opined that the chances of mishaps are greater if there are a group of wheelchair racers and a group of able-bodied runners in a particular area. Questioned as to the Gomez affidavit, Schwanger indicated that it does not say anything about requiring the wheelchair athletes to remain in their lanes the entire race. The races outlined in the affidavit are longer than 800 meters and traditionally not run in lane. On recross examination, she agreed that the rules in Gomez's affidavit were only suggested rules to the NJSIAA. She did not know whether the NJSIAA had adopted rules concerning wheelchair athletics.

Donald E. Danser has been employed by Rancocas Valley Regional High School as a Latin and journalism teacher for 25 years. He is the meet director for the sectional South Jersey cross-country NJSIAA track program and the co-director for both the winter and outdoor spring programs. Involved with the NJSIAA since 1976, he coached track at Rancocas Valley from 1972 until 1982. As the director of the state outdoor track competition, he explained his duties and responsibilities as meet director of the NJSIAA championships.

The state is divided into four geographical regions. In each section there are approximately 80 schools and a site for boys and for girls teams. Each site runs a track

meet. The top six finishers in each event go to the two-day statewide meet held at South Plainfield. The top six winners of all the groups come together for the championship meet the following week. Danser is responsible for one section, the group meet, and the meet of champions. Danser has participated in or organized over 500 meets. He was qualified as an expert in the operation of track and field meets.

Danser was responsible for the state meet in which wheelchair athletes competed. He indicated that approximately 360 schools in the State of New Jersey are involved in track and field. (Approximately 430 schools are members of the NJSIAA.) The sprints are 100, 200 and 400 meter races, while the distance events are 800, 1600 and 3200 meters. There are no 1500 meter or 3000 meter races. He noted that S.C. is not prohibited from participating in any of the throwing events. There are double dual meets (three schools run meets against each other), team meets, county meets and sectionals of the state meet. The state championships are more controlled and have more officials. There are more contestants and thus more races per meet.

The basic order of the meets has been in place for approximately 30 years. Gomez's recommendation to place all of the distance events (800, 1600 and 3200 meter races) at the beginning of the meet would destroy dual meets as they are today and make coaches extremely unhappy. At present all of the distance events are spread over the meet to allow runners to run in one or more events. If all of the distance races were condensed to the beginning of the meet, the runner would only be able to run in one event. There would not be enough participants from the smaller schools to field the events and coaching would be very difficult. Danser noted that in a dual meet, there are usually three events going on simultaneously and in the big meet seven or eight events at once.

Danser indicated that most schools still have cinder tracks. Approximately 40 percent of the tracks in the state are hard lane surfaces, macadam or rubberized. The majority of the all weather surfaces are rubberized textured tracks. About six tracks in the state have eight lanes. Approximately 90 percent have six lanes. At a dual meet the recommendation is to have five carded officials. Usually there are two people to

run the throwing events, two to run the jumping events, and minimally four on the track, one starter and three timers. For the bigger events, there is a need for approximately 40 officials.

Danser explained that a stagger is an advantage given to a runner who must stay in his lane the whole distance, to keep the distance the same as the runner starting in lane 1. At present track and field is set up for a two-turn stagger. The witness explained the manner in which staggering would occur for the 100 meter, 200 meter, 400 meter, and 800 meter races (R-8). In a dual meet there would be approximately 10 runners and in a double dual, approximately 15 runners. In a championship meet, there could be 36 racers on the track at one time. If S.C. were to compete using lanes 4, 5, and 6, this would affect competition among track runners, who would then be confined to the inside three lanes. This would make the start for the larger races next to impossible, if more than six or eight students competed. In double dual meets, there would be a problem for the finisher to pass a "lapped runner"; there would not be room to pass. He could not race 36 runners at once. All of the lanes are needed at the beginning of the race in order to give everybody a fair chance at the poll. During the race itself, lanes are needed to pass. Although runners have an advantage on a cold day if the wind is blocked by a front runner, he opined that one would not get an actual lift from a runner in front of him.

Danser indicated that under the national federation rules, anything that gives a runner an advantage is considered illegal. He noted that fouling occurs and, in addition, common injuries are spike marks and tripping. He has seen runners exhaust themselves and fall.

In regard to the state group championship the prior year, Danser indicated that about 160 schools with approximately 3000 athletes participated in the meet. The crowd was over 8000. Gold, silver and bronze medals were given to the winners. There were two wheelchair events, the 100 and 400 meter events, in which there were five participants, three girls and two boys. There was a list of the prospective entrants. They expected S.C. to be the sixth participant. They relied on the expertise of the

wheelchair association to take care of the officials, the rules, inspecting the chairs and the athletes.

On cross-examination, Danser stated that the NJSIAA decided to include wheelchair races as part of the state championship (May 29, 1993) during the first week of May 1993. Danser learned that there was going to be a wheelchair competition the first week of May when he spoke to Roy Schleicher at the association. He did not ask why there were only two races for wheelchair athletes at the state championship meet. (There are no regularly scheduled track meets for wheelchair racers.)

Danser indicated that the National Federation does not have rules concerning wheelchair athletes (the National Federation rules are incorporated by the New Jersey State Interscholastic Athletic Association), and the NJSIAA has not formally incorporated the wheelchair event as part of its program. Danser indicated that the NJSIAA could not add an event that was not recognized by the National Federation. He stated that the National Federation of Track and Field is a separate federation under the auspices of the National Federation of Athletic Associations. If the NJSIAA decided not to follow the rules of the National Federation, they would no longer be members and the students would not be recognized for their records.

Danser alleged that the wheelchair event would be part of the program for the foreseeable future. He has not been informed about more regularly scheduled events for wheelchair racers in track and field. Questioned as to whether the NJSIAA had added an event not established by the federation, Danser explained that the wheelchair race was an exhibition (a non-scoring event) that can be added at any time without violating the National Federation rules. Wheelchair athletes can compete and receive medals, but their performance does not count towards the team score. The planned for exhibition in the following year similarly would not count towards their schools' scores.

On redirect examination, Danser indicated that the reason for not counting a wheelchair race towards the team score is because the vast majority of the school districts do not have wheelchair athletes. On recross-examination, Danser admitted that

respondent could create a team category for wheelchair athletics if the members desired to do so.

DISCUSSION

Petitioner appeals respondent's determination that a wheelchair athlete, S.C., cannot compete against able-bodied athletes in the running events of high school track meets. Petitioner argues that said denial: violates the Rehabilitation Act of 1973 (29 *U.S.C.A.* § 794) and the federal regulations promulgated thereunder; violates both the federal and the state constitutional equal protection provisions; and is arbitrary, capricious and unreasonable.

I. Rehabilitation Act:

Petitioner relies, in part, upon section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.A.* § 794, in its argument that respondent's action is improper. That statute, 29 *U.S.C.A.* § 794(a) provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Subsection (b)(2)(B) applies this provision directly to local education agencies and school systems. The primary regulation upon which petitioner relies provides, in pertinent part:

> A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
>
> * * *
>
> In providing physical education courses and athletics and similar programs and activities to any of its students, a

> recipient to which this sub-part applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.
>
> [34 *C.F.R.* § 104.37 (a)(1) and (c)(1).]

The parties do not dispute that a wheelchair athlete is an individual with a disability within the meaning of 29 *U.S.C.A.* § 794(a). What is disputed in the instant case is whether or not a wheelchair athlete is "otherwise qualified" to race on a high school track team, whether or not reasonable accommodations can be made to allow such competition, whether or not these athletes have been excluded solely because of their handicap, and whether the Rehabilitation Act can apply in the instant case, since respondent receives no federal financial assistance.

Although federal case law abounds with opinions construing the term "otherwise qualified;" the seminal case is *Southeastern Comm. College v. Davis*, 442 *U.S.* 397, 99 *S. Ct.* 2361, 60 *L.Ed.* 2d 980 (1979). There, the Supreme Court stated that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* 442 *U.S.* at 406, *99 S. Ct.* at __, 60 *L. Ed.* 2d at 988 (emphasis added). What this means is that the Rehabilitation Act protects only people who are qualified in spite of their handicap, not that it protects people who are qualified in all respects except for the handicap. *Ibid. See also Strathie v. Dep't of Transp.,* 716 *F.* 2d 227, 231 (3rd Cir. 1983); *Prewitt v. United States Postal Svc.,* 662 *F.* 2d 292, 307 (5th Cir. 1981); *Sharon v. Larson*, 650 *F. Supp.* 1396, 1401 (E.D. Pa. 1986). In other words, the person must be able to meet the requirements of the program even with the disability.

The courts also consider someone "otherwise qualified" if the individual with the disability would be able to participate with reasonable accommodation. *Davis, supra,* 442 *U.S.* at 405-06, 99 *S. Ct.* at __, 60 *L. Ed.* 2d at 988. *See Strathie, supra,* 716 *F. 2d* at 230 (noting that this was termed "surmountable barrier discrimination" in *Prewitt*). Where the refusal to modify an existing program is unreasonable, the refusal is

discriminatory and illegal under the Rehabilitation Act. *Davis*, *supra,* 442 *U.S.* at 412-13, 99 *S. Ct.* at ___, 60 *L. Ed.* 2d at 992; *Strathie, supra*, 716 *F. 2d* at 230. However,

> A handicapped individual who cannot meet all of a program's requirements is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds.
>
> [*Id.* at 231 (emphasis added).]

See also Davis, supra, 442 *U.S.* at 405, 99 *S. Ct.* at ___, 60 *L. Ed.* 2d at 988; *Nathanson v. Medical College of Penn.,* 926 *F. 2d* 1368, 1384 (3d Cir. 1991). This would, under *Prewitt*, be termed an "insurmountable barrier handicap," of which Section 504, Rehabilitation Act (29 *U.S.C.A.* § 794) and *Davis* do not require redress. *Prewitt, supra,* 662 *F. 2d* at 307. *See also Davis*, *supra,* 442 *U.S.* at 405, 99 *S. Ct.* at ___, 60 *L.Ed.* 2d at 988.

The subject of the instant case, the wheelchair athlete, has an "insurmountable barrier handicap" preventing him from participating in running events on a high school track team. The "essential nature" of racing a wheelchair is different from the "essential nature" of running. They are distinctly different athletic activities. Besides a common sense understanding of the physical activity involved in each endeavor, the difference between the events is evidenced by the disparity in racing times for the events at the same distances. S.C. himself testified, on direct examination, that wheelchair athletes are not competitive with able-bodied runners at short distances. He testified that wheelchair athletes do not reach comparable times with runners until approximately 800 meters He further testified that at greater distances, such as 10 kilometers, the racing advantage shifts to the wheelchair athlete.

Laura G. Schwanger, qualified as an expert in wheelchair sports, testified as to the time and distance it takes wheelchair racers to reach top racing speeds, as opposed to able-bodied runners in the same race. She also compared times of wheelchair athletes with those of runners at the same distances, stating that the fastest

runners' times are better than the fastest wheelchair racers' times at and below 800 meter distances, but that the top wheelchair athletes will be faster than the top runners at distances of 1500 meters and greater.

These time differences are only evidence, though, of a difference that should be obvious. Schwanger stated the difference concisely:

> A person running is running with just their body. A wheelchair racer, the operative word there is the adjective, "The wheelchair." I am propelling a machine.

In fact, this tribunal does not need the assistance of an expert witness to reach the conclusion that running and propelling a wheelchair are essentially different athletic activities. Furthermore, it is difficult to imagine any reasonable accommodation, that will remedy the situation. Nothing suggested in the instant case -- staggered starts or segregated lanes -- changes the "essential nature" of what each athlete is doing. *Strathie, supra,* 716 *F. 2d* at 231 (regarding the "essential nature" of a program). In fact, there is no accommodation of which I can conceive, that will place the athletes on par with each other. The suggested accommodations are less than reasonable and would clearly amount to "a modification of the essential nature of the program," in contravention of *Strathie. Ibid.*

In addition, there have been legitimate safety concerns expressed by respondent. Clearly, safety concerns alone have withstood attack under section 504 of the Rehabilitation Act (29 *U.S.C.A.* § 794) where schools have excluded students with disabilities from participation in activities. *Kampmeier v. Nyquist*, 553 *F. 2d* 296, 299-300 (2d Cir. 1977); *Wolff v. South Colonie Central Sch. Dist.,* 534 *F. Supp.* 758, 761-62 (N.D.N.Y. 1982).

Finally, respondent's contention that it is not subject to the provisions of the Rehabilitation Act because it receives no federal funds, must fail. The NJSIAA is a voluntary association of public and parochial secondary schools in New Jersey, created to administer interscholastic athletic competition between member schools. The vast

majority, if not all, of those member schools receive federal funds. It would circumvent the purpose behind the Rehabilitation Act to allow federal fund recipients to jointly create an entity to administer programs which ordinarily would be subject to section 504, but allow that entity to be immune from the requirements of that provision simply because the entity itself does not receive federal funds.

> Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.
>
> [34 *C.F.R.* § 104.3(f)]

In other words, the NJSIAA is not allowed to do that which its members could not.

Additionally, NJSIAA would be covered under this regulation as the "instrumentality of a state," since the Department of Education approves the constitution, by-laws, rules and regulations of the NJSIAA. Also, the activities of the NJSIAA in administering, regulating and supervising interscholastic athletics have been held to constitute state action. *Christian Bros. Inst. v. New Jersey Interschol. League*, 86 *N.J.* 409, 416-17 (1981).

II. Equal Protection:

The Fourteenth Amendment to the United States Constitution contains the Equal Protection Clause. Article I, paragraph 1 of the New Jersey State Constitution does not, as petitioner contends, embody a "right to participate," but does prohibit exclusion from participation for an improper purpose, or more generally, "seeks to protect against injustice and against the unequal treatment of those who should be treated alike." *Greenberg v. Kimmelman*, 99 *N.J.* 552, 568 (1985). *See also*, *Board of Educ. of Camden v. NJSIAA,* 92 *N.J.A.R.* 2d (Vol. 4) 182, 188 (Dept. of Ed.) ("participation in interscholastic sports is not a constitutional right").

An equal protection claim must be made in opposition to a state action. United States Constitution, Amendment XIV, §1; *Washington Nat. Ins. Co. v. Board of Review of N.J. Unemployment Comp. Comm'n,* 1 *N.J.* 545, 552-53 (1949). The activities of the NJSIAA in administering, regulating and supervising interscholastic athletics constitute state action, thereby fulfilling that requirement. *Christian Bros., supra*, 86 *N.J.* at 416-17.

Petitioner contends that under the federal clause, an "intermediate scrutiny," such as that found in *Craig v. Boren*, 429 *U.S.* 190, 97 *S. Ct.* 451, 50 *L. Ed.* 2d 397 (1976) *reh den.* 429 *U.S.* 1124, 97 *S. Ct.* 1161, 51 *L. Ed.* 2d 574 (1977), must be applied to the actions of the NJSIAA. This is inaccurate. Federal courts have consistently rejected arguments to consider disabled persons as a suspect class and have refused to apply heightened levels of scrutiny in cases including handicaps; equal protection cases involving persons with disabilities are evaluated under the default standard, the rational relationship test. *See Welsh v. City of Tulsa*, 977 *F. 2d* 1415, 1420 (10th Cir. 1992); *California Ass'n of Physically Handicapped, Inc. v. F.C.C., 721 F. 2d* 667, 670 (9th Cir. 1983), *cert. den.*, 469 *U.S.* 832, 105 *S. Ct.* 121, 83 *L. Ed.* 2d 63 (1984); *Pendleton v. Jefferson Local Sch. Dist.,* 754 *F. Supp.* 570, 578 (S.D. Ohio 1990), aff'd in pt., rev'd on other grounds, 958 *F. 2d* 372 (1992); *Baker v. Department of Envir. Conservation of State of N.Y.,* 634 *F. Supp.* 1460, 1467 (N.D.N.Y. 1986); *National Ass'n of Property Owners v. U.S.,* 499 *F. Supp.* 1223, 1243 (D. Minn. 1980), *aff'd* 660 *F. 2d* 1240 (1981), *cert. den.*, 455 *U.S.* 1007, 102 *S. Ct.* 1645, 71 *L. Ed.* 2d 876 (1982); *Gurmankin v. Costanzo*, 411 *F. Supp.* 982, 992 fn. 8 (E.D. Pa. 1976), *aff'd* 556 *F.2d* 184 (1977). Under the rational relationship test, the state action does not violate the Equal Protection Clause if it is "rationally related to the achievement of a legitimate state interest." *Barone v. Dep't of Human Svcs.,* 107 *N.J.* 355, 365 (1987) (citation omitted).

Equal protection is also provided under Article 1, paragraph 1 of the New Jersey Constitution. *Id.* at 367. While the "tiered" method of scrutiny utilized under the U.S. Constitution has been rejected in New Jersey for the state constitution, in favor of a

balancing of interests, "[t]o a large extent, the considerations guiding our equal protection analysis under the New Jersey Constitution are implicit in the three-tier approach applied by the Supreme Court under the Federal Constitution" (citation omitted). *Id.* at 368. While noting that the state and federal analyses are not identical, the court conceded that they "often" lead to the same result. *Ibid.* The *Barone* court, in an equal protection challenge to the denial of Medicaid benefits, applied the rational basis test as determinative of both state and federal claims. *Id.* at 369-77. *See also, Drew Assoc. of N.J., L.P. v. Travisano,* 122 *N.J.* 249, 259 (1991) (state constitutional doctrine substantially the same as federal).

The rational basis test has been worded many ways: "rationally related to a legitimate governmental objective," *Harris v. McRae*, 448 *U.S.* 297, 324, 100 *S. Ct.*, 2671, 65 *L. Ed.* 2d 784, 809 (1980), and "based on reasonable differences in the subject matter," *Egan v. Erie R. Co.,* 29 *N.J.* 243, 253 (1959). This test, grounded in reasonability or rationality, is not very far-reaching.

A court must uphold a statute if it "can conceive of any reason to justify the classification" (citation omitted). *New Jersey State League of Municipalities v. State,* 257 *N.J. Super.* 509, 518 (App. Div. 1992). *See also, Paul Kimball Hosp., Inc. v. Brick Tp. Hosp., Inc.,* 86 *N.J.* 429, 441 (1981) (classification will not be set aside if there is a conceivable legitimate purpose for it). Furthermore, a court may not declare a statute void where the reasonableness of a classification is "fairly debatable." *League of Municipalities, supra,* at 519 (citation omitted).

The New Jersey Supreme Court has stated the test this way:

> The transgression arises only when the classification rests upon grounds wholly irrelevant to achievement of the State's objective; the separate treatment must admit of but one conclusion beyond a rational doubt, *i.e.,* that the basis therefor is arbitrary and unreasonable, and without relevance to the legislative goal.
>
> [*New Jersey Chap., Am. Inst. of Planners v. New Jersey St. Bd. of Prof. Planners,* 48 *N.J.* 581, 601-02 (1967), *appeal dismissed, cert. den.,* 389 *U.S.* 8, , 88 *S. Ct.* 70, 19 *L. Ed.* 2d 8 (1967).]

Any way the test is phrased, this action of the NJSIAA passes muster. Clearly, limiting running events to those who can run is rationally related to presenting and administering these interscholastic sporting events, which is a legitimate governmental interest. This is also "an appropriate governmental interest suitably furthered by the differential treatment" of wheelchair athletes. *Barone, supra,* 107 *N.J.* at 368 (under "State" standard).

Furthermore, the safety issues that have been raised involve legitimate, appropriate governmental interests which are suitably furthered by this rationally related action. For these reasons, the equal protection challenge must fail.

Petitioner has also challenged the action of the NJSIAA as arbitrary, capricious and unreasonable. *Worthington v. Fauver,* 88 *N.J.* 183, 204 (1982). Actions of the NJSIAA are, indeed, subject to that standard. *D.S. v. NJSIAA*, 1987 *S.L.D.* 211, 216 (Comm'r Decision). This standard, however, is subsumed within the forgoing rational relationship/balancing of interests analysis. Certainly if an action is rationally related to a legitimate governmental interest, it is not arbitrary, capricious or unreasonable. *See, e.g., Am. Inst. of Planners, supra,* 48 *N.J.* at 601-02 (defining N.J. equal protection analysis in terms of arbitrariness and unreasonableness).

III. Motion to reopen the record:

The regulation under which respondent has moved to reopen the record provides, in pertinent part: "Motions to reopen the record before an initial decision is filed . . . may be granted only for extraordinary circumstances." *N.J.A.C.* 1:1-18.5(c). Additionally, although in Superior Court reopening a record is left to the sound discretion of the trial judge, the rationale used in those cases is instructive here.

Reopening a record is permitted in Superior Court to avoid a "manifest denial of justice," *O'Neil v. Bilotta*, 18 *N.J. Super.* 82, 90 (App. Div. 1952), *aff'd* 10 *N.J.* 308 (1952) (per curiam), and to legally establish a fact that had been insufficiently proved,

Rinaldi v. Rinaldi, 94 *N.J. Eq.* 14, 22 (Ch. 1922); *Benfrey Dress Co., Inc. v. Irving Gale, Inc.* 13 *N.J. Mis.* 212 (S.Ct. 1935). Denial of a motion to reopen the record has been held improper where the omitted evidence tended to prove that the judge's legal conclusion was erroneous. *Handleman v. Cox*, 74 *N.J. Super.* 316, 332 (App. Div. 1962), *aff'd* 39 *N.J.* 95 (1963).

Other administrative cases have found the inverse to be true also: when the evidence sought to be admitted would have no impact upon the outcome of the case, it is inappropriate to reopen the record to admit such evidence. *See, I/M/O Special Election Held in Tp. of Millburn*, 93 *N.J.A.R.* 2d (Vol. 4A) 273, 279 (Dep't of Ed.) ("No prima facie showing has been made, even today, that the desired testimony would have impact"); *Cherry v. Monmouth Cty. Personnel Dept.*, 92 *N.J.A.R.* 2d (Vol. 2) 438, 439 (Merit System Board), (proffered additional documentation was found unnecessary to render a proper decision in the matter, therefore motion to reopen was denied). This approach comports with the regulation; clearly there are no "extraordinary circumstances" requiring the admission of evidence where that evidence will not affect the outcome of the case.

The profferred evidence does not pertain to the action at issue here. Respondent argues that the proposed expansion of alternative programs for wheelchair athletes should be considered in the instant case. The March 17, 1994 notice of "expansion" could not have affected the legitimacy of the prior eligibility determination of April 1, 1993, that is at issue here. Because the proffered evidence would not have any impact upon the disposition of the case, nor would denial work a manifest injustice, and admission would not establish any facts that have been insufficiently proven, the motion to reopen is denied.

CONCLUSION

Based upon the above discussion, I make the following legal conclusions:

The denial of S.C.'s eligibility to compete in running events for his high school's track team did not violate the Rehabilitation Act, because the essential nature of

wheelchair racing, is different from that of running. There is no conceivable reasonable accommodation.

Equal protection has not been violated in the instant case. The action challenged here is rationally related to the legitimate governmental interests of administering interscholastic athletics and student safety.

NJSIAA's conduct is subject to review for arbitrariness, unreasonableness and capriciousness. This review is subsumed within the equal protection review and, thus, the action passes muster.

There is no basis for reopening the record.

ORDER

Based upon the above discussion and conclusions of law, it is hereby **ORDERED** that respondent's, declaration that S.C., a wheelchair bound student, is ineligible to compete in running events against able-bodied runners for his high school track team is affirmed and petitioner's appeal dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 21, 1994
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

6/23/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

dgi/md/e

APPENDIX

LIST OF WITNESSES

For Petitioner:

S.C.

For Respondent:

Boyd A. Sands

Laura G. Schwanger

Ronald E. Danser

LIST OF EXHIBITS

J-1 Stipulation of Facts with attached exhibits A-3

J-2 New Jersey State Interscholastic Athletic Association Handbook 1992-1993

P-1 Identification racing chair

P-2 Identification sports chair

R-1 Athlete participation questionnaire for S.C.

R-2 Letter to Robert Kanaby from Sharon Frant Brooks, dated January 22, 1993 (2 pages)

R-3 Letter to Donald A. Wernes from Roy Schleicher, dated May 7, 1993 (2 pages)

R-4 Memo to all state associations from Boyd A. Sands, dated December 8, 1993 (State Association: Minnesota)

R-5 Memo to all state associations from Boyd A. Sands, dated December 8, 1993 regarding State Association: Louisiana (3 pages)

R-6 Letter to Roy Schliecher, from Frank Kovaleski, dated December 8, 1993 (2 pages)

R-7 Identification

R-8 400 meter event marking layout track and field

OAL DKT. NO. EDU 4445-93

BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by her in the initial decision.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

JULY 28, 1994

DATE OF MAILING - JULY 28, 1994

ACTING COMMISSIONER OF EDUCATION

203-94

R.H., an infant, by his mother and natural guardian, SUSAN HOLMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UPPER FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 28, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 1711-94
AGENCY DKT. NO. 28-2/94

R. H., an infant,
by his mother and natural
guardian SUSAN HOLMAN,
Petitioner,
v.
UPPER FREEHOLD REGIONAL
HIGH SCHOOL DISTRICT,
Respondent.

Edward Hunter, Esq., for petitioner

Peter P. Kalac, Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: June 15, 1994 Decided: June 15, 1994

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

This matter was transmitted to the Office of Administrative Law on February 24, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

June 15, 1994
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/23/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

EDWARD HUNTER, ESQUIRE
3228 SOUTH BROAD STREET
TRENTON, NEW JERSEY 08610
ATTORNEY FOR PETITIONER

PETITIONER(S),	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY BUREAU OF CONTROVERSIES AND DISPUTES
RICHARD HOLMAN, an infant, by his mother and natural guardian SUSAN HOLMAN,	:
-vs-	ORDER (By Consent)
RESPONDENT(S),	:
UPPER FREEHOLD REGIONAL SCHOOL DISTRICT.	:

This matter having been brought before M. Kathleen Duncan, Judge, Office of Administrative Law on application of Edward Hunter, Esquire, attorney for Petitioner, Richard Holman, by his mother and natural guardian, Susan Holman and Peter P. Kalac, Esquire, attorney for Respondent and good cause for the entry of this Order appearing and the parties, through their respective attorneys, having consented to the entry of this Order as evidenced by the signatures of the attorneys appearing on this document;

IT IS on this 15th Day of June, 1994 ORDERED that:

1. Richard Holman's temporary file will contain a copy of the Memorandum forwarded to Edward Hunter, Esq. by FAX on June 6, 1994. The

Memorandum explains "Social Probation" as the only sanction imposed against Richard Holman;

2. Social Probation ends at the end of this academic year [June, 1994]; and

3. [Social Probation as explained to Petitioner, means leaving the school grounds at the end of the school day.] Social Probation, as enforced, has precluded after school access to the library, the computer room and the "Homework Club," facilities more related to academic than social activities. Richard Holman will not have to seek special permission to use the mentnioned facilities. Instead, each of Richard Holman's teachers will be given a written direction that any recommendation of use of the academic facilities after school willl be reported by the teacher to the administration and Richard Holman's after school use of the academic facilities [all of which are staffed after school] will not consitute a violation of the social probation imposed upon Richard Holman by the Board of Education as a result of its second resolution concerning Richard Holman.

M. KATHLEEN DUNCAN, A.L.J.

I hereby Consent to the form and entry of the within Order.

EDWARD HUNTER
ATTORNEY FOR PETITIONER

PETER P. KALAC
ATTORNEY FOR RESPONDENT

OAL DKT. NO. EDU 1711-94

R.H., an infant, by his mother and natural guardian, SUSAN HOLMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UPPER FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

JULY 28, 1994

ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JULY 28, 1994

204-94

R.A.M. AND C.A.M., on behalf of their minor child, B.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TABERNACLE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged son's reading grade for the 1993-94 second marking period alleging violation of established Board policies and procedures.

In light of testimony of witnesses and review of the record, ALJ found no abuse of discretion and no failure to comply with duly adopted Board policy. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JULY 28, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. EDU 5612-94

AGENCY DKT. NO. 158-5/94

R. A. M. AND C. A. M. ON BEHALF OF THEIR MINOR CHILD, B. M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF TABERNACLE,

Respondent.

R.A.M. and C.A.M., petitioners, pro se

John G. Dyer, III, Esq., for respondent

Record Closed: June 15, 1994 Decided: June 17, 1994

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

The petitioners seek an order of the Commissioner of Education directing the respondent Board to require reassessment of B.M.'s second marking period (1993-94) reading grade, to require issuance of a new report card reflecting the reassessment and to require that an Honor Role certificate be issued and recorded for the second marking period.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for expedited hearing pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. The matter was heard on June 15, 1994 in the Tabernacle Municipal Court.

The petitioners allege that one of B.M.'s teachers violated established Board of Education policies and procedure in calculating his Reading grade for the second marking period in the 1993-94 school year. Certain facts are not in dispute and reveal the context of the matter. B.M. received a grade of B in Reading in the first marking period. On or about February 14, 1994, R.A.M. and C.A.M. received the second marking period grade report. B.M.'s numerical grade in Reading was 79. This corresponds to a letter grade of C+. The parents called the school in an attempt to reach the teacher who had assigned the grade. The teacher had left for the day. On February 15, parents wrote to the teacher asking that he call them. One or both parents discussed the grade with the teacher on February 16. The teacher stated that he based the grade on test scores. On February 22, one of the parents spoke with the teacher in the school. He indicated he would not change B.M.'s grade. The parent went to the superintendent's office and conferred with her informally. On February 24, one of the parents called the superintendent. The principal took the call. On March 1, the parents received a call from the teacher. On March 2, they again conferred with the teacher. On March 4, the parents again spoke to the teacher by telephone concerning a new Reading placement for B.M.

On March 19, one of the parents called the Board president. On March 22 one or both parents met with the principal and informally discussed the matter of a bonus question or challenge question. It is agreed that challenge questions are one or more questions calling for short written answers and, when used, are placed at the end of unit tests. On March 24, the parents telephoned to set up a meeting with the teacher, principal and superintendent. A second call was placed on the same day for the same reason. On March 25, the parents called again. The principal took the call. For

various reasons, the meeting was put off until, in a telephone call of April 6, it was scheduled for April 13. On April 13, a meeting was held attended by the parents, the principal and the superintendent. The superintendent indicated the parents would have a response in two days. On April 15, the parents called the superintendent who stated a decision had been made, but she believed it should properly come from the building principal. On April 18, a parent called the principal. He was not in the building. On April 21, the parents received a letter from the principal stating there would be no change in the grade. The parents communicated their disagreement with this decision and received a letter dated April 28 from the superintendent confirming that the decision would remain unchanged. Other letters were exchanged during the period outlined above. They amplify, but do not change, the essential facts.

The essence of the parents' argument is that academic teachers must use all of the report card components mentioned in the School District Handbook (J-3). The referenced section states

REPORT CARD COMPONENTS

> The following components are utilized to compile a report card grade in academic subjects. They represent a general agreement on the part of the staff as to how the letter/percentage grades are determined.
>
> | | |
> |---|---|
> | Tests (exams and quizzes) | Daily assignments |
> | Classwork | workpages, notes, projects, lab wk |
> | Homework | Class Participation |

The parents also rely on a part of the teacher handbook (J-2) captioned Developing Your Grading System. In its entirety, the section reads

> 1. Develop your grading system as soon as possible. It would be helpful if this were done before the school term begins.
> 2. Decide on the types of performance indicators you will use, such as the following: homework, assignments from texts, rating scales, quizzes, tests, projects and self-assessment instruments.
> 3. Be sure that the method of evaluation and the performance being evaluated are carefully matched.

4. Plan to have as many indicators as possible. If you are basing your grade on one or two indicators, you are greatly increasing the likelihood of error.
5. Be sure to weigh the different kinds of indicators so that their impact on the grade is in proportion to their importance.
6. In the event that certain indicators have greater importance than may occur to the student, please see that this is communicated to them.
7. Take time to explain your grading system to the students and their parents so they will understand what to do to be successful in your class.
8. If an indicator of great importance is not turned in, make provisions for it to be turned in late. There should be a penalty for late work, but it should not be so extreme that the indicator no longer has value.
9. At such time as a student is in danger of failing, you should communicate this to the parents.
10. In the event that a student is developing a pattern of not turning in his/her homework, efforts should be made to alter this behavior before it drastically impacts his/her grade.

Finally, parents rely on Board Policy 5121, which deals with examinations, grading, rating and testing. The relevant paragraphs state

> The superintendent, in consultation with the teaching staff, shall develop a marking system to be used uniformly in the same grade level throughout the schools. The system should be clear, easily understood by parents/guardians and pupils, and able to be applied with consistency of interpretation. Evaluation and grading symbols shall be intended to appraise the pupil's progress toward established goals, and be based on what each pupil produces in light of what he/she is capable of producing.
>
> The board of education encourages the certified staff, under the direction of the superintendent, to employ a comprehensive approach to the use of appraisal and evaluative techniques in monitoring pupil progress, including, but not limited to, recognized standardized achievement testing programs, written and oral teacher-made tests, performance observation, parent/guardian interviews, formal and informal evaluation techniques, use of cumulative pupil records, and medical examinations.
>
> The superintendent shall have the right to review disputed grades and with board approval to adjust them.

Because the teacher based the second marking period grade on six tests, there is noncompliance with Board Policy 5121, with the procedures in the Teacher Handbood and with the statement in the School District Handbook. Further, this noncompliance has led to arbitrary and discriminatory evaluation of B.M., the district administration has failed to implement and enforce policy and procedures and due process has been denied. The parents also took exception to the Board's answer to their petition of appeal. The pleadings are not dispositive; the proofs at hearing are dispositive. This decision, accordingly, addresses the proofs and arguments, not the pleadings.

After the parents' testimony the Board called two witnesses. The teacher testified about the advanced Reading-Spelling class of which B.M. was a part. This 8th grade class uses a literature-based approach to learning. The literature is chosen from 9th grade level material. Spelling work is chosen from introductory college level material.

In the second marking period short stories and poems were used and the goal was to prepare pupils for lecture and discussion classes they will encounter in high school and college. The usual sequence of activities was reading a story or poem, then discussing and analyzing it, doing various homework assignments, reviewing each assignment in class and, as the culminating activity for each unit, taking a test or quiz.

All pupils participated in the analysis and discussion. Most participated voluntarily; some had to be drawn out by teacher questions. All pupils participated and did it well. The teacher did not include participation in his grading scheme because all pupils were superior in this area.

The teacher is familiar with the handbooks (J-2, J-3). He is familiar with the discussions of components. He and other teachers of this course do not use all components. The grading scheme was reached in consultation with other teachers. The three other, more experienced teachers and he agreed not to use participation as

a component of the grade. Concerning homework, it is the discussion in class after the assignment is done that counts. The teachers simply expect homework to be done.

The teacher is comfortable with the method of evaluation. At the beginning of the year he explained to pupils what he wants, what is his philosophy of the course is and what the objectives are. All pupils this year seem comfortable with the class.

The tests on which he based grades are publisher-made and reflect what he taught. He used five tests and a quiz as the basis for each pupil's grade. All pupils received the same tests. All questions on all tests were covered in the text and in class before tests were administered.

The teacher acknowledged he mistakenly categorized a quiz as a test. B.M.'s grades were 100, 50, 84, 58, 91 and 87. He talked about the grade of 50 with B.M. Parents sign tests carrying grades less than 70. Ms. M. signed P-1 and P-3. B.M. admitted he did not study for the test on which he received a grade of 50 and he did not "study much" before the test on which he received a grade of 58. The teacher stated both grades are below B.M.'s ability level.

The teacher stated that the first marking period grade was calculated in precisely the same way as the second marking period grade. His colleagues evaluate their classes the same way he does. At Back-to-School-Night the witness described his philosophy, his expectations and his plans for the course. He cannot recall precisely what he said.

The witness met with Mr. and Mrs. M. formally and informally. He understands their position is that all grading components were not used and that this somehow constitutes noncompliance with Board policy. The written materials are guidelines for teachers. He is comfortable basing grades on the publisher-made tests. The challenge questions range in value from 3 to 5 points. The teacher sometimes does not use challenge questions in a unit test. He guages, based on class performance,

whether challenge questions will be efficacious or not. Pupils know before the test if there will be challenge questions and, if there will be challenge questions, what they will be worth.

The principal testified that he drafted the guidelines to teachers in Exhibit J-2. They are intended as guidelines, advice and assistance. He discusses these guidelines with staff at or near the beginning of each school year. Concerning his investigation of B.M.'s second marking period grade, he took three steps. First, he computed the averages for all sixth grade pupils for the marking period. The average was 78.3 and the corresponding letter grade was C+. Second, he asked the teacher if there were any irregularity in the challenge questions. Particularly, were any based on a 3-point scale when they should have been based on a 5-scale. He was satisfied that there were no irregularities in this regard. Third, he collected other pupils' tests. He could find no irregularity. He advised Mr. and Mrs. M. by telephone and letter.

The principal and superintendent subsequently met with the parents. The parents were not satisfied with the outcome and went to the Board.

DETERMINATION

There are some inconsistencies in the written and oral statements of the teacher and the principal in this matter. This is perfectly consistent with human experience. The parents, teachers themselves, appear to be emotionally invested in this controversy. This, too, is consistent with human experience. However, the determination rests on one issue: Is a teacher compelled to use certain tools and techniques in evaluating pupils. Handbooks given to teachers and to parents discuss evaluative tools and techniques. But it is the teacher who decides what is appropriate in each class situation.

The teacher testified clearly what he wants to achieve with this advanced class. He and other teachers teaching the same class use the same grading criteria. Thus, all

pupils are treated the same. B.M. and each other pupil had six opportunities in the second marking period to show what they had learned. B.M. did poorly on two tests. He candidly admitted he did not study or did not study sufficiently before those two tests.

Upon learning that the parents were not satisfied with the teacher's explanation of the second marking period grade, the principal collected information and responded to the parents. That the parents did not like the answer does not mean that the process was faulty.

Whether this matter is weighed by the ordinary standard of a preponderance of the credible evidence or by the standards for emergent relief, the petition must fail.

In establishing a case for emergent relief, it is the petitioners' responsibility to meet the standards expressed in Crowe v. DeGioia, 90 N.J. 126 (1982). Specifically, the petitioners must show immediacy of harm, irreparability of harm, likelihood of prevailing on the merits, and, when the equities are balanced, that the burden would fall more heavily on them than on the respondent if the decision were adverse.

Although there was no testimony on immediacy of harm, I can infer from the fact that the end of the school year is nigh that an adverse decision will have an immediate effect. There is, however, no showing of irreparable harm, and, more importantly, no likelihood of prevailing on the merits. If the fourth test had to be addressed, the decision would come down on the side of the Board.

The case, although presented on an expedited bases, is best judged by the traditional criterion, a simple preponderance of the credible evidence in the record. Having heard and observed the witnesses as they testified and having reviewed the whole record, I **FIND** no abuse of discretion and no failure to comply with duly adopted Board policy. The petitioners here seek an overly literal reading of Board policy and handbooks. Unfortunately, this results in an extension into absurdity. The

Commissioner of Education has not hesitated to interfere with the exercise of a local board's discretion in the management of public school provided there is a clear showing that the board has acted arbitrarily, has violated the law or has acted in bad faith. See, e.g., Bauer v. Pinelands Reg'l School Dist. Bd. of Ed., OAL DKT. EDU 1716-85 (Aug. 14, 1985), adopted Comm'r of Ed. (Sep. 20, 1985). The Board's policies and acts are entitled to a presumption of correctness and will not be overridden unless there is a clear showing of arbitrariness. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960); Thomas v. Morris Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). That has not been done.

Based on the foregoing, I **CONCLUDE** that the petition of appeal must be **DISMISSED**. It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

17 JUNE 1994
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/20/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

R.A.M.
William B. Butler, Jr.
Roger F. Hladky

EXHIBITS

Petitioners

P-1 Test, "Everyday Use," November 23, 1993

P-2 Test, "Through the Tunnel," December 7, 1993

P-3 Test, "Something Bright," December 21, 1993

P-4 Test, "Thank You, M'am," January 5, 1994

P-5 Test, "The Ransom of Red Chief," February 8, 1994

P-6 Test, "Antaeus," November 18, 1993

Respondent

R-1 Second page of grade book, covering second marking period, 1993-94 school year

Joint

J-1 Tabernacle Township Board of Education Policy 5121, 3 pp.

J-2 Excerpt, Tabernacle township Teacher Handbook, pp. 13-15

J-3 Excerpt, Tabernacle Township School District Handbook, 1993-94, cover and one page

OAL DKT. NO. EDU 5612-94

R.A.M. AND C.A.M., on behalf of their minor child, B.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TABERNACLE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by him in the initial decision.

Accordingly, the within Petition of Appeal is hereby dismissed.

ACTING COMMISSIONER OF EDUCATION

JULY 28, 1994

DATE OF MAILING - JULY 28, 1994

THOMAS MATARAZZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN CANDELMO AND THE BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 28, 1994

OAL DKT. NO. EDU 4009-93

THOMAS MATARAZZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN CANDELMO AND THE BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 28, 1994

DATE OF MAILING - JULY 28, 1994

206-94

SAMUEL A. TARULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, DEPARTMENT OF EDUCATION, HUDSON COUNTY	:	DECISION
RESPONDENT.	:	

JULY 28, 1994

OAL DKT. NO. EDU 4471-92

SAMUEL A. TARULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, DEPARTMENT OF EDUCATION, HUDSON COUNTY	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

JULY 28, 1994 — ACTING COMMISSIONER OF EDUCATION

DATE OF MAILING - JULY 28, 1994

207-94

LACEY TOWNSHIP EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

JULY 28, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -
DISMISSAL WITH PREJUDICE
OAL DKT. NO. EDU 8673-93
AGENCY DKT. NO. #298-8/93

LACEY TOWNSHIP
EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF LACEY, OCEAN COUNTY,
Respondent.

Richard A. Friedman, Esq., on behalf of petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Gary J. Brower, Esq., on behalf of respondent (Arthur Stein & Associates, attorneys)

Record Closed: June 14, 1994 Decided: June 21, 1994

BEFORE **STEVEN C. REBACK**, ALJ:

This is an appeal instituted by the petitioner before the Commissioner of Education on August 10, 1993 requesting, among other matters, that respondent recognize or classify the positions of "in-school suspension teacher" as fully certified teaching staff positions and require that all persons holding said positions hold standard certification issued by the State Board of Examiners. Thereafter, the respondent on or about September 3, 1993 filed its answer before the

Commissioner of Education denying any wrongdoing. On or about September 14, 1993, the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On June 14, 1994, both counsel filed with the Office of Administrative Law a signed Stipulation of Settlement and Dismissal. The document does not contain particularized terms of the settlement; rather, it asks that the matter be dismissed with prejudice.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the parties have agreed to voluntarily withdraw the instant appeal with prejudice and that such dismissal disposes of all issues in controversy. Accordingly, it is **ORDERED** that the matter be and is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/21/94

DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/23/94

DATE

Hope R Blackburn

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 1994

DATE

Jaynee LaVecchia

OFFICE OF ADMINISTRATIVE LAW

jz

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
JUN 11 10 51 AM '94

ARTHUR STEIN & ASSOCIATES, P.C.
1041 W. Lacey Road
P.O. Box 131
Forked River, New Jersey 08731
(609) 693-6200
Attorneys for Respondent
8045

LACEY TOWNSHIP EDUCATION ASSOCIATION,	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL Docket No. EDU 08673-93 S
vs.	
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	STIPULATION OF SETTLEMENT AND DISMISSAL
Respondent.	

The parties to this matter, through their respective counsel, hereby agree that the within matter shall be deemed settled and withdrawn subject to the following terms.

a. Petitioner shall voluntarily dismiss the within Petition of Appeal with prejudice.

b. The dismissal of the Petition of Appeal with prejudice by Petitioner is based upon the events as they existed, both presently known and unknown, as of April 7, 1994. Consequently, Petitioner is not precluded from filing a new Petition of Appeal based upon any events of a different nature which occur after April 7, 1994.

Such right, however, shall not relate back to those events occurring prior to April 8, 1994.

c. Both parties shall bear their own costs, expenses, and attorneys fees in this matter. Neither party shall make any claim against the other for fees, expenses or attorneys fees related to this matter.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

Dated: 5/26/94 By: _____
Richard A. Friedman, Esq.

ARTHUR STEIN & ASSOCIATES
Attorneys for Respondent

Dated: May 1 1994 By: _____
Gary J. Brower, Esq.

8045STIP.SET

OAL DKT. NO. EDU 8673-93

LACEY TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 28, 1994

DATE OF MAILING - JULY 28, 1994

208-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WYCKOFF, BERGEN COUNTY.	:	
	:	

JULY 29, 1994

OAL DKT. NO. EDU 4660-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WYCKOFF, BERGEN COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 29, 1994

DATE OF MAILING - JULY 29, 1994

210-94

210-94

CARIN SCHANSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 29, 1994

OAK DKT. EDU 9521-93

CARIN SCHANSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 29, 1994

DATE OF MAILING - JULY 29, 1994

211-94

RICHARD E. ZIELINSKI,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
LEROY BROWN,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning janitors alleged Board wrongfully terminated them from their positions. Petitioners claimed tenure pursuant to Board resolution of June 30, 1955.

Citing the State Board decision in Strincoski, ALJ determined that petitioners did acquire tenure as the 1955 resolution granting tenure to efficient janitors after three years of service was never repealed, amended, modified or rescinded. Moreover, the ALJ found the Board did not provide evidence of inefficiency. Petitioners' Motion for Summary Decision was granted and the Board was ordered to reinstate them with full back pay and all other emoluments of employment owed.

Commissioner adopted findings and determination in initial decision and directed reinstatement of petitioners to their respective positions with back pay and emoluments, less mitigation.

JULY 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING PETITIONERS' MOTION FOR SUMMARY DECISION AND DENYING RESPONDENTS' MOTION FOR DISMISSAL

OAL DKT. NOS. EDU 3471-93 & 6755-93
AGENCY DKT. NOS. 32-3/93 & 243-6/93
(CONSOLIDATED)

RICHARD E. ZIELINSKI,

Petitioner,

v.

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent.

AND

LEROY BROWN,

Petitioner,

v.

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent.

Nancy I. Oxfeld, Esq., on behalf of the petitioners (Balk, Oxfeld, Mandell and Cohen, attorneys)

Lisa A. Sanders, Esq., on behalf of the respondent (Martin R. Pachman, attorney)

Record Closed: May 23, 1994 Decided: June 17, 1994

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

These appeals, which have been consolidated by consent of counsel following their transmission to the Office of Administrative Law, both challenge the decision of the respondent, East Brunswick Board of Education ("East Brunswick" or "Board") terminating the employment of the individuals Richard E. Zielinski and LeRoy Brown from their positions as janitors. The petitioners contend that as a result of a resolution passed by the Board on or about June 30, 1955, they acquired tenure in their positions and as a consequence the efforts to terminate them which, in respect to Mr. Zielinski occurred at a Board meeting conducted on December 17, 1992, and with respect to Mr. Brown occurred at a Board meeting conducted on May 11, 1993, were unlawful.

As a consequence, petitions of appeal were filed with the Commissioner of Education on behalf of Zielinski and Brown on March 1, 1993 and June 24, 1993, respectively seeking a declaration that the petitioners acquired tenure; that East Brunswick contravened the law when it sought their termination on the dates previously referred to; and directing that they be reinstated to their positions with full back pay and any and other emoluments which may have been lost as a consequence of their purported unlawful termination.

East Brunswick acknowledges terminating the petitioners at the Board meetings cited above and admits the existence of the June 30, 1955 resolution. It argues however, that it is irrelevant to the matters *sub judice*. It further denies that the resolution as set forth was never repealed, amended, modified or rescinded as contended by the petitioners at paragraph 4 of their petition. It further denies that the petitioners acquired tenure rights in their positions.

Following the filing of the matter before the Commissioner of Education the appeals were transmitted to the Office of Administrative Law as contested cases pursuant to *N.J.S.A.* 52:B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The Zielinski matter was transmitted on April 16, 1993 and the Brown matter on July 19, 1993. The Brown matter was originally pending before Administrative Law Judge Bruce R. Campbell and because of the similarities of that matter with Zielinski, which had been pending before me, the cases were eventually consolidated and scheduled on my calendar. Previously Judge Campbell granted a motion by the petitioner, Brown, to place that matter on the inactive list for three months in anticipation of a decision to be rendered by the State Board of Education. The motion was unopposed by counsel for the Board. Following the decision by the State Board of Education on that matter, which I shall discuss hereinafter, Ms. Oxfeld on or about November 15, 1993, requested once again that the Brown matter be removed from the inactive list and that the appeal proceed. A similar letter was addressed to my office on November 30, 1993, in respect to Zielinski. Ms. Sanders on behalf of the Board sought to maintain the cases on the inactive list pending a disposition on what appeared to be the related matter by the appellate division. Ms. Oxfeld opposed further inactivity. On January 4, 1994, I issued a letter ruling and order denying the inactivity and ordering that the proceedings continue expeditiously.

On or about February 24, 1994, the Board instituted the current motion for dismissal. The petitioners responded on or about March 10, 1994. After reviewing the motion and responsive papers it appeared that the most expedient and appropriate way to dispose of this case would be for the petitioners to cross-move. Accordingly, on March 25, 1994, I convened a telephone conference with counsel and my suggestion

was agreed to and a schedule devised. Thereafter, the petitioner on or about April 8, 1994, moved for summary decision. In the interim, the Board replied to the petitioners' response to their motion for dismissal, that reply being submitted to my office on March 21, 1994. On March 13, 1994, the Board responded to the petitioners' cross-motion for summary decision. Following a review of the documents I placed a telephone call to counsel for the petitioners on May 23, 1994, inquiring as to whether they would be replying to the Board's response to its summary judgment motion. Ms. Oxfeld advised that unless I were to here from her by the end of the business day nothing further would be forthcoming. No further response was elicited by the petitioners in respect to the Board's motion for dismissal and accordingly the record on these motions closed on May 23, 1994.

FACTS AMD LEGAL ANALYSIS

For purposes of the current motions the facts have been derived from the pleadings and exhibits attached to the moving papers. No certifications or affidavits were provided. Clearly if there are any actual disputes they must be resolved against the moving party.

There are several fundamental facts that are not disputable. Mr. Zielinski commenced his employment with East Brunswick as a custodial employee on October 1, 1988 and continued in that position through December 17, 1992, on which date the East Brunswick Board voted to terminate his employment effective December 14, 1992.

Mr. Brown commenced his employment with East Brunswick as a custodial employee on January 2, 1990, and was terminated effective June 30, 1993, as a consequence of a vote taken by the Board on May 11, 1993.

On June 30, 1955, the East Brunswick Board of Education passed a resolution which provides as follows:

> Resolved, that it is the state policy of the Board of Education of East Brunswick to grant tenure to efficient Janitors who are members of the State Pension Annuity Fund, after three years of service.[1]

The gravamen of respondent's motion to dismiss is that assuming arguendo that the 1955 resolution is still binding and legal the petitioners fail to state a claim upon which relief may be granted because they failed to state facts which indicate that they were tenured under the resolution. More specifically, counsel argues that "nowhere in these petitions do petitioners state facts indicating that they were efficient, which is a tenure requirement under the plain language of the resolution which is asserted hereunto have granted tenure." Respondent's brief in support of its motion to dismiss at 5.

In *Carrie Strincoski v. Board of Education of the Township of East Brunswick, Middlesex County,* OAL DKT. NO. EDU 7974-91,rejected, Commissioner of Education, March 22, 1993, rev'd State Board of Education, November 3, 1993, the State Board of Education reversed the Commissioner of Education and reinstated the decision arrived at by the Administrative Law Judge holding *inter alia* that "[n]otwithstanding the fact that the Board, since the decisions in *Smith* and *Speer,* has provided custodial employees with fixed term employment contracts only, we agree with the ALJ that the Board's policy on custodial tenure remained in full force and effect and provided petitioner with tenure protection after three years of service in the district." The *Strincoski* decision also concluded that the 1955 resolution was binding because it had never been amended, rescinded or appealed. *Strinkcoski* also affirms a line of precedent which had previously found the Board policy to be still in effect and still conferred tenure on custodians. See, *Harold Smith v. East Brunswick Board of Education,* C.D. August 15, 1983, aff'd, St. Bd., April 4, 1984; Donald Spear v. East Brunswick Board of Education, C.D. June 19, 1984, aff'd, St. Bd., January 2, 1985. In *Smith* the State Board of Education held that East Brunswick was bound by its resolution and that the employee who had begun his employment in 1967 under annual contracts and was terminated in

[1] The position of respondent is that in respect to Mr. Brown's employment the Board's vote of May 11, 1993, was one not to renew his employment rather than to terminate him.

1982 was tenured and the termination was unlawful. Then in *Speer,* the Board argued that the resolution at issue was not adopted in the 1960's and 1970's and thus, was not effective to a confer tenure on that employee. Again, it was found that the custodian was tenured based upon the non-amended non-rescinded 1955 resolution. It is thus clear and I **CONCLUDE** that the resolution enacted by the respondent on June 30, 1955, granting tenure to efficient janitors after three years of service has never been repealed, amended, modified or rescinded.

Counsel for respondent argues that even if the resolution is still valid and I have just concluded it is, since it only applies to "efficient" custodial employees and since the petitioners have not alleged "efficiency" such omission is fatal to their case and requires dismissal. *N.J.S.A.* 18A:17-3 provides in pertinent part that:

> . . .every public school janitor. . .shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed. . .accept for neglect, behavior, or other offense.

Both Zielinski and Brown are "fixed term" employees based upon the contract they entered into with the Board. If respondent is correct that the cause of action instituted by the petitioners is inherently flawed because there was no allegation that the custodians were "efficient" then the analogue to that is also true: The janitor never knows whether he or she is or is not efficient unless and until the Board chooses to terminate employment and by so doing concludes that the janitor is inefficient. In my opinion, the Board cannot circumvent the clear meaning of the resolution which it enacted which has been confirmed on a number of occasions the last of which was in the State Board of Education decision in *Strinkcoski* by arguing that it and it alone possesses the discretionary authority to tell an employee that he is inefficient as a consequence of his termination. That is clearly contrary to the spirit of the resolution as interpreted by the State Board of Education and contrary as well to the applicable education statute, *N.J.S.A.* 18A:17-3.

In her motion to support summary judgment, counsel for the petitioners embellishes on the *Smith* decision to support her claim. In my judgment, that discussion to some extent bears reiteration. In that matter, the administrative law judge was upheld by the Commissioner of Education in respect to the tenure issue and the State Board of Education also upheld that decision. In *Smith,* the administrative law judge noted at page 4 of his initial decision:

> The Board's Assistant Superintendent of Personnel, who has served in that position for approximately nine years, operated under the belief, by information from her predecessor, that custodian and maintenance employees acquired a tenure status with the Board subsequent to three years of employment. . ." *Smith*, p. 4.

The administrative law judge also found the following:

> The record herein clearly reveals that the Board adopted a policy to grant tenure to its janitors after three years of employment who demonstrate that they are: (1) efficient and (2) are members of the State Pension and Annuity Fund (Public Employees Retirement System-PERS) (P-1). <u>There is nothing in the record to show that the Board has taken any action, since its adoption of the policy on June 30, 1955, to modify, amend or rescind its policy to grant janitorial tenure</u>. Smith, p. 9. [emphasis added] Id. at 9.

Furthermore, as counsel notes in her brief the Board at that time argued in *Smith* that the policy was not binding. The administrative law judge found:

> The Board cannot now assert that it was unaware of its own policy, nor can it argue that a prior Board's action cannot bind the present or future Board action. A board of education policy, just as a statute at law, is a considered judgment of the legislative body; duly promulgated and adopted, to effectuate a thorough and efficient operation of its schools. The adopted board policy is for its business and the management

> of the public schools under its direction and control. *N.J.S.A.* 18A;11-1. Those to whom the Board has delegated the responsibility for the administration and management of its enterprise must comply with and enforce the board's policies, rules and regulations, to do otherwise would be a violation of the board's state policy and would place the board of education in the position of imposing sanctions or a penalty upon the violator. Id at 10-11.

The Board argues that its assessment of petitioner's efficiency is evidenced by the fixed-term contracts. It notes that:

> [t]he resolution serves to establish the criteria which must be met in order to acquire tenure: the janitor must be efficient. The satisfaction of the criteria, or lack thereof, has been implemented by the board through its actions of either issuing open-ended salary agreements or fixed-term contracts....Simply put, the board has exercised its discretion under the policy by either granting tenure under N.J.S.A. 18A:17-3 by issuing open-ended salary agreements, or refusing to do so by issuing a fixed-term contract.
>
> [Brief in Support of Respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief may be Granted at 6.]

The Board's argument is unpersuasive. The Board has not established that the issuance of fixed-term contracts indicates an assessment of inefficiency. In fact, in the Smith, Speer and Strincoski cases, the petitioners had been initially employed for at least three years each under fixed-term contracts. Smith was employed for a 90-day probationary period and then issued annual contracts; Speeer was initially employed for a six-month probationary period pursuant to a "custodial contract" that provided that upon approval he would continue in employment until the end of the school year. He was then employed for two more years pursuant to annual contracts that provided for termination by either party on two-week's notice. The Board did not argue in these cases that the issuance of these contracts evidenced a finding of inefficiency. Since the Board has not provided further evidence of inefficiency, or a basis for its assertion

that fixed-term contracts indicate inefficiency, it seemingly has failed to carry its burden. The petitioners thus achieved tenure.

There is no other basis by which petitioner could have gained tenure.

Thus, it is abundantly clear that the petitioners in this matter have acquired tenure. If East Brunswick wanted them to be treated as non-tenured employees, it should have repealed the 1955 resolution. It did not. It must live with the consequences.

Accordingly, since in my judgment there is no genuine issue of fact of law presented and that the petitioners are entitled to prevail, the motion by the petitioners for summary decision be and is hereby **GRANTED**. It is further **ORDERED** that the petitioners be reinstated to their positions forthwith with full back pay and all other emoluments of employment to which they have otherwise been deprived.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 17, 1994
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/22/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

slf

RICHARD E. ZIELINSKI,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
LEROY BROWN,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioners' reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

The Board's exceptions essentially renew its arguments raised before the Administrative Law Judge which the Commissioner determines were fully and fairly addressed by him in the initial decision and, therefore, need not be herein reiterated.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ

that petitioners in this matter acquired tenure by virtue of the Board's resolution on custodial tenure adopted June 30, 1995 and, consequently, their employment was improperly terminated.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law granting summary decision to petitioners. The Board is hereby directed to reinstate petitioners to their respective positions with back pay and emoluments, less mitigation.

ACTING COMMISSIONER OF EDUCATION

JULY 29, 1994

DATE OF MAILING - JULY 29, 1994

211-94

EDU #3471-93 and #6755-93 (consolidated)
C # 211-94
SB # 39-94

RICHARD E. ZIELINSKI AND LEROY BROWN,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 29, 1994

For the Petitioners-Respondents, Balk, Oxfeld, Mandel & Cohen (Nancy I. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Martin R. Pachman (Lisa A. Sanders, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We, however, correct a misprint in the Commissioner's decision so as to clarify that the resolution on custodial tenure at issue herein was adopted by the district board on June 30, 1955. See Commissioner's Decision, slip op. at 12.

Daniel J.P. Moroney abstained.

December 7, 1994

Date of mailing DEC 09 1994

212-94

IN THE MATTER OF THE TENURE	:	
HEARING OF PHILIP STEIN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF LINDEN,	:	DECISION ON REMAND
UNION COUNTY.	:	
	:	

JULY 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6080-94
(EDU 6834-93 on Remand)
AGENCY DKT. # 168-5/93

SCHOOL DISTRICT OF THE
CITY OF LINDEN, UNION COUNTY
Petitioner,

v.

PHILIP STEIN
Respondent

Howard Schwartz, Esq. for petitioner
(Schwartz & Barkin, attorneys)

Michael T. Barrett, Esq. for respondent
(Bergman & Barrett, attorneys)

Record Closed: June 27, 1994 Decided: June 27, 1994

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves a settlement of the contested case before the Office of Administrative Law that was remanded by the Commissioner of Education in a decision dated May 4, 1994. The relevant details were set forth in the Initial Decision/Settlement, OAL DKT. No. 6834-93, decided March 25, 1994, and in the decision and remand of the Commissioner of Education dated May 4, 1994. Both of the above decisions are incorporated herein by reference. This decision amends the prior disposition of the matter.

In the Order of Remand, the Commissioner stated that he did not object to any of the terms currently comprising the settlement, but he was unable to be satisfied by the record that the settlement met the Cardonick standard for settlement of tenure matters (*In Re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd. State Bd. of Ed.* April 6, 1983, 1990 *SLD* 842, 846).

The Commissioner noted that the record contained no finding that respondent entered into the agreement with a full understanding of his rights or that the agreement is consistent with the public interest, nor did it provide any indication that respondent was advised of the Commissioner's duty pursuant to *N.J.A.C.* 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

The matter was accordingly remanded to the Office of Administrative Law either for revision of the settlement document or supplementation of the record consistent with the intent of the commissioner's decision.

After consultation with counsel, it was decided that a revision of the settlement agreement to reflect the foregoing factors would be most appropriate. A revised settlement agreement, signed by the parties, was then filed in the Office of Administrative Law on June 13, 1994. A copy of the revised settlement agreement is attached hereto and made a part hereof.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law. The revised agreement conforms with the Cardonick standards and with the concerns of the Commissioner, as set forth in the May 4, 1994 decision.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500**, Trenton, New Jersey 08625, marked "Attention Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 27, 1994
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

6-27-94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 05 1994
Date

OFFICE OF ADMINISTRATIVE LAW

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JUN 13 12 08 PM '94

Schwartz & Barkin
2333 Morris Avenue
Suite C-4
P.O. Box 1339
Union, New Jersey 07083
(908) 688-1644
File No. 3130-28
Attorneys for Petitioner

IN THE MATTER OF THE TENURE HEARING OF PHILIP STEIN, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION Docket No. EDU-06834-93 N SETTLEMENT AGREEMENT

WHEREAS, tenure charges were certified by the Petitioner against Respondent on or about May 28, 1993; and

WHEREAS, Respondent had not been receiving salary from Petitioner since on or about Janaury 1, 1993 through April 15, 1994; and

WHEREAS, A.L.J. Arnold Samuels has ruled in response to a motion by Respondent that he is entitled to salary for and after 120 days after the date of suspension pursuant to N.J.S.A. 18A:6-14; and

WHEREAS, it is the determination of Petitioner that based upon A.L.J. Arnold Samuels' Decision as aforementioned it is consistent with the public interest to save the monetary and time expenditures of a hearing on the issues when only the approximate amount of three (3) months salary is in issue; and

WHEREAS, Respondent is aware of his right to have the matter

tried before the Office of Administrative Law to conclusion and reviewed by the Commissioner of Education at which time the charges could be dismissed or sustained and the Respondent could, as a result thereof, be either reinstated with full back pay or dismissed from employment; and

WHEREAS, Respondent is aware of the duty of the Commissioner of Education, pursuant to N.J.A.C. 6:11-3.6 to refer all tenure determinations to the State Board of Examiners for possible revocation of teaching certification; and

WHEREAS, the parties are now desirous of resolving their differences.

NOW THEREFORE, it is agreed as follows:

1. Petitioner agrees to compensate Respondent for 13 months, those months being April 1, 1993 through June 30, 1993 and September 1, 1993 through June 30, 1994.

2. Respondent shall be compensated, retroactively, 3 months salary for April 1, 1993 through June 30, 1993 at the annual rate of $61,408.00, and from September 1, 1993 through June 30, 1994 his salary shall be at the rate of $63,825.00.

3. Petitioner shall pay health insurance premiums for Respondent through June 30, 1994.

4. Respondent is not entitled to and is not accruing any other benefits form Petitioner.

5. Respondent shall execute a resignation for the purpose of retirement effective June 30, 1994 and deposit same with his

attorneys who are to deliver to Petitioner's attorney, so long as all payments provided for herein are paid. The form of resignation for the purpose of retirement is annexed hereto as Exhibit A.

6. All of the terms of this agreement are expressly made subject to approval by the Commissioner of Education.

WITNESS:

Michael T. Barrett
An Attorney At Law of New Jersey

Philip Stein

ATTEST:

Anthony Del Sordi
Board Secretary

Alvin Coplan
President

IN THE MATTER OF THE TENURE	:	
HEARING OF PHILIP STEIN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF LINDEN,	:	DECISION ON REMAND
UNION COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

JULY 29, 1994

DATE OF MAILING - JULY 29, 1994

213-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WINSLOW	:	DECISION
TOWNSHIP, CAMDEN COUNTY.	:	
	:	

JULY 29, 1994

OAL DKT. NO. EDU 4535-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WINSLOW	:	DECISION
TOWNSHIP, CAMDEN COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 29, 1994

DATE OF MAILING - JULY 29, 1994

215-94

LOTT CONSTRUCTORS, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MONROE TOWNSHIP, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 5, 1994

OAL DKT. NO. EDU 6321-94

LOTT CONSTRUCTORS, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MONROE TOWNSHIP, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 5, 1994

DATE OF MAILING - AUGUST 5, 1994

216-94

MOSES K. CHEUNG AND CHRISTINE LAM,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY, AND KAY DOWLING,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents sought an order from the Commissioner for the release of reports related to Board's investigation of a staff member and release of test papers and results with respect to their son, K.C. Respondents argued jurisdictional and timeliness defenses.

ALJ dismissed petition for lack of jurisdiction as petitioners did not cite any violation of the Education Laws under Title 18A. ALJ found since no tenure charges were levied against respondent, petitioners could not rely on N.J.S.A. 18A:28-5. Further, ALJ concluded this was not an educational matter, but strictly an Open Public Meetings Act issue within the purview of the Superior Court.

Commissioner adopted findings and determination in the initial decision as his own. Citing Rovello, the Commissioner concurred with ALJ's dismissal of petition for lack of jurisdiction.

AUGUST 8, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL
OAL DKT. NO. EDU 11446-93
AGENCY REF. NO. 346-10/93

MOSES K. CHEUNG, AND
CHRISTINE LAM,
Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP
OF FREEHOLD AND KAY DOWLING,
MONMOUTH COUNTY,
Respondents.

Richard Sacks, Esq., for petitioners

Michael J. Gross, Esq., for respondent Board (Kenney, Gross and McDonough, attorneys)

Arnold M. Mellk, Esq., for respondent Kay Dowling (Wills, O'Neill & Mellk, attorneys)

Record Closed: April 21, 1994 Decided: April 29, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners seek an order from the Commissioner of Education (Commissioner) for the release of findings and recommendations of the Board of Education of Freehold Township (Board) Superintendent of Schools' investigation of Board

[illegible] Kay Dowling Petitioners also seek an order for the release of test papers and test results used by respondent Dowling with respect to their son, K.C.

Petitioners filed their Petition of Appeal before the Commissioner on October [illegible] 1993. On December 1, 1993 the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B- to 15 and *N.J.S.A.* 52:14F-1 to 13. On March 4, 1994, a prehearing conference was held at which among other things, the issues to be determined by this tribunal were established as follows:

> 1. Whether the Commissioner may order the release of the Superintendent's findings and recommendations of his investigation of respondent Kay Dowling.
>
> 2. Whether the Commissioner may order the release of K.C.'s test papers and test results used by respondent Dowling during the 1992-93 school year (petitioner will amend the petitioner and specify the tests and results sought). The Board stipulates that the parents are entitled to all papers which exist and will provide petitioners with those that do exist.
>
> 3. Whether the Commissioner has jurisdiction over the subject matter of the herein matter against respondent Kay Dowling.
>
> 4. Whether the petition of appeal was timely filed, pursuant *N.J.A.C.* 6:24-1.2(c).
>
> 5. Whether the allegations against respondent Kay Dowling have been asserted in bad faith and with malice.

Hearing dates of May 16, 17 and 18, 1994, were also established. In addition, respondent Dowling was granted leave to move to dismiss the instant matter on jurisdictional grounds (Issue No. 3). Respondent has done so within the time prescribed.

RESPONDENT DOWLING'S MOTION AND ARGUMENT

INTRODUCTION

Following the receipt by the Freehold Township Board of Education and its Superintendent of Schools on April 29, 1993, of a complaint by the petitioners

regarding alleged professional misconduct and racial discrimination toward the petitioners' son by respondent Dowling, the Superintendent of Schools conducted an investigation and prepared a report to be presented to the Board of Education. On June 18, 1993, the Superintendent of Schools notified respondent Dowling of the plan of the Freehold Township Board of Education to meet in closed executive session on June 22, 1993, to discuss the results of the investigation and the Superintendent's report. At that time, respondent Dowling was advised of her right to waive her statutory right of privacy via written request to have the closed session discussion held in open public meeting. Respondent Dowling refused to waive her right to such privacy. Thereafter, petitioners requested a copy of the Superintendent's investigative report from respondent Board of Education and were refused access based on respondent's Dowling's invocation of her right to privacy in personnel matters.

On October 1, 1993, petitioners appealed to this tribunal seeking to compel the respondents to release the report of the Superintendent and the minutes of any and all meetings at which the report was considered and action taken. Respondent Kay Dowling filed an answer to the Petition of Appeal on November 18, 1993, asserting as defenses, a lack of jurisdiction and timeliness, requesting dismissal of the petition with prejudice. Respondent Board of Education filed an answer with counterclaim for interpleader and cross-claim against co-respondent on November 12, 1993.

Respondent Kay Dowling now moves to dismiss the claims of the petitioners against her based on her right to privacy and confidentiality under ***N.J.S.A.*** 10:4-6, *et seq.* and based on lack of jurisdiction of this tribunal over the subject matter of petitioners' claim.

LEGAL ARGUMENT

POINT I

PETITIONERS ARE NOT ENTITLED TO THE SUPERINTENDENT'S REPORT

This controversy arises under Title 10 of the New Jersey Statutes [1] (hereinafter referred to as the "Open Public Meetings Act"). There the Legislature has provided a scheme for the doing of public business by public bodies. Although, generally all meetings and business of public bodies shall be open to the public, the Legislature

has specifically provided exclusions from that general rule for the protection of public employees. The relevant provision carving out the exception in personnel matters is found at *N.J.S.A.* 10:4-12 (b) (8) which provides as follows:

> A public body may exclude the public only from that portion of the meeting at which the public body discusses: any matter involving ... evaluation of the performance of ... any ... current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

There is no question but that this provision is meant to protect a public employee's right to privacy. *Jamison v. Morris School District, Bd. of Ed.,* 198 *N.J. Super.* 411 (App. Div. 1985). Mrs. Dowling, in accordance with *N.J.S.A.* 10:4-12 (b) (8), specifically invoked her right to privacy following notice by the Board of Education of its meeting to discuss her employment. *Jamison, supra.* See Exhibit A attached.

POINT II

THIS TRIBUNAL IS WITHOUT JURISDICTION HERE

The Open Public Meetings Act assigns to the Superior Court the task of determining issues arising under *N.J.S.A.* 10:4-6; *et seq., N.J.S.A.* 10:4-15 and 16. *Thomas v. Bergen Cty. Welfare Bd.,* 122 *N.J. Super.* 371, 376 (App. Div. 1973). There, the Appellate Division held that it is the Superior Court's duty to decide cases arising under the Open Public Meetings Act rather than the relevant administrative entity because questions of law do not require administrative expertise. Only where such expertise is required for reasons *other than* the questions of law concerning the Open Public Meetings Act, a condition completely absent here, might one have recourse to the Commissioner. *Sukin v. Northridge Bd. of Ed.,* 171 *N.J. Super.* 184, 187 (App. Div. 1979). Inasmuch as the only issue concerning Mrs. Dowling is her right of privacy under *N.J.S.A.* 10:4-12(b)(8), there is no "incidental" jurisdictional for the Commissioner to exercise. *Id.*

---

[1] There are no Title 18A issues presented, vis-a-vis respondent Kay Dowling.

For the foregoing reasons, it is respectfully requested that petition of appeal be dismissed in this matter.

PETITIONERS' ARGUMENT

INTRODUCTION

For the purpose of this motion, petitioners adopt the introduction set forth in respondent's letter brief with the following facts: after the closed executive session on June 22, 1993, respondent's agent disclosed portions of the report to the public, thus waiving any right of confidentiality.

LEGAL ARGUMENT

N.J.S.A. 18A:6-9 sets forth the Commissioner's jurisdiction over controversies and disputes under school law. The statute provides:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

Generally, disputes involving teachers are cognizable as controversies under the school laws. *Winston v. Board of Ed. of So. Plainfield,* 125 *N.J. Super.* 131, 140 (App. Div. 1973). This controversy arises under *N.J.S.A.* 18A:28-5 (conduct unbecoming a teacher).

In *Sukin v. Northfield Board of Education* 171 *N.J. Super.* 184 (App. Div. 1979) the court in recognizing that the Commissioner of Education has complete power to hear and determine all controversies and disputes arising under the school laws, held that the Commissioner "has additional incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to the controversies under the school laws." *Id.* at 187.

Because the Appellate Division has specifically held that the Commissioner has jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws and this controversy arises under the

school laws, there exists jurisdiction for the Commissioner to hear and determine this matter.

Based upon the foregoing, it is respectfully requested that respondent's Motion to Dismiss the instant petition of appeal be denied.

DISCUSSION

Respondent Dowling contends there are no Title 18A Education issues concerning her in this matter. Rather, she argues, this case involves the issue of her right to privacy as protected under the Open Public Meetings Act (Act) *N.J.S.A.* 10;4-6 to 4-21. Therefore, she argues, the Commissioner lacks jurisdiction to hear and determine petitioners' Petition of Appeal.

Under the holding by the Appellate Division of Superior Court in *Sukin, supra.,* the Court said, in part, that :

> The Commissioner of Education has complete power to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. We are equally satisfied that the Commissioner has additional incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws. (citation omitted) 171 *N.J. Super.* 187

Thus, where a matter concerns Title 18A and/or the Administrative Code under Title 6, and implicates the Open Public Meetings Act, the Commissioner has incidental jurisdiction to determine issues arising under the Act.

In *Rice v. Union County Reg. High School Bd. of Ed.,* 155 *N.J. Super.* 64 (App. Div. 1977), this matter concerned the Union County Regional High School Board's application of the personnel exception to the Act, *N.J.S.A.* 10:4-12 b (8), with respect to a reduction in force under *N.J.S.A.* 18A:29-9 to -14. There, the Court reaffirmed the board of education's statutory right to retire into closed executive session to discuss personnel matters, pursuant to section 4-12 b (8) of the Act. The *Rice* Court emphasized that the very purpose of this section of the Act is for:

> ...[P] ermitting personnel matters to be discussed in

> closed sessions. The public policy behind the personnel exception to the Open Public Meetings Act is clearly stated in *N.J.S.A.* 10:4-7 and indicates a concern for "personal privacy or guaranteed rights of individuals [which] would be clearly in danger of unwarranted invasion" if these matters were to be discussed in public. 155 *N.J. Super.* 71, 72

While maintaining "personal privacy or guaranteed rights of individuals," the *Rice* Court held that any *decisions* reached by the board of education at its executive sessions were to be revealed to the public. *Id.* at p. 71. The Union County Regional High School Board did so by adopting a resolution in open public session as a consequence of its discussion in closed executive session. The *Rice* Court, therefore, held that the board of education was in compliance with the Act.

In the *Rice* opinion, the Appellate bench held that any decisions reached by the board of education during it closed executive session must be revealed in open public session. 155 *N.J. Super.* at 71. There has been no showing here that the Board made any decision in closed executive session with respect to respondent Dowling. Therefore, there was nothing for the Board to report to the public with regard to any decision or action concerning respondent Dowling. I so **FIND and CONCLUDE.**

In their Petition of Appeal, petitioners do not cite any violation of the Education Laws under Title 18A, which were alleged to have been committed by either respondent Board or respondent Dowling. Nor is any violation of the Administrative Code, under *N.J.A.C.* 6 cited. Rather, in their Brief in Opposition to respondent Dowling's Motion to Dismiss, petitioners' allege that this matter involves *N.J.S.A.* 18A:28-5, conduct unbecoming a teaching staff member. Chapter 28 of Title 18A, however, deals with the tenure of teaching staff members, *i.e.,* how the legislative status is obtained and retained, among other things. The Legislature has established an elaborate and precise system of dealing with such matters under the *Tenure Employees Hearing Law, N.J.S.A.* 18A:6-10 to 18.1. No written charges have been levied against respondent Dowling pursuant to section 6-11, requesting her dismissal and reduction of compensation under section 6-10.

I **CONCLUDE,** therefore, that petitioners' reliance upon *N.J.S.A.* 18A:28-5 in support their position that the instant matter falls under Title 18A is mistaken and must fail.

Given all of the above, I **CONCLUDE** that this matter concerning the report of the Superintendent of Schools to the Board in closed executive session was done so pursuant to *N.J.S.A.* 10:4-12 b (8).

I **FURTHER CONCLUDE** that in the absence of any alleged violation of Education Laws under Title 18A and/or Administrative Code, Title 6, the Commissioner of Education lacks jurisdiction to hear and determine this matter.

ORDER

Accordingly, it is hereby **ORDERED** that the instant matter be and is hereby **DISMISSED** for lack of jurisdiction for the Commissioner of Education to hear and determine the controversy.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

29 April 1994
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

MAY 5, 1994
Date

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 1994
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

MOSES K. CHEUNG AND CHRISTINE LAM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY, AND KAY DOWLING,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and replies thereto of respondent Board and respondent Dowling were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners except to the ALJ's determination that the Commissioner lacks jurisdiction in this matter because there is no educational issue involved. They argue that the underlying claim here was the filing of a formal complaint with the Superintendent of Schools charging a teaching staff member with engaging in professional misconduct toward their son and, as such, this action is clearly within the Commissioner's jurisdiction. Further, they contend that the ALJ erred in concluding that the Board had no obligation to report in public session what had taken place in executive session because it took no action. Petitioners aver that an investigation regarding their complaint was conducted and a written report and recommendation were prepared by the Superintendent and presented to the Board.

> ***Once such a report and recommendation was received by the Board, it was incumbent upon the Board to act with respect to the recommendations of the Superintendent. Such action could have been to take disciplinary proceedings against Respondent Dowling or alternatively to determine that there was no basis to take further action. In any event, the Board was legally obligated to reach a decision and to take action upon that decision in public.***
>
> (Petitioner's Exceptions, at p. 2)

Lastly, petitioners object to the ALJ's dismissal of this petition in its entirety without addressing its Second Count which sought an order compelling the Board to provide them with copies of their son's test results and other records with respect to his school performance. Petitioners maintain that the dismissal deprived them of their right to be heard on this issue and, effectively deprived them of the relief sought without due process.

In reply, respondent Dowling argues that nowhere in petitioners' exceptions do they specify any education law allegedly violated or provide any reference whatsoever to legal authority in support of their assertion that the matter at bar arises under school law. The mere fact that petitioners assert a claim against a tenured teaching staff member does not bring the controversy under school law such as to grant the Commissioner jurisdiction over the matter. Respondent contends that the First Count of the within petition seeks solely to obtain the investigation report prepared by the Superintendent of Schools to which Ms. Dowling has not waived her privacy under the requirements of the Open Public Meetings Act (OPMA). Thus, as determined by the ALJ, this is not an educational matter, but strictly an OPMA issue. Disputes under the OPMA, she argues, are within the purview of the Superior Court and, therefore, the ALJ was correct to dismiss the petition for lack of Commissioner jurisdiction.

With respect to petitioners' assertion that the Board was obligated to publically report what had taken place in its executive session, the Board contends that the ALJ's decision in this regard was correct and predicated on Rice v. Union County Reg. High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977) where the court held

> It was announced to the public at the time the resolution was adopted that any decision reached during the executive session would be made known to the public when action was formally taken on it. The decisions reached at the executive session were revealed the same evening with the adoption of the resolution terminating the personnel named on a list incorporated into the resolution. (emphasis supplied) Id. at 71.
>
> (Board's Exceptions, at p. 2)

Respondent maintains in light of Rice, supra, it is clear that it is not the discussion of the Board which is significant, but only the action, if any, actually taken by the Board. It argues that the ALJ rightly concluded that since there was no formal action required or taken by the Board, there was no violation of respondent Dowling's rights or the rights of the public.

Both respondents contend that the Second Count of the within petition was rendered moot by the Board's specific agreement to provide petitioners the relief sought during a pre-hearing conference and they point out that the specifics of such agreement were outlined by the ALJ on Page 2, #2. of the initial decision.

Upon a careful review of the record in this matter, the Commissioner finds petitioners' exception arguments meritless. He concurs with the findings and conclusions of the ALJ in his initial decision that the within petition must be dismissed for lack of jurisdiction. Given that petitioners do not cite any cognizable violation of the Education Laws which was alleged to have been committed by either respondent Board or respondent Dowling, it is

clear that this forum does not have jurisdiction to adjudicate the sole alleged Open Public Meetings Act issue.

As stated in Michael Rovello v. Hopewell Valley Regional School District Board of Education, 93 N.J.A.R. 2d (EDU) 313

> ***While the Commissioner does have jurisdiction to address OPMA violations, under Sukin, Jenkins, Springvalley, and Entwistle, supra, it is clear that such jurisdiction is ancillary, pendent to an equally or more significant "school law" issue. Since the only issue presented in the within petition concerns a purported Open Public Meetings Act (OPMA) violation, absent a significant nexus to an underlying substantive school law issue, the Commissioner is without jurisdiction to adjudicate the sole question presented under the OPMA. (Rovello at 317)

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

AUGUST 8, 1994

DATE OF MAILING - AUGUST 8, 1994

217-94

217-94E

C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK AND BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, special education student C.M., sought emergent determination compelling provision of transportation to regional day school from either C.M.'s original district of residence (Newark) in which her IEP was developed or the district of father's residence (Orange). C.M. did not receive transportation or home instruction.

ALJ ordered City of Orange Board of Education to transport C.M. at its own cost and expense. Requests for compensatory education and for attorney fees were denied.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 9, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 6152-94
AGENCY DKT. NO. 185-6/94

C.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK and BOARD OF EDUCATION OF THE CITY OF ORANGE,

Respondents

Joann Fuqua, Esq., attorney for petitioner (Community Health Law Project)

Marvin L. Comick, Esq., attorney for respondent Board of Education of the City of Newark

Ray Hamlin, Esq., attorney for respondent Board of Education of the City of Orange (Ashley & Charles, attorneys)

Record Closed: June 28, 1994 Decided: June 28, 1994

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

THIS MATTER having been opened to the Office of Administrative Law on petitioner's application for emergent relief pursuant to *N.J.A.C.* 1:6A-12; and the Administrative Law Judge

having read and considered the moving papers and having heard the arguments of counsel; and for other good cause shown

IT IS on this 28th day of June 1994

ORDERED that respondent Board of Education of the City of Orange shall, at its cost and expense, provide to petitioner transportation to and from the Erickson Regional Day School, Millburn, New Jersey; and it is further

ORDERED that petitioner shall be picked up from and returned to 220 Mt. Vernon Place, Newark, New Jersey; and it is further

ORDERED that petitioner's requests for compensatory education and attorneys fees be and hereby are **DENIED.**

This Order for Emergency Relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this Order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this Order within forty-five days, this recommended Order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 28, 1994
DATE

MARIE P. SIMONELLI, A.L.J.

OAL DKT. NO. EDU 6152-94

C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK AND BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, including the tape of the hearing held on June 28, 1994, and the Order for Emergent Relief disposing of all of the issues in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by her in her oral decision.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter.

IT IS SO ORDERED.

AUGUST 9, 1994

DATE OF MAILING - AUGUST 9, 1994

COMMISSIONER OF EDUCATION

218-94

J. GARFIELD JACKSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, WILLIAM TREPICCHIO (INDIVIDUALLY), AND DR. HENRY OLIVER (INDIVIDUALLY),	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, nontenured Assistant Principal, averred that the Board's 60 days' notice terminating his position was untimely pursuant to N.J.S.A. 18A:27-10 and that respondents violated provisions of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21.

In light of the testimony of witnesses and the record, the ALJ concluded that petitioner received reasonable notice that his employment could be adversely affected at the Board meeting of July 22, 1993; thus, there was no violation of the OPMA. Moreover, as an administrator, respondent was knowledgeable as to the Board's personnel procedures concerning its meetings and employees' rights. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 9, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8940-93
AGENCY DKT. NO. 303-8/93

J. GARFIELD JACKSON, JR.,

Petitioner,

v.

ENGLEWOOD BOARD OF EDUCATION,
WILLIAM TREPICCHIO (INDIVIDUALLY)
AND DR. HENRY OLIVER (INDIVIDUALLY),

Respondents.

Alan L. Jackson, Esq., for petitioner
(Brown, Lofton, Childress & Wolfe, attorneys)

Allan S. Gutfleish, Esq., for respondents
(Gutfleish & Davis, attorneys)

Record Closed: May 12, 1994 Decided: June 24, 1994

BEFORE **RICHARD McGILL,** ALJ:

This matter concerns a petition by J. Garfield Jackson, Jr. ("petitioner") in regard to the termination of his employment as an assistant principal with the Englewood Board of Education ("Board"). Petitioner alleges that the Board, Assistant Superintendent William Trepicchio and Superintendent Henry Oliver (collectively "respondents") failed to provide in a timely manner

either a written contract for the next succeeding school year or written notice that such employment would not be offered in violation of *N.J.S.A.* 18A:27-10 and that respondents violated provisions of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to -21, with respect to deliberations concerning petitioner's employment. Respondents deny petitioner's allegations and request that the petition be dismissed.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on August 16, 1993, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondents filed an answer on August 20, 1993, and the matter was transmitted to the Office of Administrative Law on September 12, 1993 for determination as a contested case.

On March 10, 1994, respondents filed a motion for summary decision, and after petitioner submitted responsive papers, an Order was issued on April 19, 1994, in which the motion was granted in part and denied in part. The alleged violation of *N.J.S.A.* 18A:27-10 was dismissed based upon a determination that the Board had in fact complied with the requirements of said statute by offering petitioner a written contract for the next succeeding school year in a timely manner. The motion was denied with respect to the alleged violation of the Open Public Meetings Act, because material facts were in dispute.

A hearing was conducted on April 26 and 28, 1994 at the Office of Administrative Law in Newark, New Jersey. The record closed upon receipt of briefs.

ISSUES

The main issue in this proceeding is whether respondents complied with the Open Public Meetings Act with respect to petitioner's termination. A key factual issue is whether the Board conducted a secret meeting prior to July 7, 1993, without notice to petitioner. A related issue is whether a letter dated July 7, 1993 from William Trepicchio notifying petitioner of a meeting on July 22, 1993 cured any violation of the Open Public Meetings Act. Another issue is whether the

letter of July 7, 1993 constituted adequate notice under the Open Public Meetings Act. The final issue concerns any relief that may be granted.

FACTS

a. Undisputed Facts

The material facts in this matter are largely undisputed, and I **FIND** as follows. Petitioner began his employment with the Board in August 1992, as an assistant principal assigned to an elementary school known as the Lincoln and Quarles schools. Petitioner's immediate supervisor was Arlene Clinkscale, who evaluated petitioner in November 1992 and identified several areas of concern. Petitioner discussed the evaluation with Ms. Clinkscale and Dr. Henry Oliver, who is the Superintendent of the Englewood public schools. The evaluation and discussion led to the development of an action plan to improve petitioner's performance. Petitioner described his relationship with his supervisor as "rocky" due to different styles. A second evaluation by Ms. Clinkscale showed improvement in some respects, but there were still areas of concern.

By letter dated April 22, 1993, Assistant Superintendent William Trepicchio advised petitioner that the renewal or nonrenewal of his contract would be discussed by the Board at a meeting scheduled for April 29, 1993. The letter also advised petitioner of the time and place of the meeting. Further, the letter advises petitioner that he had the right to request, in writing, that any discussion concerning him be held at a public hearing and not at a meeting from which the public was excluded. By letter dated April 28, 1993, petitioner requested that any discussion related to his employment be held at a public meeting. Petitioner attended the meeting on April 29, 1993, and at that time, the Board voted to renew his contract for the 1993-94 school year.

On May 7, 1993, Assistant Superintendent Trepicchio informed petitioner that there was a vacancy in the position of assistant principal at the Janis E. Dismus Middle School and that he would be transferred to fill that position effective May 10, 1993. Petitioner's duties at the Middle School included supervision of students, budget preparation, scheduling, curriculum development, discipline and management of testing programs. Petitioner's immediate supervisor was Dr. Henry Pruitt, principal of the Middle School.

By letter dated June 17, 1993, Assistant Superintendent Trepicchio advised petitioner that the Board would discuss his reassignment in a closed session on June 24, 1993, based upon a recommendation from the Superintendent. A reorganization proposed by the Superintendent was discussed during the meeting on June 24, 1993, but several new members of the Board were not prepared to approve the plan. The Superintendent had a place for petitioner in the reorganization, but petitioner was not actually discussed at that meeting.

By letter dated June 29, 1993, Assistant Superintendent Trepicchio advised petitioner that the Board would discuss his reassignment in a closed session on June 30, 1993. Petitioner's understanding at this point was that as part of the reorganization plan, he would remain as assistant principal at the Middle School. Petitioner attended the meeting, but as it had at the meeting on June 24, 1993, the Board decided to table the reorganization plan.

Shortly thereafter, Dr. Oliver received an evaluation by Dr. Pruitt of petitioner's performance at the Middle School. This evaluation, which was dated June 30, 1993, noted several areas of concern similar to the evaluations at the Lincoln and Quarles schools.

In a letter dated July 7, 1993 to petitioner, Assistant Superintendent Trepicchio stated as follows: "Please be advised that on July 22, 1993 the Board of Education will act to issue you a 60 day notice to terminate your employment with the Englewood Public Schools."

Shortly after receipt of the letter dated July 7, 1993, petitioner met briefly with Assistant Superintendent Treppicchio and reviewed his personnel file. Assistant Superintendent Trepicchio did not advise petitioner of his right to request a public discussion by the Board at the meeting on July 22, 1993. Petitioner did not request a public discussion or the opportunity to appear before the Board, and he did not attend the meeting on July 22, 1993.

At the meeting on July 22, 1993, Superintendent Oliver presented to the Board in a closed session his recommendation that petitioner should be terminated. After hearing Dr. Oliver's presentation, the Board voted by a margin of seven to zero to terminate petitioner's employment

upon sixty days notice to begin on July 23, 1993 and end on September 20, 1993. Thereafter, petitioner was notified of the Board's action by letter dated July 23, 1993.

By letter dated August 12, 1993, petitioner's attorney requested a statement of reasons for the termination. The Board responded with a letter dated August 26, 1993, setting forth the reasons for the termination.

b. Disputed Facts

Petitioner relies on the letter dated July 7, 1993 from Assistant Superintendent Trepicchio. Petitioner infers from the wording of the letter and the absence of any other explanation that the Board had made a determination with respect to his employment prior to the issuance of the letter and that to do so, the Board must have conducted a secret meeting. Petitioner testified that upon receipt of this letter, he did not think that he had a right to request public discussion at the meeting on July 22, 1993. Petitioner thought that he would be terminated, and he felt that he had "lost the battle."

Respondents presented the testimony of Dr. Henry Oliver, William Trepicchio and Norman W. Davis, who is a member of the Englewood Board of Education. Dr. Oliver testified that he received an evaluation dated June 30, 1993, by Dr. Pruitt, who considered petitioner's performance from May 10, 1993 to June 30, 1993. Dr. Oliver viewed the evaluation as reason for serious concern. Dr. Pruitt's assessment was similar to the earlier evaluations by the principal at the Lincoln and Quarles schools identifying areas of concern. Dr. Oliver previously thought that the earlier evaluations could be the product of a personality conflict. Dr. Pruitt's evaluation raised similar concerns to the earlier evaluations and represented a second consecutive negative evaluation. In a cover note, Dr. Pruitt emphatically recommended against petitioner's continued employment. Dr. Oliver considered the evaluation dated June 30, 1993 in conjunction with other factors and decided that petitioner should be terminated. While acknowledging that Dr. Pruitt was denied an increment and has since retired, Dr. Oliver viewed Dr. Pruitt's evaluation as the critical factor in the decision to recommend termination.

Dr. Oliver spoke with Assistant Superintendent Trepicchio and authorized him to notify petitioner that his termination would be considered by the Board at its regular meeting on July 22, 1993. The Board members were not involved with the letter. Dr. Oliver began his vacation during the weekend of July 4, 1993, and did not see Assistant Superintendent Trepicchio's letter of July 7, 1993, until he returned in mid-July. Dr. Oliver stated that it would have been preferable to elaborate somewhat in the letter of July 7, 1993, and he acknowledged that the letter could give the impression that the determination to terminate had already been made. However, Dr. Oliver stated that that was not the case.

Dr. Oliver did not speak with any Board member from July 7 to July 22. The Board never initiated a termination, and he never heard of any faction of the Board meeting concerning petitioner.

Dr. Oliver met with petitioner on July 20, 1993. During the meeting, petitioner expressed dismay and disagreement with the action to terminate his employment. Dr. Oliver referred to the Dr. Pruitt's evaluation and recommendation and stated that he had no alternative but to recommend petitioner's termination. Dr. Oliver knew that petitioner was aware of his right to request a public discussion since he had done so in April 1993, but petitioner did not request a public hearing at the meeting scheduled for July 22, 1993. During the meeting on July 22, 1993, Dr. Oliver presented his recommendation concerning petitioner, and the Board voted to terminate petitioner's employment.

Assistant Superintendent Trepicchio testified that he and Dr. Oliver discussed Dr. Pruitt's evaluation of petitioner and that Dr. Oliver decided to recommend that the Board terminate petitioner's employment at its meeting on July 22, 1993. As a result, Assistant Superintendent Trepicchio prepared the letter dated July 7, 1993 to petitioner. The letter should have been similar to others which were more informative, but because he was very busy, he wrote the letter as he did. Assistant Superintendent Trepicchio stated that he would write the letter differently if he had it to do again, but that he viewed it as sufficient notice.

As part of his duties, an assistant principal should be aware of personnel procedures, including rights under the Open Public Meetings Act. Administrators are aware of the right to request a hearing, which is always provided by the Board.

Assistant Superintendent Trepicchio is involved in all meetings concerning personnel. The normal procedure is that the Superintendent makes a recommendation concerning termination to the Board. Action by the Board is required to effectuate the termination. The only meetings at which petitioner was discussed occurred on April 29, 1993 and July 22, 1993. During the period from June 24, 1993 to July 22, 1993, the Board did not have any meeting other than those on June 24, June 30 and July 22. Following petitioner's termination on July 22, 1993, petitioner's position was filled by a person from outside the school system.

Norman W. Davis testified that he is a member of the Englewood Board of Education. Mr. Davis testified that the Board considered the Superintendent's recommendation to terminate petitioner at its regular meeting on July 22, 1993 and approved the recommendation. Aside from the possibility that petitioner was discussed at meetings on June 24 and June 30, the Board had no other discussions or meetings concerning petitioner during the June to July time frame.

Respondents' witnesses were fully credible, and their testimony is accepted as true. The wording of the letter dated July 7, 1993 is a product of inartful drafting rather than an indication that the Board had met and determined prior thereto to terminate petitioner's employment. Petitioner's claim that he did not realize that he had a right to request that any discussion of his employment be held at a public meeting was not credible. Accordingly, the above summary of the testimony of respondents' witnesses is **FOUND AS FACT.** Additionally, I specifically **FIND** that the Board did not conduct a secret meeting in regard to petitioner.

LAW AND ANALYSIS

The Open Public Meetings Act (the Act), *N.J.S.A.* 10:4-6 to -21, insures that citizens have adequate advance notice of and the right to attend all meetings of public bodies at which any business of the public is discussed or acted upon in any way, subject to exception only in those circumstances where the public interest would be endangered or the personal privacy rights of

individuals or guaranteed rights of individuals would be in danger of unwarranted invasion. *N.J.S.A.* 10:4-7. A public body must provide adequate notice of its meetings. *N.J.S.A.* 10:4-9(a). "Adequate notice" means written advance notice of at least forty-eight hours in accordance with *N.J.S.A.* 10:4-8(d). The meeting must be open to the public in accordance with *N.J.S.A.* 10:4-12(a), unless the public is excluded pursuant to exceptions listed in *N.J.S.A.* 10:4-12(b). One exception set forth in *N.J.S.A.* 10:4-12(b)8 relates to employment, termination of employment, evaluation of performance of employees, and terms and conditions of employment; however, an employee whose rights could be adversely affected may request that the matter be discussed at a public meeting. An action by a public body not inconformity with the Act may be voided pursuant to *N.J.S.A.* 10:4-15(a), subject to the limitation that the public body may take corrective or remedial action by acting *de novo* at a public meeting held in conformity with the Act. Strict compliance to the letter of the law is required. *Polillo v. Deane*, 74 *N.J.* 562, 578 (1977).

Employees whose rights may be adversely affected by a decision of a public body should be given reasonable notice thereof to enable them to decide whether they desire public discussion and, if so, to present an appropriate request. *Rice v. Union Cty. Reg. High School Bd. of Ed.*, 155 *N.J.Super.* 64, 73-74 (App. Div. 1977), *certif. denied*, 76 *N.J.* 238 (1978). Notice to conform to the Act need not be actual; it may be constructive. *Jamison v. Morris Sch. Dist. Bd. of Educ.*, 198 *N.J.Super.* 411, 416 (App. Div. 1985).

Petitioner contends that the Board conducted a secret meeting in violation of the Open Public Meetings Act prior to the issuance of the letter dated July 7, 1993, and decided to terminate his employment. Petitioner's contention raises a factual issue which was resolved in favor of respondents. The specific finding was made above that the Board did not conduct a secret meeting as alleged by petitioner. Under the circumstances, the conclusion is warranted that petitioner's contention is without merit.

Respondents argued in this proceeding that the letter of July 7, 1993 and subsequent meeting on July 22, 1993 cured any violation of the Open Public Meetings Act. However, as determined above, there was no violation of the Open Public Meetings Act in the form of a secret meeting which would require a cure. Additionally, there is no allegation that the petitioner did not receive reasonable notice of the Board meetings on June 24 and 30, 1993, concerning the

proposed reorganization and his possible reassignment, and there is no indication that the Board discussed termination of petitioner's employment. It follows that there was no violation of the Open Public Meetings Act that needed to be cured at the time that Assistant Superintendent Trepicchio issued his letter dated July 7, 1993.

The final issue is whether the letter dated July 7, 1993, constituted reasonable notice concerning the termination of petitioner's employment at the Board meeting on July 22, 1993. Petitioner maintains that the letter of July 7, 1993 gave him the impression that the determination had already been made that he would be terminated. Further, petitioner contends that he would have requested the opportunity to be heard at a public meeting but the letter of July 7, 1993 did not mention his right to do so, as did the letter advising him that his contract renewal would be discussed at a meeting on April 29, 1993, leading petitioner to believe that he did not have the right to do so.

Respondents argue that the Board is only required to provide reasonable notice of a meeting at which an employee will be discussed. There is no requirement that the Board advise the employee of all his rights under the Open Public Meetings Act. Respondents maintain that the letter of July 7, 1993 provided sufficient notice of the proposed termination of petitioner's employment. Respondents emphasize that petitioner was knowledegable as to the Board's practices and procedures concerning its meetings and that petitioner had previously exercised his rights under the Open Public Meetings Act in April 1993.

Respondents' arguments are more persuasive. There can be no doubt that petitioner had actual notice and that he was fully aware that the termination of his employment would come before the Board at its meeting on July 22, 1993. While the inartful wording of the letter of July 7, 1993 could give the impession that a determination had already been made to terminate petitioner's employment, the totality of the circumstances indicate that petitioner was sufficiently knowledgeable to realize that he had rights under the Open Public Meetings Act and that the time to exercise those rights, if he intended to do so, was at hand. Petitioner had meetings with Assistant Superintendent Trepicchio and Superintendent Oliver. Evidently, based upon these conversations and other circumstances, petitioner chose not to exercise his rights under the Open Public Meetings Act. Under the circumstances, I **CONCLUDE** that petitioner received

reasonable notice that his employment could be adversely affected at the Board meeting on July 22, 1993, and that therefore there was no violation of the Open Public Meetings Act. It follows that the petition should be dismissed.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 24, 1994
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

6-25-94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESS LIST

For petitioner:

J. Garfield Jackson, Jr.

For respondent:

William Trepicchio

Norman W. Davis

Dr. Henry Oliver

EXHIBIT LIST

P-1	Letter dated April 22, 1993 from William Trepicchio to J. Garfield Jackson	Evidence
P-2	Letter dated June 17, 1993 from William Trepicchio to J. Garfield Jackson	Evidence
P-3	Letter dated June 29, 1993 from William Trepicchio to to J. Garfield Jackson	Evidence
P-4	Letter dated July 7, 1993 from William Trepicchio to to Garfield Jackson, Jr.	Evidence
P-5	Minutes of Board meeting on July 22, 1993	Evidence

R-1	Letter dated April 28, 1993 from J. Garfield Jackson to William Trepicchio	Evidence
R-2	Administrative Evaluation dated June 30, 1993 by Dr. Henry Pruitt	Evidence
R-3	Letter dated August 12, 1993 from Alan L. Jackson, Esq., to Dr. Henry Oliver	Evidence
R-4	Letter dated August 26, 1993 from Dr. Henry Oliver to Alan L. Jackson, Esq.	Evidence

OAL DKT. NO. EDU 8940-93

J. GARFIELD JACKSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, WILLIAM TREPICCHIO (INDIVIDUALLY), AND DR. HENRY OLIVER (INDIVIDUALLY),	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondents' reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions relate solely to an assertion that the ALJ erred in his credibility assessments which found respondents to be fully credible and petitioner not credible. In this connection, petitioner recasts and reasserts arguments presented to the ALJ with respect to the July 7 correspondence he received from the Board and makes extensive reference to testimony proffered at the hearing as support for his contention that "the totality of the circumstances and evidence show that a web of deceit and manipulation of the system took place to violate petitioner's rights under the Open Public Meetings Act.***" (Petitioner's Exceptions, at p. 4)

In response, respondents urge that the Commissioner not consider petitioner's exceptions in reaching a determination in this matter because

> (1) No exception was taken to any findings of law made by Judge McGill,
>
> (2) The Petitioner repeatedly refers incorrectly to testimony as well as a discussion off the record.
>
> (3) The Petitioner repeatedly misstates and/or mischaracterizes testimony, and
>
> (4) The Petitioner implies facts not in evidence such as deceit, secret meeting, etc.
>
> (Respondents' Reply, at p. 4)

Upon careful and independent review of the record in the matter, the Commissioner adopts the recommendation of the ALJ for the reasons expressed by him in the initial decision. With respect to the exceptions of petitioner, the Commissioner notes that without a review of the transcripts of this matter, which were not a part of the record before him, it is not possible to reconcile the conflicting claims made by petitioner and respondents regarding findings of fact. Further, the existing record does not provide any cause to challenge the credibility assessments made by the ALJ.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

AUGUST 9, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING- AUGUST 9, 1994

219-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SEASIDE	:	DECISION
PARK BOROUGH, OCEAN COUNTY,	:	
_____	:	

AUGUST 9, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

WITHDRAWAL

OAL DKT. NO. EDU 4536-94

AGENCY DKT. NO. 92-4/94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF SEASIDE PARK BOROUGH, OCEAN COUNTY.

Stephanie Ann Kiziukiewicz and **Wanda Muermann,** petitioners, *pro se*

Seymour J. Kagan, Esq., for respondent School District of Seaside Park Borough (Berry, Kagan & Sahradnik, attorneys)

Record Closed: July 1,1994 Decided: July 7, 1994

BEFORE **JOSEPH F. MARTONE**, ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on May 11, 1994, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge on June 17, 1994, and a hearing was scheduled for July 8, 1994.

On June 30, 1994, *pro se* petitioner Stephanie Ann Kiziukiewicz faxed a letter requesting that this matter be dismissed (Exhibit C-1). A follow-up letter also requested a dismissal of this matter (Exhibit C-2). On July 1, 1994, the OAL was orally notified by Ms. Kiziukiewicz that this request was submitted on behalf of both petitioners.

By letter dated July 1, 1994, attorney for respondent objected to a dismissal without prejudice and requested reimbursement for fees and costs (Exhibit C-3).

N.J.A.C. 1:1-19.2(a) provides that a party may withdraw a request for a hearing by notifying the judge and all parties. It further provides that upon receipt of such notification the judge shall discontinue all proceedings and return the case file to the Clerk, who is then required to return the matter to the transmitting agency. *N.J.A.C.* 1:1-19.2(c) indicates that after the Clerk has returned the matter, a party shall address to the transmitting agency head any motion to reopen a withdrawn case.

In view of the fact that petitioners who requested the hearing have indicated their intention to withdraw, I **FIND** that the OAL no longer has any jurisdiction to hear this matter as a contested case.

The request of attorney for respondent for reimbursement of fees and costs resulting from this proceeding is a matter which should be addressed to the agency head or should be pursued in the appropriate legal forum in the event that this and other matters have been filed by petitioners on specious grounds for the purpose of harassing respondent or abusing the legal system.

In any event, pursuant to *N.J.A.C.* 1:1-19.2 I **FIND** that petitioners have withdrawn their request for a hearing. Therefore, I **ORDER** the Clerk to return this matter to the agency for appropriate disposition.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

lam

LIST OF EXHIBITS

C-1 Petitioner's letter of June 30, 1994

C-2 Petitioner's correction letter of June 30, 1994

C-3 Attorney for respondent letter of July 1, 1994

36 Seventh Avenue
Seaside Park, NJ 08752
June 30, 1994

VIA FAX: 609-588-3730

The Honorable Joseph F. Martone
Administrative Law Judge
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625

Re: IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF SEASIDE PARK BORO, OCEAN COUNTY, OAL DKT NO EDU 4536-94; AGENCY REFERENCE NO. 94-4/94

Dear Judge Martone:

Please accept this letter as my request for stipluation of dismissal with prejudice in the above referenced matter. Please have this matter dismissed without prejudice and without costs against either party.

Very truly yours,

(Mrs.) Stephanie Ann Kiziukiewicz
Private Citizen
Phone 908-793-2094

C-1

CC: Seymour J. Kagan, Esq.

7/1 am
Called - left message - to call back.

7/1 pm - Called Again - left another message.

7/1 Kiziukiewicz called back - is wld for both petitions.

JUNE 30, 1994

TO: THE HONORABLE JOSEPH F. MARTONE
ADMINISTRATIVE LAW JUDGE
PHONE 609-588-6542
FAX 609-588-3730

FROM: STEPHANIE ANN KIZIUKIEWICZ
PHONE & FAX 908-793-2094

OF PAGES INCLUDING THIS COVER SHEET: 2

OAL DKT. NO. EDU 4536-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SEASIDE	:	DECISION
PARK BOROUGH, OCEAN COUNTY,	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 9, 1994

DATE OF MAILING - AUGUST 9, 1994

220-94

220-94

IN THE MATTER OF THE TENURE	:	
HEARING OF CALVIN INGRAM, STATE-	:	COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE	:	DECISION
CITY OF PATERSON, PASSAIC COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board certified tenure charges against custodian for alleged conduct constituting neglect of duty/insubordination, execssive absenteeism/insubordination, misbehavior and excessive tardiness.

ALJ determined Board sustained its charges. Moreover, ALJ found respondent had repeatedly been warned that his conduct was not acceptable; yet, his behavior did not improve. ALJ ordered respondent dismissed from his tenured custodial position.

Commissioner adopted findings and determination in initial decision and directed that respondent be dismissed from his tenured custodial position as of the date of the Commissioner's decision.

AUGUST 9, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11447-93
AGENCY DKT. NO. 369-11/93

IN THE MATTER OF THE TENURE HEARING OF CALVIN INGRAM, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

Gregory G. Johnson, Esq., for petitioner

Mary J. Hammer, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: May 16, 1994 Decided: June 30, 1994

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

This matter concerns tenure charges brought against the respondent, Calvin Ingram, which were certified by Laval S. Wilson, the State District Superintendent. The matter was transmitted to the Office of Administrative Law (OAL) on December 1, 1993 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was originally set down for a prehearing conference on March 24, 1993. It was adjourned and rescheduled for April 12, 1994 at which time the conference took place The matter was then set down for hearing on May 16, 17 and 18, 1994.

On May 16, 1994 a hearing was held in the matter at the OAL, 185 Washington Street, Newark, New Jersey. At that time the respondent, Calvin Ingram, did not appear. Counsel for respondent was present and testimony was taken. Counsel for

respondent indicated that she had not had any contact from her client and was not able to get in touch with him and also indicated that she did know whether he was coming or not. At no time did the respondent in this case contact the undersigned's office or the OAL scheduling unit to request any adjournment. At the conclusion of testimony on May 16, 1994 the hearing record closed.

ISSUE

The question in this case is whether or not the charges brought against Calvin Ingram, a custodian employed by the State-Operated School District of the City of Paterson, can be sustained. Should those charges be sustained the question then would turn to whether or not there is some mitigating or excusing factor with respect to any of those charges. The charges as outlined in the statement of charges signed by Louis W. Milone include an allegation of repeatedly failing to complete all assigned duties by cleaning the facilities at Public School No. 6 during the period between January 1988 and August 1993. It is alleged that this constitutes neglect of duty and/or insubordination. The second charge is that during the periods between June 1990 and August 1993 the respondent was absent a total of 72 5 school days of which at least 30 were taken without authorization. It is alleged this constitutes excessive absenteeism as well as jeopardizing the health and safety of students and staff persons assigned to Public School No. 6. Charge number three alleges that on numerous occasions during the period between July 1991 and May 1993 the respondent falsified staff sign-in/sign-out records indicating that he worked the full shift when in fact he did not. The fouth and final charge is that the respondent repeatedly arrived late to work for his shift without authorization in violation of district policy. It is alleged that this conduct constitutes insubordination.

UNCONTESTED FACTS

The facts in this case are not contested by respondent.

Joseph Fulmore who is the principal of Public School No. 6 testified. He was appointed in 1989 as principal and has the responsibility for managing the building as well as facilitating program and staffing. He also supervises the custodial staff and the cafeteria staff

Mr. Fulmore is acquainted with Calvin Ingram a custodian at Public School No. 6. He first met Mr. Ingram in 1983 when Mr. Fulmore was vice-principal of that school. He had had supervisory capacity over Mr. Ingram from 1986 until the present.

Mr. Ingram was assigned the 7:00 a.m. to 4:00 p.m. shift and was assigned to maintain the cleanliness of the building. He was responsible for cleaning the auditorium, staircases, classrooms, corridors and bathrooms. There are six other custodians who work with Mr. Ingram. Three custodians are assigned to the night shift.

Mr. Fulmore reports to work at 6:00 a.m. and Mr. Ingram is due in at 7:00 a.m. Mr. Fulmore stated that he would be there at the sign-in and touch base with Mr. Ingram there as well as during work.

On December 21, 1990 Mr. Fulmore sent a letter to Mr. Ingram (P-5) indicating that on December 5, 1990 Mr. Ingram was told to make certain that the auditorium of the school was cleaned immediately after lunch in his assigned area. On that evening there was to be a meeting at the school. When Mr. Fulmore walked into the auditorium at 5:00 p.m. he found debris strewn around from the children's lunch that had not been cleaned. It required Mr. Fulmore to find volunteers to clean the auditorium. The letter also informed him that this was not the first time Mr. Fulmore has had to speak with him about his unacceptable work performance. It finished with "I will not tolerate this kind of attitude from this day forward."

On July 25, 1991 a memo was sent from Mr. Fulmore to Mr. Ingram indicating that he has been seen in areas where he should not be, outside of the building during work hours and also that he has been leaving the building before the scheduled time. Mr. Fulmore asked Mr. Ingram "Please refrain from this practice." It also gave Mr. Ingram the opportunity to meet with Mr. Fulmore to discuss the contents of the letter.

On June 15, 1992 the State District Superintendent Laval S. Wilson sent a letter to Mr. Ingram indicating that his increment adjustment would be withheld for the 1992-93 school year for the reasons of poor job performance and tardiness to work.

A memo was also sent to Mr. Ingram from Louis Milone on May 1, 1992 regarding job performance. This stated that Mr. Milone, who is the supervisor of custodial services, had received a complaint from Mr. Fulmore about an incomplete work assignment on Thursday, April 30, 1992. The memo (P-8) continues "This is not the first time that you have failed to complete your assigned work." Mr. Ingram signed this document.

On November 12, 1992 a memo was sent to Calvin Ingram from Louis W. Milone advising him that he was absent on November 3, 1992 and failed to call in. It went on to say that this failure to call in when absent "is not acceptable." Mr. Ingram signed this document on November 23, 1992. (P-10)

On December 18, 1992 another memo by Louis W. Milone, from the office of custodial service,s was sent to Calvin Ingram. This letter advised Mr. Ingram that he had been receiving complaints from Mr. Fulmore again regarding Mr. Ingram's job performance. It also indicated poor work performance and an indication that stairs and bathrooms were left dirty, the gym was being neglected and that the respondent took an additional half-hour for lunch. He was advised "This type of behavior is irresponsible and must cease immediately." The memo went to state that there had been other complaints and that he was being placed on 90 days notice. During this period he would be given every opportunity to improve his work habits and to become a responsible member of the staff. This document was signed by Mr. Ingram on December 22, 1992. (P-11)

Another memo was sent on February 8, 1993 from John A. Nolan, director of personnel. This letter stated that there had been a recommendation of a suspension without pay based upon overall poor job performance in his assignment as custodian. Accordingly Mr. Ingram was suspended for five days without pay effective Tuesday, February 9, 1993. The specific charges were:

a. Failing to observe working hours by tardiness or by unexcused or excessive absenteeism.

d. Failing to adhere to rules or regulations as defined by the supervisor either by orally or in writing.

e. Continuing unsatisfactory evaluations concerning job efficiency after proper instruction. This document was also signed by Mr. Ingram. (P-13)

Mr. Fulmore also sent a memo to Mr. Ingram on April 8, 1993 regarding an absence for which Mr. Ingram did not call in. That memo finishes "Mr. Ingram, I had to use some students to clean your area, because you are not reliable." (P-15)

Mr. Fulmore then went through a number of the evaluations that were documented in evidence exhibiting unsatisfactory evaluations by the chief custodian (P-30 through P-37)

Mr. Fulmore also indicated that from June 1990 on Mr. Ingram had a total of approximately 72.5 absences. On July 13, 1993 Mr. Fulmore sent another letter to Mr. Ingram (P-19) which indicated two days of absence July 1 and 9, 1993 and a lateness on July 6, 1993.

Alfred Bridges who was the chief custodian at Public School No. 6 since September 1992 also testified.

He first met Mr. Ingram on September 2, 1992. Mr. Bridges stated that he has a staff of five including Mr. Ingram and that Mr. Bridges also has a workload. He witnessed and signed the evaluations (P-27 through 30) and each one showed unsatisfactory performance on the part of Mr. Ingram.

The witness stated that he had spoken with Mr. Ingram who at one time said he had "paid his dues." There were no further conversations at that time.

Mr. Bridges spoke with Mr. Ingram at least two times a week. He said on occasion he spoke with him regarding his tardiness as well as his absenteeism. There were also custodial meetings held in the auditorium once a month.

On March 10, 1993 he spoke with Mr. Ingram however things did not improve after that. Neither his attendance improved nor was he arriving on a more timely basis. The witness also indicated that Mr Ingram left early but never asked permission to do so.

As these facts are not contested, along with the documentary exhibits submitted by the parties I **FIND** them to be the operational facts in this case.

DISCUSSION

In this case there is no factual dispute regarding the absences themselves, the latenesses nor the performance.

High absenteeism has previously been deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse. *Montville Township Education Association v. Board of Education of the Township of Montville,* OAL Dkt. No. EDU 8247-83, Commissioner's Decision at 10 (April 16, 1984); *Angelucci v. West Orange Board of Education*, 180 S.L.D. 1066. This being the case the burden shifts to the tenured employee to show that performance was unaffected by continued absences, notwithstanding the legitimacy of excuse. *Vonita Smith v. Board of Education of the City of Trenton*, OAL Dkt. No. EDU 5255-88, Commissioner's Decision (April 18, 1984).

In this case no information is presented regarding the absences, the latnesses or poor job performance. In each case the necessary focus is not merely the number of days of absence but a consideration of the nature of the absences themselves. It is necessary to also assess the impact that the absences have on the continuity of services within the school during the period of time in which the absences occurred. There also, logically, must be some form of warning given to the employee that his or her superiors were dissatisfied with the pattern of absences and conduct which have come forward.

In *Kelsy v. Board of Education of the City of Trenton*, OAL Dkt. No. EDU 5773-88, Commissioner's Decision (May 11, 1989), the following clearly outlined the procedure which must be followed:

> What a board of education is required to show, however, is that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences, cite omitted; (2) the impact that the absences had on the continuity of instruction during the period of time that the absences occurred, not merely after the fact;

> and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences (cite omitted). . . .
> (Slip opinion at page 19)

Applying these tests to the facts in this case it is clear that the number of absences as found in the documentary evidence as well as testified to by Mr. Fulmore are excessive. A number of absences were without any type of prior authorization. Additionally it is clear that custodial services suffered as the result both of Mr. Ingram's poor job performance as well as his absences and latenesses. The very fact that Mr. Fulmore had to find volunteers to help clean the gym of lunchtime debris which included milk cartons and other food type debris, from the floor before he could hold a meeting with visitors to the school in the evening shows an adverse impact. Additionally a failure to clean bathrooms, hallways and stairways and other areas assigned to Mr. Ingram show a potential for health and safety hazards. A failure to clean bathrooms presents a health hazard to all students and other individuals who use that particular bathroom. Additionally objects of debris on stairways, floors and in classrooms cause a potential hazard for students moving from place to place in the building. This hazard is not limited to students but would also endanger teachers, parents and visitors to the school. Debris on floors and in hallways might also impede the progress of those individuals who are physically challenged.

The last factor which must be discussed is whether or not there was some warning given to the employee by his or her superiors that there has been some dissatisfaction with the pattern of work and attendance engaged in. This case is replete with documentary evidence warning Mr. Ingram that his conduct was not acceptable and would not be tolerated. His behavior did not improve. He continued to be late and he continued to be absent without authorization and most importantly his custodial duties were poorly performed jeopardizing the health and safety of students. Not only did he receive numerous letters and memoranda as well as copies of evaluations which he signed but his salary increment was withheld. After that he was suspended for five days based upon the same pattern of behavior. This respondent has clearly had every opportunity to improve his behavior as well as meet with Mr. Fulmore or other staff members to assist him in arriving at an appropriate level of work performance He has not done so. Also a notice of the

hearing was sent to the respondent and he did not appear. The respondent in this case has shown no sign of wishing to maintain his employment with the district.

CONCLUSION

Based upon the foregoing, I **CONCLUDE** that the respondent has failed to complete his assigned duties by cleaning the facilities at Public School No. 6 and that this constitutes a neglect of duty and/or insubordination as described in charge number one. I further **CONCLUDE** that the respondent has been absent a total of 72.5 school days, a large number of which were taken without authorization which is disruptive to school operations and jeopardizes the health and safety of students and staff persons assigned to Public School No. 6 as found in charge two. I further **CONCLUDE** that on numerous occasions between July 1991 and May 1993 the respondent left work early without authorization and was late to work without authorization in violation of district policy as charged in charges number three and four.

ORDER

It is hererby **ORDERED** that Calvin Ingram, a tenured custodian with the State-Operated School District of the City of Paterson, Passaic County be and hereby is dismissed from his position as a custodian.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/30/94
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

7/5/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 07 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witness List

For petitioner:

Joseph Fulmore
Alfred Bridges

For respondent:

None

Evidence

P-1	Custodian's performance responsibilities
P-2	District's work rules dated May 1, 1988
P-3	Respondent's absent record (three pages)
P-4	Memo regarding poor job performance dated February 2, 1988
P-5	Letter by principal Fulmore dated December 21, 1990
P-6	Memo by Principal Fulmore dated July 25, 1991
P-7	Increment withholding letter by State District Superintendent dated June 15, 1992
P-8	Memo by Supervisor Milone dated May 1, 1992
P-9	Letter by Principal Fulmore dated June 19, 1992
P-10	Memo by Supervisor Milone dated Novmber 12, 1992
P-11	Memo by Supervisor Milone dated December 18, 1992
P-12	Memo by Supervisor Milone dated February 2, 1993
P-13	Letter by Dr. Nolan dated February 8, 1993
P-14	Letter by Principal Fulmore dated April 7, 1993
P-15	Letter by Principal Fulmore dated April 8, 1992
P-16	Memo by Supervisor Milone dated May 7, 1992

P-17 Letter by Principal Fulmore dated May 19, 1993

P-18 Letter by Principal Fulmore dated June 21, 1993

P-19 Letter by Principal Fulmore dated July 13, 1993

P-20 Letter by Principal Fulmore dated September 2, 1993

P-21 Letter by Principal Fulmore dated October 18, 1993

P-22 Letter by Principal Fulmore dated October 25, 1993

P-23 Letter by Principal Fulmore dated October 28, 1993

P-24 to P-26 No exhibits

P-27 Maintenance evaluation dated October 12, 1993

P-28 Maintenance evaluation dated October 13, 1993

P-29 Maintenance evaluation dated October 15, 1993

P-30 Custodian evaluation report dated March 10, 1993

P-31 Custodian evaluation report dated February 1, 1993

P-32 Custodian evaluation report dated March 17, 1992

P-33 Custodian evaluation report dated April 4, 1991

P-34 Custodian evaluation report dated March 20, 1991

P-35 Custodian evaluation report dated July 24, 1990

P-36 Custodian evaluation report dated April 3, 1990

P-37 Custodian evaluation report dated April 1, 1990

P-38 Letter by Principal Fulmore dated October 19, 1992

P-39 Letter by Principal Fulmore dated December 4, 1992

P-40 Letter by Principal Fulmore dated May 4, 1993

P-41 Letter by Principal Fulmore dated April 27, 1992

OAL DKT. NO. EDU 11447-93

IN THE MATTER OF THE TENURE	:	
HEARING OF CALVIN INGRAM, STATE-	:	COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE	:	DECISION
CITY OF PATERSON, PASSAIC COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed.

Upon careful and independent review of the record in this matter, the Commissioner agrees with and adopts as his own the findings and conclusion of the Administrative Law Judge and directs that the respondent be dismissed from his tenured custodial position in the State-operated School District of the City of Paterson as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 9, 1994

DATE OF MAILING - AUGUST 9, 1994

221-94

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

AUGUST 9, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8946-91
AGENCY DKT. NO. 279-7/91

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING,
Respondent.

John H. Watson, Jr., Esq., for petitioner

William C. Brown, Deputy Attorney General, for respondent
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: June 28, 1994 Decided: June 28, 1994

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter was transmitted to the Office of Administrative Law by the Department of Education on September 20, 1991 following the filing of a request by the petitioner that it be relieved of certain requirements pertaining to permanent handicap access to its facilities. Thereafter, ongoing efforts were made in an effort to attempt to settle the case without the necessity for a plenary hearing. When it appeared that such efforts were proving not to be successful, a plenary hearing was scheduled and

commenced on May 12, 1993 with the taking of testimony. However, the parties continued thereafter to explore the possibility of settlement and as a result of their continuing efforts and following the exchange of several draft agreements, the finalized settlement agreement containing the terms and conditions of the settlement was submitted to me. That document, which is attached hereto, contains the signatures of counsel for the petitioner, Essex County Education Services Commission, and by the deputy attorney general on behalf of the Department of Education. It provides, as well, that it will become effective following approval by the Commissioner of Education.

Having reviewed the terms of the proposed settlement, I **FIND** as follows:

1. The parties have voluntarily agreed to the terms of the settlement as evidenced by the signatures which appear on the settlement agreement.

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 28, 1994
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

6/30/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 05 1994
DATE

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JOHN H. WATSON, JR., ESQ.
ATTORNEY AT LAW
63 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
(201) 674-8717
ATTORNEY FOR ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION PETITIONER, vs. DEPARTMENT OF EDUCATION, BUREAU OF FACILITIES PLANNING RESPONDENT	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 8946-91 CIVIL ACTION SETTLEMENT AGREEMENT

A hearing on this appeal was scheduled for March 17, 1994, before Administrative Law Judge Stephen Weiss. Before the hearing the parties hereto agreed to settle this matter in accordance with the following terms:

A. Both parties agree to the following terms and conditions:

1. The Department of Education will assume handi-cap-accessibility costs at the 7 sites identified in the petition, subject to an overall cap of $21,000.

2. Essex County Educational Services Commission (Commission) will render the 11 trailers, installed since the filing of the petition in this matter handicap-accessible, subject to approval by the Bureau of Facilities Planning.

3. Trailers that have remained in the same location since installation prior to 1990 will be grandfathered with the understanding that if a handicapped student or teacher needs access to trailer, or if school becomes handicap-assessable, such trailer will be made handicap-assessible by the Commission on a timely basis so as to afford prompt access to the trailer.

4. With respect to those sites where trailers installed prior to 1990 have been moved since their installation, those trailers and/or sites must be made handicap-assessable by the Commission within the next seven years. During phase-in, the trailers will be subject to the same requirements as the grandfathered trailers. In other words, if a student requires access to the trailer or the school to which the trailer is attached becomes handicap-accessible, the trailer or trailers will be rendered handicap-accessible by the Commission on a timely basis so as to afford prompt access to the trailer.

5. In the event the Commission encounters extraordinary hardships in complying with the seven year phase-in period for making the trailers, identified in paragraph 4, handicap-accessible, the Commission may make application to the Department of Education, Bureau of Facilities Planning for relief.

6. The Commission must provide the Bureau with an identification of trailers moved since 1990 within a reasonable time.

B. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party and this agreement

shall not constitute a precedent in any other matter.

C. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue the matter further.

D. Appellant waives all claims against the State of New Jersey with regard to this matter.

The above terms represent a full and final disposition of all issues in this matter. Appellant fully understands the terms as a full and final settlement of all issues involved in this petition.

John H Watson Jr

JOHN H. WATSON, JR.
Attorney for Appellant, Essex
County Education Services Commission

DATED: 6/10/94

William C. Brown

WILLIAM C. BROWN, DAG
Attorney for Respondents,
Department of Education

DATED: 6/10/94

OAL DKT. NO. EDU 8946-91

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner is unable to ascertain how the settlement agreement, specifically that provision (No. 1) requiring the Department of Education to assume handicap accessibility costs at seven specified sites up to an overall cap of $21,000, appropriately resolves the underlying controversy, serves the public interest or would actually be effectuated.

Accordingly, this matter is remanded to the Office of Administrative Law for a fuller explication of the rationale for the proposed settlement.

IT IS SO ORDERED.

AUGUST 9, 1994

DATE OF MAILING - AUGUST 9, 1994

COMMISSIONER OF EDUCATION

221-94

(221-94)
412-95R

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

NOVEMBER 14, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8379-94
ON REMAND
OAL DKT. NO. EDU 8946-91
AGENCY DKT. NO. 279-7/91

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING,

Respondent.

John H. Watson, Jr., Esq., for petitioner

William C. Brown, Deputy Attorney General, for respondent
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: October 4, 1995 Decided: October 6, 1995

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter (OAL Dkt. No. EDU 8379-94) is on remand from the decision of the Commissioner of Education, dated August 9, 1992, in OAL Dkt. No. EDU 8946-91. In that remand the Commissioner returned the case to the Office of Administrative Law in 0order to provide an opportunity for a fuller explication of the rationale behind the settlement of the original case and, in particular, an articulation of the terms requiring payment by the Department of Education of handicap accessibility costs at seven specified sites.

Following the remand the parties continued to discuss the mechanics of settlement and now have proposed an amended settlement agreement which they believe resolves the matter in accordance with the Commissioner's concerns. That amended settlement agreement, signed and dated by the attorneys on August 29, 1995 and on October 3, 1995, respectively, is attached hereto and made a part hereof.

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

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures of counsel which appear on the amended settlement agreement;

2. The settlement as set forth in the amended settlement agreement fully disposes of all issues in controversy and is consistent with law.

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

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

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

October 6, 1995
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

October 12, 1995
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 13 1995
DATE

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 08946-91

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Appellant,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING,

Respondent.

Civil Action

SETTLEMENT AGREEMENT

A settlement agreement in the above matter, conditioned upon the approval of the Commissioner of Education, was remanded by the Commissioner on August 9, 1992 for a fuller explication of the rationale of the settlement, specifically the terms calling for the payment by the Department of Education of handicap accessibility costs at seven specified sites. As a result of the Commissioner's decision, the parties have proposed an amended settlement agreement, which does not call for any payments by the Department of Education and resolves this matter in accordance with the following terms:

1. Both parties agree to the following terms and conditions:

1. Essex County Educational Services Commission (Commission) will render all trailers, installed or moved since the filing of the petition and as noted in the attached list

provided by the Commission, handicap-accessible, subject to approval by the Bureau of Facilities Planning within five years from the date of the approval of this agreement.

2. Trailers that have remained in the same location since installation prior to 1990 will be grandfathered with the understanding that if any individual with disabilities requires access to trailer, or if the school to which the trailer is attached becomes handicap-accessible, such trailer will be made handicap-accessible by the Commission on a timely basis so as to afford prompt access to the trailer.

3. During phase-in, all trailers identified in paragraph 1 will be subject to the same requirements as the grandfathered trailers identified in paragraph 2. In other words, if a student requires access to the trailer or the school to which the trailer is attached becomes handicap-accessible, the trailer or trailers will be rendered handicap-accessible by the Commission on a timely basis so as to afford prompt access to the trailer.

4. In the event the Commission encounters extraordinary hardships in complying with the five year phase-in period for making the trailers, identified in the attached list, handicap-accessible, the Commission may make application to the Department of Education, Bureau of Facilities Planning for relief.

2. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party and this agreement shall not constitute a precedent in any other matter.

3. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue the matter further.

4. Appellant waives all claims against the State of New Jersey with regard to this matter.

The above terms represent a full and final disposition of all issues in this matter. Appellant fully understands the terms as a full and final settlement of all issues involved in this petition.

John H. Watson 2

Attorney for Appellant, Essex County Education Services Commission

DATED: 8/29/95

Attorney for Respondents, Department of Education

DATED: 10/3/95

TRAILER LOCATIONS SINCE - 6/1/90

1. Our Lady of Consolation - Wayne, N.J.
2. Depaul High School - Wayne, N.J.
3. Calvary Christian - Wayne, N.J.
4. Immaculate Heart of Mary - Wayne, N.J.
5. Our Lady of Valley - Wayne, N.J.
6. St.Joseph's - West New York, N.J.
7. Ibad El-Rahman - Prospect Park, N.J.
8. Nutley Assembly of God - Bloomfield, N.J.
9. St.Paul's- Prospect Park, N.J.
10. St.Joseph's - East Orange, N.J.
11. Essex Catholic High School - East Orange, N.J.
12. St. Peters - Belleville, N.J.
13. St. Francis - Newark, N.J.
14. O.L. of Good Counsel - Newark, N.J.
15. St. Phillips School - Clifton, N.J.
16. St. Phillips School - Clifton, N.J.
17. St. Clares School - Clifton, N.J.
18. St. John Kanty - Clifton, N.J.
19. Trinity Academy - Caldwell, N.J.
20. O.L. of Mt.Carmel - Passaic, N.J.
21. St. Joseph's - West Milford, N.J.
22. Queen of Peace - West Milford, N.J.
23. St. John's - Orange, N.J.

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES,	:	DECISION ON REMAND
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

NOVEMBER 14, 1995

DATE OF MAILING NOVEMBER 14, 1995

222-94

222-94

IN THE MATTER OF THE TENURE	:	
HEARING OF ARNOLD R. TALBOT,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY VOCATIONAL	:	DECISION
SCHOOL DISTRICT, ESSEX COUNTY.	:	
	:	

AUGUST 9, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4124-93
AGENCY DKT. NO. 52-3/93

ESSEX COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION,
Petitioner,
v.
ARNOLD R. TALBOT,
Respondent.

Nathanya G. Simon, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Louis P. Bucceri, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: June 28, 1994 Decided: June 30, 1992

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

This matter constitutes a tenure proceeding pertaining to charges brought by the Essex County Vocational Schools Board of Education (petitioner) against Arnold R. Talbot (respondent) of incapacity, conduct unbecoming a teacher, and conduct constituting other just cause In part, the charges address allegations of inappropriate conduct between respondent and a student on January 15, 1993

Tenure charges were filed against respondent by the petitioner on February 24, 1993, at which time a sworn statement of evidence was also filed. Respondent was sent a copy of the tenure charges and sworn statement of evidence on February 24, 1993. On March 22, 1993, petitioner determined to certify the charges to the Commissioner of the Department of Education (Department) for a hearing pursuant to *N.J.S.A.* 18A:6-16. On the same day, petitioner determined to suspend respondent without pay.

The matter was transmitted by the Department to the Office of Administrative Law on May 5, 1993, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. Telephone conferences were conducted throughout the proceedings. Hearings initially scheduled to commence in February 1994 were adjourned because of the unavailability of a witness. The parties commenced settlement discussions and ultimately reached an agreement resolving the matter. In the interim, a hearing was held on June 15, 1994, because of witness scheduling considerations. An executed Settlement Agreement was filed on June 28, 1994, on which date the record was closed. Attached herewith is a copy of the Settlement Agreement.

Respondent has been employed by petitioner since 1976. The Settlement Agreement provides, in part, that respondent will resign from his tenured position and employment with petitioner permanently, as of September 30 1994, by signing an irrevocable letter of resignation in the form referenced in the agreement. Respondent also consents to the revocation of his teaching or other educational certificates, by voluntary agreement, upon action of the State Board of Examiners and consents to not oppose removal of his name from the rolls of those certified and licensed for educational employment in the State. The Settlement Agreement notes that respondent's intent is to permanently retire from teaching and does not constitute an admission of wrongdoing and that he understands that the revocation will be communicated to other states. Respondent also agrees to voluntarily withdraw and dismiss all other pending actions.

As the parties recognize in the Settlement Agreement, continuation of litigation, regardless of the outcome, has the potential for dissension and disruption between and among the members of the school community, including staff, parents,

and students; that respondent's future effectiveness as a teacher could be severely impacted by the notoriety arising from the continuation of the proceedings; and that certain pending procedural defenses could require a refiling of some tenure charges, resulting in additional delay, to the detriment of both parties.

The voluntary resolution of litigation through settlement is favored. Judson v. Peoples Bank and Trust Co., 25 *N.J.* 17 (1957). I am persuaded that the settlement agreement should be adopted. The settlement agreement is in the interest of both parties, ending the prospect of lengthy and divisive litigation and allowing respondent to retire after a lengthy career with petitioner.

I **FIND** the following to be **FACTS**.

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

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

I **CONCLUDE** that the tenure charges filed against respondent by the Board on February 24, 1993, should be **DISMISSED** and that the Settlement Agreement should be adopted.

It is hereby **ORDERED** that the attached Settlement Agreement be and is hereby **APPROVED** and that the parties comply with the Agreement. It is also hereby **ORDERED** that the tenure charges filed by petitioner against respondent on February 24, 1993 be and are hereby dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 30, 1994
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

7/5/94
Date

DEPARTMENT OF EDUCATION

JUL 07 1994
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

le

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE HEARING OF ARNOLD R. TALBOT,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
ESSEX COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION,	:	O.A.L. DOCKET NO. EDU 04124-93N AGENCY REF. NO. 52-3/93
ESSEX COUNTY.	:	**SETTLEMENT AGREEMENT**

ARNOLD R. TALBOT (hereinafter "Mr. Talbot"), residing at 162 North 19th Street, East Orange, New Jersey, and the ESSEX COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION (hereinafter the "Board"), with offices at 68 Harrison Street, East Orange, New Jersey, hereby stipulate and agree as follows:

WHEREAS Mr. Talbot has been employed by the Board since 1976; and

WHEREAS Mr. Talbot has been the subject of tenure charges; and

WHEREAS further pursuit of tenure proceedings and a decision by the Commissioner of Education, regardless of the outcome, would cause dissension and disruption between and among the members of the Essex County Vocational School community, including staff, parents and students; and

WHEREAS Mr. Talbot's future effectiveness as a teacher could be severely impaired by the notoriety arising from his involvement in these proceedings, regardless of their outcome; and

WHEREAS certain procedural defenses are pending which could require a re-filing of some tenure charges resulting in additional delays to the detriment of both parties; and

WHEREAS the settlement resolves any possibility of Mr. Talbot's future employment in the Essex County Vocational Schools and/or in any other school district; and

WHEREAS it is in the best interests of the parties and of the community represented by the Board to resolve this matter permanently without further disruption of the district;

NOW THEREFORE, in consideration of the mutual promises of the parties,

IT IS on this 20th day of June, 1994, agreed:

1. In return for compliance with this settlement, Mr. Talbot will:

(a) Retire from his tenured position and employment with the Board permanently, as of September 30, 1994 by signing an irrevocable letter of resignation in the form attached hereto.

(b) Consent to the revocation of his teaching or other educational certificates, by voluntary agreement, upon action of the State Board of Examiners, and consent to not oppose

the removal of his name from the rolls of those certified and licensed for educational employment in the State by said revocation.

This consent to revocation results from Mr. Talbot's decision to permanently retire from teaching and does not constitute an admission of wrong-doing by Mr. Talbot. Mr. Talbot understands that this revocation will be communicated to other states pursuant to interstate compact.

(c) Permanently waive and relinquish any and all rights to tenure, seniority, recall or employment in the Essex County Vocational Schools, effective September 30, 1994, and

(d) Agree to voluntarily withdraw and dismiss all pending actions, arbitration requests, and grievances regarding the withholding of his 1993-94 salary increment as well as waive any and all rights to contest the withholding of his 1994-95 increment pursuant to this Agreement.

2. In return for Mr. Talbot's compliance with this Agreement, the Board agrees to:

(a) Pay Mr. Talbot the sum of $17.000.00 as a payment to compensate him for the relinquishment of his tenure and seniority rights and in full and final settlement of all pending litigation. Said amount shall be paid in a lump sum on or about September 1, 1994 and in accordance with Paragraph 12. Said sum does not constitute back salary or wages and shall not

be subject to payroll deductions. The Board may issue an IRS Form 1099 as provided by law.

(b) Pay Mr. Talbot the gross sum of $9,091.32 which, after the deduction of payroll taxes, will result in an actual net payment of $6,162.00. This sum constitutes Mr. Talbot's entitlement pursuant to the teachers' collective bargaining agreement as final compensation for 137 accumulated leave days.

(c) Place Mr. Talbot on a leave of absence with full salary and health insurance from September 1, 1994 through September 30, 1994. Salary shall be paid at the same rate as was in effect for the 1993-94 school year.

(d) Dismiss the pending tenure charges captioned above.

3. Mr. Talbot shall not be entitled to any other benefits or emoluments of employment except as set forth in this Agreement.

4. Mr. Talbot, in consideration of this Agreement, releases and forever discharges the Board and the Board's members, directors, trustees, officers, employees, agents, attorneys, successors, heirs, executors and assigns (the Board and the foregoing persons and entities are hereinafter collectively referred to as the "Releasees") from:

(a) Any and all claims asserted or which could have been asserted;

(b) Any and all claims, charges or complaints asserted, or which could have been asserted concerning any aspect of Arnold Talbot's employment with the Board, any agreement concerning such employment or the termination of such employment, including, but not limited to, any and all claims of wrongful discharge or breach of contract, any and all claims for equitable estoppel, any and all claims for employee benefits, and any and all claims of discrimination on any basis including, but not limited to the New Jersey Law Against Discrimination, Federal laws against discrimination and the Americans with Disabilities Act;

(c) Any and all claims for back pay, vacation pay, liquidated, compensatory and punitive damages, reinstatement, and attorneys' fees, disbursements and costs;

Nothing in this release shall be deemed to bar the right of Mr. Talbot to pursue a claim to enforce the terms of this Agreement.

5. The Board, in consideration of this Agreement, releases and forever discharges Mr. Talbot from any and all claims asserted or which may be asserted against him related to any aspect of his employment with the Board, including, but not limited to, any claims for wrongful conduct, contribution, indemnity or any matter related to the payment of his salary or benefits. Nothing in this release shall be deemed to bar the right of the Board to pursue a claim to enforce the terms of this Agreement.

6. This Agreement shall be interpreted, construed and enforced pursuant to the laws of the State of New Jersey.

7. This Agreement sets forth the entire agreement between the parties hereto.

8. This Agreement shall not in any way be construed as an admission by the Board or Arnold Talbot of any liability, or of any unlawful acts whatsoever; and the Board and Arnold Talbot specifically disclaim any liability for any wrongful or unlawful acts whatsoever.

9. Both Mr. Talbot and the Board expressly acknowledge, represent and warrant that the terms and provisions of this Agreement are the only consideration for signing this Agreement; that no other promise or agreement of any kind has been made to or with any person or entity whatsoever to cause the signing of this Agreement; and that in executing this Agreement, Mr. Talbot does not rely and has not relied upon any representation or statement made by any of the Board's agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

10. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. The parties understand that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. It shall not take effect until all such approvals are received. In the event that this Agreement is not approved, or if a court or agency of competent jurisdiction shall at any time declare this Agreement, or any part of it, to be illegal, null, void or of no force or effect, then the entire Agreement shall be rendered null and void and the paries shall be returned to the status quo existing prior to the Agreement as to all of their respective rights, claims and defenses. In particular, if the settlement is not approved or is subsequently nullified in whole or in part, all releases shall be void and Mr. Talbot's agreement to retire and his relinquishment of his tenure and seniority, as well as his consent to the revocation of his teaching and educational certificates, shall be similarly rendered null, void and of no force or effect. No payment shall be made hereunder unless and until the approval of the Commissioner of Education is received.

13. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be

deemed to establish any "past practice" or "precedent" requiring or restricting the Board in providing any benefit to any person, group or association other than Mr. Talbot.

14. Arnold Talbot expressly acknowledges, represents and warrants that he has carefully read this Agreement and has fully reviewed and discussed its terms with his attorneys; that Mr. Talbot fully understand this Agreement's terms, conditions and significance; and that Mr. Talbot has executed this Agreement voluntarily, knowingly and with the advice of his representatives.

15. This Agreement is the entire Agreement between the parties and incorporates the complete financial obligation of the board to Arnold R. Talbot.

IN WITNESS WHEREOF, the parties do set forth their hands and seal as of the date first above written.

ESSEX COUNTY VOCATIONAL
BOARD OF EDUCATION

By: _____
Sally Goodson, President

Attest: _____

Dated: June 20, 1994

AIDA M. MERCADO
Notary Public of New Jersey
My Commission Expires April 27, 1998

ARNOLD R. TALBOT

Arnold R. Talbot

Witness: _____

Dated: 6/20/94

fh

STATE OF NEW JERSEY)
:SS:
COUNTY OF PASSAIC)

On JUNE 20, 1994, before me personally came Arnold R. Talbot to me known and known to me to be the individual described in and who executed the foregoing Agreement, and he duly acknowledged to me that, with the advice of counsel, he voluntarily and knowingly executed the said Agreement, after having read and understood said document.

MARY ANN BLAKE
Notary Public of New Jersey
My Commission Expires July 20, 1994

4

162 North 19th Street
East Orange, NJ 07017
June 20, 1994

Robert Noonan, Superintendent
Essex County Vocational Schools
68 South Harrison Street
East Orange, NJ 07018

Re: Resignation

Dear Dr. Noonan:

I hereby resign my position of employment and my tenure in the Essex County Vocational Schools effective September 30, 1994. This resignation is conditioned upon the Board's compliance with the Settlement Agreement of June 20, 1994. This resignation is otherwise irrevocable.

Very truly yours,

Arnold R. Talbot

Arnold R. Talbot

/lg

OAL DKT. NO. EDU 4124-93

IN THE MATTER OF THE TENURE	:	
HEARING OF ARNOLD R. TALBOT,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY VOCATIONAL	:	DECISION
SCHOOL DISTRICT, ESSEX COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms, as they comport, for the reasons set forth in the initial decision and in the agreement itself, with the Cardonick standards for review of settlements in tenure matters. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846).

Accordingly, the Commissioner adopts the instant settlement as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement. Consistent therewith, this matter is forwarded to the State Board of Examiners for action against respondent's certificate(s) as it deems appropriate.

AUGUST 9, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 9, 1994

221-94

(221-94)
412-95R

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

NOVEMBER 14, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8379-94
ON REMAND
OAL DKT. NO. EDU 8946-91
AGENCY DKT. NO. 279-7/91

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING,

Respondent.

John H. Watson, Jr., Esq., for petitioner

William C. Brown, Deputy Attorney General, for respondent
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: October 4, 1995 Decided: October 6, 1995

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter (OAL Dkt. No. EDU 8379-94) is on remand from the decision of the Commissioner of Education, dated August 9, 1992, in OAL Dkt. No. EDU 8946-91. In that remand the Commissioner returned the case to the Office of Administrative Law in 0order to provide an opportunity for a fuller explication of the rationale behind the settlement of the original case and, in particular, an articulation of the terms requiring payment by the Department of Education of handicap accessibility costs at seven specified sites.

Following the remand the parties continued to discuss the mechanics of settlement and now have proposed an amended settlement agreement which they believe resolves the matter in accordance with the Commissioner's concerns. That amended settlement agreement, signed and dated by the attorneys on August 29, 1995 and on October 3, 1995, respectively, is attached hereto and made a part hereof.

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

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures of counsel which appear on the amended settlement agreement;

2. The settlement as set forth in the amended settlement agreement fully disposes of all issues in controversy and is consistent with law.

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

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

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

October 6, 1995
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 13 1995
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mh

RECEIVED
OFFICE OF ADMINISTRATIVE LAW
OCT 4 11 53 PM '95

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 08946-91

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Appellant,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING,

Respondent.

Civil Action

SETTLEMENT AGREEMENT

A settlement agreement in the above matter, conditioned upon the approval of the Commissioner of Education, was remanded by the Commissioner on August 9, 1992 for a fuller explication of the rationale of the settlement, specifically the terms calling for the payment by the Department of Education of handicap accessibility costs at seven specified sites. As a result of the Commissioner's decision, the parties have proposed an amended settlement agreement, which does not call for any payments by the Department of Education and resolves this matter in accordance with the following terms:

1. Both parties agree to the following terms and conditions:

1. Essex County Educational Services Commission (Commission) will render all trailers, installed or moved since the filing of the petition and as noted in the attached list

provided by the Commission, handicap-accessible, subject to approval by the Bureau of Facilities Planning within five years from the date of the approval of this agreement.

2. Trailers that have remained in the same location since installation prior to 1990 will be grandfathered with the understanding that if any individual with disabilities requires access to trailer, or if the school to which the trailer is attached becomes handicap-accessible, such trailer will be made handicap-accessible by the Commission on a timely basis so as to afford prompt access to the trailer.

3. During phase-in, all trailers identified in paragraph 1 will be subject to the same requirements as the grandfathered trailers identified in paragraph 2. In other words, if a student requires access to the trailer or the school to which the trailer is attached becomes handicap-accessible, the trailer or trailers will be rendered handicap-accessible by the Commission on a timely basis so as to afford prompt access to the trailer.

4. In the event the Commission encounters extraordinary hardships in complying with the five year phase-in period for making the trailers, identified in the attached list, handicap-accessible, the Commission may make application to the Department of Education, Bureau of Facilities Planning for relief.

2. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party and this agreement shall not constitute a precedent in any other matter.

3. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue the matter further.

4. Appellant waives all claims against the State of New Jersey with regard to this matter.

The above terms represent a full and final disposition of all issues in this matter. Appellant fully understands the terms as a full and final settlement of all issues involved in this petition.

John H. Watson

Attorney for Appellant, Essex
County Education Services Commission

DATED: 8/29/95

Attorney for Respondents,
Department of Education

DATED: 10/3/95

TRAILER LOCATIONS SINCE - 6/1/90

1. Our Lady of Consolation - Wayne, N.J.
2. Depaul High School - Wayne, N.J.
3. Calvary Christian - Wayne, N J.
4. Immaculate Heart of Mary - Wayne, N.J.
5. Our Lady of Valley - Wayne, N.J.
6. St.Joseph's - West New York, N.J.
7. Ibad El-Rahman - Prospect Park, N.J.
8. Nutley Assembly of God - Bloomfield, N J
9. St.Paul's- Prospect Park, N.J.
10. St.Joseph's - East Orange, N.J.
11. Essex Catholic High School - East Orange, N J
12. St. Peters - Belleville, N J.
13. St. Francis - Newark, N.J.
14. O.L. of Good Counsel - Newark, N.J.
15. St. Phillips School - Clifton, N.J.
16. St. Phillips School - Clifton, N.J.
17. St. Clares School - Clifton, N.J.
18. St. John Kanty - Clifton, N.J.
19. Trinity Academy - Caldwell, N.J.
20. O.L. of Mt.Carmel - Passaic, N.J.
21. St. Joseph's - West Milford, N.J.
22. Queen of Peace - West Milford, N.J.
23. St. John's - Orange, N.J.

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

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

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

COMMISSIONER OF EDUCATION

NOVEMBER 14, 1995

DATE OF MAILING NOVEMBER 14, 1995

223-94

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

AUGUST 12, 1994

OAL DKT. NO. EDU 3545-94

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1994

DATE OF MAILING - AUGUST 12, 1994

224-94

224-94

HAROLD S. FRANCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

AUGUST 12, 1994

OAL DKT. NO. EDU 9850-93

HAROLD S. FRANCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1994

DATE OF MAILING - AUGUST 12, 1994

225-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BOUND BROOK	:	DECISION
BOROUGH, SOMERSET COUNTY.	:	
	:	

AUGUST 12, 1994

OAL DKT. NO. EDU 4530-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BOUND BROOK	:	DECISION
BOROUGH, SOMERSET COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1994

DATE OF MAILING - AUGUST 12, 1994

226-94

GAIL TRUCHEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF SPECIAL EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 12, 1994

OAL DKT. NO. EDU 12015-93

GAIL TRUCHEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF SPECIAL EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1994

DATE OF MAILING - AUGUST 12, 1994

227-94

IN THE MATTER OF THE DISCIPLINARY HEARING OF WILLIAM MC CARGO, GROUNDS WORKER, MARIE H. KATZENBACH SCHOOL FOR THE DEAF, NEW JERSEY STATE DEPARTMENT OF EDUCATION.	:	COMMISSIONER OF EDUCATION DECISION

AUGUST 12, 1994

IN THE MATTER OF THE DISCIPLINARY	:	
HEARING OF WILLIAM MC CARGO,	:	
GROUNDS WORKER, MARIE H.	:	COMMISSIONER OF EDUCATION
KATZENBACH SCHOOL FOR THE DEAF,	:	DECISION
NEW JERSEY STATE DEPARTMENT OF	:	
EDUCATION.	:	

This matter was opened before the Commissioner of Education as an appeal of a preliminary notice of discipline (D93-010) which calls for Mr. McCargo's (appellant's) dismissal from service as a Grounds Worker at the Marie H. Katzenbach School for the Deaf.

The disciplinary hearing was conducted on June 29, 1994, at the Katzenbach School under the provisions of the contract between the State of New Jersey and the Operations, Maintenance and Services and Crafts Unit of the International Federation of Professional and Technical Engineers, AFL-CIO, Local 195 (IFPTE). Hope R. Blackburn, Acting Director of the Bureau of Controversies and Disputes, State Department of Education, served as the Commissioner's designee to hear the matter. Mr. Pasquale Severino, Local 195, Katzenbach School Chapter President, was appellant's representative and Mr. Greg Hodge, Business Manager of the Katzenbach School, served as management's representative. An interpreter was provided to Mr. McCargo. The record closed in this matter on July 15, 1994, following management's submission of legible copies of documentary

evidence introduced at the hearing and five working days for any objection by appellant's representative.

Disciplinary Notice D93-010 seeks termination of appellant's employment for insubordination, N.J.A.C. 4A:2-2.3(a)(2), neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), and misuse of public property, N.J.A.C. 4A:2-2.3(a)(8) charging that on October 6 and 7, 1993, appellant was insubordinate in refusing to complete his assigned job duties; that on October 7, 1993 he destroyed state tools assigned to him for his use; and that on November 11, 1993, he unlawfully entered Building #20 at the Katzenbach School and slept overnight. It is charged that these actions represented continued patterns of insubordination, neglect of duty and misuse of state property for which he had been previously disciplined and that the actions were in direct violation of the agreement he signed with management on October 3, 1991. The agreement held in abeyance an earlier disciplinary action seeking his removal from service for allegedly threatening his supervisor and the Food Service Director, transferred appellant to the position as an assistant grounds worker and referred him to the Employee Advisory Service on the condition that appellant not act in an insubordinate or threatening manner towards his supervisors and co-workers.

FINDINGS OF FACT

The accounts of the incidents establishing the basis of the disciplinary action seeking Mr. McCargo's removal were provided by Mr. Hodge, witnesses testifying on behalf of the Katzenbach School and Mr. McCargo's prior disciplinary history including an earlier decision by the Commissioner of Education, In the Matter of the Disciplinary Hearing of William McCargo, Senior Food Service Worker,

Marie H. Katzenbach School for the Deaf, New Jersey State Department of Education, #184-91, decided October 24, 1991, in which Mr. McCargo was ordered to be suspended without pay for five days. Mr. McCargo did not dispute the evidence offered on behalf of the Katzenbach School. Instead, he admitted to the actions alleged, repeatedly stated that he refused to work by himself unless he was given help and acknowledged ignoring the orders of his superiors, refusing to complete his assigned duties, destroying state property and unlawfully entering a building and sleeping there overnight. Accordingly, the evidence presented on behalf of the Katzenbach School is accepted as fact, as follows:

1. On October 6, 1993, Mr. McCargo refused to follow the direct order of his supervisor to cut weeds growing along a fence on the Katzenbach grounds adjacent to Upper Ferry Road. He, also, refused to leave the maintenance area or to go to his assigned work area.

2. On October 7, 1993, Mr. McCargo refused to follow the direct order of his supervisor to complete the work assigned to him on October 6, 1994. Instead of completing the job. Mr. McCargo destroyed two weed cutters assigned to him to complete the task.

3. On November 11, 1993, Mr. McCargo entered Building #20 on the Katzenbach grounds without authorization and spent the night there.

4. On October 3, 1991, Mr. McCargo entered into a written agreement with the management of the Katzenbach school which provided, in part, that a disciplinary action then pending against him would be held in abeyance and he would be transferred to the position of Assistant Grounds Keeper provided that he stop behaving aggressively towards his co-workers, follow his supervisor's directions, and not threaten anyone including threats by gesture.

5. That Mr. McCargo continuously refused to comply with direct instructions of his supervisors.

6. That Mr. McCargo continuously destroyed state property by destroying lawn mowers when he became angry with his supervisors or did not want to perform the work assigned.

7. That Mr. McCargo exhibited a pattern of threatening gestures towards his supervisors and other Katzenbach staff members.

8. That Mr. McCargo has stated that he refuses and will continue to refuse to perform the tasks assigned to him by his supervisors because the work is too hard.

All of the facts found, above, were admitted by Mr. McCargo, who reiterated the admissions even after repeatedly being advised that the potential consequence of his statements was to be terminated from his employment.

CONCLUSIONS AND RECOMMENDATION

As a result of Mr. McCargo's admission of all of the allegations presented against him, the only issue to be determined herein is whether dismissal from his position is appropriate under the circumstances. The hearing officer concludes that it is. The disciplinary record in this matter is extremely lengthy and Mr. McCargo has been the subject of an earlier decision of the Commissioner of Education in which it was determined that his "record shows a pattern...of defiance and unwillingness to meet even the most minimal obligations of employment." (October 24, 1991 decision, at p. 6) The testimony presented at the hearing established that the pattern of unwillingness to comply with the requirements of his employment has not changed three years later.

The hearing officer finds, therefore, that management has proved the elements of the charges against Mr. McCargo and recommends he be terminated from employment by the Commissioner.

* * * * * *

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

Accordingly, William McCargo is to be removed from employment as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1994

DATE OF MAILING - AUGUST 12, 1994

228-94

228-94

LINDA MULLIN, STEFANIE GOLAM AND SUSAN FRANTZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioners, riffed child study team (CST) members, alleged Board violated their tenure and seniority rights when it employed non-district employees to provide services formerly provided by them.

ALJ found petition was untimely filed as petitioners did not file until almost nine months after receipt of notification that they were to be terminated and more than five months after their actual termination date, both dates well beyond the 90-day limitation period provided for in N.J.A.C. 6:24-1.2(c), but determined that it was in the best interest of all involved to proceed on the merits of the petition. ALJ found that the petition should be dismissed because the Board did not supplant the CST staff but supplemented the work of an existing full-time CST. Also, reduction in force decisions were made entirely within the authority of the local Board and since none of the petitioners served the district under any certificate other than their educational services certificates, none of them had tenure rights in any other positions.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 18, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1050-92

AGENCY DKT. NO. 419-12/91

LINDA MULLIN, STEFANIE GOLAM AND SUSAN FRANTZ,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,

Respondent.

Steven E. Klausner, Esq., for petitioners (Klausner, Hunter, Cige & Seid, attorneys)

Aron M. Schwartz, Esq., for respondent (Vogel, Chait, Schwartz and Collins, attorneys)

Record Closed: May 24, 1994 Decided: July 8, 1994

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners who are former members of a Child Study Team (CST) and who were formerly employed as a Learning Disabilities Teacher/Consultant (LDTC), a School Psychologist and a School Social Worker, challenge the abolishment of their respective positions by respondent and respondent's entering into a contractual relationship with individuals who are non-board employees to provide CST services for respondent, which they allege includes the duties formerly performed by the petitioners.

Petitioners filed a Petition of Appeal on December 2, 1991, and filed an Amended Petition of Appeal on December 23, 1991. Respondent filed an Answer on January 29, 1992. Thereafter the matter was transmitted by the Commissioner of Department of Education to the Office of Administrative Law (OAL) on February 7, 1992, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge on March 6, 1992. A prehearing conference was scheduled and an initial prehearing conference was held and concluded on April 15, 1992. Because of the complexity of the issues involved, a final prehearing conference was scheduled for May 20, 1992. Following this, a prehearing order was entered on May 21, 1992, settling the procedures to be followed in the hearing of this matter.

The matter was scheduled for hearing on September 16 and 17, 1992. Because the matter was not concluded on those two days, additional hearing dates were scheduled. This matter was continued and heard on January 27, 1993. It was then scheduled for February 26, 1993, but this hearing date was adjourned at the request of attorney for petitioner due to a court conflict. The matter was rescheduled for hearing on April 20, 1993, but was adjourned at the request of all parties due to their unavailability. The matter was scheduled for additional hearing dates on July 8 and 12, 1993, and hearings were held on those dates. On July 12, 1993, the hearing was concluded. However, the record remained open in order to permit the attorneys for the respective party to provide submissions to the ALJ. The time within which

submissions were to be made was extended through November 17, 1993. Through inadvertence, the record was not closed by the ALJ until May 24,1994, after the ALJ had been afforded an opportunity to review the submissions of the parties.

ISSUES TO BE RESOLVED

At the prehearing conferences held in this matter, the parties agreed that he following issues were to be resolved.

1. Whether the board of education has improperly abolished a CST and supplanted the duties of the members thereof?

2. Whether the positions formerly held by petitioners are mandated by statute and regulation?

3. Whether respondent replaced petitioners with non-district and/or non-tenured individuals, and, if so, whether respondent violated petitioners' seniority and/or tenure rights in doing so?

4. Whether respondent's actions were arbitrary, capricious and unreasonable, and violated *N.J.S.A.* 18A:28-11, *N.J.S.A.* 18A:28-13 and *N.J.A.C.* 6:3-1.10?

    (a) Whether respondent had good cause to abolish petitioners' positions?

    (B) Whether respondent had a good faith belief that the petitioners' positions were no longer necessary when it abolished them?

    (C) Whether respondent's abolishing of petitioners' tenured positions and employing non-district employees is a subterfuge designed for the purpose of destroying or diminishing the tenure and seniority of the petitioners?

5. Whether respondent's actions in using and retaining non-district employed individuals to perform the duties of petitioners' respective positions was in violation of *N.J.A.C.* 6:28-3.1(b) and is therefore void and *ultra vires.*

6. If petitioners are successful in proving their allegations and are correct as a matter of law, to what remedy are they entitled? Does the remedy include, (a) reinstatement, (b) salary reimbursement, and/or (c) damages?

7. Whether petitioners' claim are barred by the limitations of *N.J.A.C.* 6:24-12.(b) by reason of the failure of petitioners to initiate this action within 90 days from the date of accrual of their alleged claims? What is the date their claims accrued?

8. Whether petitioners' demand for reinstatement should be dismissed because of their failure to accept re-employment offered by respondent?

9. Whether respondent by its actions in this matter, violated its written plan for special education which is required by *N.J.A.C.* 6:28-1.2?

10. Whether by reason of petitioners' demand for reinstatement any other employees of respondent who might be affected by such reinstatement need be joined to this action as indispensable parties?

STIPULATED FACTS

At the commencement of the hearing in this matter, the attorneys for the respective parties indicated that 26 factual assertions had been agreed to by and between the parties. These stipulated facts are summarized as follows:

Effective September 1, 1994, petitioner Linda Mullin was hired by respondent as a part-time Learning Disability Teacher/Consultant (LDTC). Until June 30, 1991, petitioner Mullin was employed by the Board as a tenured LDTC. A true copy of Mullin's employment record card is attached to the Stipulation (Exhibit J-1A). As of

June 30,1991, Mullin had 4.2 years of seniority in the Town of Boonton School districts, all of which was acquired as an LTDC.

Effective in or about late May or early June, 1985, petitioner Stefanie Golam was hired by the Board as a School Psychologist. Until June 30,1991, petitioner Golam was employed by the Board as a tenured School Psychologist. A true coy of Golam's employment record card is attached to the Stipulation (Exhibit J-1B). As of June 30, 1991, Golam had 4.28 years of seniority in the district, all of which was acquired as a School Psychologist.

Effective February 29, 1988, petitioner Susan Frantz was hired by the Board as a School Social Worker. Until June 30, 1991, petitioner Frantz was employed by the Board as a tenured School Social Worker. A true copy of France's employment record card is attached to the Stipulation (Exhibit J-1C). As of June 30, 1991, Frantz had 4.4 years of seniority in the district, all of which was acquired as a school social worker.

A CST consists of an LDTC, School Psychologist and a School Social Worker.

As a result of the reduction in force (RIF) and budget cuts, by letters dated April 16, 1991 (Exhibits J-1D, E and F), all of the petitioners were notified that respondent was terminating their employment effective June 30, 1991, and was placing them on a preferred recall eligibility list in the event a vacancy occurred in the certificated area in which they were serving.

Petitioners Mullin and Golam met with the District Superintendent of Schools, then Dr. Walter Sheely, on or about April 23, 1991, and on two other occasions, to discuss whether they were entitled to other positions by virtue of the tenure and seniority rights. In approximately the middle of June, 1991, petitioner Frantz met with Superintendent Sheely to discuss whether she was entitled to other positions by virtue of her tenure and seniority rights.

In May, 1991, petitioner Mullin was offered a position as a learning consultant by the Matheny School and Hospital. Petitioner Mullin accepted this position and commenced employment on June 5, 1991. Petitioner Mullin is still employed in this position.

In June, 1991, petitioner Frantz commenced full-time employment as a Medical Social Worker and Mental Health Professional at Morristown Memorial Hospital. Petitioner Frantz is still employed in this position. Morristown Hospital offered petitioner Frantz this position by letter dated April 26, 1991 (Exhibit J-1G).

Petitioner Golam has been employed as a school psychologist by the Hackensack school district since September, 1991. Petitioner Golam acknowledged that she is earning more money in her current employment then she did while employed by the Board, and does not claim any loss of income, profits or earnings in this action.

Effective June 30, 1991, the positions of Mullin, Golam and Frantz were abolished by the Board as part of a reduction in force; and their employment with the district was terminated. At the time petitioners Mullin's, Golam's and Frantz's employment was terminated, they were placed on preferred recall eligibility lists for district wide LDTC, district wide School Psychologist and district wide School Social Worker, respectively.

On December 16, 1991, the Board approved the hiring of a .2 or one day per week CST to consists of a .2 LDTC, a .2 School Social Worker, and a .2 School Psychologist. Prior to this, the Board had contracted out for CST services, first on an as needed basis and then for four days per month, to handle overflow or excess CST work that the CST remaining after the reduction in force could not handle.

By letter dated December 17, 1991 (Exhibit J-1H), petitioner Mullin was notified that he Board had approved the hiring of a .2 LDTC beginning January 10,1992 and that she was entitled to that position if she so desired. Petitioner Mullin declined this offer by letter dated December 31, 1991 (Exhibit J-1).

By letter dated December 17, 1991 (Exhibit J-1J), petitioner Golam was notified that the Board had approved the hiring of a .2 school psychologist beginning January 10, 1992, and that she was entitled to that position if she so desired. Petitioner Golam declined this offer by letter dated January 3, 1992 (Exhibit J-1K).

By letter dated June 15,1 992, (Exhibit J-1N), petitioner Mullin was notified that the Board had increased the part-time (.2) position of LDTC teacher to two days of employment per week (a .4 position), and was offered re-employment for two days per week commencing September 1, 1992, in that position. Petitioner Mullin declined this offer by letter dated June 19,1992 (Exhibit J-10).

By letter dated June 15, 1992 (Exhibit J-1P), petitioner Golam was notified that the Board had increased the part-time (.2) position of school psychologist to two days of employment per week commencing September 1,1992 in that position. Petitioner Golam declined this offer.

By letter dated June 15, 1992 (Exhibit J-1Q), petitioner Frantz was notified that the Board had increased the part-time (.2) position of school social worker to two days of employment per week (a .4 position), and was offered re-employment for two days per week commencing September 1,1992 in that position. Petitioner Frantz declined this offer by letter dated July 7, 1992 (Exhibit J-1R).

Petitioner Mullin holds certificates as LDTC, Nursery School Teacher, Teacher of Psychology, Teacher of the Handicapped and Principal/Supervisor. Petitioner's Mullin's only service in the district was under LDTC certificate. Petitioner Frantz hold certificates as School Social Worker, Teacher of Mathematics, Secondary School Teacher of Social Studies and, effective June, 1991, as Elementary School Teacher. Her only service in the district was under her School Social Worker certificate. Petitioner Golam holds certificates as School Psychologist and Principal/Supervisor. Her only service in the district was under her School Psychologist certificate.

The Petition in this matter was filed on December 5, 1991.

FACTUAL DISCUSSION

At the hearing in this matter, certain additional testimony and documentary evidence was elicited. This testimony may be summarized as follows.

Linda Mullin testified that she is a Learning Disabilities Teacher/Consultant. In addition to her Educational Services Certificate, she is also validly certified as a Nursery School Teacher and a Teacher of the Handicapped under her instructional certificates. She had these certificates prior to the time she was employed with Boonton.

Ms. Mullin testified that, at the time of her RIF, she spoke with the then Superintendent of Schools, Dr. Sheely, and he advised her that she had no bumping rights into any other position and if she wanted to obtain a Teacher of the Handicap position, or an Elementary school position, she must give up all her seniority rights to the LDTC position. No position was ever offered to her, even if she accepted this proposal.

In August, or early September, 1991, Ms. Mullin testified that she was contacted by the school district to do some contract work as an LDTC and she agreed to do those cases for students that she knew.

Ms. Mullin testified that P-4 is a statistical analysis of each CST in Morris County with the ratios between CSTs and classified students. She indicated that the ratio between full-time CSTs to students was approximately one per 100 classified students.

Ms. Mullin identified the three-year special education plan for the district (P-9) which she testified is required of the district by the State Department to develop a plan

of goals and objectives in a variety of areas relating to special education. It was stipulated by counsel that the plan was required to be prepared pursuant to the Administrative Code. She indicated that after the board abolished her position, the plan was never modified, amended, or altered, to reflect the reduction in the CST.

The three-year plan required the Board to increase CST services, and this was not complied with by respondent.

Ms. Mullin testified that there were a number of non-tenured teachers of the handicapped, or elementary school teachers, employed by the district at the time of her RIF and that she was never offered any of these positions.

Susan Frantz testified that she holds an Educational Services Certificate, a School Social Worker certificate and holds Instructional Certificates with endorsements in Mathematics, Social Studies and Elementary. Ms. Frantz testified that she worked in Kennilworth as a Math Teacher, and in Hackensack as a Social Studies Teacher, prior to obtaining her Social Worker endorsement, but she never worked in a classroom in Boonton. She further testified that after the RIF she was contacted by Al Tagliabue, respondent's then Director of Special Services, to see if she wanted to do contract work as a Social Worker to draft IEP's for the district. Ms. Frantz testified that after the Board created Counselor/Consultant positions, as reflected in the Board's minutes (P-12) that pursuant to the Administrative Code, she was authorized to provide counseling services for handicapped children and that while employed in Boonton, she provided such services. She indicated that prior to the RIF she performed all kinds of counseling services for the district, including counseling all of the children in the ED class and for parents. She further testified that no one from the Board ever contacted her after they created the position of Special Education Counselor/Consultant.

Ms. Frantz testified that a normal school day was 8:30 a.m. to 3:00 p.m. which included a lunch hour, and that two part-time Counselor/Consultant positions that were created by the Board were the functional equivalent of a full-time job.

Ms. Frantz testified that in June 1991, she had a discussion with Dr. Sheely relative to her obtaining an Elementary School position from a non-tenured teacher, or a Social Studies position in the Middle School. She indicated that Dr. Sheely advised her that he would only give her the position if she waived her rights to tenure as a Social Worker.

On cross-examination, Ms. Frantz testified that she provided counseling services for approximately three hours every Monday afternoon and Friday afternoon, in addition to two hours of counseling for the Perceptually Impaired class and another one hour of counseling for the Neurologically Impaired class. In addition, she provided Crisis Intervention Counseling. In total, she provided counseling services to district students totaling approximately ten hours per week.

Stefanie Golam testified that she is a certified School Psychologist and that, subsequent to her RIF, she had a conversation with Superintendent Sheely who advised her that the district was going to be employing a part-time counseling team for services to be provided in one of the respondent's schools, and that if she wanted to take the position, she would need a Guidance Counselor certificate and would have to give up all of her tenure as a School Psychologist in the district and her recall rights. She further testified that counseling of students was a major portion of her job. Ms. Golam testified that she spent approximately two and one-half days per week performing these counseling services to individuals and small groups, as well as Crisis Intervention. She further testified that she counseled an ED class and crisis intervention with students who were not classified, students who were depressed and suicidal, students who were involved with Satanism, or who had been sexually or physically abused. In further identifying P-13, Ms. Golam testified that the Board publicly articulated that it was going to contract out the services that she had previously performed.

Ms. Golam testified that she prepared a report showing the ratio of student populations to CSTs and found that the average in Morris County was approximately

one full-time Team per 1200 students compared to Boonton's average of one per 1400. She indicated that she spoke with Betty Brinamen from the Morris County Superintendent's office, who advised her that the ratio for one full-time Team to classified students should be one Team per 100.

Ms. Golam testified that in the fall of 1991, she was advised that the Board of Education had created contract-consultant positions to do counseling. She further stated that she had never received a phone call relative to the position, and that the counselors worked 8 to 10 hours per week respectively for a total of 29 hours. The new counseling positions were to be for special education children. This, she indicated, was exactly what a School Psychologist is authorized to do, and what she had done. She further testified that the Board used the services of a psychological extern for 450 hours over the course of a school year. This was the functional equivalent of a .4 position.

In cross-examination, Ms. Golam agreed that the Administrative Code does not require a specific ratio of CST per either enrolled or classified students but that it does require that a Board of Education employ sufficient numbers to provide services as outlined. Ms. Golam also testified that subsequent to her termination, she was employed by the Boonton Board of Education to provide per diem services.

The District Business Administrator, Joy Northrop, and Board member Marilyn Nolan testified concerning the 1991-92 fiscal year budget and the circumstances and events leading to the reduction in force that resulted in the termination of petitioners' employment. As a result of legislative changes in 1990 that affected the amount of state aid and imposed a cap on the amount of revenue that could be raised through local property taxes, the Board learned in January 1991 that it was going to have to cut approximately $1,000,000 from a budget of about $13,000,000. The Board instructed all the administrators, including the Director of Special Services, Alfred Tagliabue, to re-examine their budget proposals and to find every possible way to reduce their budgets with the least possible effect on the children. (R-6). Numerous Board meetings were held at which there was extensive discussion and input by the public as

well as comment and reaction by Board members. (See R-6 to R-12). Although the Board tried to cut the $1,000,000 without personnel cuts, it could not be done.

In the meantime, the Board had not renewed Superintendent Sheely's contract, and it had difficulty in obtaining information from him and in having him follow through on Board requests.

When the administrators reported back to the Board, the common theme, including that of Mr. Tagliabue, was that any further cuts could not be made without substantial negative impact. Eventually, the Board developed a plan that called for the elimination of 23.5 positions. Virtually every area of the District was affected by the RIF except for the bus drivers. Among the positions to be eliminated were all department heads, two school guidance counselor positions, the assistant superintendent, seven teachers, one librarian, 4.5 aides, several secretaries, one custodian, and the part-time CST.

Although petitioners, with Mr. Tagliabue's support, attempted to show that eliminating the part-time CST would leave the District with an extremely high CST to classified students ratio, a telephone survey of Morris County school districts conducted by Mr. Tagliabue demonstrated that, even with the cuts, Boonton would fall well within the range of CST to classified student ratios around the county.

With the elimination of the part-time CST, petitioners and Mr. Tagliabue argued to the Board that Boonton would have a ratio of approximately one LDTC, one social worker, and one school psychologist per 230 classified students. Petitioners further argued that the State recommend a ratio of one CST per 100 classified students although there is no written regulations to that effect. The results of Mr. Tagliabue's telephone survey (P-15), which was apparently distributed to the Board during the budgeting process, demonstrated that virtually all districts in the county substantially exceed the 1 to 100 ratio and that many of them were close to or exceeded Boonton's ratio of 1 to 230.

There was substantial concern that the budget cutbacks would cause an increase in class size. Despite the reduction, the Board was able to meet objective of maintaining the class size policy. (R-6, p.2).

Despite the Board's adopting of a budget that came in under the budget cap, and despite the Board's cutting of approximately $1,000,000, the voters defeated the budget. Eventually, the Board and the Board of Alderman, after some further non-personnel cuts, agreed on a budget. When it was considering the RIF plan, the Board did not know which members of the two CST's had seniority over the others; nor did the Board know whether any CST personnel would have bumping rights as to other professional staff. To determine bumping rights as to all certified staff, the Board hired an outside, independent consultant.

The 1991-92 budget did not allocate any funds for contracted CST services. The District's application for Federal flow through funds under P.L. 94-142 requested $16,750 for supplemental CST services, including secretarial services, on an as needed basis as determined by the Director of Special Services to supplement the basic functioning of the district's basic CST.

Joy Northrop, the Board Secretary, testified that Mr. Tagliabue had advised the Board that it might not be in compliance with the State regulations if the cuts were made as planned. She also indicated that in the summer of 1991, the Board retained outside services for the CST and spent approximately $5,200 for their services. The respondent brought the remaining CST members in for a few weeks during the summer of 1991 in order to complete the work that had to be done by the beginning of the new school year. (R-32). Two of the remaining CST members worked 15 days and the other worked 17 days during the summer of 1991. CST members had worked in previous summers, and the collectively negotiated contract anticipates that some summer work by the CST is anticipated: it permits the Board to require CST personnel to work at least five days during the summer. The Board did not have to supplement the CST work with any contracted CST services during the summer of 1991. The

number of summer days required by the CST to complete the work was less than what Mr. Tagliabue had originally anticipated.

Mr. Northrop testified that in the summer of 1992, the Board retained outside individuals and expended approximately $10,000 for their services. On cross-examination, Ms. Northrop testified that she was never in the executive session of the Board where Mr. Tagliabue made a recommendation that rather than abolish the CST, that his position, as the Director, be eliminated to save money so that the team would remain.

After reviewing R-16, Ms. Northrop testified that the Board of Education approved and executed it on May 6, 1991. She agreed that the Board of Education had an opportunity, between May 6 and May 15, to review the contents of same but did not do so. She agreed that a psychology extern was hired for school year 1991-92, that he provided psychological services and that he worked 450 hours during that year. Ms. Northrop was shown exhibits P-7 and P-8 and she agreed that the Board of Education made application for and received money from the State of New Jersey for family counseling for two distinct age groups so that the board could hire additional professional staff in the amount of $26,000. She further agreed, after being shown P-12, that the Board of Education, on November 25,1991, hired Catherine Angelastro and Sharon McLean to provide counselor/consultant services for special education.

On recross-examination, Ms. Northrop agreed that 38.4 percent of the total salaries and benefits of the CSTs were provided by Federal funds.

The respondent's current Superintendent of Schools, Harry Powers, also testified on behalf of the board. Dr. Powers was hired effective July 1, 1991, and he met with all of the administrators, including Mr. Tagliabue, to learn about the district and it personnel. Dr. Powers testified that it was his understanding that, after the RIF and the elimination of petitioners' positions, the Board intended to use contracted services to supplement the one full-time team that remained. Dr. Powers also testified that he received a letter from the State Department of Education, dated July 22, 1991

(R-21) which advised the Board that it was going to received $45,000 for counseling services from the State. The approval letter did not specify how the money was to be used. Dr. Powers, after receipt of such notification, made a decision to recommend to the Board that they employ a Guidance Counselor in the middle school.

After reviewing P-12, Dr. Powers testified that Catherine Angelastro was hired by the Board ten hours a week for school year 91-92 and that she primarily counseled students in an ED class. Ms. Angelastro continues to be employed by the board. Dr. Powers indicated that Ms. Angelastro's present duties primarily involved counseling families, students in dysfunctional family situations and counseling non-classified students in crisis. This counseling accounts for five hours per week of her time and the other ten are devoted to classified students. Dr. Powers testified that Mrs. Angelastro did not have a regular certificate in student personnel services, but rather, possessed an emergency certificate.

On cross-examination, Dr. Powers could not testify as to what counseling services petitioner, Stafanie Golam, provided in school years 1988-89, 89-90 and 90-91. Dr. Powers agreed that the administrative code authorizes a School Psychologist to counsel students. Dr. Powers further agreed that the School Social Worker is similarly authorized to counsel students. He admitted that there was a professional relationship between Mrs. Angelastro's husband and his wife. He further indicated that the school Guidance Counselor hired for the John Hill school was a woman named Anne Mazziotta, and that she also only had an emergency counseling certificate. Dr. Powers agreed that he never asked Ms. Golam whether or not she wanted to come back as a Guidance Counselor because she was not so certified, despite the fact that neither Ms. Mazziotta nor Ms. Angelastro was regularly certified. He also agreed that he never gave Ms. Frantz the opportunity to return as a guidance counselor.

Dr. Powers was shown the Special Education Plan for school years 1991-92 and 1992-93 (R-19) and asked whether or not the plan was amended after the reduction in CST, to which he responded no. After reviewing P-33 and P-34, Dr. Powers agreed

that he had discussed with Mr. Tagliabue that the State Department of Education recommends one full-time CST for every 100 major classified students.

Despite being shown P-35, a memo dated July 2, 1992, Dr. Powers could not remember whether there were 59 workups that had to be done in the summer of 1992. Dr. Powers was also shown P-40, a report from the interim CST Director, David Vivino, in which Mr. Vivino, after working less than two months in the district, made a recommendation that the CST be increased to at least 1.8 2 full-time CSTs. Dr. Powers could not testify whether the student population of classified students was the same between 1987 and 1991.

The Board's next witness was Marilyn Nolan, a Board member. On cross-examination, Ms. Nolan testified that she was neither certified school Psychologist nor certified Social Worker. She indicated that she could not testify as to how much State aid the school district received in 1990-91 school year. She indicated, after being shown P-2, that there was an increase of approximately $300,000 in State aid for special education between school years 1990-91 and 1991-92. Ms. Nolan further testified that it was her general impression that the classified population of the school district has continued to increase.

On rebuttal, petitioners' produced Al Tagliabue, formerly Director of Special Services of Boonton. Mr. Tagliabue testified that the State aid for special education increased from 1990-91 to 1991-92 in an amount in excess of $300,000. Mr. Tagliabue was shown the three-year plan for special education (R-19). He testified that it is a rather lengthy process to prepare, that a committee must be formed of citizens, teachers, administrators, members of the CST and board members, that the entire community is surveyed and that the survey forms the basis for the Special Education plan. He further indicated that after the plan was adopted, it was never altered, amended or modified while he was employed with the school district. There were no meetings with citizens, parents and teachers to discuss altering, amending or modifying the plan despite the fact that there is a legal requirement to do so. Mr. Tagliabue testified that in school year 1988-89, the student population of classified

students was approximately 220 and that in school year 1991-92, the year of the RIF, it was 233. He further stated that the number of classified students has been slowly rising over the years, and by the time he left, there were almost 270 classified students. Dr. Tagliabue was shown an amended application for fiscal year 1991-92 for flow-through funds (P-7). The purpose of the application was to provide counseling services to special education students who were required to have counseling as part of their individualized education plans (IEP). He indicated that the School Psychologist, School Social Worker or Guidance Counselor could perform these counseling services for ED students and that the Board of Education hired Ms. Angelastro, a non-tenured individual, to perform these duties. He stated that Ms. Angelastro worked with classified students, ED students, P.I. students and N.I. students and that he supplied her with all of the IEP's and set up her schedule to work with students on a regular basis. Mr. Tagliabue was aware that, prior to the RIF, Ms. Frantz and Mrs. Golam performed the counseling services that Ms. Angelastro was to perform. He also indicated that Anna Mazziotta was hired at the John Hill school, and that she also performed counseling services for classified students for approximately 15 hours per week while Ms. Angelastro provided the same services for classified students for approximately 10 hours each week.

Mr. Tagliabue testified that the Board of Education never discussed with him the impact on student services if the reduction in the CST was effectuated. He indicated that he had heard Mrs. Northrop state at Board meetings that the Board was going to contract the services out to replace those who had performed the work. He stated that he was aware that the Administrative Code requires classroom observations and that this was not done during any summer that the contracted CSTs performed work.

After reviewing P-35, Mr. Tagliabue stated that in June 1992, he advised Dr. Powers that there were 21 evaluation that had to be done, and with reevaluations a total of 38 students needed testing to be done that had not been done in school year 1991-92. Mr. Tagliabue testified that the Board had no educational justification to eliminate the CST.

On redirect examination, Mr. Tagliabue was shown a memo that he prepared, sometime in February or March, during the budget crisis (P-41). In that memo, he prioritized cuts in the special education budget that would be least disruptive to the Special Education program. Mr. Tagliabue indicated that the board had overbudgeted Special Education by $48,000 and this could be reduced from the budget. The second reduction that he suggested was elimination of resource room supplies and texts, saving $736,000. The third item was a reduction in the amount of home instruction. The board had budgeted $10,000 while the Department rarely expended more than $5,000, resulting in a savings of $5,000. The fourth item was a lease, rather than a purchase, of a photocopier, which would have saved the Board $4,000. The fifth item was elimination of a P.I. aide's salary of $10,000. The sixth item was elimination of two E.D. aides, for a saving of $20,000. Elimination of the aides' position would have resulted in a savings of $30,000 in salaries in addition to a savings of $22,500 in benefits for these three aides for a total of $52,500 reduction. These recommendations were rejected by the Board. His next suggestion was eliminating his own position as Director of Special Services, which would have saved the board approximately $60,000 plus benefits. Mr. Tagliabue testified that the district could function without a Director of Special Services since the Director was merely the Superintendent's designee.

In further discussion of his recommendation that his own position be abolished, Mr. Tagliabue expressed the opinion that educationally, it would be more advantageous for the children, because the children needed to be tested, needed to be placed in programs, teachers needed to consult with the Psychologist, and the children would have received better services. He indicated that the local Board of Education's portion of the salary for the part-time team would have been $60,000, which was exactly his annual salary.

LEGAL DISCUSSION AND ANALYSIS

In its post-hearing brief, the first legal issue raised by respondent is that petitioner's claims are time barred by *N.J.A.C.* 6:24-1.2(c). This regulation provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of a notice of final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Respondent points out that the petitioners' employment with the school district was terminated on June 30, 1991, that all had prior notice of this contemplated action and all received specific written notification on April 16, 1991. Each petitioner testified that she met with the superintendent concerning the termination. Accordingly, respondent alleges that, at the latest, the 90 day limitation period commenced on June 30,1991, so that petitioners were required to file their claim within 90 days thereafter, or by September 28, 1991.

By their letter brief dated November 17, 1993, petitioners argue that after respondent terminated petitioners, it continued to violate all of petitioners' tenure and seniority rights. Petitioners argue that this is a continuing violation. In addition, petitioners assert that respondent never prosecuted its limitation of action defense and that this constitutes a waiver. However, respondent raised the issue whether petitioner's claims are barred by the limitations of *N.J.A.C.* 6:24-1.2(b) in its answer and this issue was preserved at the time of the prehearing conference and included in the prehearing order as issue number 7. There is no provision in the Uniform Administrative Procedure Rules, *N.J.A.C.* 1:1-1.1 to -21.6 which indicates that a defense is waived if not pursued by motion prior to a hearing. Compare *R.* 4:6-7.

In *Gorton v. Passaic Township Board of* Education, 1985 *S.L.D.* 1929 (1985), aff'd, App. Div. Dkt. No. A-3294-84T (May 27, 1986) (unreported), certif. den. 105 *N.J.*

534 (1986), the State Board of Education specifically held that the limitations in *N.J.S.A.* 6:24-1.2 applied to claims alleging violation of tenure or seniority rights. 1985 *S.L.D.* at 1931. The State Board also held that the 90-day limitations rule is to be strictly applied and is to be measured from the time when the cause of action accrued. *Id.* In *Sasse v. Board of Education of Point Pleasant, S.L.D.* , OAL Dkt. No. EDU 10365-90, (decided April 30,1992), the Commissioner of Education affirmed the ALJ's finding that a petition which alleged a violation of tenure and seniority rights in the context of a reduction in force should be dismissed because it was untimely under *N.J.A.C.* 6:24-1.3(c). The ALJ specifically held that petitioner's cause of action accrued upon her receipt of a letter notifying her that her position was abolished pursuant to a reduction in force. See Initial Decision at p. 13-14.

In *Kaprow v. Berkeley Tp. Bd. Of Educ.,* 131 *N.J.* 572, at 581-86 (1993), the Supreme Court strictly applied the 90-day limitations period to bar the claims of a tenured assistant superintendent who was "riffed" and who sought to exercise his tenure and seniority rights to obtain another position with the respondent Board.

Based upon the foregoing, I **FIND** that the 90-day limitation period provided for in *N.J.A.C.* 6:240-1.2(c) is specifically applicable to employment termination claims arising out of a reduction in force, and that the cause of action for such claims accrues at the time an employee receives notice of the action which is claimed to violate the asserted right. In this case, the notice was received in April, 1991, the time all three petitioners received written notification that their positions were to be abolished and their employment terminated. Their employment terminated on June 30, 1991, as stated in the April notification. Because petitioners did not file the petition in this matter until December 5, 1991, almost nine months after receipt of notification that they were to be terminated, and more than five months after their actual termination date, I **CONCLUDE** that their claims should be dismissed as untimely.

Despite the foregoing finding and conclusion, it is the appropriate and in the best interest of all involved that I proceed to discuss the other issues raised by the parties in

this matter. This is particularly appropriate where an extensive hearing has been held and legal arguments have been submitted.

The essential substantive issue to be decided in this matter is whether respondent has violated statutes and regulations by supplanting its Learning Disability Teacher/Consultant, school social worker and psychologist by retaining non-district individuals to prepare IEP's; by hiring a psychology extern to do testing; and by hiring non-tenured guidance counselors to counsel classified students.

A board is not permitted to provide professional service to its pupils by means of nonemployees. *N.J.S.A.* 18A:16-1 provides:

> Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary or a school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a treasurer of school moneys, when and as provide by section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment.

N.J.A.C. 6:28-5.1(c)1.i. provides that a board may, in order to fulfill its duties to non-public school pupils residing in the district, contract for all CST services including the evaluation, classification, and preparation of an IEP. In terms of providing services to public school pupils, however, a board's authority to contract is limited to CST evaluations and diagnostic services to supplement existing local district services. *N.J.A.C.* 6:28-5.1(c)1.

The above-referenced provisions make it clear that a board cannot subcontract the services of its CST to outside individuals. A board may supplement those services, but this presupposes an existing CST with members who are employed by the local board. Outside contractors for CST services are only permitted in limited circumstances and only for purposes of supplementing services provided by existing team members.

The leading administrative decision, relating to board efforts to "RIF" and replace tenured educational services personnel through subcontracting arrangements with third parties, is the State Board of Education's decision in *Cochran et al. V. Watchung Hills Regional High School Bd. Of Educ.,* 1985 *S.L.D.* 1878, affirmed App. Div. Docket No. A-2327-85T7 (decided December 22, 1986). In that case, petitioners were all tenured teaching staff members employed by the board in full-time CST positions of Learning Disabilities Teacher/Consultant, Social Worker and School Psychologist respectively. On April 12, 1982, the Board of Education voted to abolish these full-time positions, for economy reasons, replacing them on May 10, 1992 with half-time positions.

In September, 1982, the petitioners learned that the Board had contracted with an outside entity for the providing of CST services, including some of the services previously provided by petitioners. Petitioners challenged the Board's action as being in violation of their tenure and seniority rights. In sustaining the decisions of an ALJ and the Commissioner of Education, the State Board of Education, in its decision, concluded:

> The statute under which the Board acted here to abolish Petitioners' full-time positions, *N.J.S.A.* 18A:28-9, authorizes local 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 organizations of the district or for other good cause.
>
> Reduction in force decisions made pursuant to *N.J.S.A.* 18A:28-9 are entirely within the authority of the local Board. In re *Maywood Bd. of Ed.,* 168 *N.J. Super.* 45, 55 (App. Div.), cert. denied, 81 *N.J.* 292 (1979); *Boult and Harris v. Passaic Bd. of Ed.,* 1939 *S.L.D.* 7, 13 aff'd State Board, 1939 *S.L.D.* 15, aff'd 135 *N.J.L.* 329 (Sup. Ct. 1947), aff'd 136 *N.J.L.* 521 (E. & A. 1948). Such decisions have, however, been reviewed to determine whether the position ostensibly abolished has not, in fact, been

> abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights, *Viemeister v. Prospect Park Bd. of Ed.,* 5 *N.J. Super.* 215 (App. Div. 1947); *Catano v. Woodbridge Bd. of Ed.,* 1971 *S.L.D.* 448, 458, or whether the reduction in force decision has been made arbitrarily when legitimate economic and educational objectives could have been served with less erosion of the rights of tenured employees. *Lingelbach v. Hopatcong Bd. of Ed.,* decided by State Board May 17, 1984, aff'd Superior Court, Appellate Division, Docket No. A-4783-87T7, decided May 5, 1985. In either case, one must examine the entire course of events.
>
> The CST was intended by regulation to represent a multi-disciplinary approach to identifying, evaluating and planning suitable educational programs for children with learning difficulties. *N.J.A.C.* 6:28-1.3(d) [1982]. The basic CST consisted of a school psychologist, a learning disabilities teacher-consultant and a social worker, all of whom were expected to be employees of the local board of education, *N.J.A.C.* 6:28-1.3(a). Outside contractors were authorized in limited circumstances by *N.J.A.C.* 6:28-1.3(f) only with prior approval of the County Superintendent, and only for the purpose of supplementing existing team members. General CST work was still intended to be performed by employees of the local board. Nevertheless, in the instant case, the board set out to abolish full-time CST positions and replace them with half-time positions fully recognizing that more general CST contracting would be necessary because of anticipated case load. * * * .
>
> Hence, the Board's intention was not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider. Under these circumstances the Board's action taken here falls squarely with the prohibition of *Viemeister v. Prospect Park Bd. of Ed., supra.* The Commissioner and the ALJ correctly concluded that the integrity of the reduction in force decision was vitiated by the virtually contemporaneous decision to contract for additional CST services that the team, as originally constituted, would have otherwise performed. That being the case, the reduction in force decisions were properly voided, the full-time positions reinstated and Petitioners ordered restored to those positions.

The Appellate Division affirmed the State Board of Education's decision in its entirety. The Appellate Division specifically held that:

> Watchung argues that its decision to reduce the positions to half-time was made for reasons of economy and that *N.J.S.A.* 18A:28-9 allows reductions in force for this reason. It is apparent that the State Board of Education's decision rests upon the Commissioner's "Sense and experience" that Watchung was not, in fact, abolishing Petitioner's positions but merely dividing up their duties and distributing part of those duties to an outside contractor in violation of Petitioner's tenure rights. The State Board of Education correctly noted that a local Board's decisions concerning reduction in force are properly reviewable "to determine whether the position ostensibly abolished has not, in fact, been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights. . ."; citing *Viemeister v. Board of Education of Prospect Park,* 5 *N.J. Super.* 215 (App. Div. 1949). The State Board found the local Board's action to fall squarely within the prohibition of *Viemeister* concluding "the Board's intention was not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider". (Slip. Opinion at pages 3 and 4).

In response, the respondent argues that its use of a modest amount of supplemental outside help for CST services in the fall of 1991 differs from the Watchung Hills scenario. It points out that in the Watchung Hills case, the one full-time CST was reduced to a half-time team and that the underlying assumption of the ALJ, Commissioner and State Board was that the amount of CST work contracted out was equivalent to half-time CST positions which would yield a full-time CST.

Respondent points out that in the present case the circumstances are vastly different and that, consistent with the practice of prior summers, and as contemplated by the collective negotiations agreement, existing CST personnel worked during the summer to complete the work necessary to meet various deadlines. Respondent also points out that in the fall of 1991, the Board used a very modest level of outside services to supplement the work of the remaining full-time CST and paid only $5,200 for supplemental CST assistance from September to January 1992. Respondent argues that these figures show that the respondent did not in any way supplant petitioners' positions with outside contracted services, but supplemented existing CST services, as expressly permitted by *N.J.A.C.* 6:28-5.1(c)1.i. Respondent also points out that after the Board established .2 CST positions in December 1991, which

petitioners were offered by declined, respondent had no need to use any outside contracted services for the remainder of the 1991-92 school year, except for two evaluations in January 1992.

The determination as to whether the utilization of outside contracted services amounts to a supplanting of existing CST members or a supplementing of such members, involves a review of all surrounding facts and circumstances. In support of their contentions, petitioners assert that their duties were supplanted by an extern in school psychology, who was associated with respondent during the 1991-92 school year. However, petitioner's presented no evidence that the extern associated with respondent performed any of the former duties and responsibilities of any of the petitioners. Respondent also points out that *N.J.A.C.* 6:11-11.12(b)3 regulates the 450 hours externship in school psychology and that funding for the extern was a part of federal funds.

Petitioners also allege that the termination of the CST resulted in a violation of the district's special education plan, relying on *Primka v. Jamesburg Boro. Bd. Of Educ.*, 93 *N.J.A.R. 2d.* (EDU) 91. However, I have serious reservations as to whether the members of a CST are given substantive rights by a school district's special education plan. The *Individuals with Disabilities Education Act* provides at 20 *U.S.C.A.*, Sec. 1400(c) that its main purposes are to assure that all children with disabilities have available to them a free appropriate public education, and to assure that the rights of such children and their parents and guardians are protected. The State regulations implementing the Act set forth virtually the same purposes at *N.J.A.C.* 6:28-1.1(b). Nowhere is there any indication that the Act or the implementing regulations were adopted to protect the positions of CST members. In any event, in the present matter, petitioners have failed to show a provision of respondent's special education plan which respondent has violated. There is no specific provision in the plan requiring CST staffing levels. In addition, there was no indication by the county superintendent that respondent's special education plan was required to be amended in order to implement a reduction in respondent's CST staffing levels.

In view of all of the above circumstances, I **FIND** that the actions of respondent in this matter did not amount to a supplanting of the CST staff by petitioners in this matter, but amounted to supplementing of the work of an existing full-time CST.

Petitioners argue that respondent acted arbitrarily and capriciously in terminating the position of petitioners. *N.J.S.A.* 18A:28-9 permits a 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 for other good cause. Reduction in force decisions made pursuant to this provision are entirely within the authority of the local board. In re *Maywood Board of Education*, 168 *N.J. Super.* 45, 55 (App. Div.), *certif. den.* 81 *N.J.* 292. Such decisions have been reviewed to determine whether the position ostensibly abolished has not, in fact, been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights. *Viemeister v. Prospect Park Board of Education,* 5 *N.J. Super.* 215 (App. Div. 1947). If the decision to reduce the number of teaching staff members is done for reasons of economy, such a determination is entirely within the authority of the Board. *Klinger v. Cranbury Tp. Bd. of Ed.*, 190 *N.J. Super.* 354, 357 (App. Div. 1982); *certif. den.* 93 *N.J.* 277 (1983). The testimony and evidence presented by petitioners in this matter was to the effect that additional funds were available to retain petitioners' positions, and additional savings could have been effectuated in order to retain the services of petitioners. However, as is indicated in Civil Services layoff cases, proofs that a decision to RIF employees was unwise, or that the Board could have chosen a different method of achieving needed savings is an insufficient basis for setting aside the RIF of petitioners. See *Kyles v. Paterson,* 5 *N.J.A.R.*, 445, 461 (Dept. of Personnel, 1982); *Acchitelli v. Dept. of Environ. Prot. & Energy,* 92 *N.J.A.R.* 2d. (CSV) 716.

The final major argument of petitioners involves their claim that respondent violated the tenure rights of petitioners Mullin and Frantz by failing to permit them to bump non-tenured teaching staff members. Petitioners assert that Mullin and Frantz

were both validly in possession of instructional certificates with subject area endorsements as well as educational services certificates at the time of their termination. Neither petitioner was offered any position for which they were certified and in which respondent employed non-tenured teachers. Respondent admits that petitioner Frantz holds an instructional certificate with an elementary education endorsement but asserts that she did not obtain that endorsement until June 1991, after she had received notice that her employment with the school district was being terminated. It further asserts that there was no proof that the district had notice that Frantz had obtained the certificate. Accordingly, it argues that the Board cannot be deemed to have knowledge that she possessed it. It argues that certificates obtained after the date of an employee's RIF do not confer retroactive entitlement for reemployment in the event that a position subsequently becomes available for which the employee is qualified under the newly obtained certificate, citing, *Francey v. Bd. of Educ. of the City of Salem*, OAL Dkt. No. EDU 10219-91, Comm. of Educ. (July 22, 1992). Respondent points out that petitioners assert that even though they never served in Boonton in any certificate other than their educational services certificate with the respective endorsements entitling them to tenure as members of the CST, they were entitled to bump persons serving under other certificates that they held.

Petitioners rely upon *Dennery v. Bd. of Educ.*, 131 *N.J.* 626 (1993) in support of their position. Based on the language of *Dennery,* petitioners argue that the Supreme Court has recognized that, under appropriate facts, tenure achieved under one certificate can entitle an educator to tenure in a position under another certificate. Petitioners point out that *N.J.A.C.* 6:11-11.13 requires that to be eligible to become an LDTC, the applicant have a standard New Jersey Teacher's Certificate and three years of successful teaching experience and that petitioner Mullin met these requirements. *N.J.A.C.* 6:11-11.8 requires that to be eligible for a school social worker endorsement, the applicant have three years of successful teaching experience and that petitioner Frantz met this requirement.

The right to tenure is statutory and the Tenure Act, *N.J.S.A.* 18A:28-1 to 18, specifically defines the conditions under which school district employees are entitled to

tenure. *Spiewak v. Rutherford Bd. of Ed.,* 90 *N.J.* 63, 72 (1982). Pursuant to *N.J.S.A.* 18A:28-5, in order to achieve tenure, teaching staff members must serve in given positions which require them to hold appropriate certificates issued by the Board of Examiners for the requisite period of time. Tenure under *N.J.S.A.* 18A:28-5, attaches to a "position" which is defined as "any office, position or employment." *N.J.S.A.* 18A:28-1.

The law is settled that a teaching staff member who obtains tenure under a certificate entitles that person to tenure under all endorsement held by that person under the particular certificate. *Dennery, supra* at 634. Petitioners seek to extend the tenure that they achieved under the educational services certificate for which they held positions in the CST, to an instructional certificate which they hold but under which they never served in Boonton. This very argument was considered and rejected by the Supreme Court in *Dennery*. In that case, the teacher was a tenured guidance counselor under an educational services certificate. As a result of a departmental reorganization, her guidance counselor position was eliminated and its functions incorporated into a newly created class supervisor position. The class supervisor's position require both an educational services certificate and an administrative certificate, which petitioner did not have. Petitioner thereafter became qualified to hold an administrative certificate. The Board refused to appoint her as a class supervisor because she had not previously served in any position included under the administrative certificate. Petitioner claimed that her tenure rights were violated when the Board failed to appoint her. The Supreme Court, referring to the *Spiewak* decision, concluded that, by the express terms of the statute, an employee of a Board of Education is entitled to tenure only if the employee has complied with the definite requirement of actually performing the duties under the relevant certificate in order to obtain tenure.

Since none of the petitioners served the district under any certificate other than their educational services certificates, none of them have tenure rights in any other positions. Therefore, they have no bumping rights based on their seniority or otherwise.

Accordingly, I **FIND** that petitioners' claim that respondent has violated their tenure and seniority rights has not been shown.

Based upon the foregoing discussion, I **FIND** and **CONCLUDE** that petitioners' petition of appeal should be **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 8, 1994
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/11/94
DATE

[redacted]
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lam

LIST OF WITNESSES

For Petitioners:

Joy Northrop
Linda Mullin
Susan Frantz
Stefanie Golam
Alfred C. Tagliabue

For Respondent:

Joy Northrop
Harry Powers
Marilyn V. Nolan

LIST OF EXHIBITS

J-1 Stipulation of Facts
J-1A Linda Mullin Employment Record Card
J-1B Stefanie Golam Employment Record Card
J-1C Susan E. Frantz Employment Record Card
J-1D Notice of April 16, 1991 to Linda Mullin
J-1E Notice of April 16, 1991 to Stefanie Golam
J-1F Notice of April 16, 1991 to Susan Frantz
J-1G Letter of Morristown Memorial Hospital, dated April 26, 1991
J-1H Letter of December 17, 1991 to Linda Mullin
J-1I Letter of Linda Mullin, dated December 31, 1991
J-1J Letter of December 17, 1991, to Stefanie Golam
J-1K Letter of Stefanie Golam, dated January 3, 1992
J-1L Letter of December 17, 1991 to Susan Frantz
J-1M Letter of Susan Frantz, dated December 31, 1991
J-1N Letter of June 15, 1992, to Linda Mullin
J-1O letter of Linda Mullin, dated June 19, 1992
J-1P Letter of June 15, 1992 to Stefanie Golam
J-1Q letter of June 15, 1992 to Susan Frantz
J-1R Letter of Susan Frantz, dated July 7, 1992

P-1 New Jersey Department of Education, Special Education Funding, 1990-91 (November 8, 1990)
P-2 Legal Notice of March 8, 1992, Proposed 1992-93 School District Budget
P-3 New Jersey Department of Education Special Education Funding, 1991-92 (March 11, 1991)
P-4 Child Study Team Memo dated April 1, 1991
P-5 History and Overview of Child Study Team II
P-6 Child Study Team Man Hour Review
P-7 Amendment Application, Flow-Through funds

P-8 Application for Flow-Through Funds, 1992

P-11 List of Nontenure staff as of April 1, 1992

P-12 Board of Education minutes, November 25, 1991

P-13 Excerpts from Board of Education Publication

P-14 "Synopsis", Board of Education of March 15, 1991

P-15 Morris County Child Study Staffing Ratios

P-16 Tagliabue Memo of April 2, 1991

P-17 Tagliabue Memo to Dr. Sheely of April 3, 1991

P-18 Tagliabue Memo to Dr. Sheely of April 3, 1994

P-19 Tagliabue Memo to Dr. Sheely of April 4, 1994

P-20 Dr. Sheely Memo of April 5, 1991

P-21 Tagliabue Memo to Dr. Sheely of April 30, 1991

P-22 Tagliabue Memo of May 7, 1991

P-23 Tagliabue Memo of May 22, 191

P-24 Tagliabue Memo of June 3, 1991

P-25 Tagliabue Memo of July 9, 1991

P-26 Tagliabue Memo of August 5, 1991

P-27 Dr. Powers Memo of August 6, 1991

P-28 Tagliabue Memo of August 9, 1991

P-29 Tagliabue Memo of August 19, 1991

P-30 Dr. Powers Memo of August 26, 1991

P-31 Child Study Team Memo of April 2, 1991

P-33 Tagliabue Memo of July 19, 1991

P-34 Tagliabue Memo of December 20, 1991

P-35 Tagliabue Memo of June 10, 1992

P-36 Tagliabue Memo of July 2, 1992

P-37 Tagliabue Memo of July 20, 1992

P-38 Tagliabue Memo of September 11, 1992

P-39 Tagliabue Memo of September 25, 1992

P-40 Vivino Memo of December 23, 1992

P-41 Recommendations to cut $314,538 from CST budget

R-2 L. Mullin pay stub for December 21, 1991

R-4 S. Frantz pay stubs for August 8, 1992 and August 22, 1992

R-5 S. Golam pay stub for 3/31/92

R-6 Minutes of January 5, 1991 Closed Session

R-7 Minutes of March 21, 1991 Meeting and Closed Session

R-8 Minutes of March 25, 1991 Meeting and Closed Session

R-9 Minutes of April 2, 1991 Meeting and Closed Session

R-10 Minutes of April 8, 1991 meeting and Closed Session

R-11 Minutes of April 15, 1991 Meeting and Closed Session

R-12 Minutes of April 20, 1991 Meeting and Closed Session

R-13 Town of Boonton School Report, April, 1991

R-14 Excerpt from 1991-92 Annual Budget

R-15 Commissioner of Education Memo as to Supplemental Aid

R-17 Purchase Orders

R-18 Payroll time Sheets

R-19 Special Education Plan for 1990-1993, Part One

R-20 Handwritten Calculations as to Exhibit R-18

R-21 Supplemental Aid approval of July 22, 1991

R-22 Dr. Powers Memo of July 25, 1991

R-23 Dr. Powers letter of August 21, 1991

R-24 County Superintendent letter of august 27, 1991

R-25 Evaluation of Special Services dated July 10, 1992

R-26 Tagliabue memo of October 24, 1991

R-28 Tagliabue Memo of November 21, 1991

R-29 Tagliabue Memo of December 19, 1991

R-31 Tagliabue Memo of August 5, 1991

R-32 Tagliabue Memo of September 27, 1991

R-33 Dr. Powers Memo of March 10, 1992

R-34 Dr. Powers Memo of April 9, 1992

OAL DKT. NO. EDU 1050-92

LINDA MULLIN, STEFANIE GOLAM AND SUSAN FRANTZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

The parties' exceptions consisted solely of their respective post-hearing submissions made to the Administrative Law Judge upon which both of them wish to reply.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ in his initial decision for the reasons clearly articulated by him therein.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

AUGUST 18, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 18, 1994

230-94

230-94 M

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, RESPONDENT.	:	DECISION ON MOTION

SYNOPSIS

Petitioning Board alleged that the Township Committee failed to meet and consult with it prior to reducing the budget for the 1994-95 school year and failed to provide supporting reasons for budget reductions. Thus, the Board sought declaration from Commissioner that the budget reductions would deprive Board of the funds necessary for a T&E school system and that the Township Committee acted erroneously, arbitrarily and unlawfully. Since Township Committee did not submit a reply, Board sought summary decision.

Commissioner denied summary decision finding the use of a procedural defect to defeat review on the merits compromises the Commissioner's role in budget decisions to encourage mutual cooperation between the local school board and the municipality to make budget decisions based on the appropriate educational considerations.

AUGUST 23, 1994

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

For the Petitioner, Peter P. Kalac, Esq. (Kalac, Newman, Lavender & Campbell)

For the Respondent, William F. Dowd, Esq. (Dowd & Reilly)

This matter comes before the Commissioner on Motion for Summary Decision pursuant to N.J.A.C. 1:1-12.5 by the Board of Education of the Township of Middletown, Monmouth County, filed on June 29, 1994, based upon assertions that the Township Committee failed to meet and consult with the Board and failed to provide supporting reasons for budget reductions. Petitioner seeks a judgment declaring:

(a) that the budget reduction resulting from the *** certification and Resolution of the respondent municipality will deprive the petitioner of the funds required to provide a thorough and efficient school system in the district for the year July 1, 1994 to June 30, 1995.

(b) that the actions of the respondent municipality were erroneous, arbitrary and unlawful.

> And determining:
>
> that the amount required to be raised by local taxation for current expense purposes, to provide a thorough and efficient school system in the district for the year July 1, 1994 to June 30, 1995, exclusive of Debt Service, is $62,327,463.00.
>
> And certifying:
>
> to the Monmouth County board of Taxation, or ordering the respondent municipality to so certify, exclusive of Debt service, the foregoing amount of $62,327,463.00 to be raised by local tax levy for the school district during the year 1994-95 for current expenses. (Petition, at pp. 3-4)

By letter dated July 5, 1994, the Bureau of Controversies and Disputes acknowledged receipt of the Motion for Summary Decision and advised the Township Committee that it had ten (10) days from its receipt of the motion to submit its reply. No reply to the Motion for Summary Decision has been received from the Township Committee.

The Motion for Summary Decision is hereby denied for the reasons set forth herein.

A motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.***" (N.J.A.C. 1:1-12.5(b)) In Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67 (1954), the Supreme Court articulated the standards to be followed when deciding motions for summary judgment. A review of a motion for summary judgment requires

> a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion***.

***

> [In the event] the opposing party offers no affidavits or matter in opposition***, he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. (17 N.J. at 75)

Moreover, the moving party has the burden of proving that it is entitled to a judgment as a matter of law. As has been recently rearticulated by the State Board of Education in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County and In the Matter of the Cap Waiver of the Board of Education of the Borough of Edgewater, Bergen County, decided July 6, 1994, the Commissioner has independent responsibilities in reviewing local school budgets which have been defeated by the voters.

The State Board opined that

> In East Brunswick, the New Jersey Supreme Court carefully delineated that standard, stressing that when the Commissioner is reviewing such reductions,
>
> > ...his function is not to sit as an original budget-making body, as he would had the governing body failed to make any certification...his function is admittedly to sit as a reviewing body which, however, is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out. [citations omitted.]
> >
> > ...if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements of 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.
> East Brunswick, supra, at 106-107
> (Edgewater State Board Decision, Slip Opinion, at pp. 6-7)

After review of the Motion for Summary Decision and required search to the "merits of the pleadings" and the record established pursuant to N.J.A.C. 6:24-7.1 et seq., notwithstanding alleged procedural deficiencies which may be addressed in further proceedings, the Commissioner finds that petitioner has not established its entitlement to summary judgment at this time. The Supreme Court in Deptford, supra, held that "[t]he remedy *** is too drastic a reaction to the failure to timely file a statement of reasons. More importantly, the remedy obviates a consideration of the educational merits of the budget itself." (at 317) The Court found that

> the use of such a procedural defect to defeat review on the merits compromises the Commissioner's role, which should in every way possible encourage mutual cooperation between the local school board and the municipality to make budget decisions based on the appropriate educational considerations. Moreover, it short-circuits the Commissioner's own important responsibility in overseeing local action to assure optimum public education." (Id.)

Accordingly, the Motion for Summary Decision is denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 23, 1994

DATE OF MAILING - AUGUST 23, 1994

230-94

C # 230-94
SB # 40-94

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, PETITIONER-APPELLANT, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, RESPONDENT-RESPONDENT.	:	STATE BOARD OF EDUCATION DECISION ON MOTION

Decision on motion by the Commissioner of Education, August 23, 1994

For the Petitioner-Appellant, Kalac, Newman, Lavendar & Campbell (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Respondent, Dowd & Reilly (William F. Dowd, Esq., of Counsel)

The State Board of Education grants the motion of the Board of Education of the Township of Middletown for leave to appeal the Commissioner's decision of August 23, 1994, denying its motion for a summary decision. We stay any further proceedings before the Commissioner pending our decision in this matter.

October 5, 1994

Date of mailing OCT 07 1994

230-94

C # 230-94
SB # 40-94

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, PETITIONER-APPELLANT,	
V.	STATE BOARD OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, RESPONDENT-RESPONDENT.	DECISION

Decision on motion by the Commissioner of Education, August 23, 1994

Decision on motion by the State Board of Education, October 5, 1994

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

For the Respondent-Respondent, Dowd & Reilly (William F. Dowd, Esq., of Counsel)

This matter was initiated on May 31, 1994 by an appeal to the Commissioner of Education by the Board of Education of the Township of Middletown (hereinafter "Board") pursuant to N.J.S.A. 18A:22-37 following voter defeat of the education budget for 1994-95 and reductions of $3,546,946 made to that budget by the Township Committee (hereinafter "Township") on May 16.

The Township Committee filed an answer to the Board's appeal on June 7, 1994, but did not include the documentation required by N.J.A.C. 6:24-7.7.[1] On June 14, the Township

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[1] N.J.A.C. 6:24-7.7 provides that along with its answer, the governing body must provide the Commissioner with:

> 1. A copy of the current expense line item budget detailing specific reductions that were effectuated by the governing body or bodies along with the statement of supporting reasons for each of the line item reductions;

April 5, 1995

Committee was notified of this deficiency when receipt of its answer was acknowledged by the Bureau of Controversies and Disputes. The Township Committee addressed the deficiency by sending a copy of its resolution to the Acting Director of the Bureau of Controversies and Disputes on June 21, 1994.

On June 28, 1994, the Board filed its Position Statement and supporting affidavits by the Board Secretary and the Superintendent.

On July 15, the Township Committee filed its Position Statement along with supporting affidavits by John Laezza, who had been retained by the Township to review the budget after its defeat, and Joseph Leo, Administrator for the Township.

On July 25, the Board filed its response to the Township's Position Statement and a supplemental affidavit by the Superintendent.

On July 5, 1994, before the Township filed its Position Statement, the Board filed a motion with the Commissioner seeking a summary decision in its favor pursuant to N.J.A.C. 1:1-12.5.[2] In support of its motion, the Board alleged that the Township had never

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2. A copy of the capital outlay budget detailing specific reductions that were effectuated along with a statement of supporting reasons for each of the line item reductions; and

3. ...a certification stating the date on which the documents were originally given to the district board of education.

2 N.J.A.C. 1:1-12.5 provides in pertinent part that:

(a) At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein.

(b)...The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material

consulted with it as required by N.J.S.A. 18A:22-37 and had never provided supporting reasons for its reductions despite a directive from the Commissioner that it do so. The Board contended that under the New Jersey Supreme Court's decisions in Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 1966, and Bd. of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989), these failures entitled it to restoration of the amounts that had been reduced by the Township Committee.

The Township Committee did not file any response to the Board's motion.

By decision of August 23, 1994, the Commissioner denied the Board's motion for summary decision. The Commissioner did not address whether any of the material facts were in dispute, but did cite the judicial standards governing summary judgment, finding that the Board had not established that it was entitled by law to restoration of the amounts at issue. In support of his conclusion, the Commissioner observed that the Court's decision in Deptford had held that restoration of funds by issuing a summary judgment in reaction to a municipal governing body's failure to provide the reasons for its reductions was too dramatic a remedy. He also noted

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fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

See also N.J.A.C. 6:24-1.14 (summary judgment before the Commissioner prior to transmittal to OAL).

that the Court had pointed out that such remedy obviated consideration by the Commissioner of Education of the educational merits of the budget.

The Board then sought leave from the State Board of Education to appeal the Commissioner's denial of its motion. On October 5, 1994, the State Board granted leave and stayed further proceedings before the Commissioner pending disposition of this appeal.

The Board contended that the Commissioner erred in denying its motion for summary decision. Citing the same judicial standards governing summary judgment that the Commissioner relied upon, the Board argued that because the facts it asserted were not opposed, these facts must be taken as true by the Commissioner. This being the case, the Board concluded the determination required is purely one of law. On this point, the Board stressed that in contrast to Deptford, which involved the failure of the governing body to timely file a statement of reasons, the requirement to consult with the district board is part of the express language of the statute. The Board maintained that because the governing body in this case both failed to provide reasons for its reductions when it responded to the Board's appeal and also violated a statutory requirement when it failed to consult with the Board, the reductions made by the Committee must be set aside under East Brunswick.

In response to the Board, the Township Committee filed a brief with the State Board dated July 14, 1994, representing to us that it had intended to file this brief in opposition to the Board's motion for summary decision before the Commissioner but had not done so because of an oversight.

The Township Committee contended that N.J.S.A. 18A:22-37 does not mandate a meeting between the full governing body and the full board. It asserted that in this instance, meetings did in fact occur between the mayor and Township Committee members and representatives of the Board and that these meetings were sufficient to meet the statutory requirement for consultation. The Township also argued that its resolution detailing the line item cuts it made provides the reasons for its reductions and that submitting this resolution fulfilled the requirements of N.J.A.C. 6:24-7.7. The Township maintained that, therefore, it did not breach either its statutory or regulatory obligations.

The Township Committee further urged that because an appeal involving the Board's 1993-94 budget is currently before the Appellate Division, the issues relating to that budget must be addressed in this appeal. It also argued that this matter requires a hearing before an assistant commissioner so that the "testimony" submitted can be fully reviewed.[3]

The Legal Committee reviewed the record that had been thus far developed in the matter. Based on that review, the Legal Committee issued its Report on February 1, 1995, finding that summary disposition of this case would be inappropriate.

The Middletown Board filed exceptions to the Legal Committee's Report on February 9, 1995. In its exceptions, the Board conceded that, as had been attested by Joseph Leo,

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3 We note that there have been no evidentiary hearings thus far in this case. Nor does the record include any depositions. We must assume that the Township's reference to "testimony" is to the affidavits that have been filed.

Administrator of the Township, a meeting between members of the Township Committee and the Board had taken place on May 13, 1994. The Board contended that compliance with N.J.S.A. 18A:37-22 requires a meeting between the full Board and the governing body and that it was entitled to summary decision restoring the amounts the Township Committee had reduced from its budget since such meeting had not occurred.

Review of the Board's exceptions has reinforced our view that, as expressed in the Legal Committee's Report, summary disposition of this case would be inappropriate at this point.

New Jersey was among the first states to make summary judgment procedures available and, consequently, the standards which the New Jersey courts apply when deciding whether to grant a summary judgment are well established. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). As described by the Court, summary judgment

> ... is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial...
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.
>
> ...it is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact....

Id. at 74-75 (citations omitted).

In applying court-based precepts such as these, we are cognizant that we must temper their potential for achieving sound

results by a full appreciation of our agency's statutory foundations, executive nature, and its special jurisdictional and regulatory concerns. City of Hackensack v. Winner, 82 N.J. 1 (1980).

In this case, the Board sought leave to appeal in order to obtain a ruling that the Township Committee's conduct constituted such a breach of its obligations under the law that this agency should summarily dispose of the entire matter by restoring the amounts at issue to the education budget without further hearing. This view is flawed.

First, as discussed above, summary judgment can not issue when there are genuine disputed issues of fact. This alone would bar issuance of a summary judgment in this case.

While there is no dispute that the Township Committee did not provide a statement of reasons when it filed its answer to the Board's appeal, even the Board does not contend that this in itself would entitle it to summary judgment. Deptford, supra. Rather, the Board argues that when this failure is considered in conjunction with the Township Committee's conduct in relation to its statutory obligation to consult with the Board, the law calls for summary judgment restoring the reductions.

In order for it to prevail on its motion, the Board had the burden of excluding any reasonable doubt as to the material facts. E.g., Costa v. Josey 83 N.J. 49, 53 (1980). Our review of the record shows that the affidavit by the Township Administrator, which was filed in support of the Township's Position Paper, attests that the mayor and Township Committee members did meet with Board representatives before the Township Committee made its reductions to the budget. This affidavit was included in the record before the

Commissioner when he decided the motion. It is evident from this affidavit as well as from review of the position papers filed with the Commissioner by both parties that the Township's conduct in relation to its obligation to consult with the Board was in dispute.

The fact that the Board now concedes that some members of the Township Committee did meet with representatives of the Board does not entirely resolve this dispute. While confirming that a meeting of some kind took place, there is nothing in the record as to what transpired at that meeting. Although the Board continues to assert that it is entitled to summary judgment solely because the meeting was not between the full bodies, we find that information relating to the circumstances would be material to such determination. Board of Education of the Township of Branchburg v. Township Committee of the Township of Branchburg, 1981 S.L.D. 1230, 1232-33 (subsequent history omitted).

In short, it is not as clear to us as it is to the Board that the fact that the full Board and Township Committee did not meet is alone sufficient to entitle it to summary judgment as a matter of law. Rather, we find that the record before us is not a sufficient one upon which to conclude that the Township Committee failed to exhibit sufficient compliance with the statute so as to entitle it to proceed to a determination on the proofs. Id.

Secondly, we can not ignore that a ruling that the alleged violations which occurred here would entitle the Board to summary judgment involves significant policy considerations and would impact other cases. Sandvik, Inc. v. Satewide Sec. Systems, 192 N.J. 138, 142 (1969). As recognized by the Commissioner, summary decision at this juncture would obviate any review of the merits of the

reductions made by the Township. Given the Commissioner's constitutional and statutory responsibilities and his role in insuring that budget decisions are based on appropriate educational considerations, Deptford, supra. at 317-18, it would be imprudent to decide this matter in a summary fashion. In this respect, we recognize that regardless of why cooperation broke down, the Commissioner had the means available to make certain that the budget cuts were made subject to the proper educational considerations, such as requiring mutual consultation under his supervision, thereby avoiding any need to restore the amounts on procedural grounds. Deptford, supra, at 320. See In re Uniform Admin. Procedure Rules, 90 N.J 85, 93-94 (1982) (agencies have great flexibility to use the adjudicative process to handle specialized problems that arise; this power is directly and integrally related to its regulatory function).

We therefore affirm as modified herein the Commissioner's determination to deny summary decision and direct that the matter proceed on the merits. However, this does not mean that the Township Committee's failure to fulfill its responsibility to provide the reasons for its reductions when it acted would be without effect in those proceedings. To the contrary, as stressed by the New Jersey Supreme Court:

> ...if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts. Hence, the greater the delay in the submission of detailed reasons in support of such cuts, the stronger will be the presumption against their validity and the heavier will be the municipality's burden on appeal to establish the validity of the reduced budget. In that posture, the Commissioner will be entitled initially to presume that such cuts

> have been made purely for extra-educational reasons or for political expediency without specific cognizance taken of their educational effects...

Deptford, supra, at 320-21.

Any failure of the Township Committee that the Board establishes in relation to the Township's statutory obligation to consult would increase that presumption.

We stress that in reviewing budget appeals under N.J.S.A. 18A:22-37, the Commissioner is not sitting as the original budget-making body. Hence, in the proceedings in this case, the Commissioner

> is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out. [citations omitted.]
>
> ...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.

East Brunswick, supra, at 106-107.

Therefore, as we reiterated in our decision in Edgewater,

> ...the Commissioner cannot ignore completely the municipality's political concerns and indeed may not override them without some necessity strictly related to the constitutional mandate to provide for a thorough and efficient school system.

Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver

Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994, slip op. at 7, citing Deptford, supra, at 314 (emphasis added).

We recognize that in resolving the merits of this case, the Commissioner is not necessarily required to provide the parties with an evidentiary hearing and may be able to dispose of the merits of this matter by summary decision if he is satisfied that the papers filed establish the facts requisite to his determination. See, e.g., Cunningham v. Department of Civil Service, 69 N.J. 13 (1975). However, we remind the Commissioner that if facts material to his determination are in dispute, he is both empowered and obligated to provide such hearing as necessary to resolve those issues and to assure that the record is complete. Edgewater, supra, at 11. See N.J.A.C. 6:24-7.9 (should the Commissioner find that there are material issues of fact to be determined in a budget appeal, he may conduct an evidentiary hearing or transmit the case to OAL for a hearing).

We take notice that our decision of March 2, 1994, relating to the Board's 1993-94 budget is currently on appeal to the Appellate Division. In that case, we held that the Township Committee had proffered no valid reason for setting aside the Commissioner's decision directing restoration of all amounts that the Township Committee had reduced from the proposed 1993-94 budget. Critical to our decision was our determination that the Township Committee could not supplement the record on appeal so as to introduce factual information as to the district's financial circumstances occurring after the Township acted to reduce the budget for 1993-94 school year. Consistent with that determination,

we find that any facts relating to 1993-94 expenditures and revenues which are material to establishing the amount that was necessary to provide a thorough and efficient education for 1994-95 must be considered in deciding this matter.

In sum, as modified herein, we affirm the Commissioner's determination to deny the Board's motion for summary decision and remand this matter to the Commissioner in order that he may conduct any further proceedings that are necessary to resolve the substance of the Board's appeal in conformity with this opinion.[4]

Attorney exceptions are noted.

April 5, 1995

Date of mailing APR 05 1995

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[4] On March 2, 1995, the Board submitted a letter representing that it intended to withdraw its appeal of the 1994-95 budget. However, no further communication from the parties was received thereafter and, in any event, all proceedings before the Commissioner in this matter had been stayed by our decision of October 5, 1994.

By our decision today, the stay of proceedings before the Commissioner is dissolved. Given the effect of our decision, the parties must now seek the approval of the Commissioner of Education of any settlement they may reach that would dispose of the matter.

231-94

VALERIE D. HARP,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

AND

VIRGEN REYES,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

AND

SARAH REUBEN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, three school clerks, alleged Board's termination of their employment violated their tenure rights under N.J.S.A. 18A:17-2(b). Board contended their rights were governed by civil service law rather than by education statutes.

ALJ concluded that the Commissioner of Education lacked subject matter jurisdiction over this dispute, as the Newark school district employs its nonprofessional staff under the civil service system and there is no relief the Commissioner could afford petitioners. ALJ ordered the appeals dismissed for lack of jurisdiction and ordered them transferred to the Merit System Board for action as it deems appropriate.

Commissioner adopted findings and determination in initial decision, dismissing the petitions and transferring them to the Merit System Board.

OAL DKT. NOS. EDU 10918-93, EDU 10919-93 and EDU 3544-94 (CONSOLIDATED)

VALERIE D. HARP,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

AND

VIRGEN REYES,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

AND

SARAH REUBEN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions were filed on July 29, 1994, well beyond thirteen days from the date of mailing of the initial decision (July 11, 1994) as provided by N.J.A.C. 1:1-18.4, and are not considered herein. The Board, in reply to these exceptions, filed a letter endorsing the conclusion of the ALJ and referencing its prior papers.

Upon review of the record, the Commissioner concurs with the ALJ that, employment of school clerks in the Newark school district being controlled by civil service law, there is no relief he can afford petitioners even in the wake of their claim that the Board routinely ignored civil service procedures with regard to their hiring and subsequent employment. As indicated by the ALJ, any administrative controversy arising from such circumstances is properly before the Merit System Board rather than the Commissioner of Education, who will not retain jurisdiction where he cannot provide a remedy. Newark Attendance Counselors, supra

Accordingly, the initial decision of the Office of Administrative Law, dismissing the Petitions of Appeal and transferring them to the Merit System Board for action as it deems appropriate, is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 23, 1994

DATE OF MAILING - AUGUST 23, 1994

232-94

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID CLARK, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF NEPTUNE TOWNSHIP,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of conduct unbecoming against tenured high school English teacher with over twenty years of service for alleged "racist, inflammatory and confrontational" remarks made by respondent on a radio talk show.

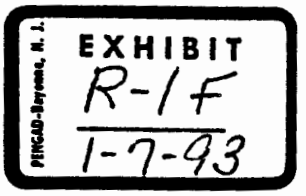
ALJ dismissed all tenure charges against respondent, concluding that respondent had successfully demonstrated that he spoke as a citizen on a matter of public concern; that respondent's rights of freedom of speech were guaranteed under the First Amendment; that there was no showing by the Board that respondent's conduct interfered with its effective and efficient fulfillment of its responsibilities to the public; that the protected speech was the motivating factor for the certifying of tenure charges against respondent; and that, but for the speech, no tenure charges would have been certified.

Commissioner adopted findings and determination in initial decision and ordered the Board to reinstate respondent to his position with salary and all emoluments, less mitigation, from the date of his suspension.

AUGUST 23, 1994

T R A N S C R I P T of the

January 30, 1992 taped conversation on WABC Radio between David Clark and Bob Grant (radio talk show show host) as transcribed by STEVEN J. GRIFFING, a Certified Shorthand Reporter and Notary Public of New Jersey, on Thursday, February 6, 1992.



MR. CLARK: Hello, Bob. . .

. . . seventh and eighth grade French in an affluent suburban school disctict in New Jersey. She and another woman built up a fine program there. They've always had full classes, and 90 percent of their students went on to a high school and continued their French education, and many of those students qualified for advanced placement in senior year.

Last week my wife was called into the Superintendent's office and it was announced that they were eliminating the French program in the seventh and eighth grade school and it was going to be replaced by Spanish. And the way that this came about was that a survey was sent out by the Board of Education to the tax payers, and they received a 25 percent response to the survey but it was worded very ambiguously in such a way that it sounded as though Spanish was going to be added to the French curriculum. And many of the people thought that this was a good idea, because in this town they favor any increase in education. But the truth of the matter was that it was a vote to eliminate the French program and, as I say, replace it with the Spanish.

Well, this took place, as I said, a week ago; and people have heard about it now and a lot of people are up in arms. And I wanted you to know that we're not going to let this thing sit. We are going to fight it and we're not going to give up.

In my own school -- I teach in a high school -- I was approached by an administrator and I was asked what special activities I have planned for the month of February. Our high school curriculum calls for American Literature. So, I explained that we would be doing a unit involving some of Abraham Lincoln's speeches, some excerpts from Frederick Douglass and also Booker T. Washington's speech at Tuskegee University, which is a fine speech. Well, I was told that this wasn't enough for the month and I was given a list of ten authors, whose names I coudn't pronounce -- I teach English -- and ten short stories and poems that were tranlations from Swahili and Bantu.

MR. GRANT: Oh, brother.

MR. CLARK: And -- Well, I handed the list right back, Bob, and I told the administrator that until these things became part

of the regular curriculum, I refused to teach them.

MR. GRANT: Good for you. Good for you. What -- may I -- do I dare, in the United States of America, in the year 1992, do I ask what the heck this Black History Month is anyway? What is it supposed to be? If it's supposed to be something that has to do with the experience of Blacks in the United States of America, that's one thing; but Blacks in the United States of America did not speak Swahili, or Bantu or any of those other languages that they speak on the continent of Africa, did -- did they?

MR. CLARK: Well, Bob --

MR. GRANT: Of course not.

MR. CLARK: The emphasis of our school seems to be on, as you put it, the continent of Africa. They put up a banner in one of the classrooms: 200 years of United States History, 2,000 years of African History.

But the difference, Bob, is that in 200 years we went to the moon. After 2000 years they're still over there urinating in their drinking and bathing water.

MR. GRANT: What school do you teach

at?

MR. CLARK: Do I name it?

MR. GRANT: If you wish.

MR. CLARK: Neptune High School, Neptune, New Jersey.

MR. GRANT: Ah-huh. Well, Neptune years ago wasn't a bad place but I --

MR. CLARK: I started in Neptune in 1972. It was one of the best schools in the area, Bob.

MR. GRANT: Ah-huh. Let's dedicate this to what has become -- let's dedicate this to the school administration out there in -- in Neptune.

MR. CLARK: My wife is in a different district. She's not in Neptune.

MR. GRANT: Okay. You know, people listen to you, and they hear my response, and they get irate and that's the end of it.

MR. CLARK: I don't care what people think, Bob.

MR. GRANT: But -- but it's an invasion. It's an absolute invasion. It's a takeover. Well, you know we -- we brag about -- about the fact the Soviet Union collapsed without

a shot being fired. Guess what? The United States of America is in the process of collapsing without a shot being fired. Well, I take it back. Quite a few shots being fired. But you know what I mean.

MR. CLARK: I'm shooting, Bob.

MR. GRANT: All right. Thank you, Dave.

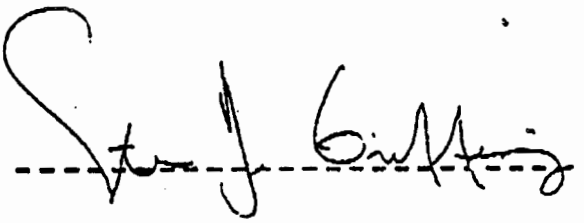
MR. CLARK: Thank you, Bob.

MR. GRANT: Oh my gosh, incredible.

(Whereupon the transmission ceases.)

C E R T I F I C A T E

I, STEVEN J. GRIFFING, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the audiocassette in the above entitled matter.



STEVEN J. GRIFFING, C.S.R.

Dated 2/6/92

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2694-92
AGENCY REF. NO. 69-3/92

IN THE MATTER OF THE TENURE HEARING OF DAVID CLARK, SCHOOL DISTRICT OF NEPTUNE TOWNSHIP, MONMOUTH COUNTY,

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James T. Hundley, Esq., for the complainant, Board of Education (Hundley, Parry & Hopkins, attorneys)

Stephen R. Cohen, Esq., for the respondent, (Selikoff & Cohen, attorneys; Michael C. Damm, Esq., on the Brief)

David Earle Powers, Deputy Attorney General, for participant, Commissioner of Education (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: December 17, 1993 Decision: May 23, 1994

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

The Board of Education of the Township of Neptune (Board) on March 17, 1992, certified to the Commissioner of Education (Commissioner) charges of unbecoming conduct against David C. Clark (respondent), a tenured teaching staff member in the employ of the Board, pursuant to *N.J.S.A.* 18A:6-10 to -25. Respondent denies the charges and sets forth seven affirmative defenses, seeking the dismissal of all of the charges.

This matter was transmitted to the Office of Administrative Law (OAL) on April 13, 1992, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on July 16,

1992 followed by a Prehearing Order dated July 20, 1992. Pursuant to the Prehearing Order, a conference call was arranged for September 10, 1992. The Prehearing Order also provided for ten (10) days of hearing commencing January 4, 1993, and continuing through January 25, 1993.

The scheduled conference call on September 10, 1992, was adjourned due to attorney conflict. A second prehearing conference was held on October 1, 1992, where, among other things, the issues to be resolved by this tribunal were expanded to include respondent's seven (7) affirmative defenses, among others. The Second Prehearing Order also provided, pursuant to respondent's First Affirmative Defense, that the Commissioner be Ordered to Show Cause as to: (1) why the instant matter should not be dismissed; (2) why the matter should not be removed from the authority of the Commissioner and/or; (3) why the matter should not be returned to the Department of Education for an impartial and unbiased review?

The Order to Show Cause was executed on November 9, 1992. On November 16, 1992, the undersigned acknowledged that Assistant Attorney General Robert H. Stoloff would represent the Commissioner. On November 19, 1992, Deputy Attorney General David Earle Powers applied to participate on behalf of the Office of the Commissioner. On November 25, 1992, the undersigned granted the Attorney General's application to participate with all the rights and privileges set forth in *N.J.A.C.* 1:1-16.6 (c) 4. On December 10, 1992, Deputy Attorney General Powers submitted discovery requested by respondent.

On December 18, 1992, oral argument on the Order to Show Cause was heard at the Trenton OAL, Mercerville, New Jersey. The record remained open to provide the parties the opportunity to engage in further discovery by way of depositions. The scheduled hearing dates in January 1993 were adjourned. The record closed on December 15, 1993, with the last submission of briefs and supporting documents.

Respondent submits his application for the dismissal of the Certified Tenure Charges filed against him by the Board. The Board opposes the application and is joined by the Commissioner.

Extensions were granted to execute this decision on motion.

STATEMENT OF FACTS

The respondent David C. Clark is employed by the Neptune Township Board of Education as a high school teacher at the Neptune High School, Neptune Township, Monmouth County, New Jersey. The respondent is a tenured employee with over twenty (20) years of service to the Board.

On January 30, 1992, at approximately 5:10 p.m., the respondent, David C. Clark, hereinafter referred to as "Respondent," telephoned "The Bob Grant Show," a talk show broadcasted over radio station WABC in New York City. The Bob Grant Show is broadcasted five afternoons a week and is heard throughout the New York Metropolitan area; including Monmouth County, New Jersey. The show features telephone conversations between the host, Bob Grant, and various listeners who call the radio station. The respondent identified himself as "Dave," and at the request of the host, indicated he was an English teacher with Neptune High School. The respondent, among other things, entered into a discussion with the talk show host about teaching African literature in his American Literature class during Black History Month and whether this curriculum was appropriate. The telephone call was made on respondent's own time and not on school time.

In his discussion with Bob Grant, respondent asserted that he was approached by an administrator in the High School and asked what special activities respondent had planned for Black History Month. Respondent asserted he told the administrator that he intended to use some of Abraham Lincoln's speeches, some excerpts from Frederick Douglas and also Booker T. Washington's speech at Tuskegee University, which respondent stated was a fine speech. Respondent then told Bob Grant that the administrator told respondent that his plan was not enough for the month and that respondent was given a list of ten authors, whose names respondent could not pronounce, and ten short stories and poems that were translations from Swahili and Bantu. Respondent told Bob Grant that he handed the list back to the administrator and told the administrator that until these items became a part of the regular curriculum, respondent refused to teach them.

Respondent told Bob Grant that a banner was placed in one of the school's classrooms which read, "200 years of the United States History, 2000 years of African History." A transcript of the Bob Grant Show of January 30, 1992, demonstrate that respondent said:

> "... But the difference, Bob is that in 200 years we went to the Moon. After 2000 years they're still over there urinating in their drinking and bathing water." (Board's Exhibit A)

The discussion between respondent and Bob Grant continued for a short period of time.

School Superintendent Michael Lake testified in his deposition that on the morning of January 31, 1992, while he was out of the district, he received a telephone call from his secretary advising that calls were being received regarding statements made about the district on a call-in radio program. Mr. Lake was given two or three messages when he returned to the office. One of the messages (Respondent's Exhibit "C") was from a group called "Media Monitors." Mr. Lake stated he telephoned the group and was informed by a representative that Media Monitors had a tape recording of the telephone call made to the radio station. Mr. Lake listened to the tape but could not identify the caller. Mr. Lake then searched his school directory for the person who identified himself on the tape as "Dave," an English teacher from Neptune High School. Mr. Lake found respondent's name, called the principal of respondent's school and summoned respondent to a meeting with him that day based upon the assumption that the respondent had made the call to the radio station.

At the meeting, respondent was accompanied by two members of his teachers' association. Superintendent Lake advised respondent of the telephone calls he had received and that he had listened to the tape recording of the broadcast. Superintendent Lake asked respondent if he had made the statements on the Bob Grant Show and respondent replied that he had. Superintendent Lake suspended respondent with pay pursuant to the provisions of *N.J.S.A.* 18A:25-6.

At his deposition, Mr. Lake stated that the basis for his suspension of respondent was based upon respondent's admission that he had called the Bob Grant show and that respondent had no reasonable explanation as to why he had placed the call. The Superintendent asserted had had listened to the tape recording of the show and was shocked by respondent's remarks. Mr. Lake stated that as the Superintendent of Schools he perceived respondent's remarks as racist, confrontational and thought that the remarks could lead to some very difficult times at the school with the students and teachers and throughout the school-community.

This was confirmed by way of a written memorandum "Superintendent's Case File Report" prepared by Lake and dated January 31, 1992. In that memorandum, Lake, without questioning respondent regarding the substance of his remarks on the radio, interpreted the same to be "racist, inflammatory and confrontational" and suspended him as of February 3, 1992 (Respondent's Exhibit "D").

Superintendent Lake admitted that the district had received no reports of disruption involving students or teachers. Superintendent Lake further stated that prior to the statement made on radio, there was no contemplated investigation of respondent. Furthermore, but for respondent's statements on the radio, he would not have been suspended.

Between January 31, 1992 and February 12, 1992, respondent's remarks on the Bob Grant Show received attention in the media. Respondent's remarks and subsequent suspension were carried on the Bob Grant Show broadcast over this twelve day period. Respondent was the subject of radio news reports and comments on both New York and New Jersey radio stations. These included New York radio station WFAN's Don Imus Program; WDAB South Belmar, WJLK Asbury Park, Seaview 107 in Long Branch, New Jersey.

Newspaper stories about respondent's broadcast appeared in the New York Post, the Star Ledger, The Asbury Park Press (Board's Exhibits C and D) and the Trenton Times. The local cable station, Monmouth Cablevision TV 34 carrier television news stories about respondent's remarks.

On February 3, 1992, Superintendent Lake wrote to respondent formally notifying him of his suspension as a result of his statements made over the radio. (Respondent's Exhibit "E"). Superintendent Lake testified that after he acted to suspend respondent, he obtained respondent's personnel file and began to review it. An investigation was then conducted whereby teachers and students were asked to respond to a series of questions concerning respondent. This took place over a series of dates in February and March, 1992. Superintendent Lake admitted to making statements to a reporter from the Asbury Park Press concerning the respondent on approximately five (5) occasions. At least one Board meeting was televised. Newspaper articles were published and letters written with respect to the curriculum and the conduct of the Superintendent in sanctioning respondent.

On or about February 10, 1992, a letter was written by a concerned citizen, Mrs. C. Scott Bartlett, to the Governor of the State of New Jersey protesting the treatment of the respondent, supporting the exercise of his freedom of speech, criticizing the actions taken against the respondent and demanding an investigation, (Respondent's Exhibit "F"). The Governor responded, indicating that he had referred the matter to his staff who would be providing an explanation, (Respondent's Exhibit "G").

At the regular meeting of the Board held on February 12, 1992, the Board issued a "Public Statement," which reads as follows:

> The Board of Education tonight was charged with deciding between a staff member's Right of Freedom of Expression which is guaranteed under the United States Constitution, and the safe and efficient operation of our school system.
>
> While an individual's rights are extremely important, those rights cannot supersede the responsibility of this Board and its Administration to maintain a positive educational and work environment for our nearly 4,000 students and our 500 employees.
>
> The actions taken by a staff member on January 30, 1992, indeed pose a threat to this environment. As a result, the Neptune Township Board of Education this evening has accepted the Superintendent's recommendation to continue this employee's suspension and that Tenure Charges be brought against this individual for conduct unbecoming a Teacher.
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> Since this action places the Board in litigation against this individual, there will be no further comment on this matter by the Board.

Respondent's suspension was continued under the provisions of *N.J.S.A.* 18A:25-6. The public statement was read to all in attendance at the Board meeting held on February 12, 1992, which was estimated to be approximately 400 in number. Copies of the public statement were posted and additional copies were made available to the print media. The Board meeting was attended by members of the staff, students, the public and the press. Prior to the public meeting, the Board met in Executive Session, pursuant to *N.J.S.A.* 10:4-12.b (8), to consider if respondent should be continued on paid suspension. Superintendent Lake advised the Board that he intended to file tenure charges against respondent on paid suspension pending the filing of such charges, pursuant to *N.J.S.A.* 18A:6-10 to -18.1.

On February 20, 1992, tenure charges against the respondent were submitted to the Neptune Township Board of Education (Exhibit "I") pursuant to the Tenure Employees Hearing Act, for consideration. The respondent was charged with "unbecoming conduct." The allegations were not only that the issues of public concern voiced by respondent over the radio were improper, but he was also charged with misconduct for vague and unsubstantiated statements or events allegedly occurring many years earlier and which had previously been resolved or in the case of Charges 1-B and E, expunged. (Respondent's Exhibit J).

On March 6, 1992, the Department of Education, through the Commissioner, wrote to Mrs. C. Scott Bartlett, (respondent's Exhibit "K"), in response to her letter to the Governor. In that letter, the Commissioner stated *inter alia* that his office had conducted its own review of the statements made by the respondent. The Commissioner's letter states as follows:

> Dear Mrs. Bartlett:
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> Governor Jim Florio has asked me to respond to your letter of February 10, 1992. Please be assured that we are equally concerned with everyone's right to freedom of speech, however, the issue at hand is not the First Amendment. Instead, it is the inappropriate behavior of a tenured teacher to belittle the history of people.
>
> In reviewing the full transcripts of the Bob Grant Show from January 30, Mr. Clark clearly identified himself and the school where he teaches. He was not an anonymous caller. As a teacher, he is entrusted by the board of education and the taxpayers of the state to broaden the scope of learning of the pupils in his charge.
>
> Mr. Clark has been suspended, with pay, pending receipt of his response to the charges submitted to him by the Neptune Township Superintendent of Schools, Mr. Michael T. Lake. Needless to say, we are very concerned with this matter and are doing everything to get it resolved as quickly and fairly as possible.
>
> We appreciate your writing to the Governor and trust that our actions will be judicious to all concerned.
>
> (Respondent's Exhibit K)

The Commissioner's letter to Mrs. Bartlett was written prior to the Board having made a determination as to the sufficiency of the charges against respondent or whether to present such charges to the Commissioner. The information upon

which the Commissioner based his letter to Mrs. Bartlett was obtained from the office of then Monmouth County Superintendent of Schools, Milton Hughes. On or about February 28, 1992, a packet of materials were sent by FAX to the Monmouth County Superintendent's office which included a copy of the Bartlett letter (Respondent's Exhibit F), a letter from the New Jersey State House, Office of Constituent Relations (Respondent's Exhibit L), together with a memorandum dated February 20, 1992, from the Department of Education Assistant Commissioner, Charles P. Mitchell, which requested County Superintendent Hughes to prepare a draft reply for the Commissioner's signature and return (Respondent's Exhibit M). County Superintendent Hughes spoke with Superintendent Lake and a copy of the Barlett letter was subsequently sent to Lake with instructions to draft a response for Commissioner Ellis (Respondent's Exhibit N). Superintendent Lake replied by letter dated February 24, 1992, to Superintendent Hughes and enclosed a copy of a transcript of the January 30, 1992, Bob Grant radio show (Respondent's Exhibit O). Patricia Eaton, secretary to County Superintendent Hughes, reviewed the above documents and an article published by the Asbury Park Press, dated February 23, 1992 (Respondent's Exhibit P), and prepared a draft response for the Commissioner (Respondent's Exhibit Q), which was approved by County Superintendent Hughes. The prepared draft (Exhibit Q) was sent to the Office of Assistant Commissioner Mitchell as instructed (Exhibit M).

On March 11, 1992, the Board met in closed session to consider the tenure charges against respondent. Board voted to certify tenure charges against respondent to the Commissioner and, further, suspend respondent without pay pursuant to the tenure laws. Charges were certified to the Commissioner on March 17, 1992. (Board's Exhibit I). A copy of the notice of the Board's determination and suspension without pay were forwarded to respondent on March 17, 1992. (Board's Exhibit J).

On or about April 3, 1992, the respondent filed his Answer to the charges alleging, among other things, that the actions of the Department of Education, Commissioner of Education and Board of Education, in improperly prejudging the matter, demonstrated bias toward the respondent, constituting a denial of respondent's right to due process. In addition, respondent alleged his right to free speech had been violated. Respondent demanded the dismissal of all charges.

On April 10, 192, Commissioner Ellis wrote to the parties to advised that as a result of the issue raised in respondent's First Affirmative Defense, he was removing

himself from the case and designating Deputy Commissioner John C. Woodbury to decide the case pursuant to the provisions of *N.J.S.A.* 18A:4-33. (Board's Exhibit L; Respondent's Exhibit T). The Commissioner's letter, addressed to the parties attorneys, states as follows:

> Dear Gentlemen:
>
> I note the concerns respondent raises by way of affirmative defenses in the case captioned *In the Matter of the Tenure Hearing of David Clark, School District of Neptune Township, Monmouth County,* Agency Dkt. No. 69-3/92. I am constrained to point out at the time my letter to Ms. Elizabeth Bartlett, dated March 6, 1992, was written, no tenure charges had been filed against Mr. Clark. However, in order to prevent even the remotest suggestion of a predisposition in this matter, I have determined to designate Deputy Commissioner John C. Woodbury to decide this case pursuant to my authority under *N.J.S.A.* 18A:4-33. (Board's Exhibit L, Respondent's Exhibit T).

Maureen R. Keller, Director of the Bureau of Controversies and Disputes, New Jersey State Department of Education, testified at her deposition that upon receipt of respondent's Answer to the tenure charges, Kathryn Hughes Kim, an examiner in the Bureau brought to Keller's attention the Commissioner's letter of March 6, 1992, to Mrs. Bartlett and the fact that respondent had raised the Affirmative Defense as to whether the Office of the Commissioner had prejudiced the matter. Director Keller admitted that the Office of the Commissioner should not have sent the communication dated March 6, 1992, to Mrs. Bartlett. Director Keller directed Examiner Kim to prepare a response. The letter dated April 10, 1992 (Exhibit L; Exhibit T) was prepared by Kim, reviewed by Keller and forwarded to Deputy Commissioner Isaac Bryant for his review and finally on to the Commissioner. Director Keller recommended that Deputy Commissioner John C. Woodbury decide the matter once the Commissioner had recused himself. This recommendation was accepted by the Commissioner.

On April 13, 1992, respondent's attorney wrote to the Commissioner stating, among other things, that as a result of the actions of the Commissioner, the proceedings had become incurably tainted and that the charges against respondent should be dismissed.

On April 21, 1992, Director Maureen P. Keller wrote to respondent's counsel in response to the criticisms raised, restating the fact that the Commissioner had

decided to recuse himself and that his deputy would be deciding the matter. (Exhibit Z) Ms. Keller testified that this response letter was drafted for her signature by Examiner Kim.

Ms. Keller explained at her deposition the functions of the Bureau of Controversies and Disputes in assisting the Commissioner in the issuing of school law decisions. She also explained the procedure by which her three person office handles tenure cases. She stated that once charges are filed with her office, a preliminary determination is made as to whether the charges are sufficient or should be rejected before forwarding them to the Office of Administrative Law as a contested case. She also testified as to the role her office plays in reviewing decisions which come from the Office of Administrative Law and making recommendations to the Commissioner as to whether or not these decisions should be accepted or rejected. Ms. Keller testified that the recommendations of her office are accepted by the Commissioner approximately 80 percent of the time and rejected approximately 20 percent of the time.

The respondent, upon being suspended without pay on February 3, 1992, filed a claim for unemployment compensation. A hearing was held on May 13, 1992, before the New Jersey Department of Labor. On June 25, 1992, a decision was entered by Appeals Tribunal Examiner, Ronald Gitter, finding the respondent had not been discharged for misconduct connected with work, and that he was qualified for unemployment benefits pursuant to statute. (Respondent's Exhibit "AA").

At the May 13, 1992 hearing, respondent testified, under oath, about the events leading up to his January 20, 1992 radio broadcast. (Board's Exhibit 0). Respondent testified that on January 20, 1992 at approximately 11:30 a.m., he received a list of African authors in his school mailbox. (Exhibit "O"; T21-8 to -15.) Respondent did not know who put the list in his school mailbox. Respondent testified that the list was addressed to both faculty and students. Respondent did not know if any other teachers in the high school received the same list.

Respondent testified that at approximately 1:00 p.m. on January 30, 1992, he went to the office of his Department Chairperson, Michael Mixson to discuss the list. Mr. Mixson told respondent that he was busy and asked respondent to see him later. Respondent testified that he looked for Mr. Mixson at the end of the school day, 1:50 p.m., but could not locate him. Respondent did not attempt to discuss his

concerns about the list with any other supervisor, assistant building principal or, building principal prior to telephoning the Bob Grant Show at 5:10 p.m.

Respondent also testified about the statements he made during the January 30, 1992 radio broadcast. Respondent admitted that his statement about being approached by an administrator and being questioned about his activities for Black History Month was incorrect. Respondent stated that he was actually referring to a conversation he had a week earlier with a fellow teacher, Ruth Wise. Mrs. Wise is a history teacher at the high school and a member of respondent's teachers' association. Mrs. Wise had no supervisory or administrative authority over respondent.

Respondent further testified about his broadcast statement,"they put up a banner within one of the classrooms; 200 years of United States history, 2000 years of African history." Respondent testified that the banner was in respondent's classroom on January 30, but he did not know who put up the banner. Respondent testified that he took the banner down and put it in the garbage can.

On February 1, 1993, respondent's Department Chairperson, Mr. Michael Mixson gave a sworn statement concerning the events testified to by respondent at the May 13, 1992, Department of Labor hearing. (Board's Exhibit P). Mr. Mixson stated that he was not aware of any list of Black Authors that was placed in teachers' mailboxes at Neptune High School. Mr. Mixson also stated that respondent did not produce the list of authors at the January 31, 1992, meeting with respondent and Superintendent Lake that was held at the high school principal's office.

Mr. Mixson also stated that in June 1992, respondent telephoned him to arrange to remove respondent's personal belongings from the high school. At the end of the conversation, Mr. Mixson questioned respondent about the presence of the banner in respondent's classroom and, advised respondent that he had never seen such a banner. Respondent replied: "I'm afraid of I misspoke myself." (Board's Exhibit P; T13-1 to 2). Respondent went on to advise Mr. Mixson that he either heard about such a banner or, that he saw it in a classroom in another school.

THE PARTIES LEGAL ARGUMENTS

RESPONDENT'S POSITION

POINT I

THE *EX PARTE* INVESTIGATION AND PREJUDGMENT OF THE RESPONDENT'S ACTIONS BY THE DEPARTMENT OF EDUCATION, AT A TIME WHEN THE NEPTUNE BOARD OF EDUCATION HAD NOT EVEN MADE A DECISION AS TO THE SUFFICIENCY OF THE CHARGES, VIOLATED THE RESPONDENT'S RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS, AND SO TAINTED THE PROCEEDINGS UNDER THE TENURE EMPLOYEES HEARING LAW AS TO MANDATE THE DISMISSAL OF ALL CHARGES

The Tenure Employees Hearing Law, specifically *N.J.S.A.* 18A:6-11 provides the procedure by which tenure charges may be brought. Charges must first be filed with the secretary of the local board of education and a copy served upon the employee, together with a statement of evidence. The employee is then given the opportunity to submit a written statement of position. After considering the charges, statement of position and statement of evidence, the board is required to determine by majority vote of its full membership, at a closed meeting, whether there is probable cause to credit the evidence in support of the charges and whether the charges are sufficient to warrant dismissal or a reduction in salary. If so, the employee is then required to be notified and the charges are forwarded to the Commissioner of Education. See also *N.J.A.C.* 6:24-5.1 (b) (4). Pursuant to *N.J.S.A.* 18A:6-16, upon receipt of the charges, the Commissioner or the Commissioner's designee is required to consider whether they sufficiently set forth a cause of action, and if so, conduct a hearing, on notice, to all parties in interest.

N.J.S.A. 18A:6-20 provides, *inter alia,* that at any hearing held, a party has the right to counsel, the right to testify, to compel witnesses to appear and to cross examine witnesses.

The procedural determinations required by these statutes are not perfunctory, but an integral part of the process due the affected employee. *Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., etc.,* 187 *N.J. Super.* 426, 430 (App. Div. 1981).

In addition to the statutory procedural requirements, constitutional due process under the Fourteenth Amendment also requires that state governments provide notice and a hearing before taking action which deprives an individual of "liberty" or "property." *Board of Regents v. Roth,* 408 *U.S.* 564 (1972). The deprivation of government employment such as the loss of a tenured teacher position has been defined as both a "liberty" and "property" interest requiring the observation of the basic components of due process. *Board of Regents v. Roth, supra.* The Supreme Court of New Jersey in *Nicoletta vs. North Jersey District Water Supply Commission,* 77 *N.J.* 145 (1978) recognized this as a constitutional mandate for New Jersey. *See also, Matter of Wolf,* 231 *N.J. Super.* 365-377 (App. Div. 1989) certif. den. 117 *N.J.* 138 (1989).

The elements required to meet due process hearing standards were fully set forth in *Goldberg* v. *Kelly,* 397 *U.S.* 254 (1970) and are as follows:

a. Notice - There must be timely, adequate notice of the proposed action;

b. Time and Manner - The hearing must be conducted at a meaningful time and in a meaningful manner;

c. Confrontation of witnesses - The person affected must be afforded an opportunity to confront adverse witnesses and present his/her own arguments in evidence orally;

d. Right to counsel - The person affected must be afforded the opportunity to obtain counsel;

e. Basis for Decision - the decision maker must state the reason for his determination and indicate the evidence relied upon;

f. The decision maker must be impartial.

There is no question that the procedures undertaken to deprive Respondent Clark of his tenured employment as a teacher invoke the application of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.,* and constitutional due process principles.

An examination of the actions of the Department of Education show clear violations of both the provisions of *N.J.S.A.* 18A:6-10 *et seq.* and respondent's due process rights as guaranteed under the Constitution, thereby requiring a dismissal of the charges.

The Office of the Commissioner in the letter of March 6, 1992, found respondent to have acted improperly, stating that his behavior was "inappropriate," that he "belittled the history of a people" and breached the public trust. The findings were made *before* charges were presented to the Board for a probable cause determination and *prior* to respondent even being served with the charges.[1] Respondent was given *no notice* that the Office of the Commissioner was investigating his conduct. *No hearing* took place which due process requires and which is required by statute. Respondent was given *no opportunity to participate by presenting witnesses or being able to cross examine witnesses.* He was *not afforded the right to have counsel present.* (Emphasis supplied).

These constitutional improprieties were not just limited to the actions of the Office of the Commissioner. At least four (4) levels of government were involved in the investigatory and fact finding process. The Office of Assistant Commissioner Charles P. Mitchell forwarded the Bartlett letter to County Superintendent Milton Hughes to draft a reply. Neptune Township Superintendent Michael Lake was then asked by the Office of County Superintendent Hughes to draft such a response for the Commissioner, (Respondent's Exhibit "N"). Superintendent Lake spoke with Hughes and also responded by letter of February 24, 1992, (Respondent's Exhibit "O") condemning respondent. In addition, he sent to the Office of the County Superintendent Hughes a copy of an alleged transcript (Respondent's Exhibit "A") of what was stated on the radio. The Offices of County Superintendent Hughes, based on the information received from Lake and a newspaper article (Exhibit "P"), then drafted a reply, finding the actions of respondent to be improper, (Respondent's Exhibit "Q"). This was forwarded to the Offices of the Assistant Commissioner Mitchell and accepted. The response ultimately found its way to the Commissioner who, after making minor revisions, signed the correspondence of March 6, 1992, (Respondent's Exhibit "K") echoing the previous findings made by Mitchell, Hughes and Lake. No doubt other personnel from the Department of Education were

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[1] The charges were forwarded to respondent on February 20, 1992. The Board's determination to charge respondent did not occur until March 11, 1992.

also involved in making the determination that the Respondent acted improperly.[2] As a consequence of the above, the due process violations clearly resulted from the actions and findings made by the Department of Education itself, and could not just be limited to the Commissioner.

Not only was there a violation of statute and respondent's due process rights by the Department of Education as set forth above, but the factual findings as contained in the letter of March 6, 1992, demonstrated impermissible bias and prejudgment on the part of the Department, against respondent. As stated in *Goldberg v. Kelly, supra.* at 257, an impartial decision maker is a basic constituent of minimum due process. *See also, Wasson v. Trowbridge,* 382 *F. 2d.* 807, 813 (2d. Cir. 1967). Any other collateral procedural guarantees are largely without meaning if the deciding tribunal has in some way adversely prejudiced the merits of the case. *Simard v. Board of Education,* 473 *F. 2d.* 988 (2d. Cir. 1972). A fair trial and a fair tribunal is a basic requirement of due process. *In re Murchison,* 349 *U.S.* 133, 146, (1955). This applies to administrative agencies which adjudicate as well as to the Courts. *Gibson v. Berryhill,* 411 *U.S.* 564, 579 (1973). Not only is a biased decision maker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness" *In re Murchison, supra.,* at 136. While it has been held that there is no constitutional deficiency where an administrative agency makes known in advance that it takes a general position on a question of law, it is different when the agency acting as a finder of fact with respect to conduct or practices of parties to a proceeding makes known, in advance, its position on the facts. *F.T.C. v. Cement Institute,* 333 *U.S.* 638 (1948).

In *United States ex rel. Accardi v. Shaughnessy,* 347 *U.S.* 260 (1954), the petitioner attacked the denial of his application for suspension of a deportation order against him on the ground that his application had been prejudged through the issuance by the Attorney General, prior to the decision of the Board of

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[2] The Bureau of Controversies and Disputes also became involved in investigating the matter in an attempt to defend the acts of the Office of the Commissioner and the Department of itself, as discussed *infra.*

Immigration Appeals, of a list of "unsavory characters" whom he wished to deport. The list was allegedly circulated to employees in the immigration service thus making it impossible for the Board to give fair consideration of the petitioner's case. The district judge denied a petition for *habeas corpus,* without allowing a hearing on the truth of the allegations. The Courts of Appeals affirmed. The Supreme Court, reversed, directing that the petitioner be permitted an opportunity prove his allegation that the list had operated to deprive the Board of its independent judgment. The matter was then remanded and a hearing before the District Judge took place on the issue. *See also, Mass. Bay Telecasters, Inc. v. F.C.C.,* 261 *F. 2d.* 55 (1958) holding that where there are *ex parte* communications to agency members who are adjudicating a case the decision of the agency may be set aside on the ground of improper influence.

In the instant case, the statements made by the Department of Education were based upon *ex parte* investigation and fact-finding at various agency levels. These activities not only ignored the entire process mandated by *N.J.S.A.* 18A:6-10 *et seq.,* but created an appearance of impropriety, bias and that the matter had been prejudged in violation of the Respondent's constitutional rights. A prejudicial atmosphere was created which now pervades the entire department due to the involvement of numerous personnel as previously discussed. In addition, since the statements as contained in the letter of March 6, 1992 were made *prior* to the March 11, 1992 Neptune Board meeting to determine whether the charges were sufficient pursuant to *N.J.S.A.* 18A:6-11 to warrant sanctions, the Board's findings were tainted as well. The impressions created *cannot* be eliminated by the substitution of a Deputy Commissioner. The bias shown is pervasive, unquestionably violative of respondent's due process rights, and cannot be cured. As a result, the charges must be dismissed. *Goldberg v. Kelly,* 397 *U.S.* 254 (1970).

Bias was further demonstrated by the fact that Superintendent Lake, who initially determined that tenure charges were appropriate, and who in fact drafted the charges, was asked to prepare a reply to the Bartlett letter *for* the Office of the Commissioner. Based on information supplied by Superintendent Lake, plus the transcript and a newspaper article, the Office of the Commissioner of Education in the letter of March 6, 1992 determined that respondent's behavior was 'inappropriate." Thus instead of making an independent determination, the Commissioner on behalf of the State Department of Education deferred to the charging party and adopted *its* position. This manner of proceeding not only

violated the *N.J.S.A.* 18A:6-11 but has specifically been found impermissible on a constitutional basis as well. *In re Fulcomer,* 93 *N.J. Super.* 404, 420 (App. Div. 1967); *see also, Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., etc., supra,* at 430.

Further constitutional violations occurred as a result of the Department of Education taking on the role of investigator, prosecutor and judge, predetermining respondent's guilt. The United States Supreme Court in the case of *In re Murchison, supra,* found a denial of due process where a judge, empowered under state law to sit as a "one man grand jury" and to compel witnesses to testify before him in secret about possible criminal charges, first found two witnesses guilty of criminal contempt (one for perjury and the other for refusing to answer certain questions) in the "investigatory" phase, and then tried and convicted them. The Court ruled that due process had been denied because the judge in effect became part of the prosecution and assumed an adversarial position. In addition, the Court found that as a judge, passing on guilt or innocence, he was very likely to rely on his "own personal knowledge and impression of what had occurred in the grand jury room," an impression that could not be erased by cross-examination. *Id.* at 138. Likewise, in the case of *Wong Yan Sung vs. McGrath,* 339 *U.S.* 33 (1950), the United States Supreme Court found that it was a violation of due process for an immigration inspector to hear a deportation case while he was also engaged in the prosecution and investigation of similar cases.

For the Department of Education to now sit in judgment of respondent, after having concluded that he is guilty, is constitutionally impermissible and accordingly, the charges should be dismissed.

The case of *McCarroll v. Board of Education of the City of Jersey City,* OAL Dkt. No. EDU 3871-88, (July 21, 1988), is not on point. There, the Commissioner of Education recused himself and substituted a deputy commissioner in his stead where *he* had made public statements on the issue in dispute. This differs significantly from the instant case in that here the charging party was asked to draft the Commissioner's position which was considered *ex parte,* approved and adopted through at least four (4) agency levels. It should also be pointed out that the *McCarroll* case was never subjected to appellate review and, therefore, it has little precedential value. Finally, the Office of the Commissioner, by attempting to rely on this case, is attempting to defend its actions by putting a band-aid (its own case law) on a problem of its own creation.

The actions of the Department of Education through the Office of the Commissioner were so prejudicial to the consideration of the case that the matter must be dismissed.

POINT II

AS A RESULT OF JUST CRITICISMS DIRECTED TOWARD THE OFFICE OF THE COMMISSIONER, STAFF MEMBERS OF THE DEPARTMENT OF EDUCATION HAVE BEEN PLACED IN THE UNTENABLE POSITION OF HAVING TO JUSTIFY ITS IMPROPER ACTIONS. THIS CONSTITUTES BIAS TOWARD THE RESPONDENT WHICH CANNOT NOW BE CURED BY THE MERE STEPPING ASIDE OF THE CURRENT COMMISSIONER, WHILE ALL OTHER STATE DEPARTMENT PERSONNEL REMAIN TO ULTIMATELY CONSIDER THE MATTER.

An adjudicator may be disqualified on grounds of bias where the adjudicator has a pecuniary interest in the outcome of the case where the adjudicator has been the target of personal abuse or criticism from the party before him. *Matter of Carberry,* 114 *N.J.* 574, 586 (1989). In the instant case, the Department of Education and the Office of the Commissioner have been subject to criticism from respondent and others resulting from the prejudging of this matter in deprivation of respondent's constitutional rights. *See* Respondent's Answer to the charges, affirmative defenses and letter of April 13, 1992, (Respondent's Exhibit Y) wherein bias is charged. The response to this just criticism is contained in the Commissioner's letter of April 10, 1992, (Respondent's Exhibit T), whereby he recused himself, and in the subsequent letter of April 21, 1992, (Respondent's Exhibit Z), from the Director of the Bureau of Controversies and Disputes attempting to explain why the Department of Education acted as it did. This demonstrates actual bias.

One of the functions of the Bureau of Controversies and Disputes, Division of Executive Services in the Department of Education is to review decisions of the Office of Administrative Law and then present its own recommendation to the Commissioner as to whether to accept or reject the decision. Maureen R. Keller, Director of the Bureau, admitted in her deposition that the letter of March 6, 1992 from Commissioner Ellis should *not* have been sent. She testified that it was she who directed the preparation of the letter of April 10, 1992, (Respondent's Exhibit T), by Katherine Hughes Kim, Controversies Examiner in her office. The letter was then forwarded to Deputy Commissioner Isaac Bryant for review and finally to the Commissioner. This letter, in particular paragraph two, was written in response to the criticisms raised by respondent and in an attempt to justify the Commissioner's

actions. As a result of having to reply to the criticism directed toward the Commissioner, staff members of the Department of Education are and were placed in the untenable position of having to justify the position taken by the Department and defend criticisms directed at the Office of the Commissioner for having predetermined the matter.[3] This clearly is indicative of bias which cannot be eliminated by the mere recusal of the current Commissioner in favor of a deputy. Should this matter be required to go forward in its present form, those employees of the Department of Education in the Bureau of Controversies and Disputes who were compelled to justify the actions of the Department will continue to sit in judgment of respondent. This is wrong. It violates respondent's constitutional rights and cannot be permitted. Respondent has been prejudiced to such an extent that the charges against him should be dismissed.

POINT III

THE PREJUDICIAL PUBLIC STATEMENTS MADE AGAINST RESPONDENT BY SUPERINTENDENT LAKE, THE BOARD AND COUNTY SUPERINTENDENT HUGHES, AT A TIME WHEN THE BOARD HAD NOT EVEN DETERMINED THE SUFFICIENCY OF THE CHARGES, WAS INDICATIVE OF BIAS AND VIOLATED THE RESPONDENT'S RIGHT TO DUE PROCESS. AS A CONSEQUENCE THE CHARGES MUST BE DISMISSED.

On February 12, 1992, the Neptune Board issued a "Public Statement" (Exhibit H) condemning respondent for his opinions expressed on the radio program of January 30, 1992. The "Public Statement" was read to all of those in attendance at a public meeting held by the Board on February 12, 1992. It was posted and made available to those in attendance at the meeting, including the press.[4] The "Public Statement" made it apparent that the Board was predisposed to certify tenure charges against respondent and, in fact, it did so on March 11, 1992. The Board,

[3] Although Director Keller denied that the statement as contained in paragraph two of the April 10, 1992 letter, (Exhibit T), prepared by her office, was in defense of the Commissioner, she did admit it was prepared as an explanation for his actions (1/12/93, 45-11 through 46).

[4] Superintendent Lake admitted to making statements to a reporter from the Asbury Park Press, concerning Respondent on approximately five (5) occasions.

by making the public announcement that the opinions expressed by respondent on the radio program "pose a threat to [a positive educational and work] environment,"*prior* to serving respondent with charges or the receipt and *any consideration* of respondent's submission of a "written statement of position and written statement of evidence," deprived respondent of procedural due process as mandated by *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1 (b) (3). (Emphasis supplied). The February 12, 1992 "Public Statement" was also violative of *N.J.A.C.* 6:24-5.1 (b) (7) which requires that "[a]ll deliberations and actions of the district board of education with respect to such charges shall take place at a closed meeting." Most significantly, respondent was deprived of an essential element of due process, namely the right to an unbiased tribunal, *Goldberg v. Kelly, supra* and *Nicoletta v. North Jersey District Water Supply Commission, supra.* In this regard, *N.J.A.C.* 6:24-5.1 (b) (4) mandates:

> Upon receipt of the respondent's written statement of evidence under oath ... the district board of education shall determine by a majority vote of its full membership within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction in salary (*See N.J.S.A.* 18A:6-11).

No examination was made prior to making the public statement as to probable cause or the sufficiency of the charges as required by statute. In fact, respondent was not even served with the charges or a Statement of the Evidence until February 20, 1992. By that time the Board had already prejudged the allegations made against him by Superintendent Lake, crediting these allegations without even receiving a position statement from respondent. The Board thereby deprived respondent of his right to an impartial decision-maker respecting, the "probable cause" determinations required under *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1 (b) (4). *Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., etc., supra.* at 430.

The conduct of the Board with respect to respondent, including the issuance of the "Public Statement," showed bias and that it had pre-decided respondent's case. Prejudicial statements against respondent were also repeated in the letter of February 24, 1992, (Respondent's Exhibit O) from Superintendent Lake to County Superintendent Hughes and once again by County Superintendent Hughes in his draft letter to the Commissioner (Respondent's Exhibit Q).

As a result of these due process violations, the charges against respondent should be dismissed.

POINT IV

THE *EX PARTE* INVESTIGATION CONDUCTED BY THE NEPTUNE BOARD, WITHOUT NOTICE TO THE RESPONDENT, BY INTERVIEWING WITNESSES, OBTAINING STATEMENTS, AND TAKING DEPOSITIONS, VIOLATED THE RESPONDENT'S RIGHT TO DUE PROCESS AND FOR THIS REASON, THE CHARGES SHOULD BE DISMISSED.

Superintendent Lake admitted during his deposition that as a result of the statements made on the radio program by respondent, he initiated an investigation. This investigation was undertaken without respondent's knowledge. The investigation was detailed and statements were obtained from respondent's students, former students and co-employees. These statements were obtained prior to the consideration of the charges by the Board on March 11, 1992. A statement was taken from a Thomas Marshall on February 7, 1992. On March 5, 6, and 9, 1992, statements were obtained from a total of approximately twenty-five (25) individuals. These statements were not made available to respondent until *after* the charges had been considered by the Board and the matter referred to the Office of Administrative Law (Emphasis supplied). The investigatory process took place over a number of months, primarily February and March of 1992. Despite this intensive process, respondent was not permitted the opportunity to participate in the investigation. Nor was respondent furnished with this evidence as *required* by *N.J.S.A.* 18A:6-11, so as to be able to respond to the allegations via a position statement. (Emphasis supplied). The *ex parte* consideration by the Board of this evidence upon which the charges were based, and the failure to furnish it to respondent *prior* to making the required probable cause determination and whether the charges were sufficient to warrant a dismissal or reduction in salary, violated respondent's right to the due process, and requires in and of itself, a dismissal of the charges. *Goldberg v. Kelly, supra; Nicoletta v. North Jersey District Water Supply Commission, supra.*

POINT V

THE CHARGES MADE AGAINST THE RESPONDENT, WITH THE EXCEPTION OF CHARGE 1.F, ARE VAGUE, STALE AND SHOULD BE DISMISSED ON THE BASIS OF ESTOPPEL, WAIVER AND LACHES

All of the charges referred to by petitioner with the exception of Charge 1.f, are either so vague and ambiguous that they cannot be substantiated, or in the alternative, occurred so long ago that they are stale and estoppel, waiver and laches should be applied to prevent the charging party from raising such allegations.

Charges 1.B and 1.E were *expunged* from respondent's file on May 11, 1981, (Respondent's Exhibit J), and should not have been considered by the Board at all. Both relate to an incident which allegedly occurred in January of 1981. The Board is now estopped form raising those charges for the purpose of imposing discipline. Obviously the reason for "expunging" a file is so that an incident cannot be used in the future against an individual. Estoppel arises to as to prevent one from repudiating an act done or position assumed where that course would cause an injustice to another who, having the right to do so, has relied thereon. *In re Atlas Foundry, Co.,* 155 *F. Supp.* 615 (D.C.N.J., 1957). Estoppel precludes a party from taking a position inconsistent with that previously assumed and intended to influence another's conduct who has relied thereon to his detriment. *Flammia v. Maller,* 66 *N.J. Super.* 440, 449 (App. Div. 1961). Respondent did in fact rely on the representations of the charging party that everything in his file with respect to the alleged incident in January of 1981 was, in fact, expunged. As set forth in the May 11, 1981 letter of expungement, (Respondent's Exhibit J), an independent review was conducted of respondent's file at that time, and it was found that it was appropriate that the incident and all documents connected therewith be removed from the file. As a result, respondent took no further action with respect to the matter, relying on this. For respondent to now be compelled to reconstruct what happened twelve (12) years ago and also determine the reasons why the former Superintendent found expungement appropriate, would be unconscionable and unfairly prejudice the respondent. In addition, the doctrine of laches applies where as here, the delay in making such a charge is unexplained, unexcused and unreasonable under the circumstances causing respondent substantial prejudice. *Allstate v. Howard Savings, Inst.,* 127 *N.J. Super.* 479, 489-491 (CH. Div. 1974). Furthermore, the expungement of the incident operated as a waiver by the Board of any further consideration of the incident. Waiver is defined as the" intentional relinquishment of a known right" and operates to prevent a party from pursuing a

course of action once a waiver has occurred. *Beneficial Finance Co. of Jersey City v. Norton,* 76 *N.J. Super.* 577 (App. Div. 1962). The letter of May 11, 1981, also operated as a waiver, since the use of the word "expunge" means the incident is no longer to be considered as part of the record. Accordingly, the charging party waived any right to now consider the incident as grounds for discipline and should be barred from unilaterally attempting to revoke the previous determination made in 1981.

Similar arguments also apply to Charge 1.C. This alleged incident occurred in October of 1986, some seven (7) years ago. The matter is totally unrelated to the various expressions of opinion which make up the other charges. It involved the alleged use of Respondent's private automobile by two students. Superintendent Michael Lake, as set froth in his letter of February 3, 1987 (Exhibit B attached to the Statement of Evidence) found, *inter alia,* after investigating the matter:

> ... It is the opinion of the Administrative Staff that the only allegation that can be substantiated is the fact that Mr. Clark allowed two High School pupils, [B] and [R], to use his van for a one week period.

There was *no* finding that B. was permitted to *operate* respondent's vehicle as Charge 1.C implies. (*See* Exhibit C attached to Statement of Evidence and Respondent's Answer to Tenure Charges). In fact, what is not mentioned in the charge is the fact that the evidence showed that respondent had allowed only R. to operate the vehicle, the holder of a valid driver's license, and permission was only granted for R. to use the vehicle in connection with a class project at the Wall Vocational School Auto Shop. Furthermore, at least one other teacher had given similar permission to other students, prompting a recommendation that a letter be sent to *all* High School Staff regarding procedure for vocational school shop utilization. This information was known to Superintendent Lake at the time of the filing of the charge, but not disclosed. (See Exhibit B attached to Statement of Evidence and Respondent's Answer to Tenure Charges.) On this basis alone, the charging party, by virtue of its own conduct, should be found to have "unclean hands" and the charge dismissed. *Schmidt v. Schmidt,* 220 *N.J. Super.* 46 (Ch. Div. 1987). Moreover, this incident, like the 1981 incident, was previously disposed of long ago via the letter of February 7, 1987. It does not establish a course of conduct on the part of the respondent as it is totally unrelated to the other charges. For respondent to be placed in a position of having to defend himself for something that allegedly happened many years ago unfairly prejudices him. The doctrines of estoppel, waiver and laches apply to prohibit the use of such allegations in the present proceedings.

Charges 1.A, D, and H involve alleged expressions of opinion made over an unspecified period of time. These allegations are *vague, unsubstantiated and speculative.* (Emphasis supplied). As with charge 1.F, discussed *infra,* such statements, even if made, were protected expressions of free speech guaranteed under the First Amendment. In addition, the evidence upon which they were based was obtained in violation of respondent's due process rights in that respondent was never furnished with such evidence prior to the Board considering the charges as required by statute, *N.J.S.A.* 18A:6-11. *Manalapan-Englishtown Ass'n v. Bd. of Ed., etc., supra.* Superintendent Lake testified at his deposition that a statement was obtained on February 7, 1992, from a Mr. Thomas Marshall to support Charge 1.A. Statements were also obtained from approximately twenty-four (24) other witnesses from March 6, 1992 through March 9, 1992. The Board considered the sufficiency of the charges on March 11, 1992. Copies of the statements obtained from these witnesses were not furnished to respondent until after the matter had reached the Office of Administrative Law and discovery begun. Respondent was never given an opportunity to participate in the Board's investigatory process or respond to this evidence by presenting a Statement of Position. This resulted in the Board considering and judging the sufficiency of the evidence on an *ex parte basis, denying* Respondent due process. The charges should be stricken for these reasons. Importantly, Charge 1.D refers to a letter dated June 19, 1990, (Exhibit G attached to Statement of Evidence) to respondent from the Superintendent of Schools James L. Terrell regarding respondent's alleged expressions of opinion. This letter was *not* a disciplinary letter and, in fact, respondent was *not* disciplined for the statements alleged to have been made by him. (Emphasis supplied) To the contrary, at page three, the finding was that racially biased statements could *not* be substantiated. Furthermore, the letter merely *"suggested"* that respondent be more careful of statements made and the context in which the statements are expressed. (Emphasis supplied). For the charging party to now claim that the alleged statements are the basis for disciplinary action is clearly misplaced and the charges should be stricken.

The above charges filed against respondent are baseless and subject to the application of the doctrines of estoppel, waiver and laches. They clearly were initiated as a result of respondent's statements made over the radio. Superintendent Michael Lake admitted at his deposition that *no* investigation of respondent was in progress prior to his making the statements. Furthermore, it was admitted that *"but for"* the statements made on the radio, respondent would *not* have been disciplined. (Emphasis supplied) As discussed *infra,* at Point VI, a finding

therefore, that respondent's comments made on the radio (Charge 1.F) were protected free speech, necessitates as a result, the dismissal of all other charges.

POINT VI

THE TENURE CHARGES INSTITUTED AGAINST THE RESPONDENT, AS A RESULT OF HIS STATEMENTS MADE IN A PUBLIC FORUM, WHICH ARE CRITICAL OF THE SCHOOL DISTRICT, VIOLATED THE RESPONDENT'S RIGHT TO FREE SPEECH GUARANTEED TO HIM UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

It is clearly established that a state may *not* discharge an employee for a reason which infringes upon the employee's constitutionally protected interest in freedom of speech. (Emphasis supplied) *Perry v. Sinderman,* 408 *U.S.* 593, 598 (1972).

The determination as to whether statements made by a public employee are entitled to the protection of the First Amendment requires the application of a three part test, (1) did the speech address matters of public concern, *Pickering v. Board of Education,* 391 *U.S.* 563, 568 (1960); *Connick v. Myers,* 461 *U.S.* 138, 140, 75 *L. Ed. 2d.* 708 (1983); (2) does the interest of the employee in commenting upon matters of public concern outweigh the interest of the state as an employer to promote the efficiency of the public service it performs through its employees, *Pickering v. Board of Education, supra,* at 568; and, (3) whether the employee's speech was a substantial factor in causing the employee to be discharged, *Mount Healthy City School District Board of Educa. v. Doyle,* 429 *U.S.* 274, 287 (1977).

The threat of dismissal from public employment is a potent means of inhibiting speech. *Pickering, supra.,* at 574. Vigilance is necessary to insure that public employers do not abuse authority over employees to silence discourse, not because it hampers public functions, but simply because the superiors disagree with the content of the employee's speech. *Rankin v. McPherson,* 429 *U.S.* 274 (1987). The Supreme Court has repeatedly held that speech on public issues occupies the "highest rung of the hierarchy of the First Amendment values" and is entitled to special protection. *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 *U.S.* 886, 913 (1982); *Carey v. Brown,* 447 *U.S.* 455, 467 (1980).

In determining whether respondent's statements on the radio meet the first part of the three part analysis and touch upon a matter of public concern, the

"content, form and context" of the speech, as revealed by the whole record must be considered. *Connick v. Myers,* 461 *U.S.* at 147, 148; *Caron v. Silvia,* 7 *IER* Cases 523, Mass. Appeals Court, No. 90-P-1051 (1992); *Holder v. Allentown, Pa.,* Higginbotham, J. CA 3, No. 921358, 3/4/93, U.S. Law Week (3/23/93). A public employee's criticism of the internal operations of his/her place of public employment is a matter of public concern. *Zamboni v. Stamler,* 847 *F. 2d.* 73, 77 (3d. Cir., 1988). The contents of the statements made by respondent concerned the curriculum at Neptune High School, in particular whether it was appropriate for respondent to teach African Literature in an American Literature class during Black History Month. Curriculum certainly is an internal operation and thus a matter of public concern. Furthermore, the statements were made in the context of a public radio program where individuals are encouraged to call in and express their opinions. Obviously they were made in such a forum so as to encourage public debate over issues raised. This further characterizes them as touching upon matter of public concern. *Holder v. Allentown, supra.*

In the case of *Pickering v. Board of Education, supra,* the Supreme Court held it impermissible under the First Amendment of the Constitution to dismiss a high school teacher for openly criticizing the Board of Education by writing a letter to the editor of a local newspaper which was critical of the way funds were being allocated in the school budget. *Pickering's* subject was found to be "matter of legitimate public concern upon which free and open debate is vital to an informed decision-making by the electorate." *Id.* at 571-572. Likewise in *Mount Healthy City School District board of Education v. Doyle, supra,* the statements of a public school teacher criticizing her superiors with respect to teacher dress and appearance was considered a matter of public concern entitling her to the protection of the First Amendment. Also in the case of *Givhan v. Western Line Consolidated School District,* 439 *U.S.* 410, 58 *L. Ed. 2d.* 619 (1979) the First Amendment was held to apply to statements by a teacher critical of a school district's allegedly racially discriminatory policies. Finally, in *Levin v. Harleston,* 770 *F. Supp. 895,* (S.D.N.Y. 1991), affirmed in part, vacated in part 966 *F. 2d.* 85 (CA. 2, 1992) a *professor's expression of racially denigrating theories outside the classroom were found to be subject to First Amendment protection and thus safeguarded.* (Emphasis supplied). There is no question the statements by respondent over the radio were legitimate matters of public concern to which the First Amendment applies. A teacher needs to be able to communicate with respect to these issues so that there can be informed decision making as to what is to be taught in schools.

Part two of the analysis requires the application of a balancing test as to whether respondent's speech *caused* such interference with the "effective functioning of the public employer's enterprise" as to justify suspension and dismissal. (Emphasis supplied). *Rankin v. McPherson, supra.* at 278.

In discussing the application of the balancing test, the Supreme Court in *Pickering, supra.,* determined that the statements of the teacher, critical of Board of Education and Superintendent were protected free speech, where the statements could be easily countered and there was no showing that they actually interfered with the operation of the school or the teacher's ability to teach. *Id.* at 571-572. The Court went on to find that the right to free speech *outweighed* the interests of the Board in managing the school district. (Emphasis supplied). Furthermore, it was essential that a teacher be able to speak out freely on such questions of public concern without fear of retaliatory dismissal. *Id.* In the instant case, the statements made by respondent pertain to curriculum, which is equally if not *more* important. (Emphasis supplied). In order for the interests of the public employer to outweigh the special protection afforded by the First Amendment, the public employer must show a material and substantial disruption of the functioning of the public enterprise actually resulted. *Zamboni v. Stamler, supra.* at 79. In the instant case, Superintendent Lake testified that he had received *no* reports of disruption involving students or teachers. (Emphasis supplied). He testified that the reason for taking action against respondent was because he thought that if he did not, it "*could* lead to some very difficult times at the school setting ..." (Transcript 1/7/93, 18-11 to 19-3). The possibility of "difficulties" clearly was not a sufficient reason to justify the action taken against respondent in suspending him and seeking to discharge him as a result of exercising his right to free speech. Respondent's statements in no way impeded his ability to properly perform his daily duties in the classroom or interfered in any way with the regular operation of the school. Respondent's right to free speech clearly outweighed any interest the school administration may have had in limiting such free speech.

Any allegation that the statements made by respondent on the radio were not accurate, is also specious. The Supreme Court in *Pickering, supra.,* found that even though the public statements involved there were false, this did *not* limit protection afforded to the teacher under the First Amendment. (Emphasis supplied). There

had been no showing that the statements were willfully false or had been made in reckless disregard of the truth, a necessary prerequisite. *Id.* at 572. Furthermore, the statements were *not* of such a nature as to be taken seriously by the reader. (Emphasis supplied). In the instant case, whether or not the statements made were true or not is irrelevant. There is no evidence whatsoever that they were willfully false or made in reckless disregard of the truth.

In applying the analysis required under the *third* part of the test, there is *no* question that the statements made by respondent on the radio caused the charges to be filed against him. The previous incidents alluded to in the charges were not even considered until *after* these statements were made. (Emphasis supplied). Respondent's statements over the radio were not just a substantial factor in motivating the Board to seek his discharge but the only factor. In fact, Superintendent Lake admitted at depositions that *prior* to respondent making the statements over the radio, there were no charges pending against him and in fact, *no contemplated* investigation. (Emphasis supplied) Furthermore, he admitted that *but for* respondent's statements on the radio, disciplinary action would *not* have been taken against him. (Emphasis supplied).

Respondent's speech is entitled to protection under the First Amendment in that the statements were made over the radio concerning curriculum were matters of public concern; the importance of his First Amendment rights making the statements outweighed any governmental interest in regulating or prohibiting such activity; and, if it had not been for these statements, clearly no charges would have been brought against him. The finding that respondent's conduct constituted protected free speech by necessity requires the dismissal of all other charges against respondent as well. Superintendent Lake admitted that the other charges were not even being considered until the incident occurred over the radio. There has been no showing by petitioner, nor can it establish that it would have reached the same decision to terminate respondent absent the protected conduct. Accordingly, the finding that respondent's speech was protected results in the failure of the other charges. *Mount Healthy City School District Board of Education v. Doyle, supra.* at 287.

POINT VII

THE DECISION OF THE APPEALS TRIBUNAL FINDING THAT THE RESPONDENT WAS NOT DISCHARGED FOR MISCONDUCT CONNECTED WITH WORK IS BINDING IN THE ADMINISTRATIVE LAW PROCEEDINGS AND THE BOARD IS COLLATERALLY ESTOPPED FROM RE-LITIGATING THIS SAME ISSUE.

Respondent, upon being suspended without pay, filed a claim for unemployment compensation. The application was opposed. On June 25, 1992, a decision was entered by the Appeals Tribunal examiner, Ronald Gitter, (Respondent's Exhibit "AA") finding respondent had *not* been discharged for misconduct connected with work, and that he was qualified for unemployment benefits. The Appeals Tribunal stated, *inter alia:*

> The employer contends that the purpose of the radio call was to make disparaging racial remarks, under oath the claimant denies this allegation.
>
> The claimant called the radio station to voice his concerns that the curriculum was not being properly followed. He only called the station after he was refused a meeting with a supervisor.
>
> The evidence presented at this hearing does not show the claimant's phone call to the radio station was a willful act in disregard of the employers (sic) best interest, therefore no disqualification for benefits applies under *R.S.* 43:21-5 (b).
>
> No disqualification arises under *R.S.* 43:21-5 (b) as the claimant was not discharged for misconduct connected with work.

Prior to making that determination, a plenary hearing was conducted by the Appeals Tribunal at which time respondent, his counsel and counsel for the Board were present and participated. A determination was then made in respondent's favor based upon the evidence. No appeal was filed from the decision of the Appeals Tribunal.

As the Court stated in *City of Hackensack v. Winner,* 162 *N.J. Super.* 1, 27 (App. Div. 1978); mod. 82 *N.J.* 1. (1980):

> *Res Judicata* as a principle of law bars a party from re-litigating a second time what was previously fairly litigated and determined finally. The general

> requirements for the invocation of this principle are a final judgment by a court or tribunal of competent jurisdiction, identity of issues, parties, cause of action and thing sued for. (citations omitted).
>
> Collateral estoppel is that branch of the broader law of *res judicata* which bars re-litigation of any issue or fact actually determined in a prior action, generally between the same parties, involving a different claim or cause of action. *Id.* at 27-28.

Principles such as *res judicata* and collateral estoppel apply not only to courts of law but also to administrative tribunals and agency hearings, particularly as to findings of fact. *Id.* at 24. Under principles of comity, one agency should ordinarily defer to the other agency's determination in order to avoid wasteful, duplicative litigation. *Id.* at 27.

In the instant case, the Appeals Tribunal found that respondent had *not* engaged in misconduct connected with work. (emphasis supplied). This determination was made after a full hearing on the facts. The determination to be made by the administrative law judge, pursuant to *N.J.S.A.* 18A:6-10 in a tenure hearing, is whether respondent engaged in "unbecoming conduct." There is no distinction between misconduct and unbecoming conduct. Consequently, the determination made at the unemployment hearing that respondent had not engaged in misconduct, is the same issue to be determined by the administrative law judge. The facts and circumstances remain the same. *In City of Hackensack v. Winner, supra.* the Court found that where the Civil Service Commission and the Public Employees Relations Commission (PERC) had concurrent jurisdiction, a decision on the facts by the Civil Service Commission was binding as to any examination of the issue by PERC. *See also, Charlie Brown of Chatham v. Board of Adjustment,* 202 *N.J. Super.* 312 (App. Div. 1985) wherein the Court held that a determination made by the local planning board constituted a determination by a quasi-judicial body, which precluded the plaintiff from again submitting the same issue to the zoning board, also a quasi-judicial body, for a second determination.

Likewise, in the case at bar, the hearing before the Appeals Tribunal was quasi-judicial in nature. A determination was made after a full hearing in which both parties had an opportunity to present evidence and testimony. Both forums are administrative in nature. Just as the burden of proof before the Appeals Tribunal was with the Board, so does it remain with the Board while before the Office of Administrative Law (OAL). This is not a case where different issues are being

determined or the burden of proof is different. The OAL therefore should take judicial notice of the decision of the Appeals Tribunal and the charges should be dismissed.

THE BOARD'S POSITION

POINT ONE

THE CIRCUMSTANCES SURROUNDING THE ISSUANCE OF THE COMMISSIONER OF EDUCATION'S MARCH 6, 1992 LETTER DO NOT WARRANT DISMISSAL OF THE TENURE CHARGES

In Point One and Two of his brief, respondent argues that the actions of the Department of Education violated both the provisions of *N.J.S.A.* 18A:6-10 *et seq.* and respondent's Constitutional Due Process rights, requiring a dismissal of the tenure charges: Respondent's brief states that a "prejudicial atmosphere was created which now pervades the entire Department due to the involvement of various personnel." Respondent further argues "impressions created cannot be eliminated by the substitution of a Deputy Commissioner." (Respondent's brief at 19).

Respondent's conclusions are not supported by the evidence presented in support of his motion to dismiss. First, the January 12, 1993, transcript of the testimony of Dr. Maureen R. Keller, Director of the Bureau of Controversies and Disputes of the State Department of Education, shows that the Bureau was not aware of the Commissioner's March 6, 1992 letter (Board's Exhibit "K") until April, 1992 when the Bureau received respondent's Answer and Separate Defenses.

Dr. Keller testified that she first became aware of the David Clark tenure matter when the Answer and Affirmative Defenses were received. (Board's Exhibit "Q"). The matter was brought to Dr. Keller's attention by Kathryn Hughes Kim, the Examiner working on the case. Upon reviewing the nature of the case and the Affirmative Defense, Dr. Keller immediately recommended to Commissioner Ellis that he recuse himself from the case " so that there wouldn't even be the remotest suggestion of a predisposition in this matter." (Board's Exhibit "Q"; T36-20 to 25).

Rather than showing a "prejudicial atmosphere" pervading the entire Department of Education as argued by respondent, Dr. Keller's testimony shows that the Bureau of Controversies and Disputes immediately recognized that Commissioner Ellis was in error when he issued the March 6, 1992 letter to Mrs. Bartlett.

> Q. I believe that you indicated that a letter was sent out erroneously.
>
> A. Well, a letter meaning that Commissioner Ellis should not have signed the Barlett letter. He should have (not done?) that. The Barlett letter should not have gotten to him.
>
> So I had to follow up on that to find out where the foul up occurred and how is it, you know, that this letter had got to the Commissioner to start with. (Board's Exhibit Q; T39-12 to 22).

Respondent's argument that Commissioner Ellis' actions created a "prejudicial atmosphere" that still pervades the Department of Education is further negated by the fact that Commissioner Ellis resigned from his office in December 1992.

Second, respondent has not shown that Deputy Commissioner John C. Woodbury was in anyway biased against respondent in this case. Dr. Keller testified that it was her decision to recommend that Deputy Commissioner Woodbury decide the case after Commissioner Ellis indicated that he was recusing himself. (Board's Exhibit "Q") Respondent did not depose Deputy Commissioner Woodbury or, in anyway attempt to establish if he is actually biased against respondent. Our Supreme Court has held that a showing of "actual bias" is required to disqualify an agency head from hearing a matter:

> ...The probability of actual bias is grounds for disqualification when the decision maker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief. *In the Matter of Carberry* 114 *N.J.* 574, 586 (1989)

Finally, the matter is distinguished from the cases relied upon in respondent's brief by the fact that the case is being heard as a contested matter before the Office of Administrative Law, pursuant to the provisions of the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -15. In the case of *In Re Uniform Administrative Procedures Rules,* 90 *N.J.* 85, 90 (1982) our Supreme Court recognized that the Legislative's primary purpose in creating the Office of Administrative Law was to promote

fairness and impartiality of Administrative adjudication of contested cases by replacing agency examiners with independent law judges. The primary reason for establishing the Office of Administrative Law was:

> ...to bring impartiality and objectivity to agency hearings and ultimately to achieve a higher level of fairness in administrative adjudications. 90 *N.J.* at 90.

This is not to say that an OAL referral is dispositive of the issue of actual bias. Our Supreme Court has recognized that the issue of actual bias by an administrative head is not cured by referral of a contested case to the OAL for a hearing. The agency head would still retain the power of "adopt, reject or modify the recommended report and decision;" *N.J.S.A* 52:14B-10 (c), or "findings of fact and conclusions of law" of the Administrative Law Judge, *N.J.S.A.* 52:14F-7. The Court held if actual bias is present, the proper procedure would be for the agency head to remove himself from the case.

> Independent of the procedures outlined in the Administrative Procedure Act, if the agency head is tainted by actual bias, then he or she should not hear the matter. *Matter of Carberry, supra.* at 585.

Any actual bias against the respondent by Commissioner Ellis was cured when Commissioner Ellis recused himself from the case. Respondent has failed to show any actual bias on the part of the Deputy Commissioner designated to hear this matter in place of the Commissioner. Dismissal of the tenure charges against respondent is not warranted in this case.

POINT TWO

THE BOARD FEBRUARY 12, 1992, PUBLIC STATEMENT DID NOT VIOLATE RESPONDENT'S STATUTORY OR CONSTITUTIONAL DUE PROCESS RIGHTS

Respondent was identified as the teacher who telephoned the Bob Grant Show on January 30 1992, in a newspaper story that appeared in the Asbury Park Press on February 8, 1992. (See Board's Exhibit "C"). This was four days before the Board's February 12, 1992 public meeting.

The Board believes that Media Monitors, the group that supplied a tape recording of respondent's remarks to Superintendent Lake, also sent a copy of the tape to Howard L. West, Sr., President of the Asbury Park-Neptune branch of the

NAACP (*See* February 13, 1992 letter from George J. Wilson to Michael T. Lake, attached hereto as Board's Exhibit "R"). Mr. West had sent a letter to School Superintendent Lake on February 6, 1992 requesting, on behalf of NAACP, that "Dave" be removed from the school system and that the District secure a tape of the Bob Grant Show to eliminate claims of hearsay. (*See,* February 6, 1992 letter from Howard L. West, Sr. to Michael T. Lake attached hereto as Board's Exhibit "S"). The Board believes that either Media Monitors or the NAACP provided a copy of the tape to the Asbury Park Press reporter, Jeanne Jackson for use in her February 8, 1992, news story, (Board's Exhibit "C"). Armed with the tape, Ms. Jackson could use either the high school directory or the high school year book, both of which were available to the public, to identify respondent as the caller "Dave" in the same manner as Superintendent Lake had identified respondent on January 31, 1992.

As a result of respondent's January 30, 1992 broadcast and, his subsequent identification in the press, the matter received a great deal of attention on the radio, television and in the newspapers. The Board correctly anticipated that the February 12, 1992 public meeting be attended by a large number of the public who were either angry or upset by respondent's radio comments. The Board believed that a public statement was necessary to respond to the public concern and maintain order at the meeting.

Prior to the February 12, 1993 public meeting, the Board met in closed session to consider if respondent should be continued on paid suspension pursuant to *N.J.S.A.* 18A:25-6 or, returned to the classroom. At this closed session, Superintendent Lake advised the Board the he intended to file tenure charges against respondent for conduct unbecoming a teaching staff member and recommended to the Board that respondent remain on paid suspension. The Board continued respondent on paid suspension pending the filing of the tenure charges by Superintendent Lake. There was no deliberation of tenure charges at the February 12, 1992, Board meeting.

At the beginning of the public portion of the February 12, 1992 Board meeting, the Board President read a "Public Statement." (Board's Exhibit "E") The statement was an explanation of the Board's action "tonight" in continuing respondent on suspension pursuant to *N.J.S.A.* 18A:25-6. Respondent was not named in the "Public Statement." A reading of the "Public Statement" shows that it was intended to cutoff public debate at the meeting on a very controversial and volatile issue. When read in the context of the atmosphere of the February 12, 1992 public meeting, it is

clear that the Board's "Public Statement" was intended to protect respondent's rights.

The February 12, 1992 "Public Statement" did not violate either the statutory or regulatory provisions governing filing and certifying tenure charges. When viewed in the context of the publicity generated by the respondent's broadcast, the Board did not violate any of respondent's constitutional "due process" rights.

POINT THREE

THE TENURE CHARGES AGAINST RESPONDENT ESTABLISH A CONTINUOUS COURSE OF UNBECOMING CONDUCT

In Point Five of his brief, respondent argues that the February 20, 1992 tenure charges filed against respondent, with the exception of Charge 1F, are vague, stale and should be dismissed on the basis of estoppel, waiver and laches. A review of the February 20, 1992 tenure charges an accompanying statement of Evidence, (Board's Exhibit "T"), show a clear and continuous course of unbecoming conduct by respondent during the course of his employment by the Board. It is the cumulative effect of this continuous course of unbecoming conduct that is the basis of the tenure charges against the respondent.

It should be first noted that neither Title 18A of the Statutes or Title 6 of the Administrative Code contain any time limitations for instituting tenure charges against tenured employees. This lack of a time limitation for the institution of tenure charges is significant when compared with the 90 day time limitation established by *N.J.A.C.* 6:24-1.2 (c) for instituting actions pursuant to *N.J.S.A.* 18A 6-9.

In a tenure hearing, the ultimate issue is the employee's continued employment in a school district. The employee's entire history is therefore relevant to the proceedings. The Doctrine of Estoppel, Waiver and Laches do not apply under these circumstances.

In the case of *In the Matter of the Tenure Hearing of David Brody, School District of the Borough of Elmwood Park,* 1984 *S.L.D.* 1216, aff'd State Board of Education, 1984 *S.L.D.* 1247, aff'd Appellate Division, Docket No. A1326-84T7,

March 27, 1986, a tenured teacher was charged with corporal punishment and unbecoming conduct. The teacher had previously been charged with unbecoming conduct on two previous occasions, but the Commissioner had dismissed both charges. The Commissioner dismissed the teacher in the present case based upon the cumulative effect of the teachers' unbecoming conduct.

The tenure charges (Board's Exhibit "T") establish a continuous course of conduct by respondent. This course of conduct is relevant to the issue of respondent's continued employment as a teaching staff member in the District.

Finally, respondent argues that charges 1B and 1E were *expunged* from respondent's file. (Emphasis supplied). There's no merit to this position. There are no statutory or regulatory provisions for the expungement of disciplinary proceedings from a teaching staff member's personnel file.

POINT FOUR

THE TENURE CHARGES FILED AGAINST RESPONDENT DO NOT VIOLATE RESPONDENT'S CONSTITUTIONAL RIGHT TO FREE SPEECH

In *Pickering v. Board of Education,* 391 *U.S.* 536, 88 *Sup. Ct.* 1831 (1968), the Supreme Court first articulated the balancing test used in school speech cases. The Court ruled that a teacher's comment to a local newspaper regarding the School Board's fiscal policy were protected speech. Comments by teachers on matters of public concern that are *substantially correct* may not furnish grounds for dismissal even though they are critical. (Emphasis supplied). *Pickering,* 391 *U.S.* at 570. In reaching its decision, the Court balanced the interests of a teacher as a citizen in commenting on matters of public concern against the interest of the State as an employer in promoting efficiency in public services. *Id.* at 568. The Court rejected the Board's argument that the speech would be harmful to the operation of the schools, articulating four factors to analyze the relationship between the speech and the teachers' professional responsibilities: (1) whether the speech would interfere with the employee's performance, (2) whether it would create disharmony among coworkers, (3) whether it would undercut an immediate supervisory discipline over the employee or, (4) whether it would destroy the relationship of loyalty and trust required of confidential employees.

The Court refined this balancing test in *Mt. Healthy City School District Board of Education v. Doyle,* 429 *U.S.* 97 *Sup. Ct.* 568 (1977), by adding a "but for" standard. The teacher was dismissed for several reasons, including distributing to a local radio station a memorandum critical of the school's dress code. The Supreme Court required resolution through a three step analysis: (1) Is the speech protected under the First Amendment? (2) If so, was it a motivating factor in the disciplinary decision? (3) If so, would the School Board have nonetheless made the same disciplinary decision? *Mt. Healthy* 429 *U.S.* at 285.

Since *Mt. Healthy,* the Supreme Court has distinguished speech related to private matters from speech related to public matters. *In Connick v. Myers,* 461 *U.S.* 13 *Sup. Ct.* 1684, (1983), the Court stated the following:

> We hold ... that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in reaction to the employee's behavior. *Connick,* 461 *U.S.* 147.

The Court said speech is public if it relates to "any matter of political, social or other concern to the community." *Id.* at 146. In deciding whether or not speech relates to a public concern, the Court should consider content form and context, and generally, public employers should have "wide latitude in managing their offices." *Id.* at 146.

Since *Connick,* most teacher speech cases have focused on the distinction between matters of public and private concern. Comments on internal school practices are generally unprotected. Where the speech relates to policy affecting the community in general, or to the protection of students, it typically will be protected. However, even speech on matters of public concern, can serve as a basis for termination if, the speech has become disruptive. This is true both of actual and symbolic speech. *See Stewart v. Baldwin County Board of Education,* 908 *F. 2d.* 1499 (11th Cir. 1990).

The 5th Circuit in *Nielto v. San Perlita Ind. Sch. Dist.,* 894 *F. 2d.* 174, 5th Cir. (1990) recognized that the balancing test "is not all - or - nothing but rather a sliding scale under which 'public cc ern' is weighed against disruption. A strong showing

of disruption may be necessary if the employee's speech more substantially involves matters of public concern." (citations omitted) *Id.* at 179. The Court determined that a school maintenance supervisor's unfounded and persisting complaints to the school administration and the School Board about alleged misconduct by a basketball coach, although possibly addressing a matter of public concern, failed the balancing test where they had become disruptive to the school. *Id.* at 180.

Similarly, the 10th Circuit ruled that a school nurse's conduct, helpful in initiating a School Board investigation into the District's medication policy, eventually became disruptive. *In Johnsen v. The Independent School District No. 3, F. 2d.* 1485 (10th Cir. 1989), the Court stated:

> In general, "an employee's First Amendment rights are protected unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee. (citation omitted) *Id.* at 1493.

In *Stroman v. Collection County School District,* No. 92-1340, (4th Cir. December 4, 1992), the court ruled that a teacher's letter to colleagues complaining about a change in the School Board's pay schedule and encouraging a "sick-out" by teachers during exam week had the basic thrust of expressing a private grievance and under *Connick* was thus unprotected by the First Amendment.

In the present case, respondent's January 30, 1992 broadcast comments were expressions of a private grievance resulting from the alleged receipt by respondent of a list of African authors in his school mailbox. (Board's Exhibit "O") Respondent's expression of a private grievance was not protected by the First Amendment.

Respondent's brief argues that his comments concerned curriculum at Neptune High School. However, respondent testifies that the list was addressed to both faculty and students. (Board's Exhibit "O") The list could not be reasonably viewed as an administrative directive to change the high school curriculum. The fact that respondent's public comments may have touched upon curriculum did not change these comments from expressions of respondent's private grievance.

Even if we assume, for the sake of argument, that the respondent's January 30, 1992, statement did touch upon matters of public concern, respondent's comments did not meet the test set forth in *Pickering* which requires that such statements be "substantially correct." Respondent's May 13, 1992, testimony before the

Department of Labor (Board's Exhibit "O"), and his June 29, 1992, statements to Mr. Mixson, (Board's Exhibit "P11"), show that respondent fabricated the statements that were broadcasted on January 30, 1992.

Respondent's January 30, 1992, statements broadcast over a New York City radio station were expressions of respondent's private grievances. Respondent's statements concerning statements made to him by administrators and, his comment about the presence of a banner in his school were fabricated by respondent. Respondent's statements caused a disruption of the educational program in the District. (*See,* Asbury Park Press, February 22, 1992 news story, Board's Exhibit "U"). Respondent's statements were not protected by the First Amendment.

POINT FIVE

THE BOARD'S INVESTIGATION OF RESPONDENT'S CONDUCT DID NOT VIOLATE RESPONDENT'S CONSTITUTIONAL DUE PROCESS RIGHTS

In Point Four of his brief, respondent argues that his due process rights were violated because detailed statements were taken from individuals on February 7, 1992, and March 5, 6 and 9, 1992 and were not provided to respondent until after the Board considered the tenure charges against him on March 11, 1992.

It should be noted that the bulk of the statements referred to by respondent were taken after February 20, 1992, the date Superintendent Lake filed the tenure charges with Board Secretary Ruggieri. (Board's Exhibit "T") Transcripts of the statements were not prepared until after the March 11, 1992, Board meeting at which the tenure charges were considered.

At the March 11, 1992 meeting, the Board considered only the Statement of Evidence that had been provided to respondent on February 20, 1992. (Board's Exhibit "F") The witness statements were duly provided to respondent through discovery after the charges were certified to the Commissioner of Education. Under the statutes and regulations governing the filing of tenure charges, the Board and its attorney are the proper parties to prosecute tenure charges. *See; In the Matter of the Tenure Hearing of Milton Belford.* 1978 *S.L.D.* 660; *In Re: The Matter of the Tenure Hearing of Dominick Parsi,* 1974 *S.L.D.* 631. Neither the statutes or regulations require that the individual against whom tenure charges are filed, participate in the Board's investigation of those charges.

POINT SIX

THE BOARD OF EDUCATION IS NOT ESTOPPED FROM PROSECUTING TENURE CHARGES AS THE RESULT OF THE DEPARTMENT OF LABOR'S DECISION GRANTING RESPONDENT UNEMPLOYMENT COMPENSATION BENEFITS

In Point Seven of his brief, respondent argues that the Department of Labor's decision, granting him his unemployment compensation benefits as the result of his 120 day suspension without pay, under *N.J.S.A.* 18A:6-14, is binding upon the parties in the present tenure proceedings.

A reading of the Decision of the Department of Labor, respondent's Exhibit "AA," page 2, clearly shows that the decision was based upon the definition of misconduct as it appears in the Unemployment Compensation Act.

The Court in the *City of Hackensack v. Winner,* 162 *N.J. Super.* 1 (App. Div. 1978); modified 82 *N.J.* (1980), the case relied upon by the respondent in his brief, clearly holds that there must be an identity of issues in both proceedings to raise *res judicata*. There is no identity of issues in the present case.

The Department of Labor matter dealt solely with the issue of respondent's eligibility for workers compensation benefits and relied upon the provisions of the Unemployment Compensation Act to arrive at its conclusion. The present matter was brought before the Commissioner of Education under Title 18A to determine if respondent had engaged in unbecoming conduct within the meaning of the Education Laws. There is no identity of issues within the meaning of the *City of Hackensack v. Winner.*

For the reasons set forth above, it is respectfully requested by the Board of Education of the Township of Neptune, Monmouth County that respondent's application to dismiss the tenure charges be denied.

INTERVENOR'S POSITION

The Commissioner of Education sought, and was granted, intervention in this limited matter for the purpose of addressing the Affirmative Defense raised on behalf of respondent that prior actions by the Commissioner and the Department of Education had so tainted these proceedings that the tenure charges should be dismissed.

PROCEDURAL HISTORY

Petitioner Board of Education of the School District of Neptune Township (Neptune) certified tenure charges against respondent David C. Clark to the Commissioner of Education (Commissioner) on or about March 17, 1992. The answer filed on behalf of respondent, on or about April 3, 1992, alleged that past conduct by the Commissioner and members of the Department would operate to deny respondent due process and sought dismissal of the tenure charges.

The Commissioner responded to respondent's counsel noting that the actions by the Commissioner and the Department cited by said counsel predated the filing of tenure charges. In order, however, to preclude any suggestion that he had prejudged the matter, the Commissioner designated Deputy Commissioner John C. Woodbury to hear the case. *See* Exhibit "T" to respondent's brief.

The matter was transferred to the OAL for hearing as a contested case on April 13, 1992.

By letter to the Commissioner of the same date, respondent's counsel again asserted that the proceedings had been so tainted that dismissal was required. *See* Exhibit "Y" to respondent's brief.

The Director of the Office of Controversies and Disputes, Maureen R. Keller, responded to this second letter that the Commissioner had designated Deputy Director Woodbury to hear the matter and that respondent was free to raise his defense in the Office of Administrative Law. *See* Exhibit "Z" to respondent's brief.

Subsequent to transmission to the OAL the undersigned sought to intervene on behalf of the Commissioner for the limited purpose of contesting respondent's allegation that the bias and/or prejudgment of the Commissioner and the

Department would act to deny him due process. The request for limited intervention was granted.

Following a prehearing and oral argument, a schedule for discovery, including extensive depositions, and briefing on respondent's motion to dismiss was set.

COUNTER-STATEMENT OF FACTS

Respondent's allegations arise from a letter which was issued under the signature of then Commissioner John C. Ellis,* dated March 6, 1992, to a Mrs. C. Scott Bartlett (Exhibit K to respondent's brief) and to the events surrounding its drafting.)

Mrs. Barlett had written to Governor Florio on February 10, 1992. The Governor's Office of Constituent Relations directed the letter, with a request to respond to the same, to the Commissioner of Education. The Commissioner's office referred the letter and request for response to the office of the then Assistant Commissioner for County and Regional Services Charles Mitchell. He, in turn, transmitted it to the then County Superintendent for Monmouth County, Milton Hughes. County Superintendent Hughes' office transmitted it to Neptune Superintendent Michael C. Lake with a request for information. Superintendent Lake responded by letter dated February 24, 1992 to which was attached a copy of a transcript of remarks made by respondent in a call to the Bob Grant (radio) show. Superintendent Hughes' secretary, Pat Eaton, prepared a draft response which was reviewed and approved by Hughes. This draft response was faxed to Assistant Commissioner Mitchell's office. The draft was retyped, a single word as changed, and the letter was signed by Commissioner Ellis. Superintendent Hughes was out of his office from the date the fax arrived from Assistant Commissioner Mitchell's office until the date the proposed response was faxed from his office.

* It is one of the more unusual aspects of this case that respondent relies on the alleged bias and prejudgment of those in the Department of Education who had contact with this matter prior to the certification of tenure charges and those individuals are no longer there. Commissioner Ellis, Deputy Commissioner Woodbury, Assistant Commissioner Mitchell and County Superintendent Hughes have all resigned or retired.

The radio broadcast which created the furor took place on January 20, 1992. As noted in respondent's brief, Neptune initiated steps culminating in the filing of tenure charges almost immediately thereafter.

The only evidence of any contact between the Department of Education and Neptune with respect to respondent prior to the certification of tenure charges was the request for information from the Monmouth County Superintendent's office on February 20, 1992 and Superintendent Lake's response thereto of February 24, 1992.

ARGUMENT

NEITHER THE FACTS ALLEGED BY RESPONDENT NOR RELEVANT LEGAL PRECEDENT WOULD HERE REQUIRE THE COMMISSIONER TO RECUSE HIMSELF FROM DECIDING THIS MATTER AND THUS CANNOT SUPPORT A CONCLUSION DISMISSING THE TENURE CHARGES AGAINST CLARK .....

This overriding point must be stressed at the outset. Recusal is a most drastic measure, not to be exercised except in the most drastic of circumstances.* As the Appellate Division has said, "A judge is not required to withdraw from the hearing of a case upon a mere suggestion that he is disqualified to sit." Indeed, "it is improper for him to do so unless the alleged cause of recusation is known by him to exist or is shown by proof to be true in fact." *Clawans v. Schakat,* 49 *N.J. Super.* 415, 420 (App. Div. 1958), quoting *State v. DeMaio,* 70 *N.J.L.* 220, 222 (E. & A. 1904). Recusal is, moreover, " a matter entrusted in the first instance to the discretion of the trial judge himself." *Hundred East Credit Corporation v. Eric Shuster Corporation,* 222 *N.J. Super.* 350, 358 (App. Div. 1986). *See Bonnet v. Stewart,* 155 *N.J. Super.* 326, 330 (App. Div. 1978), certif. den. 77 *N.J.* 468 (1978).

The essence of the argument here made by respondent is that this matter should be dismissed because the inquiry made at the Commissioner's behest in

* Intervenor/Respondent is cognizant of the fact that respondent's motion is not for recusal but dismissal. In so far as he seeks to ground that dismissal on bias, it is obvious that evidence which would not support recusal itself a drastic remedy, would be insufficient to support the more drastic relief of dismissal. Accordingly, the argument here presented examines the legal precedent for recusal which is equally applicable to the remedy sought by respondent.

order to respond to a letter directed to the Governor and the response signed by the Commissioner so taint these proceedings that this matter must be dismissed. Both the courts in New Jersey and the federal courts have long recognized that regulatory officials not only cannot avoid, but, indeed, should not avoid knowing the characteristics of the particular field or issue they are responsible for supervising and possessing and expressing their views.

More than four decades ago the Supreme Court of the United States was confronted with the argument that members of the Federal Trade Commission had become biased to the point of disqualification by virtue of their reporting to Congress and the President regarding the possible antitrust implications of a pricing system when that issue was pending before the agency. The Court rejected the assertion that because an opinion had been formed by the Commission as as result of its previous official investigation that the Commission must be disqualified.

> The fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence - volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions, of the trade practices within the range of legally permissible business activities. [Federal Trade Comm'n. v. Cement Institute, 333 *U.S.* 683, 701, 68 *S. Ct.* 93, *L. Ed.* 1009 (1947)]

The *Cement Institute* holding represents only a reaffirmation of the Court's decision in the fourth of the *Morgan* line of cases, *United States v. Morgan,* 313 U.S. 409, 61 *S. Ct.* 999, 85 *L. Ed.* 1429 (1940), a case directly on point with the instant matter. There the Court refused to disqualify the Secretary of Agriculture merely because he had written a letter to a newspaper criticizing a previous decision by the Court.

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. [313 *U.S.* at 421].

The Court restated the principle in another matter by noting the existence of "a presumption of honesty and integrity in those serving as adjudicators ... " *Winthrow v. Larkin,* 421 *U.S.* 35, 47, 95 S. *Ct.* 1456, 43 *L. Ed.* 2*d.* 712 (1975).

The Supreme Court of New Jersey has addressed the rigorous standard which must be satisfied before an adjudicator may be disqualified. In *Kramer v. Bd. of Adjustment of Sea Girt,* 45 *N.J.* 268 (1965), applicants for a variance alleged that members of the municipal Board of Adjustment and the governing body had prejudged their application. In particular, they pointed to public statements by the Mayor and a councilman and a newspaper advertisement taken by the Mayor's reelection committee. The court nevertheless refused to order disqualification.

> True, from his so-called "realistic attitude toward the Stockton Hotel," a reasonable mind might be left with little doubt as to where the Mayor's sentiments lay; but it is equally true that the campaign literature, the statements to the press, and all other official statements represent no more than the views of public officials pertaining to a matter of deep moment to the community. [*Id.* at 282].

Kramer is consistent with the holding of the court a decade earlier that an adjudicator is not disqualified merely because he signed the complaint initiating litigation. *Meckler v. Bd. of Ed. of City of Camden,* 16 N.J. 362, 367-69 (1954). *See also Clawans b. Schakat, supra.,* 49 *S.J. Super.* at 419-421.

Our Supreme Court has held that the touchstone for disqualification is proof of actual basis. *Matter of Carberry,* 114 *N.J.* 574 (1989). There the Court stated:

> Independent of the procedures outlined in the Administrative Procedures Act, if an agency head is tainted by actual bias, then he or she should not hear the matter. An agency head, however, does not automatically become partial or unfair merely because that person has become familiar with the facts of the case through the performance of statutory or administrative duties. Nor is disqualification automatically required merely because a decision maker has announced an opinion on a disputed issue. If an interested party has a right to cross examine witnesses and present proof, the mere fact that an administrative agency has conducted an investigation and formulated a policy position does not necessarily mean that the mind of the agency head is closed. [*Id.,* 114 *N.J.* at 585-586] [citations omitted].

As to actual bias the Court stated:

> In this context, actual bias becomes the touchstone of disqualification. The probability of actual bias is grounds for disqualification when the decision-maker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief. *[Id.]*

The Court declined to disqualify the Superintendent of the State Police in *Carberry* finding no evidence of either a pecuniary interest or of a personal vendetta. *Id.*

In responding to citizen correspondence, and in initiating a limited inquiry to obtain the information requisite to responding, the Commissioner was clearly fulfilling the role assigned to him by our State Constitution and Legislature. Contrary to the hyperbole of respondent's brief there was no investigation, *ex parte*, or otherwise. Notably, however, the *Morgan* line of cases would not support recusal or disqualification had there been an investigation. Neither the past nor present Commissioner of Education has a pecuniary interest in the outcome of this litigation nor is there the slightest evidence of a personal vendetta. The mere fact that respondent has sought dismissal on the basis of alleged bias does not create the requisite personal vendetta. Otherwise any litigant could force recusal in every case merely by alleging bias.

Not only is respondent assured of due process in the hearing at OAL, where respondent will have every opportunity to influence the record on which the Commissioner must ultimately rule, but the determination of the Commissioner of Education is not the last word. As the Appellate Division has frequently noted the ultimate administrative decision maker in matters arising under the school laws in the State Board of Education. *See Dore v. Bedminister Township Bd. of Ed.,* 185 *N.J. Super.* 447, 452 (App. Div. 1982).

For the reasons set forth herein it is respectfully submitted that respondent's Motion to Dismiss should and must be denied.

RESPONDENT'S REPLY BRIEF

POINT I

THOSE FACTUAL ALLEGATIONS MADE BY THE NEPTUNE TOWNSHIP BOARD OF EDUCATION IN ITS BRIEF, WHICH ARE NOT SUPPORTED BY AFFIDAVIT OR BY REFERENCE TO DEPOSITION TESTIMONY OR ANY OTHER CREDIBLE SOURCE, SHOULD NOT BE CONSIDERED AS COMPETENT EVIDENCE TO CREATE A TRIABLE ISSUE OF FACT

An administrative tribunal must make a determination based upon a residuum of legal and competent evidence. *Weston v. State,* 60 *N.J.* 36, (1972). While hearsay testimony may be received, it *cannot* form the basis of a determination. *Andricsak v. National Fireproofing Corp.,* 3 *N.J.* 466, 471 (1950); *Borgia v. Board of Review,* 21 *N.J. Super.* 42, 466 (App. Div. 1952).

Respondent's application is for summary judgment dismissing the charges. A party opposing an application for summary judgment cannot successfully resist the application by relying upon conclusory allegation or mere denials in his pleadings. Competent evidentiary material must be presented to resist such an application. *Robbins v. Jersey City,* 23 *N.J.* 229, 241 (1957); *New Jersey Mortgage and Investment Corp. v. Calvetti,* 68 *N.J. Super.* 18, 32 (App. Div. 1961). Mere sworn conclusions of ultimate facts, without material basis or supporting affidavits by persons having *actual* knowledge of the facts, are not sufficient . *James Talcott, Inc.* v. *Shulman,* 82 *N.J. Super.* 438, 443 (App. Div. 1964); *Patrolman's Benev. Ass'n v. Montclair,* 70 *N.J.* 130 (134) (1976).

The brief submitted by the Neptune Township Board of Education (Board) in opposition to the respondent's application to dismiss the charges, repeatedly refers to alleged facts and circumstances which are not supported by affidavit, deposition testimony or any other verifiable credible source.

For example, the Board, on page 7 of its Statement of Facts, refers to media attention allegedly generated by the respondent's remarks over the radio. It claims the respondent's remarks "dominated the Bob Grant Radio Show" over the period of January 31, 1992 to February 12, 1992, and that respondent was the "subject of radio news reports and comments on both New York and New Jersey radio stations" such as the "Don Imus" program, etc. No evidence is presented whatsoever to

document these assertions. Reference is further made to newspaper articles and television news stories. Copies of various articles are annexed to the Board's brief. Their contents are certainly *not* reliable, competent evidence upon which a factual assertion can be based. (Emphasis supplied).

On page 8 of the Board's Statement of Facts, it makes reference to the number of people who attended the Board meeting of February 12, 1992 and that it was televised. The Board goes on to purport what Superintendent Lake allegedly advised the Board prior to the February 12, 1992 meeting. Again these statements are uncertified and not based on any fact established as part of the record.

Additional unsupported factual assertion are contained on pages 21 and 22 of the Board's legal argument. There, the Board indicates that it *"believes"* a copy of the tape recording of respondent's remarks over the radio was given by "Media Monitors" to the president of the NAACP, and a copy also distributed to the press. Again, these statements are uncertified and not supported by any credible evidence.

The statements contained on page 22, paragraph one of the Board's legal argument, as to (1) the number of persons the Board anticipated would attend the February 12, 1992 meeting, and that (2) "The Board believed that a public statement was necessary to respond to the public concern and maintain order at the meeting," again are totally unsubstantiated.

The Board on page 23, line one of its legal argument makes reference to what it was advised during *"closed session."* This is yet another example of a totally unsupported assertion. Again on page 23, paragraph one, reference is made to what allegedly happened during the meeting of February 12, 1992. No evidence is presented to verify this whatsoever.

Finally, the most striking instance of lack of verification is contained on page 23, beginning on line six of the Board's brief. There it is asserted that the "respondent's statements caused a disruption of the education program in the district." In support of this, the Board cites an article in the Asbury Park Press, (Respondent's Exhibit "U"). As previously stated events described in a newspaper article are most certainly *not* competent evidence. Moreover, this allegation directly conflicts with the sworn deposition testimony of Superintendent Michael

Lake himself, who admitted that the district received *no reports of disruption involving students or teachers.*[1] (Emphasis supplied). Nevertheless, even if the newspaper article is considered, nowhere does it indicate there was any disruption to corroborate the assertion made.

These unsubstantiated hearsay statements made by the Board in its brief are not legal and competent evidence and therefore should not be considered as creating a triable issue of fact.

POINT II

THE MERE FACT THAT CERTAIN DEPARTMENT OF EDUCATION PERSONNEL ARE NO LONGER WITH THE DEPARTMENT DOES NOT ELIMINATE THE BIAS THAT CONTINUES THERE, DUE TO THE FACT THAT PERSONNEL AT NUMEROUS AGENCY LEVELS PARTICIPATED IN IMPROPERLY PREJUDGING THE RESPONDENT, AND THEN AGAIN PARTICIPATED IN ATTEMPTING TO JUSTIFY SUCH IMPROPER CONDUCT

The Board argues at Point One of its legal argument that any actual bias against the respondent was cured when Commissioner Ellis recused himself from the case. The fact is, however, that personnel at numerous levels of the Department of Education were involved in either preparing and approving the response to the Bartlett letter or were placed in the position of having to justify the contents of that response. The precedential impact of the communication of March 6, 1992 (respondent's Exhibit "K") and the attempt to justify it has created a biased atmosphere permeating the Department which has so tainted the proceedings as to require the dismissal of the charges.

Despite the citation by the Board in its brief to *Matter of Carberry,* 114 *N.J.* 574 (1989), it nowhere addresses the holding in *Carberry* that an adjudicator may be disqualified when that adjudicator has been the target of personal abuse or criticism from the party before him. *Id.* at 586. The Board fails to respond or refute the fact

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1. See January 7, 1993 deposition testimony of Michael Lake, pages 19, line 13 through 20, line 9.

that the Department of Education and the Commissioner have been the subject of just criticism by the respondent and others as a result of improperly prejudging respondent's case.[2] Nor does it address the fact that the Bureau of Controversies and Disputes, the Office of the Deputy Commissioner and the Office of the Commissioner have all become involved in attempting to justify those actions. This constitutes impermissible bias under *Carberry, supra.,* and inasmuch as that bias now pervades the Department, the charges against the respondent should be dismissed.

POINT III

THE ARGUMENT ADVANCED BY THE NEPTUNE TOWNSHIP BOARD OF EDUCATION THAT IT BELIEVED THE "PUBLIC STATEMENT" WAS NECESSARY TO RESPOND TO "PUBLIC CONCERN" AND TO "MAINTAIN ORDER" IS UNSUPPORTED BY THE RECORD, AND NO EXCUSE FOR VIOLATING THE RIGHT OF THE RESPONDENT TO AN UNBIASED, FAIR AND IMPARTIAL HEARING.

The Board, at Point Two, page 22 of its brief, argues that it "believed" that it was necessary at the Board meeting of February 12, 1992, to issue the "Public Statement"[3] *condemning* the respondent, so as to respond to "public concern and to "maintain order." (Emphasis supplied.) Once again the Board provides no evidence whatsoever to corroborate these assertions. In fact, the testimony of Superintendent Michael Lake, at his deposition, directly contradicts this in that he admits that the district received *no* reports of disruption involving teachers or students. Moreover, it is obvious that the typewritten statement was prepared prior to the actual meeting so that it could be read and posted for all to consider. No explanation is offered by the Board how it knew, prior to the meeting, that it would be necessary to issue the statement.

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[2] See Point II of respondent's initial brief.

[3] Exhibit "H" attached to respondent's brief.

What is important about the "Public Statement" and what the Board fails to address in its argument is that this statement is *direct* evidence of bias and predisposition on the part of the Board against the respondent at a time when he had not even been served with the charges, or given an opportunity to reply to them as required by *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1 (b) (c). (Emphasis supplied.) In *Staton v. Mayes,* 552 *F.* 2*d.* 908 (10th Cir.) cert. denied, 434 *U.S.* 907 (1977), findings announced by Board members in advance have been held to constitute *impermissible bias.* (Emphasis supplied). In *Staton, supra,* a Superintendent was discharged by a local board for neglect of duty and incompetence. In reviewing the matter, the Court found impermissible prejudgment where three out of five Board members had made prior statements about the Superintendent's competence. In fact, one Board member campaigned on the issue.

In addition, the Board fails to address its violation of *N.J.A.C.* 6:24-5.1 (b) (7) by deliberating the charges at a public meeting rather than a closed meeting.

These actions on the part of the Board deprived the respondent of procedural and substantive due process. *Goldberg v. Kelly,* 397 *U.S.* 254 (1970); *Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., etc.,* 187 *N.J. Super.* 426, 430 (App. Div. 1981). As a result, the charges against the respondent should be dismissed.

POINT IV

THE NEPTUNE TOWNSHIP BOARD OF EDUCATION MAY NOT USE VAGUE, STALE AND PREVIOUSLY EXPUNGED INCIDENTS TO ESTABLISH WHAT IT CLAIMS TO BE A CONTINUOUS COURSE OF CONDUCT ON THE PART OF THE RESPONDENT, UNBECOMING OF A TEACHER

The Board, at Point Three, page 26 of its brief cites *In Re Tenure Hearing of David Brody, Elmwood Park, supra.,* and argues that the additional charges, which are unrelated to the statements made on the radio, may be considered in attempting to establish a continuing course of conduct unbecoming a teacher. The *Brody* case is not on point. David Brody, a teacher was formally charged in May and June of 1982 and found guilty of conduct unbecoming a teacher. Brody had previously been disciplined by the Commissioner in two prior disciplinary matters after plenary hearings were conducted. Upon being found guilty a third time, the Commissioner of Education in determining the appropriate penalty to be imposed,

considered the fact that Brody had been adjudicated guilty and disciplined twice before, Based on this, it was determined that Brody should be dismissed from his employment.

The Commissioner's decision to consider Brody's past record was *only* in connection with determining what penalty should be imposed upon him. (Emphasis supplied). This is not the situation in the case at bar. Unlike *Brody,* the Board has charged the respondent with a number of unrelated incidents which, for the most part, were resolved years ago or which are vague and stale.[4] Superintendent Lake has admitted that the Board had not even considered filing charges with respect to these incidents prior to respondent making the statements over the radio. This is not the penalty phase of the litigation where there has been an adjudication of guilt. Respondent has never been involved in a tenure hearing before and, in fact, had never been charged. *Brody, supra.,* certainly does not sanction proceeding in such a manner. Nor does it refute respondent's arguments for dismissal.

Moreover, respondent is unduly prejudiced in being placed in the position of defending such charges which are old and stale, making respondent's ability to obtain discovery through witnesses and documents extremely limited.

Charges 1B and 1E were expunged from the respondent's file on May 22, 1981. (See Exhibit "J" attached to respondent's brief.) The Board argues at page 26 of Point Three of its brief, "There are no statutory or regulatory provisions for the expungement of disciplinary proceedings from a teaching staff member's personnel file." What the Board fails to mention, however, is that there *is* no statutory or regulatory provision which prohibits this, and in fact, it has been sanctioned by case law. In *Lacey Twp. Bd. v. Lacey Twp. Educ.,* 259 *N.J. Super.* 397, 399 (App. Div. 1991),

[4] See respondent's initial brief at Point V, beginning at page 28. Charges 1B and 1E, were *expunged* from respondent's file. Charge 1A is based on the deposition of Thomas Marshall and statement allegedly made by respondent sometime prior to 1981. Charge 1C was fully investigated and resolved over 7 years ago. The findings were different than the charge implies. Charge 1D was fully investigated and respondent was never disciplined. The finding was that alleged racially biased statements could not proven and it was "suggested" that respondent be more careful in what he says. Charge 1G and I H are likewise vague and not specifically defined.

the Appellate Division found that an arbitrator's award directing that a teacher's records be expunged, *was* a proper remedy which did *not* substantially interfere with a school administration's management prerogatives. (Emphasis supplied). Thus, the remedy of expungement *did not* violate any statutory policy. Accordingly, the fact that in the instant case, the Board *agreed* to expunge the respondent's file with respect to incidents 1B and 1E, is just as enforceable as an arbitrator's decision. (Emphasis added). For this reason alone, the charges should be dismissed. Additionally, as with the other charges, the fact that they are almost thirteen (13) years old unfairly prejudices the respondent's ability to defend them.

Importantly, should it be found that the statements made by the respondent on the radio call in program (Charge 1F) were protected free speech, then all of the remaining unrelated charges must be dismissed. The Board has admitted that it would *not have* reached the same decision to certify tenure charges against the respondent absent such statements made over the radio. (Emphasis supplied). Superintendent Lake admitted at his deposition that "but for" the statements made on the radio, the Board would not have taken any action against respondent. Where it cannot be established the Board would have reached the same decision to terminate the respondent *absent* what is found to be constitutionally protected conduct, the remaining charges must also fail. (Emphasis supplied). *Mount Healthy City School Dist. Bd. of Ed. v. Doyle,* 429 *U.S.* 274, 287 (1977); *Boundbrook Board of Education v. Trautwein,* Commissioner's Decision, January 13, 1984; 1984 *S.L.D.* 35.

POINT V

THE BOARD HAS *FAILED* TO ARTICULATE ONE VALID REASON WHY THE STATEMENTS MADE BY THE RESPONDENT, ON A PUBLIC FORUM, CALL IN RADIO PROGRAM WERE NOT AN EXERCISE OF FREE SPEECH PROTECTED UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

There is no question that should the respondent's statements be characterized as an exercise of protected free speech, then those statements cannot be used as a basis to discipline him. *Perry v. Sinderman,* 408 *U.S.* 593, 598 (1972). Furthermore, if the remaining charges would not have been instituted "but for" the exercise of protected free speech then those charges also must be dismissed. *Mount Healthy City School District Board of Education v. Doyle,* 429 *U.S.* 287 (1977). *Boundbrook*

Board of Education v. Trautwein, Commissioner's Decision, January 13, 1984; 1984 *S.L.D.* 35.

The Board argues at Point Four, page 32, of its brief, citing *Connick v. Meyers,* 461 *U.S.* 138 (1983) that the statements made by the respondent did not constitute matters of "public concern" under the first prong of the analysis outlined in *Pickering v Board of Education,* 391 *U.S.* 536, (1968) and, therefore, they were unprotected. *Connick v. Meyers, supra.,* is clearly distinguishable. In *Connick,* the Supreme Court outlined the difference between statements concerning matters of public concern which are protected, and statements expressing purely personal interests, which are not. In *Connick,* a deputy attorney general was discharged after she distributed what her employer felt was an improper questionnaire to her fellow employee. The Court in *Connick,* after examining the "content" form and "context" in which the document was prepared, found that the portion of the questionnaire which pertained to office transfer policy, office morale, the need for a grievance committee and the level of confidence employees had in supervisors, did not relate to a political, social or other concern of the community. It was instead the product of a *purely personal* interest the assistant district attorney had in gathering support to oppose a directive of her employer that she be transferred to another department. Accordingly, the Court found this expression of a purely personal interest was not protected. The only other case cited by the Board in support of its position, *Stroman v. Collection County School District,* No. 92-1340, (4th Cir., December 1992) had to do with statements made by a teacher in connection with a salary dispute which encouraged a sick-out. Obviously, this also was a personal grievance.

The statements made by the respondent certainly do not fall within the category of the expression of a purely personal interest. Respondent questioned whether it was appropriate for him to teach *African Literature* in an *American Literature* class during Black History Month. (Emphasis supplied) This was a curriculum issue. Issues of curriculum, *i.e.,* what should be taught in schools and how it should be taught, are matters of concern to the public who have an interest in the manner in which their children are education and how taxpayers' money is spent in the education process.

The argument raised by the Board ignores the Supreme Court's finding in *Pickering, supra.* There, Marvin L. Pickering, a teacher in a letter to a newspaper, criticized school board policy in promoting funding for athletic programs over

educational programs. This was a curriculum issue, which was held to constitute a matter of legitimate public concern and was thus protected. *Id.* at 539. The respondent Clark's statements are no different and are entitled to the same protections.

Noticeably, the Board fails to address the numerous cases cited by respondent in his original brief on pages 34 through 36. In particular, no reference whatsoever is made to the most recent case of *Levin v. Harleston,* 770 *F. Supp.* 895, (*S.D.N.Y.* 1991), affirmed in part, vacated in part, 966 *F. 2d.* 85 (2nd Cir., 1992) where it was specifically held that a professor's expressions of racially denigrating theories outside the classroom *were* matters of public concern and thus constituted free speech subject to First Amendment protections and safeguards. Accordingly, even if respondent's statements were to be characterized as such, this does not limit the protection afforded to them.

The Board also argues that under the balancing test established in *Pickering, supra.,* should respondent's statements be found to be a matter of public concern, then the interest of the Board in suppressing such statements outweighed the respondent's right under the First Amendment to freedom of expression. The Board recognizes on page 30 of its brief, that in order to prevail on this point, it must make a strong showing that disruption resulted from the speech. The criterion which has actually been established by the Third Circuit is that in order for the interest of the public employer to outweigh the protections afforded by the First Amendment, the employer must show that a *material and substantial disruption of the public enterprise actually resulted.* (Emphasis supplied) *Zamboni v. Stamler,* 847 *F. 2d.* 73, 70 (3d. Cir., 1988). Even then, however, depending on the content of the speech, this may still *not* be sufficient. (Emphasis supplied). *Id.* at 79.

In the instant case, Superintendent Lake testified that he had received *no reports of disruption involving student or teachers* (Emphasis supplied). He testified that the reason for taking action against the respondent was because he thought that if he did not, it "could lead to some very difficult times at the school setting." In its brief, the Board fails to cite any competent evidence whatsoever that the statements made by the respondent caused a material disruption of the education process in the district. Noticeably, the Board fails to mention the sworn statement of the Superintendent that no such disruption occurred. Instead the Board relies upon a newspaper article (Exhibit "U") which is clearly not competent evidence. Moreover, even if the article were to be considered, there is no indication in it that

the functions of the educational process in the district were impeded in anyway. The mere possibility of a "difficulty" is not evidence of a material or substantial disruption under *Zamboni, supra,* at 799. The Board has failed in sustaining its burden of proof and therefore the argument that its interest outweighed respondent's right to freedom of expression is without merit.

The Board also cites alleged inaccuracies in the statements made by the respondent and implies that these inaccuracies present a basis for denying him the protections afforded by the First Amendment. The Board cites, in its brief on page 32, *Pickering, supra.,* and claims that, in order to be entitled to First Amendment protection, respondent's statements were required to be "substantially correct." This is *not* what the Supreme Court held in *Pickering.* In fact, the Supreme Court found that four (4) of the statements made by Pickering to the newspaper were false. The Court, nevertheless, found that the statements were the result of "carelessness" or "insufficient information," and the Board had presented no evidence to satisfy its burden to demonstrate that they were made in *deliberate or reckless disregard of the truth.* (Emphasis supplied) *Id.* at 572. Furthermore, the statements were not of such a nature as to be taken seriously and in fact could easily have been corrected by the Board, had it chosen to do so. *Id.* at 571.

Accordingly, therefore, even if the statements made by the respondent in the instant case were not accurate, the Neptune Board has presented *no* evidence whatsoever to meet its burden of proof to establish that they were made in deliberate disregard of the truth, *i.e.,* with malice or in reckless disregard of the truth. (Emphasis supplied) Moreover, whether the respondent may have been questioned by a teacher rather than an administrator about what he was to teach, or whether he saw the banner in his classroom, or heard about it, or saw it in another classroom is insignificant and of no consequence.

The statements made by the respondent over the radio were protected free speech under the First Amendment of the United States Constitution. The Board has presented no evidence whatsoever to justify the abridgement of those rights and accordingly the charges filed against the respondent, all admittedly initiated as a result of his statements made on the radio, must be dismissed. *Mount Healthy City School District Board of Education v. Doyle,* 429 *U.S.* 274, 287 (1977).

POINT VI

THE FACT THAT THE BOARD PROVIDED THE RESPONDENT WITH DISCOVERY AFTER THE CHARGES HAD BEEN CERTIFIED TO THE COMMISSIONER OF EDUCATION, DOES NOT CURE THE CONSTITUTIONAL INFIRMITIES RESULTING FROM THE EX PARTE INVESTIGATORY PROCESS, AND THE FACT THAT THE INFORMATION OBTAINED IN THAT PROCESS WAS NOT MADE AVAILABLE TO THE RESPONDENT, PRIOR TO THE BOARD CONSIDERING THE CHARGES AGAINST HIM

The Board argues in Point Five of its brief that, although it did obtain detailed statements from various individuals, transcripts of the statements were not prepared until after the March 11, 1992 Board meeting. Consequently, since the Board did not have the transcripts, it could not be said that this information was used in making its determination at the meeting to certify the charges to the Commissioner of Education. Assuming that the Board did not have the transcripts, the fact of the matter is, that Superintendent Lake participated in the investigatory process and had first hand knowledge of the information which had been obtained from the numerous witnesses which were contacted. The Board in making its determination relied upon the information provided by Superintendent Lake and his recommendation. There is no question that this information was considered by him in making his recommendation as to the sufficiency of the charges. There is no reason why the Board hearing could not have been scheduled after the information had been obtained in written form and provided to respondent as required by *N.J.S.A.* 18A:6-11 so that he could have had an opportunity to reply. In the alternative, respondent could have been given an opportunity to participate in the investigatory process. However, he was denied this opportunity. The fact that the witness statements were given to the respondent, after the charges were certified, in no way cures the resulting denial of the respondent's right to procedural and substantive due process before the Board. Accordingly, on this basis the charges should be dismissed.[5]

[5] The Board has continued to conduct an *ex parte* investigation to the exclusion of the respondent. Evidence of this is the sworn statement of Michael Mixson, (Exhibit "P" attached to the Board's brief) allegedly taken February 1, 1993. Respondent was not given the opportunity to be present or participate in this proceeding.

POINT VII

THE MERE FACT THAT THE DETERMINATION MADE BY THE APPEALS TRIBUNAL WAS PURSUANT TO THE PROVISIONS OF *N.J.S.A.* 43:21-1 *ET SEQ.* AND JURISDICTION UNDER THE PRESENT CASE IS PREMISED UNDER *N.J.S.A.* 18A:6-1 *ET SEQ.* , DOES NOT MEAN THAT RES JUDICATA AND COLLATERAL ESTOPPEL SHOULD NOT APPLY TO PREVENT THE BOARD FROM RE-LITIGATING THE SAME FACTS AND ISSUES WITH RESPECT TO THE PROPRIETY OF THE RESPONDENT'S CONDUCT

The Board *incorrectly* argues at Point Six of its brief, that because the Appeals Tribunal made its determination under a different statutory provisions than that under which the instant cases is premised, issue preclusion should not be applied to prevent the Board from re-litigating the propriety of the respondent's conduct. In *City of Hackensack v. Winner,* 162 *N.J. Super.* 1, (App. Div, 1978), affirmed as modified 82 *N.J.* 1 (1980), the Court found that the mere fact the Public Employment Relations Commission (PERC) functioned under one statute and civil service functioned under another did *not* prevent the application of issue preclusion, where each agency had jurisdiction, the facts presented and determined were the same, each party was given a full opportunity to participate and did participate, each party was represented by counsel, and the proofs were not restricted. *City Of Hackensack v. Winner, supra.* 82 *N.J.* 38, *N.J. Super. 30.*

In the instant case, the Appeals Tribunal clearly had jurisdiction to determine whether respondent was entitled to unemployment compensation. In finding eligibility, a full hearing was conducted at which time both parties were represented by counsel and participated. The proofs were not restricted in any way. The Appeals Tribunal rendered a decision holding that respondent had *not* engaged in "misconduct connected with work." "Misconduct connected with work" was specifically defined on page three of the decision (Exhibit "AA") as:

> ...a deliberate act or omission by the worker which constitutes a material breach of his duties and obligations arising out of the contract of employment, or an act or course of conduct in violation of the worker's duties, which is tantamount to an intentional disregard of the employer's interests.

The tribunal found, on page 3, paragraph 7 of the decision that "The evidence presented at this hearing does not show that the claimant's phone call to the radio station was a willful act in disregard of the employers best interest ..."

Under *N.J.S.A.* 18A:6-10, "conduct unbecoming a teacher" is not specifically defined, however, it has been held to be determined by the common understanding of the term, the touchstone of which is "fitness to discharge the duties and function's of one's office or position." *Laba v. Newark Board of Education,* 23 *N.J.* 364, 384 (1957); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 29, (App. Div. 1974). Obviously, if the respondent's conduct was not in disregard of his employer's interest, it could not be said to be unbecoming conduct adversely impacting his fitness to discharge his prescribed duties. The administrative law judge is not being called upon to make any different a determination as that which was made by the Appeals Tribunal, although each decision clearly has different consequences. The facts upon which the determination of the Appeals Tribunal was based are the same as the case at bar. The Board is bound by those findings, having chosen not to appeal them. It cannot now re-litigate the same issues.

RESPONDENT'S REPLY TO INTERVENOR

POINT I

THE *FACTUAL* DETERMINATION MADE BY THE DEPARTMENT OF EDUCATION, PRIOR TO CERTIFICATION OR EVEN CONSIDERATION OF THE CHARGES BY THE BOARD, AND BASED UPON THE *EX PARTE* OPINIONS EXPRESSED BY THE CHARGING PARTY, SO PREJUDICED THE RESPONDENT'S DUE PROCESS RIGHTS THAT THE CHARGES SHOULD BE DISMISSED

The provisions of the Tenure Employees hearing Law, *N.J.S.A.* 18A:6 *et seq.* were enacted for a purpose, namely to provide a procedure by which tenure matters are to be heard and to preserve the individual constitutional rights of those charged under the law. *In re Fulcomer,* 93 *Super.* 404 (App. Div. 1967); *Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., etc.* 187 *N.J. Super.* 426, 420 (App. Div. 1981).

The position espoused by the Intervenor in its brief not only ignores these statutory provisions but disregards the basic constitutional rights of the respondent with respect to the hearing process.[1] *Goldberg v. Kelly,* 397 *U.S.* 254 (1970).

In support of the Intervenor's position, counsel cites the case of the *Federal Trade Comm'n v. Cement Institute,* 333 *U.S.* 683 (1947). This case is clearly distinguishable as are the other cases cited by the Intervenor.

In *Federal Trade Comm'n v. Cement Institute, supra,* the Court found that where individual commission members had previously investigated and expressed an opinion as to the *legality* of a pricing system, they were not disqualified from examining the propriety of the Cement Institute's particular pricing practices. *Id.* at 700-701. The difference between *Cement Institute* and the instant case is clear. First, in the *Cement Institute* case, the opinions expressed dealt with the law and policy, whereas the statements made by the Department of Education in the instant case, were *findings of fact* as to the propriety of the respondent's conduct, indicating that the Department had a "closed mind" with respect to the actions of the respondent. (Emphasis supplied) Second, the Department's findings were not based upon the investigation of the agency itself, but were based upon opinions received from the charging party, *i.e.,* the Neptune Board of Education. Thus, the Department of Education made clear that regardless of respondent's position, the charging party's position was to be adopted. Third, the respondent was given no opportunity to participate or present his position prior to the Department of Education making such a determination. Fourth, and finally, the findings made do not indicate a mere expression of opinion but that the Department of Education had investigated the matter and made a decision as to respondent's conduct.

Where a fact finder has rendered a fixed opinion regarding a party to the procedures, there is bias. This is especially true where the bias is expressed publicly. *In Staton v. Mayes,* 552 *F. 2d.* 908 (10th Cir.) cert. denied, 434 *U.S.* 907 (1977) a Superintendent was discharged by a local Board for neglect of duty and incompetence. In reviewing the matter the Court, emphasizing that *factual* issues

[1] Obviously had the Department of Education believed that there had been no impropriety, or an appearance of impropriety, the Commissioner would not have recused himself from further participation in the matter.

were involved, found impermissible prejudgment where three out of five Board members had made statements on the subject of the Superintendent's competence, including one Board member who campaigned on the issue. (Emphasis supplied). In *American Cynamid Co. v. FTC,* 363 *F. 2d.* 757 (6th Cir. 1966) an order of the Federal Trade Commission was reversed where a Commissioner of the Federal Trade Commission participated in antitrust proceedings against American Cynamid Co. despite the fact that he had previously served as counsel to an investigatory committee on the drug industry, played an active role as counsel investigation many of the same facts and issues which he subsequently considered as a member of the Commission prior to entering the order, and who, while serving as counsel for the investigatory committee, made statements condemning American Cynamid for unfair trade practices and helped draft a committee report critical of the company. (Emphasis supplied).

In the instant case, a determination regarding the propriety of respondent's conduct was made at *various levels* of the Department of Education, as the Bartlett letter and the Department's prepared response was approved and made its way to the Commissioner's office from the Offices of the Assistant Commissioner who in turn received it from the County Superintendent Hughes. (Emphasis supplied). The respondent had no opportunity to confront the charges or present his side of things. The Department made a determination at a time when it was not its role or duty to do so. The finding was then announced publicly by the Commissioner in his letter of March 6, 1992. (Exhibit "K"to respondent's brief). The involvement of the Department did not end here however. Thereafter, upon receipt of the respondent's answer to the charges, additional levels of the Department were placed in the untenable position of attempting to justify the opinions expressed. As the deposition testimony shows, the Bureau of Controversies and Disputes prepared the correspondence of April 10, 1992, (respondent's Exhibit"T"), which was forwarded to Deputy Commissioner Bryant for review and approval and finally to the Office of Commissioner. A further communication dated April 21, 1992, (respondent's Exhibit "Z") from the Bureau of Controversies and Disputes was prepared in an attempt to explain the Department's actions. As a result a biased atmosphere now exists, pervading the Department, which has so tainted the proceedings as to require the dismissal of the charges.

The intervenor also cites *U.S. v. Morgan,* 313 *U.S.* 409 (1940). There, the Supreme Court after considering the matter on four different occasions, found that due process required that an administrative agency decision-maker must be familiar

with the record prior to making a ruling, and that the parties affected by such a determination must be informed as to the nature of the proceedings and be given an opportunity to participate. Of course, respondent was afforded none of this prior to the Department of Education making its determination as contained in the letter of March 6, 1992. (Respondent's Exhibit "K") Intervenor now argues that respondent will have this opportunity before the Office of Administrative Law. However, this argument ignores the impact of the letter on the decision making process. The fact of the matter is that the case will once again come before the Department of Education for review. The initial finding not only has precedential impact as coming from the Commissioner and his office, but as previously stated, there was participation at numerous other agency levels. Moreover, the Bureau of Controversies and Disputes, which will now sit in judgment of the respondent should the matter be permitted to follow its normal course, became involved in having to justify the actions of the Department. The mere fact that certain agency personnel are no longer with the Department of Education, as alleged by intervenor, does not eliminate the bias due to the previous participation not just at the level of the Commissioner but at the various other agency levels. The bias existing as a result of the findings made cannot be cured and, therefore, the charges must be dismissed.

The intervenor points to *U.S. v. Morgan, supra.,* and the Court's refusal to disqualify the Secretary of Agriculture because of a letter written by him criticizing a prior decision by the Court in a previous *Morgan* case. Again, as with the *Federal Trade Commission v. Cement Institute, supra.,* the fact that an administrative head may take a position on a particular aspect of the law is not objectionable. However, where, as here, a determination of the facts has been made without a hearing and where the decision maker has accepted the *ex parte* findings of the charging party, there is a violation of due process which cannot be cured. *Goldberg v. Kelly,* 397 *U.S.* 254 (1970); *In re Murchison,* 349 *U.S.* 133 (1955).

The intervenor also cites the *Morgan* line of cases for the proposition that an *ex parte* investigation by an administrative agency does not prohibit it from subsequently determining the matter. However, in the instant case, as previously stated, the Department went beyond the mere investigation of the matter by making a finding of fact that the respondent had acted inappropriately. This was based solely on information received from the charging party. This kind of conduct was certainly not approved by the Court in *Morgan.*

The respondent cites *Winthrow v. Larken,* 421 *U.S.* 35 (1975) in support of its position. In *Winthrow, supra.,* the Supreme Court found that an agency charged with an investigatory function can make a mere probable cause determination especially where the party accused of the alleged improper conduct has an opportunity to participate and present defenses. As set forth in respondent's initial brief, when tenure charges are certified to the Department of Education, such a probable cause finding is made pursuant to statute. However, in the instant case, the Department of Education made an actual finding of fact before even receiving the charges. Moreover, the statements made went far beyond a mere finding of "probable cause" but found guilt. This action coupled with the blind acceptance of the position adopted by the charging party irrevocably violated the respondent's due process rights.

As the consequence of the actions of the Department of Education the respondent's rights have been irrevocably prejudiced and therefore the proceedings must be dismissed.

POINT II

THE RESPONDENT HAS ESTABLISHED BIAS AND PREJUDICE AGAINST HIM BY THE DEPARTMENT OF EDUCATION WHICH CANNOT BE CURED, ACCORDINGLY, THE CHARGES MUST BE DISMISSED

The intervenor cites *Matter of Carberry,* 114 *N.J.* 574 (1989) in support of its position that there has been no showing of actual bias and, therefore, the charges should not be dismissed. Importantly, however, the intervenor fails to adequately address that portion of *Carberry* which provides for disqualification particularly where the adjudicator "has been the target of personal abuse or criticism from the party before him." *Id.* at 586. As set forth in respondent's initial brief at Point II, page 22, such has been the case here. Criticism has been levied at the Department of Education by the respondent and others, (See Exhibit "U" and Exhibit "Y" attached to Respondent's initial brief). The response to this just criticism is contained in the Commissioner's letter of April 10, 1992, (Respondent's Exhibit "T") whereby he recused himself and in the subsequent letter of April 21, 1992, (Respondent's

Exhibit "Z") from the Director of the Bureau of Controversies and Disputes which attempts to justify the actions of the Department with respect to the Bartlett letter. Thus, the Department has been the subject of criticism for its actions which the Bureau of Controversies and Disputes and other levels of the agency have been compelled to attempt to justify. This indicates impermissible bias which cannot now be cured.[2.]

DISCUSSION

The first issue to be addressed is whether the Department of Education and/or the Commissioner may decide the instant matter subsequent to an initial decision by the OAL or, whether the herein matter should be dismissed on the grounds of bias, prejudice and a violation of respondent's rights to due process. Respondent's arguments, set forth in great detail, will not be repeated here.

Respondent complains, among other things, that the Department of Education personnel, the Commissioner in particular, prejudged the charge against him to the extent that his due process rights were violated. It is observed, however, that the principal Department of Education personnel whom respondent claims prejudiced his due process rights are no longer in office. Commissioner Ellis', Deputy Commissioner Woodbury, Assistant Commissioner Mitchell and County Superintendent Hughes have all resigned or retired. The present Department of Education personnel, with the exception of Bureau Director Keller, have had no involvement with the instant matter. The present Commissioner, Leo Klagholz, is, in fact, twice removed from the certification of charges against respondent, *i.e.*, Commissioner Fitzgerald replaced Commissioner Ellis and Commissioner Klagholz having replaced Commissioner Fitzgerald. Thus, Commissioner Klagholz nor his immediate subordinates have engaged in an y activity with respect to the Board's tenure charges against respondent, nor respondent's defenses.

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2. The intervenor's brief represents yet another attempt to justify the actions of the Department in response to the criticisms raised. This is further evidence of bias.

Respondent's fear that Bureau Director Keller will have an undue influence on the Commissioner's decision in the instant matter is unfounded. Pursuant to his obligation under *N.J.S.A.* 52:14B-10 (c) the Commissioner is required to review the herein record and "shall adopt, reject or modify the recommended report and decision ..." The Commissioner's final decision must be based upon the herein record presented, under *N.J.S.A.* 52:14B-10 (d). Thus, in his role as decision maker, the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -21, requires the Commissioner to conduct an independent review of the matter *sub judice.* In the event, respondent is uncomfortable with this, he may rest assured that the ultimate administrative decision maker for controversies arising under school law is the State Board of Education. *Dore v. Board of Education of Bedminister Township,* 185 *N.J. Super.* 447, 449 (App. Div. 1982).

I **CONCLUDE,** therefore that Commissioner Klagholz is the proper person to review and determine the instant matter under *N.J.S.A.* 52:14B-10.

Accordingly, respondent's Motion to Dismiss the herein matter on these grounds is hereby **DENIED.**

It is first noted that the instant matter concerns a question of the First Amendment of the United States Constitution and the protected rights of free speech. It has been established that the Commissioner's jurisdiction extends to matters involving constitutional issues so long as the issues advanced to him are not novel in nature and have already been adjudicated by a court of competent jurisdiction. *In the Matter of the Tenure Hearing of Thomas Sciarrillo, School District of the City of Garfield, Bergen County,* 197, 202 *S.L.D.* 1977; *Frank Schultz, et al v. Board of Education of the Township of Teaneck, Bergen County,* 86 *N.J. Super.* 29. (App. Div. 1964). The instant matter is similar, in many respects to the matter in *Jeffries v. Harleston,* 828 *F. Supp.* 1066 (S.D. N.Y. 1993).

In *Jeffries,* Professor Leonard Jeffries was Chairman of the Black Studies Department, City College, City University of New York. The position of Chairman is an elected one and on June 6, 1991, Professor Jeffries was reelected for a three year term by the faculty of the Black Studies Department. On July 1, 1991, Bernard Harleston, President of City College, sent a letter of congratulations to Professor Jeffries upon his reelection as Department Chairman. On July 20, 1991, Professor Jeffries made a speech before the Empire State Black Arts and Cultural Festival in

which he "...made strident attacks against particular individuals, and made derogatory comments about specific ethnic groups." 828 *F. Supp.* at 1073. President Harleston characterized the speech as containing "clear statements of bigotry and anti-semitism." *Id.* at 1073.

Professor Jeffries' speech caused an outcry of protest and was condemned both within and without the University. On August 8, 1991, Present Harleston addressed a letter to his City College colleagues attacking the speech and assuring a thorough review of the situation. Letters and memoranda of the administration of the College and University suggested possible actions that might be taken against Professor Jeffries, including his removal as chairman of the Black Studies Department. On September 12, 1991, President Harleston requested that Provost Robert Pfeffer:

> ...undertake a review of Dr. Leonard Jeffries' leadership of Black Studies Department to determine whether Dr. Jeffries can continue to act effectively as department administrator ... *Id.* at 1074

Provost Pfeffer and President Harleston requested Jeffrey Rosen, Dean of the Division of Social Sciences, to observe and evaluate Professor Jeffries performance. On September 19, 1991, Dean Rosen addressed a memorandum to Provost Pfeffer in which Dean Rosen found that Professor Jeffries was adequately fulfilling his duties as Chairman of the Black Studies Department. A subsequent report from Dean Rosen, dated October 2, 1991, described his interaction with Professor Jeffries as productive and collegial. On October 4, 1991, Provost Pfeffer submitted his review of Professor Jeffries' performance and found, among other things, that Professor Jeffries performance had not suffered as a result of the speech or publicity surrounding it.

District Judge Conboy, in *Jeffries,* admonished President Harleston for his imprecise attempt to define Provost Pfeffer's task to determine whether Professor Jeffries leadership as a college chairman had been compromised as a consequence of Jeffries' speech and whether the College had been injured by the impact of the speech. District Judge Conboy contended that Provost Pfeffer should have broadened his focus and performed a more systematic analysis of Professor Jeffries performance by addressing three critical issues which he chose to ignore; *e.g.,* (1) whether Professor Jeffries could effectively interact as Chairman with faculty members and specifically Jewish faculty members; (2) whether the racist and bigoted nature of Professor Jeffries remarks would stigmatize and isolate the Black Studies'

Department and make it a parochial backwater of the College, and; (3) whether the college's alumni would withdraw their financial support in light of the professional embarrassment Professor Jeffries represented as a formal leader of the College administration.

Despite the positive review of Professor Jeffries by Provost Pfeffer, President Harleston recommended to the Chancellor and the Board of Trustees of the University that Professor Jeffries' term as Chair be limited to one year rather than the customary three year term. On October 28, 1991, the Board of Trustees adopted President Harleston's recommendation. On October 29, 1991, President Harleston sent a letter to Professor Jeffries advising him of the action.

During the months of October and November 1991, Professor Jeffries was involved in two incidents which raised concern within the University administration. The first incident occurred on October 18, 1991, with a student newspaper reporter from the *Harvard Crimson* who interviewed Jeffries. The student tape recorded the interview during which Professor Jeffries made disparaging remarks about other scholars in the field of African-American Studies as well as homosexuals. Professor Jeffries called Henry Louis Gates, Chair of the African-American Studies Department at Harvard University, " a faggot and a punk." *Id.* at 1076, n.8. Also, Jeffries threatened to "kill" the student reporter if the content of the interview ever became public. Professor Jeffries confiscated the tapes made by the student reporter at the conclusion of the interview. The tapes were never returned to the Harvard student reporter.

The second incident occurred at the end of October 1991, when Professor Jeffries learned from a student that Professor Morris Silver was alleged to have said that the Black Studies Department was to be investigated. Professor Jeffries, in response, wrote to Dean Rosen to declare "war" on the faculty. Also, on October 31, 1991, Professor Jeffries went to an Economics student-faculty luncheon and exchanged "intense words" with Professor Silver. *Id.* at 1076.

The third incident occurred on November 12, 1991, at a meeting with Professor Jeffries, Provost Pfeffer and Dean Rosen where the Provost and Dean urged Jeffries to voluntarily relinquish the position of Chair of the Black Studies Department. Professor Jeffries became angry ad threatened to turn City College into "Crown Heights." *Id.* at 1076.

The fourth incident occurred on November 15, 1991, when Professor Jeffries confronted President Harleston in the lobby of the administration building as Harleston was leaving for an appointment. Professor Jeffries was angry and became hostile over negative comments Present Harleston had made on a television program about Jeffries.

The University administration continued to review Professor Jeffries' performance as a Chair of the Black Studies Department from the Pfeffer report, on October 4, 1991 until the Spring of 1992. The reviews became increasingly negative and in December 1991, Present Harleston, Provost Pfeffer and Dean Rosen agreed that Professor Jeffries should be replaced as Chairman. There were no written records or documents to support the decision.

On March 20, 1992, President Harleston and Provost Pfeffer met with the Black Studies Department faculty to advise that Harleston would recommend to the Board of Trustees that Professor Edmond Gordon be named as the new Chairperson. The reaction of the faculty was extremely negative. On the same day, March 20, 1992, the Executive Committee of the Black Studies Department together with the Department's full-time faculty sent a memorandum to President Harleston protesting the actions of the Board of Trustees to limit Professor Jeffries' term as Chairman without consulting the Department.

On March 23, 1992, the Board of Trustees voted to appoint Professor Gordon to the position of Chairman upon expiration of Jeffries' one year term, effective July 1, 1992. No reasons were given for the Board's actions.

On June 5, 1992, Professor Jeffries commenced his action alleging that defendants' denial of his full three year term as Chairman of the Black Studies Department had violated his rights under the First and Fourteenth Amendments to the United States Constitution. The trial was conducted from April 22, 1993 to May 18, 1993, where the Court found the defendants had violated Professor Jeffries First Amendment rights. The Court set aside the jury verdict based upon the Fourteenth Amendment claim.

In the opening of his opinion, District Judge Conboy said:

> A federal jury has found that City University, without justification, punished a tenured professor on its faculty for an off-campus speech he had given, by removing him as Chairman of his academic

> deportment. It is unequivocally clear, under our Constitution, and the law enunciated on the subject by the United States Supreme Court, and in the light of the factual trial record developed in this case, that the action taken by the University was constitutionally impermissible. This is and must be the case, in spite of the hateful, poisonous and reprehensible statements made by the professor in the speech in question. *Id.* at 1071

In his opinion in *Jeffries,* District Judge Conboy cited *White Plains Towing Corp. v. Patterson,* 991 *F.* 2*d.* 1049 (2*d.* Cir. 1993), where it was held that a public employee who seeks judicial relief on the grounds that he has been removed from employment because of the exercise of his First Amendment speech rights, the employees must first establish that his speech may be fairly characterized as constituting speech on matters of public concern. *Id.* at 1058. In *White Plains Towing Corp.,* the court said:

> Once the employee establishes that he has spoken as a citizen on a matter of public concern, he must also establish that that speech was at least a "substantial" or "motivating" factor in the discharge. *Mt. Healthy City School District Board of Education v. Doyle,* 429 *U.S.* at 287, *S. Ct.* at 576.

In *Frank v. Relin,* 1 *F.* 3*d.* 1317 (2*d.* Cir. 1993), the Court continues the analysis by stating:

> If the plaintiff establishes both elements, the employer may nonetheless escape liability in either of two ways. It may prevail if it can show that it would have made the same decision in the absence of the protected conduct, *see Mt. Healthy City School District Board of Education v. Doyle,* 429 *U.S.* at 286, 97 *S. Ct.* at 575, or if it can show that the employee's conduct interfered with its "effective and efficient fulfillment of its responsibilities to the public," *Connick v. Meyers,* 461 *U.S.* at 150, 103 *S. Ct.* at 1692.

As in the *Jeffries* case and the instant matter, a "substantial" and "motivating" factor in the action to terminate both individuals was their speech of "public concern." In Professor Jeffries case, his public concern was his perception of the treatment of African-Americans by whites, in general, Jews in particular. In respondent's case, his public concern was the matter of the Neptune Board's use of it curriculum for Black History month and whether African Literature was to be taught in an American Literature class. *Mt. Healthy, supra.*

Both respondent and Professor Jeffries held tenured teaching positions where no disciplinary action was contemplated by the respective school administrators prior to their public speech. "But for" respondent's telephone call to the *Bob Grant Radio Show,* Superintendent Lake would not have conducted an investigation of respondent's prior conduct. Nor would Superintendent Lake have proceeded with tenure charges against respondent, absent the telephone call and respondent's remarks on the radio talk show. *Mt. Healthy, supra.*

Thus, it is clear that the Neptune Board, acting upon Superintendent Lake's recommendation brought tenure charges against respondent based upon respondent's exercise of protected free speech under the First Amendment. As District Judge Conboy observed that despite "hateful, poisonous and reprehensible statements" such statements are protected free speech where, as here the speech was the substantial or motivating factor in the discharge of the public employee. *Patterson, supra. Mt. Healthy, supra.*

Finally, by Superintendent Lake's own admission, respondent's conduct did not interfere with the Board's effective and efficient fulfillment of its responsibilities to the public. *Connick, supra.,* Superintendent Lake admits there were no disruptions of the everyday operation of the public schools under his direction, either by pupils, teachers or other staff members, as a consequence of respondent's actions and conduct.

CONCLUSIONS

I **CONCLUDE** that respondent has successfully demonstrated that he spoke as a citizen on a matter of public concern.

I **CONCLUDE** that respondent clearly established that his speech was the substantial and motivating factor is Superintendent Lake's and the Board's certifying tenure charges against him.

I **FURTHER CONCLUDE** that the Board failed to demonstrate that, but for respondent's speech, it would have certified tenure charges against respondent.

I also **CONCLUDE** that there was no showing by the Board that respondent's conduct interfered with its effective and efficient fulfillment of its responsibilities to the public.

I **FINALLY CONCLUDE** that the Board, through Superintendent Lake, caused a deprivation of respondent's rights of freedom of speech is guaranteed under Article I of the Amendments to the Constitution of the United States.

I **FIND and CONCLUDE**, therefore, that respondent's Motion for Summary Decision for the dismissal of all of the tenure charges against him is meritorious and must be granted.

Accordingly, I **FIND and CONCLUDE** that having made this determination, it is unnecessary to address the other issues raised in this matter.

ORDER

It is therefore **ORDERED** that Summary Decision is hereby **ENTERED on BEHALF** of the **RESPONDENT** and that all tenure charges certified against him are hereby **DISMISSED.**

It is **FURTHER ORDERED** that respondent David Clark be reinstated to his former position with all rights, privileges, and salary withheld from him, less mitigation from the date of his suspension.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

23 May 1994
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/26/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 01 1994
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 2694-92

IN THE MATTER OF THE TENURE HEARING OF DAVID CLARK, SCHOOL DISTRICT OF NEPTUNE TOWNSHIP, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The parties' exceptions and reply exceptions filed by respondent were timely pursuant to N.J.A.C. 1:1-18.4.

Respondent's exceptions consisted of a brief in support of the ALJ's decision dismissing the Board's charges against him on the basis of the Board's violation of his constitutionally protected right to freedom of speech.

The Board's exceptions, along with respondent's reply thereto, are summarized, in pertinent part, below.*

EXCEPTION ONE:

> THE ADMINISTRATIVE LAW JUDGE FAILED TO MAKE ANY FINDING CONCERNING THE "REASONABLE PREDICTIONS OF DISRUPTION OR HARM" THAT WOULD ARISE FROM RESPONDENT'S JANUARY 30, 1992 RADIO BROADCAST.

The Board argues that a recently decided Supreme Court case, Waters v. Churchill, 62 U.S.L.W. 4397 (1994) held that a

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* Because it is central to the disposition of this case and not quoted in full in the initial decision, the transcript of the radio conversation at issue (Exhibit R-1F) is appended to this decision.

governmental entity, in its capacity as an employer, can discipline its employees' speech based on reasonable predictions of disruption or harm arising from such speech.

> Likewise, we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.... But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential. Waters, supra, at 4400
> (Board's Exceptions, at p. 3)

The Board contends that because the school district's student population is largely black, because respondent's remarks received a great deal of publicity, and because the Board's first meeting after the publication of respondent's remarks was attended by 400 people, there was clearly a great potential for disruption of the district's educational program caused by respondent's speech. The Board asserts, therefore, that the ALJ should have made findings with respect to the potential for disruption and harm the Board could reasonably anticipate would result from respondent's speech.

In reply, respondent urges that the facts in the instant matter are clearly distinguishable from those existing in Waters, supra.

> ***In Waters, a nurse was fired from a public hospital because of alleged statements made to a co-worker, on the job, concerning the internal operation of the hospital. There was a dispute as to what was actually said by the nurse, and the issue arose as to whether the test as set forth in Connick v. Myers, 461 U.S. 138, 150 (1983) for determining whether speech is protected, should be applied to what the employer thought was said by the employee, or what the trier of fact ultimately determines to have been said by the employee.

> The Court, inter alia, found that the Connick test should be applied to what the employer reasonably believed was said, based upon investigation. The Court then, in applying the test, found that statements allegedly made by the nurse in "discouraging people from coming to work" would impede the ability of the hospital to function and thus were not protected. Id. at para. 14. This impairment of the ability to internally function constituted a disruption. The matter was then remanded back to the district court for a determination of the particular speech which caused the nurse to be terminated, and then in light of the above, whether the First Amendment protections applied.
>
> (Respondent's Exceptions, at pp. 2-3)

Respondent contends that in the case at bar -- 1) there is no dispute with respect to respondent's remarks; 2) the statements made by respondent were on his own time not while he was working; 3) they were made on a public radio program -- an obvious forum for the expression of free ideas; 4) the comments pertained to the curriculum to be taught to public school students which is obviously a topic where free expression of ideas is important to the functioning of the public educational process; and, most importantly, 5) the Superintendent of Schools admitted in testimony that respondent's statements did not interfere with the Board's effective and efficient fulfillment of its responsibilities to the public. (See Exhibit A.)

Respondent further argues that the Board presented no evidence whatsoever to substantiate disruption or even the possibility thereof. He asserts that unproven arguments with respect to his statements generating a great deal of publicity or a large number of people attending a meeting after respondent spoke, even if true, are not evidence of disruption, or even the propensity for disruption of the Board's operations, but, rather, just that the statements caused some debate. (Respondent's Exceptions, at p. 4)

Consequently, he argues, that unlike Waters, supra, where the statements made by the nurse were found to have caused disruption to the hospital's vital ability to function, there is no such circumstance here and the ALJ was correct in not engaging in speculation contrary to the evidence.

Finally, respondent argues that, as determined by the ALJ, "the holding of Pickering, supra, and also Jeffries v. Harleston, 828 F. Supp. 1068 (S.D.N.Y. 1993) where the Court found as constitutionally protected, statements made by an educator which were debatable and controversial, but not disruptive, are applicable here.***" (Respondent's Exceptions, at p. 5)

EXCEPTION TWO:

RESPONDENT'S JANUARY 30, 1992 REMARKS WERE ON ISSUES OF PRIVATE NOT PUBLIC CONCERN.

The Board cites portions of respondent's statements dealing with a banner being in his classroom and remarks it contends were directly critical of his supervisor (Exhibit "A", T3-7 to 21; T3-23 to 25; T4-1), asserting that these are clearly unrelated to matters of public concern but are, rather, purely matters of private interest and are, consequently, not protected.

Respondent urges that viewing portions of his statement out of context is contrary to the requirements of Connick, supra:

> ***[A]n examination must be based upon the "content" "form" and "context" of the speech as revealed by the whole record. Id. at 148. When one exam[ines] the speech as a whole in this manner, as the ALJ did, there is no question that it clearly involved what curriculum should be taught in the Neptune Township School District. What should be taught to children in public schools is unquestionably of important concern to the public.*** (emphasis in text)
> (Respondent's Exceptions, at p. 6)

EXCEPTION THREE:

RESPONDENT'S JANUARY 30, 1992 REMARKS WERE NOT "SUBSTANTIALLY CORRECT" AND ARE THUS NOT PROTECTED SPEECH.

The Board avers that in Pickering v. Board of Education, 391 U.S. 563, 88 Sup. Ct. 1731 (1968), the Court held that comments by teachers on matters of public concern that are "substantially correct" may not furnish grounds for dismissal even though they are critical. (Board's Exceptions, at p. 6) Here, it argues, even though the ALJ recognized there was substantial evidence to indicate that respondent's remarks concerning his supervisor, a banner in his classroom, and the existence of a list of authors for Black History Month were either inaccurate, incorrect or outright fabrications (see Initial Decision, at p. 11), he made no finding on the accuracy of these remarks. The Board contends that such remarks were unprotected speech in that not only were they a matter of private, rather than public, concern but they also were not substantially correct.

In reply, respondent disputes the Board's assertion that Pickering, supra, requires that in order for respondent's statements to have First Amendment protection, they must have been substantially correct.

> ***In Pickering, the Supreme Court found four (4) of the statements made by Pickering to a newspaper were false. The Court, despite the inaccuracies in the statements, found that they were protected, stating that there had been no showing that they resulted from anything but carelessness or insufficient information and in fact were of such a nature that they would not be taken seriously and could have easily been corrected by the Board. Id. at 571. Furthermore no showing had been made that they were willful or deliberate. Id. at 571. (emphasis in text)
> (Respondent's Exceptions, at p. 7)

Respondent argues that the Board has not proven such statements of respondent were inaccurate but, he contends, even assuming they were, no evidence was presented to indicate that these statements were any different than those made in Pickering, supra, and the ALJ was correct in not considering this a valid basis for denying First Amendment protection.

EXCEPTION FOUR:

> THE ADMINISTRATIVE LAW JUDGE'S RELIANCE ON THE CASE OF [JEFFRIES] V. HARLESTON, 828 F. Supp. 1066 (S.D.N.Y. 1993) IS MISPLACED.

The Board argues that Waters, supra, a Supreme Court case decided on May 31, 1994, one week after the decision in the instant case, wherein the Court distinguished between governmental restrictions on speech when the government is acting as employer as opposed to when it is acting as sovereign, is controlling in this matter.

> Recognizing that the Courts give greater deference to government restrictions on employee speech, the Court applied the Connick test and held that a nurse's remarks to a fellow employee that substantially dampened that employee's interest in working in the hospital's obstetrics department was not protected.
>
> [Likewise, here] Respondent's remarks, critical of his supervisor, clearly fall within the factual framework of Waters rather than Jeffries. (Board's Exceptions, at p. 7)

In reply, respondent urges that the ALJ, in fact, based his opinion on more than just Jeffries, supra, contending that he also relied on such cases as Pickering, supra, and Connick, supra, in reaching his determination with respect to Jeffries. He asserts

> ***The Jeffries case *** dealt with disparaging remarks made by a professor toward various ethnic groups and segments of society. The Court found these statements were absolutely protected, given their content, form and the context in which they were made. ***The instant case clearly falls

> within the factual framework of Jeffries and those line[s] of cases cited by the ALJ, many of which dealt with statements made by an educator or in an education environment. Waters, supra did not, but dealt with the ability of a hospital to carry on [its] vital functions. Accordingly, the ALJ correctly relied on the case law cited, which continues to remain controlling.
> (Respondent's Exceptions, at p. 8)

EXCEPTION FIVE:

THE ADMINISTRATIVE LAW JUDGE FAILED TO RENDER A DECISION ON THE OTHER ISSUES RAISED IN RESPONDENT'S MOTION.

The Board objects to the ALJ's decision only addressing two of the issues raised by the parties, i.e., the First Amendment issue and the propriety of the Commissioner of Education's participation in this case. It urges remand of this matter for a decision on the remaining issues so these may be considered and addressed on any subsequent appeal.

Respondent, in response, proffers that once it was determined that his right to freedom of speech was violated by the Board and, in view of the fact that the Board admitted that had it not been for respondent's statements, no action would have been taken against him (see Exhibit "B", p. 27, line 15), this required the dismissal of all of the charges (Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977)). (Respondent's Exceptions, at p. 9)

Upon a careful and independent review of the record in this matter, including the exceptions submissions and replies thereto advanced by the parties, the Commissioner finds the Board's arguments unpersuasive and agrees with the findings and conclusions of the the ALJ in his initial decision for the reasons articulated

therein. Further, the Commissioner finds no basis, under the particular facts of this matter, to alter those conclusions in light of Waters, supra.

It is also clear here that respondent's exercise of constitutionally protected free speech under the First Amendment cannot form the basis of any disciplinary action against him and, consequently, the within tenure charges must be dismissed in their entirety.

Accordingly, the Commissioner adopts the initial decision of the Office of Administrative Law as the final decision in this matter. Summary decision is hereby granted to respondent and the within tenure charges are dismissed. The Board is ordered to reinstate respondent to his position with salary and all emoluments, less mitigation, from the date of his suspension.

COMMISSIONER OF EDUCATION

AUGUST 23, 1994

DATE OF MAILING - AUGUST 23, 1994

232-94

EDU #2694-92
C # 232-94
SB # 41-94

IN THE MATTER OF THE TENURE :
HEARING OF DAVID C. CLARK, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF NEPTUNE, MONMOUTH COUNTY. :

Decided by the Commissioner of Education, August 23, 1994

For Petitioner-Appellant, Hundley, Parry & Hopkins (James T. Hundley, Esq., of Counsel)

For Respondent-Respondent, Selikoff & Cohen (Steven R. Cohen, Esq., of Counsel)

For the Participant, David Earle Powers, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

The decision of the Commissioner of Education directing the reinstatement of respondent to his tenured position is affirmed for the reasons expressed therein. We fully concur with the conclusion of the Administrative Law Judge as adopted by the Commissioner that, under the circumstances in this particular case, the comments made by respondent on a radio talk show cannot form the basis for disciplinary action against him. See Connick v. Meyers, 461 U.S. 138 (1983) (the First Amendment protects a government employee's speech if it is on a matter of public concern and the employee's interest in expressing himself on such matter is not outweighed by any injury the speech could cause to the government's interest in protecting the efficiency of the public services it performs through its employees). Nor do we find the result herein altered by Waters

JAN. 4, 1995

v. Churchill, 511 U.S. ____ (1994) (Connick test is applied to what government employer reasonably thought was said by employee, not to what the trier of fact ultimately determines to have been said). The Board's action in this matter was based on a certified transcript made from an audio recording of the radio show and there is no dispute as to the content of the controverted speech. We emphasize that the fundamental protection provided by the First Amendment "does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided." Jeffries v. Harleston, 21 F.3d 1238, 1245 (2d Cir.), vacated on other grounds and remanded, 63 U.S.L.W. 3385 (U.S. Nov. 14, 1994).

January 4, 1995

Date of mailing JAN 06 1995

234-94

234-94M

R.C., on behalf of his daughter, E.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ORADELL, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

AUGUST 29, 1994

R.C., on behalf of his daughter, E.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ORADELL, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Robert Cohen, pro se

For the Respondent, Sills, Cummis, Zuckerman, Radin, Tishman, Epstein & Gross (Lester Aron, Esq.)

This matter comes before the Commissioner of Education by Robert Cohen, pro se, on Notice of Motion for Emergent Relief, dated July 6, 1994, seeking to have his four-your-old daughter retested to determine if she is sufficiently gifted for the Superintendent of Schools to recommend to the respondent Board of Education that the Board policy requiring all children to attain the age of five years old by the cutoff date of October 1 be waived in order to permit her to enter kindergarten in September 1994. This motion did not comply with the N.J.A.C. 6:24-1.5(b) requirement that a motion for emergent relief "shall be accompanied by a letter memorandum or brief which shall address the standard to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982)." Petitioner was given notice of the deficiency by letter dated July 7, 1994, from the Bureau of Controversies and Disputes. In response to the

deficiency notice, petitioner filed a Notice of Motion to Relax the Rules reiterating the contents of the petition and reasserting that "[t]here will be no justice unless E.C. is fairly tested by an experienced professional." (emphasis in text, at p. 3) For the reasons set forth herein both motions are denied.

The Board, in response to the petition and motions, filed an answer and brief in opposition asserting that petitioner has not demonstrated that he is entitled to a relaxation of the rules pursuant to N.J.A.C. 6:24-1.15 based upon his claims of "unfamiliarity with the administrative rules of practice before the Commissioner, as well as his inability to finance an attorney" (Board's Reply, at p. 5); that petitioner has not demonstrated irreparable harm or a likelihood of success on the merits of the claim in that "E.G. is not five years old, and she will not be five years old until after October 1" (at p. 11); that the "Oradell Board of Education has the authority to establish a kindergarten class and the discretion to determine a cut-off date for admission into kindergarten" (at p. 6); and that petitioner's reliance on the special education regulations is inappropriate because E.C. was not tested to determine whether she should be classified as a child with a disability. Finally, respondent asserts that the "present petition before the Commissioner is barred by the doctrine of res judicata" (at p. 12) as a result of a prior ruling by the Honorable William C. Meehan, J.S.C. denying petitioner's request for emergent relief and finding that respondent had not acted arbitrarily, capriciously or unreasonably in administering tests to E.C. or denying E.C. admission to kindergarten. Respondent advised the Commissioner that the written order of Judge Meehan had not yet been entered.

In light of the Superior Court action, the parties were advised that no action would be taken by the Commissioner until the written order of Judge Meehan was entered and provided to him. The order was transmitted to the Department of Education by the parties and the Superior Court pleadings and order were transferred by the Bergen County Clerk. The order, dated August 9, 1994, provides, in pertinent part, as follows:

> 1. Finding that plaintiff, having failed to demonstrate that he has a substantial likelihood of success on the merits of his claims and having failed to demonstrate that immediate, irreparable harm will be caused if he does not receive the relief requested, is not entitled to emergent relief;
>
> ***
>
> 4. Finding that this Court does not have jurisdiction over this matter since it is a dispute arising under the school laws which properly belongs before the Commissioner of Education; and
>
> 5. Transferring the matter to the Commissioner of Education for disposition.

The Commissioner having reviewed the entire record and considered the arguments of the parties regarding the Motions for Emergent Relief and to Relax the Rules hereby denies the motion to relax the rules for failure to meet the standard articulated in N.J.A.C. 6:24-1.15 and denies the Motion for Emergent Relief based upon the August 9, 1994, Order of Judge Meehan for the reasons articulated therein.

IT IS SO ORDERED.

IT IS further ORDERED that this matter be transmitted to the Office of Administrative Law for further proceedings.

AUGUST 29, 1994

DATE OF MAILING - AUGUST 29, 1994

COMMISSIONER OF EDUCATION

236-94

LOU CHALUPA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK ET AL., MIDDLESEX COUNTY,	:	
RESPONDENTS.	:	

AUGUST 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NOS. EDU 9334-92
and EDU 10111-93
AGENCY DKT. NOS. 439-9/92
and 299-8/93
(CONSOLIDATED)

LOU CHALUPA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, ET AL, MIDDLESEX COUNTY,
Respondent.

Lennox S. Hinds, Esq., on behalf of petitioner

Martin R. Pachman, Esq., on behalf of respondent

Record Closed: July 11, 1994 Decided: July 11, 1994

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of two petitions filed with the Commissioner of Education pursuant to the School Law, *N.J.S.A.* 18A:6-9. The matters were separately transmitted to the Office of Administrative Law as contested cases pursuant to *N.J.S.A.* 52:14F-1 to -13, and are consolidated. The parties now seek to have the matters dismissed with prejudice (see attached stipulation of dismissal). Based on this representation, I

CONCLUDE that the matter is no longer a contested case before the Office of Administrative Law, and it is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/11/94
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

7/13/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 18 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

LENNOX S. HINDS, ESQ.
STEVENS, HINDS & WHITE, P.C.
42 Van Doren Avenue
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(908) 873-8096

116 West 111th Street
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(212) 864-4445
Attorney for Plaintiffs

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
NEWARK, DIVISION

_____X

OAL DOCKET NOS:
EDU 09334-92
EDU 10111-93

LOUIS A. CHALUPA

Petitioner,

STIPULATION OF DISMISSAL WITH PREJUDICE

vs.

BOARD OF EDUCATION OF EAST BRUNSWICK, ET AL.

Respondents.

_____X

This matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed without costs against either party, with prejudice.

BY: _____
LENNOX S. HINDS
Attorney for Petitioner
Louis A. Chalupa

BY: _____
MARTIN R. PACHMAN, ESQ.
Attorney for Respondents
East Brunswick Board of Education et, al.

OAL DKT. NOS. EDU 9334-92 AND EDU 10111-93 (CONSOLIDATED)

LOU CHALUPA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK ET AL., MIDDLESEX COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law, incorporating a "Stipulation of Dismissal with Prejudice" based on the parties' having "amicably adjusted" their differences, have been reviewed.

Upon such review, the Commissioner finds no basis on which he can ascertain the terms of the "adjustment" reached by the parties in this matter. Because the case was transmitted to the Office of Administrative Law as a contested matter pursuant to N.J.S.A. 52:14B, the specific terms of any settlement must be spread on the record pursuant to N.J.A.C. 1:1-19.1 so that the Commissioner may review them prior to making a final decision on the recommendation of the ALJ.

Accordingly, the initial decision of the Office of Administrative Law is remanded for supplementation of the record consistent with the provisions of N.J.A.C. 1:1-19.1.

IT IS SO ORDERED.

AUGUST 29, 1994

DATE OF MAILING - AUGUST 29, 1994

COMMISSIONER OF EDUCATION

236-94

148-95-R
(236-94)

LOU CHALUPA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, ET AL., MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	
	:	

MAY 9, 1995

OAL DKT. NO. EDU 9334-92 (EDU 8699-94 On Remand)

LOU CHALUPA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, ET AL., MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 9, 1995

DATE OF MAILING MAY 9, 1995

236-94

148-95-R
(236-94)

LOU CHALUPA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, ET AL., MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	
	:	

MAY 9, 1995

OAL DKT. NO. EDU 9334-92 (EDU 8699-94 On Remand)

LOU CHALUPA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, ET AL., MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 9, 1995

DATE OF MAILING MAY 9, 1995

237-94

237-94

MICHELLE LA MONICA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured special education teacher, alleged that the District was paying her the wrong sum in violation of the teacher's salary schedule and that there was an improper charging of sick leave during leave directed by District.

ALJ found this matter contested the increment withholding of school year 1990-91 not the calculation of petitioner's salary. Citing Probst and Cordasco, the ALJ found that when a salary increment is withheld, the teacher will lag behind in salary for the following years. Thus, this case was really contesting the 1990-91 withholding and was untimely filed as it was well outside the 90-day regulatory period for filing appeals. Petition was dismissed. ALJ found sick leave claims subject to collectively negotiated grievance procedure.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 29, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 9520-93
AGENCY DKT. NO. 319-9/93

MICHELLE LA MONICA,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Karen A. Murray, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: April 26, 1994 Decided: June 10, 1994

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

This matter arises out of a verified petition filed by Michelle LaMonica alleging violations of her tenure and seniority rights. The petition in this case was filed on September 9, 1993. A response was filed by the State Operated School District of the City of Jersey City on September 29, 1993. The matter was transmitted to the Office of Administrative Law (OAL) on October 5, 1993, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to 13.

PROCEDURAL HISTORY

On February 4, 1994, the respondent school district filed a motion for summary decision with supporting briefs and affidavit as well as exhibits. Hearing dates had previously been scheduled for March 2 and 3, 1994. Those dates were adjourned at the request of the parties and the petitioner's attorney was given an extension of time to file a response within 20 days of February 23, 1994. After the March 15, 1994 deadline for filing, the undersigned's secretary contacted the attorney for petitioner who requested an extension of 10 days from the April 4, 1994 date. As consent was received from the adversary, petitioner was granted an extension of time to respond until April 14, 1994. As part of the agreement with his adversary the respondent school district was then given until April 26, 1994 for any response to petitioner's opposition to the motion. On that date the hearing record closed for the purposes of this motion.

ISSUES

The matter as presented in this case is whether or not this case deals with an increment withholding by respondent board of the petitioner's salary. If so the question becomes whether or not this action has been timely filed.

DISCUSSION

The relevant facts for the purposes of this motion are not in dispute.

The petitioner in this case alleges that the Jersey City School District is paying her substantially less than what is called for on the teachers' salary schedule. The petitioner concedes that the facts are set forth in the respondent's brief up to the point at which the respondent relates what the petitioner should have received beginning with the 1990-91 school year and beyond are not in dispute. As a result the following facts constitute the operational facts in this case:

Petitioner is a special education teacher currently assigned to the Children's Partial Hospital Unit (CPHU) program at the Jersey City Medical Center. Petitioner was awarded her first contract as teacher of the handicapped for the period January

20, 1987 to August 31, 1987, at an annual salary of $18,500. Petitioner obtained tenure on or about January 20, 1990. *N.J.S.A.* 18A:28-5. Petitioner's current annual salary is $32,015.

Petitioner has had only one increment withheld and that was for the school year 1990-91. The increment was withheld due to "unsatisfactory ratings." Petitioner's increment was not withheld due to absenteeism as alleged in her petition.

On December 12, 1989, G. Jackson evaluated petitioner and rated her good in two areas, fair in five areas. On March 12, 1990, DiTursi evaluated petitioner and rated her fair in six areas and good in only one area. On March 22, 1990, Carol R. Grannasio evaluated petitioner and rated her unsatisfactory in two areas, fair in four areas, and good in one area.

There was also a letter of complaint received from a parent requesting that a student be taken out of petitioner's class because she was "not giving my daughter meaningful or appropriate academic work. Also I feel she does not have the ability to manage or control my daughter." DiTursi took the child out of class after the parent's "strong request." DiTursi also indicated in that letter that he was "having her daily action monitored."

By letter dated June 26, 1990, petitioner was advised of and invited to attend courses being offered on August 27, 1990, which would address the areas in which she had received an unsatisfactory rating; assessing needs and evaluating progress of pupils, and effective organization and planning. However, petitioner did not take advantage of this opportunity and failed to attend the training.

Based on the unsatisfactory reviews received during the 1989-90 school year, respondent withheld petitioner's 1990-91 increment for inefficiency pursuant to *N.J.S.A.* 18A:29-14. Petitioner was notified by letter dated August 20, 1990, that her 1990-91 increment was going to be withheld due to her "unsatisfactory reviews" and that she would remain at her 1989-90 salary of $23,510. Thus, petitioner remained on step A for the 1990-91 school year.

There is no question that in the following school years she moved up one step from that point in each consecutive year.

The petitioner states in its response to the motion for summary decision that it does not raise the issue of whether or not her increment from the 1990-91 school year should have been denied. The petitioner alleges that the respondent is paying her the wrong sum and misapplied the principles of school law.

As these facts are not in dispute for the purposes of the motion I **FIND** them to be operational facts.

LEGAL DISCUSSION

The respondent seeks to dismiss petitioner's appeal in this case based on the fact that the petition was filed over three years beyond the 90-day time frame for action specified in *N.J.A.C.* 6:24-1.2. In this case there is no question that the teacher's increment was withheld and that no appeal was taken within 90 days of the withholding of the increment for the 1990-1991 school year pursuant to *N.J.S.A.* 18A:29-14. An annual increment, pursuant to *N.J.S.A.* 18A:29-8 is subject to annual evaluation of teacher performance. It is not a matter of statutory right but is subject to "denial for inefficiency or other good cause." *N.J.S.A.* 18A:29-14. It is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute. The relevant regulation, *N.J.A.C.* 6:24-1.2, provides that a petition to determine the controversy under the school laws "must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." *North Plainfield Ed. Assn. v. Bd.of Education of Borough of North Plainfield*, 96 *N.J.* 587, 594 (1984). In that case the court points out that the fact that teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations. *Id.* at 5.

The petitioner was notified of her 1990-91 increment withholding and had a 90-day time frame in which to respond by requesting a hearing. She did not do so and as a result her increment was withheld. Even if the limitation period were to be

relaxed the facts in this case show a lag of three years. The facts would not militate toward relaxation.

There is no evidence of circumstances that would warrant relaxation of the 90-day rule. *Kaprow v. Board of Ed., of Berkley Tp.,* 131 *N.J.* 572, 587 (1993).

The petitioner couches her argument in terms of a presently existing violation of the teacher's salary schedule. As indicated above, that does not however constitute a continuing violation. Additionally it is well established that a teacher whose salary increments were withheld by a board of education for unsatisfactory performance is not entitled to restoration of a salary concomitant with the salary schedule for teachers within the district. *Probst v. Board of Ed.*, 127 *N.J.* 518 (1992); *Cordasco v. Board of Ed. of the City of East Orange*, 205 *N.J.Super.* 407, 410 (App. Div. 1985). In essence petitioner's argument is that she should be returned to the position she would be in absent the increment withholding and be restored to a salary which would bring her in the range of the salary schedule for other teachers within the district with the same experience. That is not what is to occur when a salary increment is withheld. It is clear that when a salary increment is withheld the teacher will lag behind in salary in the following years.

The petitioner also alleges that there was an improper charging of sick leave during a leave of absence. There is no statutory and/or regulatory violation on the part of respondent that is articulated which stems from a supposed improper charging of that sick time. This particular question is in the nature of a grievance and does not involve Title 18A but is a claim which arises from the collective bargaining agreement between the petitioner and the respondent. As a result petitioner would have to follow the procedures for dispute arising under collective bargaining.

The verified petition dated September 9, 1993, in this case is well outside the 90-day regulatory period for filing of appeals for increment withholdings. Notwithstanding the language in which the petitioner wishes to couch it this case contests the increment withholding rather than the calculation of salary that petitioner is presently receiving. As such, the petitioner is barred from pursuing this claim. *N.J.A.C.* 6:24-4.1.

CONCLUSION

For the reasons given above, I hereby **CONCLUDE** that the petitioner is outside of the 90-day period for filing a claim under *N.J.A.C.* 6:24-4.1. As a result I **CONCLUDE** that the motion for summary decision should be granted.

ORDER

It is hereby **ORDERED** that the petition filed by Michelle LaMonica in this matter, be and hereby is **DISMISSED.**

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSISON OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/10/94
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

6/13/94
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 1994
Date

OFFICE OF ADMINISTRATIVE LAW

am

OAL DKT. NO. EDU 9520-93

MICHELLE LA MONICA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon such review, the Commissioner concurs with the ALJ that, under the facts of this matter and in light of Probst, supra, and Cordasco, supra, petitioner's salary claims are, in effect, an attempt to appeal a long-past increment withholding and so must be found to have been filed out of time. The Commissioner further concurs that petitioner's sick leave claims are clearly contractual in nature and are, therefore, subject to the collectively negotiated grievance procedure rather than adjudication by the Commissioner.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

AUGUST 29, 1994

DATE OF MAILING - AUGUST 29, 1994

COMMISSIONER OF EDUCATION

238-94

238-94E

M.D., on behalf of her minor niece, E.L.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

AUGUST 30, 1994

M.D., on behalf of her minor niece, E.L.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For Petitioner, Jeffrey D. Kotler, Esq.

For Respondent, Stephen J. Christiano, Esq. (Christiano & Christiano)

This matter comes before the Commissioner of Education by way of a Petition of Appeal with Motion for Emergent Relief filed on August 29, 1994, wherein Petitioner seeks to have her minor niece, E.L.A., who has resided with her since entering the United States in March 1994, admitted to the Respondent school district in September 1994. Admittance to the district was denied by the Board in April 1994 based on E.L.A.'s purported failure to meet the requirements of N.J.S.A. 18A:38-1, and E.L.A. has not attended school since that time.

Pursuant to N.J.S.A. 18A:4-34, Petitioner's request for emergent relief was delegated for determination to Assistant Commissioner Peter B. Contini, who heard the parties' arguments on emergent relief by telephone conference on August 30, 1994.

Petitioner claims irreparable harm to E.L.A. if she is not admitted to the Respondent school district pending resolution of the dispute, as Petitioner's residency is apparently not at issue and E.L.A. would, therefore, receive no education elsewhere in the interim. The Board argues that Petitioner's appeal is out

of time, being filed well beyond both the 21-day period of controlling statute and the 90-day rule of N.J.A.C. 6:24-1.2(c). Petitioner set forth an explanation for the delay in filing a petition, relating to her good faith efforts to appeal to the Commissioner in May 1994 and to follow up again in early August 1994; the Board replied that the explanation proffered, even if true, did not excuse Petitioner from her procedural obligations or warrant acceptance of her application at such late date.

Upon consideration of the parties' positions, applicable law and the standards for granting of emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), the Assistant Commissioner determines to grant Petitioner's request for the reasons set forth below.

Initially, the Assistant Commissioner stresses that he makes no determination on the ultimate merits of this case, including the question of whether the appeal was timely filed, or if not, whether relaxation is warranted under the circumstances. However, he finds that the overriding consideration at this point in proceedings is the educational status of E.L.A., who would, under the terms of N.J.S.A. 18A:38-1, expressly be entitled to admittance to school during the pendency of any timely appeal to the Commissioner and who will, absent emergent relief, not be able to attend public school within the respondent district or elsewhere due to 21 days having passed since the Board's decision and Petitioner's residency not being at issue. Under these circumstances, the irreparable harm to E.L.A. if emergent relief is not granted is clear, and the equities lie in her favor due to

the Commissioner's ability under N.J.S.A. 18A:38-1 to assess tuition if Petitioner's claim to a free public education in the district is ultimately dismissed by him.

Accordingly, for the reasons expressed herein, it is ORDERED this 30th day of August, 1994, that Petitioner's Motion for Emergent Relief is GRANTED, so that E.L.A. is to be admitted to the West Orange school district pending resolution of the instant dispute. The Board is further directed to file an answer to the Petition of Appeal consistent with N.J.A.C. 6:24-1.4, upon receipt of which this matter will be transmitted to the Office of Administrative Law for expedited hearing pursuant to N.J.S.A. 18A:38-1.

Peter B. Contini

ASSISTANT COMMISSIONER

AUGUST 30, 1994

DATE OF MAILING - AUGUST 31, 1994

239-94

ROSALIND BUSH, CAESAR CASALE, MOSES E. COBB, AND WILLIE J. YOUNG,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, four former principals, alleged the Board transferred and reassigned them to duties other than those they had been performing, in violation of their tenure and seniority rights.

ALJ concluded that petitioners as tenured principals could not be transferred to the positions of vice principals or department chairpersons without their consent. In order to remove a tenured individual from his or her position, without consent, the school district must demonstrate inefficiency, incapacity, conduct unbecoming, or other just cause. (N.J.S.A. 18A:28-5) The Board clearly violated petitioners' rights when it transferred and reassigned them even though they officially retained the title of principal with attendant salary and benefits. ALJ granted summary decision to petitioners and ordered that each of the petitioners be restored to the position of principal.

Commissioner adopted findings and determination in initial decision as his own.

SEPTEMBER 2, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER ON MOTION FOR SUMMARY DECISION
OAL DKT. Nos. EDU 10947-93
EDU 10943-93
EDU 10946-93
EDU 10917-93
AGENCY DKT. Nos. 355-10/93; 351-10/93; 352-10/93; 356-10/93
(CONSOLIDATED)

ROSALIND BUSH,
CAESAR CASALE
MOSES E. COBB &
WILLIE J. YOUNG
Petitioners
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY
Respondent

Anthony P. Sciarrillo, Esq., for petitioners

Carolyn Ryan Reed, Associate Counsel, Newark Board of Education, for respondent
(**Marvin L. Comick**, General Counsel)

Record Closed: June 18, 1994 Decided: July 25 1994

BEFORE **ARNOLD SAMUELS, ALJ**:

The petitioners, Rosalind Bush, Caesar Casale, Moses E. Cobb & Willie J. Young appeal from actions taken by the respondent, Board of Education of the City of Newark (Board), transferring and reassigning them to duties other than those they had been performing, allegedly in violation of their tenure and seniority rights.

PROCEDURAL HISTORY

Two of the petitions (Caesar Casale & Moses E. Cobb) were filed on October 14, 1993. The other two (Rosalind Bush & Willie J. Young) were filed on October 19, 1993. An answer was filed to each petition by the respondent.

The Commissioner of Education transmitted the four matters to the Office of Administrative Law (OAL) on November 15 & 16, 1993, for hearing and determination as contested cases, pursuant to *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on April 5, 1994. The resulting prehearing order defined and limited the issues to be decided, provided for discovery, scheduled the hearing and dealt with other procedural aspects of the matter. The prehearing order also recognized that all parties had requested and agreed that the four separately filed petitions should be consolidated for all purposes. With consent of counsel and because of the existence of similar questions of law and fact, consolidation was granted, as reflected in paragraph 13 of the prehearing order.

The petitioners filed a motion for summary decision on May 5, 1994. No papers in opposition were filed by the respondent, and the motion proceeded to oral argument on the hearing date, June 8, 1994. The respondent had previously signified its opposition to the motion, and the Board was permitted to file its brief within five days after oral argument. A letter memorandum was filed by the respondent on June 13, 1994. The record was closed on June 18, 1994, upon receipt of petitioners' advice that no post argument papers would be filed.

DISCUSSION

A summary decision may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to prevail as a matter

of law. *N.J.A.C.* 1:1-12.5(b). This rule is substantially similar to the summary judgment rule in the New Jersey Court Rules, *R.*4:46-2.

A summary judgment proceeding is designed to allow the judge quickly and inexpensively to dispose of any case which does not present any genuine issue of material fact requiring disposition at a hearing. *Judson v. Peoples Bank & Trust Co of Westfield*, 17 *N.J.* 67, 74, (1954). The role of the judge in such a motion is to determine whether there is a genuine issue of material fact, but not to decide the issue if such an issue exists. *Judson* at 73.

The standards governing the grant or denial of a summary decision emphasize that a party opposing a motion is not to be denied an evidential hearing unless the moving party sustains his or her burden of clearly showing the absence of a genuine issue of material fact. Thus, it is the movant's burden to exclude any reasonable doubt as to the existence of any material fact. All inferences of doubt are to drawn against the movant and in favor of the party against whom the motion is directed. The papers supporting the motion are closely scrutinized and the opposing papers are indulgently treated. *Judson* at 75.

In the instant matter, there is no question or dispute about the material facts, all of which are uncontroverted. This resulted from the submission of such facts, with exhibits, by the petitioners and the lack of objection from respondent's counsel, who also accepted and stipulated to the facts, as uncontroverted, at oral argument.

Therefore, there is no question that this matter is appropriate for determination by way of summary decision, as a matter of law.

Facts:

The material facts contained in the stipulation are as follows:

1. CAESAR CASALE, (hereinafter, "CASALE") is an employee of the Board of Education of the City of Newark, (hereinafter, "the Respondent") and has been employed by the Respondent as follows:

Year	Position
8/24/93	Transferred - vice-principal at Montgomery Street School
9/76 - 6/93	Principal at First Avenue Elem. School (Newark B/E)
9/74 - 9/76	Vice-principal at First Avenue Elem. School (Newark B/E)
2/73 - 6/74	Teacher to assist principal at First Avenue Elem. School (Newark B/E)
9/64 - 2/73	Regularly assigned teacher at First Avenue Elem. School (Newark B/E)
9/56 - 6/64	Regular assigned teacher at Avon Avenue Elem. School (Newark B/E)
9/51 - 6/56	Long term substitute teacher (Newark B/E)
9/50 - 6/51	Per diem substitute teacher (Newark B/E)

2. Casale holds the following Certificates:
New Jersey Principal (K-12) 5/73
New Jersey Elementary Teacher (1-8) 7/57
New Jersey Secondary Teacher of Social Studies (7-12) 7/57
New Jersey Secondary Teacher of English (7-12) 7/57

3. As a result of Casale's employment service and certification, Casale gained tenure, pursuant to *N.J.S.A.* 18A:28-5.

4. On or about August 23, 1993, Casale received a telephone call from Dr. R. Gonzalez, Assistant Executive Superintendent, Cluster 4, directing CASALE to report to Montgomery Street School to function in the position of vice-principal.

5. On or about August 23, 1993, Casale received a letter from Louis M. Conte, Assistant Personnel Director, Department of Human Services, dated August 20, 1993 advising Casale that he was transferred, without consent, to Montgomery School effective August 24, 1993. (Exhibits 1 and 2).

6. Casale was further advised that while he would remain in the title of principal, his assignment would be as vice-principal. (Exhibit 1).

7. The transfer was approved by the respondent at its action meeting of August 24, 1993. (Exhibit 3).

8. For the 1993-1994 school year, the respondent will employ individuals with less seniority in the position of principal.

9. MOSES E. COBB, (hereinafter, "COBB") is an employee of the respondent and has been employed by the respondent as follows:

Year	Position
08/24/93	Transferred - vice-principal
09/25/87	Acting principal
09/06/85	Acting vice-principal
10/29/84	Teacher of emotionally disturbed
09/04/82	Teacher of mentally handicapped
10/09/79	Teacher of educable mental retarded

10 Cobb holds the following Certificates:

New Jersey, Teacher of the Handicapped, 6/76.
New Jersey, Principal (K-12) 12/70.
New Jersey, Secondary Teacher of General Science, 1/68
New Jersey, Teacher of Agriculture, 1/68.

11. As a result of Cobb's employment service and certification, Cobb gained tenure, pursuant to *N.J.S.A.* 18A:28-5.

12. On August 21, 1993 Cobb received a letter from Louis M. Conte, Assistant Personnel Director, Department of Human Services, dated August 20, 1993, advising Cobb that he was transferred without consent to Miller Street School effective August 24, 1993. (Exhibits 4 and 5).

13. Cobb was further advised that while he would remain in his title of principal, his assignment would be as vice-principal. (Exhibits 4 and 6).

14. The transfer was approved by the respondent at its action meeting of August 24, 1993. (Exhibit 7).

15. For the 1993-1994 school year, the respondent will employ individuals with less seniority in the position of principal.

16. ROSALIND BUSH, (hereinafter, "BUSH") is an employee of the respondent and has been employed by the respondent as follows:

Year	Position
1993	South Seventeenth Street School Newark, N.J. - transferred, vice-principal
1992/1993	Belmont-Runyon Elementary School Newark, N.J. - principal
1987/1992	Chestnut Street School, C.E.P. Newark N.J. - principal
1985/1987	Peshine Avenue School, Newark, N.J. vice-principal
1983/1985	Chestnut Street School, C.E.P. Newark, N.J. - biology, general science and chemistry teacher
1980/1983	Education Center for Youth, Newark, N.J. biology, general science and math
1967/1980	East Side High School, Newark, N.J. - biology & general science

17. Bush holds the following Certificates:

New Jersey Supervisor - 5/73
New Jersey Principal - 5/73
New Jersey Secondary Teacher of Science - 3/68

18. As a result of Bush's employment service and certification, Bush gained tenure, pursuant to *N.J.S.A.* 18A:28-5.

19. On or about August 23, 1993, Bush received a letter from Louis M. Conte, Assistant Personnel Director, Department of Human Services, dated August 20, 1993 advising Bush that she was transferred, without consent, to South Seventeenth Street School effective August 24, 1993. (Exhibits 8 and 9).

20. Bush was further advised that while she would remain in the title of principal, her assignment would be as vice-principal. (Exhibit 8).

21 The transfer was approved by the respondent at its action meeting of August 24, 1993. (Exhibit 10).

22. For the 1993-1994 school year, the respondent will employ individuals with less seniority in the position of principal.

23. WILLIE J. YOUNG, (hereinafter, "Young") is an employee of the respondent and has been employed by the respondent as follows:

Year	Position
08/24/93	Transferred - Department Chairperson-Guidance (Head Guidance Counselor).
08/20/79	Principal
10/01/77	Director, S.W.A.S.
10/20/75	Head Guidance Counselor
09/01/70	Guidance Counselor

24. Young holds the following Certificates:
New Jersey, Principal, 4/75.
New Jersey, Director Student Personnel Services, 8/73.
New Jersey, Student Personnel Services, 1/71.
New Jersey, Secondary School Teacher of Social Studies, 6/68.

25. As a result of Young's employment service and certification, Young gained tenure, pursuant to *N.J.S.A.* 18A:28-5.

26. On August 21, 1993, Young received a letter dated August 20, 1993 from Louis M. Conte, Assistant Personnel Director, Department of Human Services, advising YOUNG that he was transferred, without consent, to West Kinney Alternative High School as a Department Chairperson-Guidance (Head Guidance Counselor), effective August 24, 1993. (Exhibits 11 and 12).

27. Young was further advised that while he would remain in the title of principal, his assignment would be Department Chairperson-Guidance (Head Guidance Counselor). (Exhibits 11 and 13A and 13B)

28. The transfer was approved by Young [the Board?] at its action meeting of August 24, 1993. (Exhibit 14).

29. For the 1993-1994 school year, the respondent will employ individuals with less seniority in the position of principal.

The fourteen exhibits in evidence, which are referred to in the above stipulated facts, were attached to the motion for summary decision and are incorporated herein by reference.

Legal Discussion:

Boards of education have the power and authority to transfer teaching staff members, without their consent. *N.J.S.A.* 18A:25-1. However, while such transfers may take place within the scope of a teacher's certification, it is a violation of tenure rights, *N.J.S.A.* 18A:28-5, to effect such a transfer from a tenured position to a different position. See, *Forte v. Bd. of Ed. of Twp. of Belleville*, 1988 *S.L.D.* 977, *aff'd Comm'r. of Ed.* 1988 *S.L.D.* 986, *aff'd State Bd. of Ed.* 1988 *S.L.D.* 992.

The fact that the position of principal and the position of vice-principal require the same certification, *N.J.A.C.* 6:11-9.3(b), is of no import. When dealing with the rights of a tenured teaching staff member facing involuntary transfer to another position, tenure attaches to a particular position. *Forte* at 983.

See, *Colella v. Elmwood Park Bd. of Ed.* 1983 *S.L.D.* 149, *rev'd Comm'r. of Ed.* 1983 *S.L.D.* 160, *aff'd. St. Bd. of Ed.* 1983 *S.L.D.* 172, *aff'd.* No. A-6090-82T3 (N.J. App. Div., July 19, 1984) (The nonconsentual transfer of a tenured school administrator from the position of high school principal to high school vice-principal, without reduction in salary, is improper and illegal.)

See also, *Howley v. Ewing Bd. of Ed.*, 1982 *S.L.D.* 1328, 1340, *aff'd, St. Bd. of Ed.* 1983 *S.L.D.* 1554 (a tenured employee may be transferred to another assignment within his position, but may not be transferred involuntarily from one position to

another.); *Miscia v. East Hanover Bd. of Ed.* 1983 *S.L.D.* 269 *rev'd. Comm'r. of Ed.* 1983 *S.L.D.* 276, *aff'd St. Bd. of Ed.* 1984 *S.L.D.* 1971.

It also is of no importance that the Board, in the instant matter, has maintained the petitioners in their titles and at the same salaries they had earned as principals. This follows from the concept that, in tenure matters, it is the nature of the duties performed, rather than the title of the job which controls. Form does not prevail over substance. See *Christie v. Bd. of Ed. of the City of East Orange*, 1985 *S.L.D.* 307 (*Comm'r. of Ed.*); *Viemeister v. Bd. of Ed. of Prospect Park* 5 *N.J. Super.* 215, 218 (*App. Div.* 1949).

In *Forte*, the State Board of Education addressed the question of the differences between the title of a position to which a tenured employee is transferred and the nature of the duties of that position. After the Commissioner of Education affirmed the administrative law judge's Initial Decision in *Forte*, holding that the transfer from elementary school principal to high school vice-principal without consent was a violation of the petitioner's tenure rights, the Board and the petitioner entered into an agreement whereby the petitioner would "retain the title of elementary principal, remain on the elementary principal's salary guide and continued to accrue all seniority and other benefits to which he was entitled as elementary principal. However, it was further agreed that he would remain in the position of an elementary principal, but assigned as a vice-principal of the Belleville Senior High School until such time as any other position would be agreed to by *Forte* and the board. It was also agreed that petitioner would not pursue implementation of the Commissioner of Education's decision ordering his reinstatement as elementary principal, and the board was to withdraw its appeal of such decision to the State Board of Education.

In rejecting that proposal and agreement, the State Board of Education stated:

> While the State Board encourages amicable resolution of disputes before us, we cannot permit the Board to employ petitioner in the separately tenurable position of vice principal while designating that position as that of principal. *N.J.S.A.* 18A:28-5. See, e.g., *Capodilupo v. Bd of Ed. of the Town of West Orange*, deciding by the *St. Bd.* Sept. 3. 1986, *aff'd.* 218 *N.J. Super.* 510 (*App. Div.*) *certif. den.* 109 *N.J.* 514 1987. The parties may not by agreement alter the operation of the statutes so that the service of a teaching staff member in one separately tenurable position would not

> be credited toward the achieving (of) tenure in that position. Nor we can we permit the Board to assign to the position of high school vice principal and other recognized position title, along with its status, salary and other benefits that is not properly descriptive of either the position or the assignment but, rather, is attached to a entirely different assignment within the scope of a different tenurable position. Such an arrangement contravenes the education laws, regardless of the duration of the assignment. [Footnote omitted] As it was emphasized in *Viemeister v. Bd of Ed. of Prospect Park* 5 *N.J. Super.* 215, 218 1949; "We look to the substance [of the assignment] rather than the form." [*Forte v. Belleville* 1988 *S.L.D.* 993.]

The respondent argues that the broad educational concepts embodied in *Robinson v. Cahill,* 69 *N.J.* 449 (1976), mandating the provision for a thorough and efficient education, transcends all of the foregoing. The Board states that it's overriding responsibility is to provide such an education to the children in the district, and therefore has a duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing students with such an opportunity, citing *Abbott v. Burke*, 119 *N.J.* 287 (1990) and *Richfield Park Educ. Assoc. v. Richfield Park Bd. of Ed.* 78 *N.J.* 144 (1978).

The Newark Board of Education, in the instant matter, also indicated that it considered the ramifications of its actions in effecting the transfers, and was cognizant of the statutory limitations granting tenure rights to certain positions. Having done so, the Board believed that having based the transfers on the critical needs of the educational programs, and having retained the salaries and seniority rights of the petitioners, the actions taken conformed overridingly with the mandate of the New Jersey Supreme Court to provide for the maintenance and support of a thorough and efficient system of free public schools.

In oral argument, the Board indicated that it had been experiencing "problems" with the petitioners, and that some action, such as transfer to less sensitive positions, was needed. At the same time, the Board stated that it wished to avoid depriving these long term employees of their positions, and there was no desire to reduce their salaries. Assuming that the Board would have been able to prove that the petitioners

were having problems fulfilling the increased responsibilities of their principal's positions, and that steps needed to be taken to correct that situation, there is no reason why the Board should not have been expected to comply with the applicable laws and established procedures in such cases.

CONCLUSIONS

It is **CONCLUDED** that the respondent cannot single-handedly ignore and transcend the specific statutory protection afforded to teaching staff members by invoking the broad policies stated above. The applicable law is clear. Tenure protects the right of a teaching staff member, once having attained such tenure, to hold a particular position. Each of the petitioners are tenured principals, and they cannot be transferred to the positions of vice-principals or department chairpersons without their consent. In order to remove a tenured individual from his or her position, without consent, the school district must demonstrate inefficiency, incapacity, conduct unbecoming, or other just cause. *N.J.S.A.* 18A:28-5. The fact that the petitioners would officially retain the title of principal, and presumably all of the salary and other benefits attendant to the position of principal, does not alter this conclusion. The respondent was clearly in violation of the tenure and seniority rights of the petitioners when it transferred and reassigned them to other positions.

ORDER

It is therefore **ORDERED** that the applications of the petitioners for summary decision are **GRANTED**, and it is further **ORDERED** that each of the petitioners be restored to the position of principal.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 25, 1994
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:
Hope R Blackburn

7/27/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 1994
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NOS. EDU 10917-93, EDU 10943-93, EDU 10946-93 AND EDU 10947-93 (CONSOLIDATED)

ROSALIND BUSH, CAESAR CASALE, MOSES E. COBB, AND WILLIE J. YOUNG,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner is in full agreement with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by him in his initial decision.

Accordingly, summary decision is granted to petitioners and the Board is hereby ordered to restore each of them to the position of principal.

COMMISSIONER OF EDUCATION

SEPTEMBER 2, 1994

DATE OF MAILING - SEPTEMBER 2, 1994

240-94

SUE JANSSEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

SEPTEMBER 2, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6958-93
AGENCY DKT. NO. 252-7/93

SUE JANSSEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

Alvin D. Hersh, Esq., for petitioner
(Hersh, Ramsey & Berman, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: July 1, 1994 Decided: July 27, 1994

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

On July 2, 1993, petitioner, Sue Janssen, filed a verified petition of appeal with the Commissioner of Education, alleging that respondent, Board of Education of the West Essex Regional School District, reduced petitioner in employment from a full-time teacher of French to a two-fifths position as a French teacher in violation of *N.J.S.A.* 18A:28-9. Respondent filed an answer on July 22, 1993, denying the allegation and stating certain affirmative defenses. On July 26, 1993, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of

Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on August 4, 1993, and a prehearing conference held on October 14, 1993. At that time, the issues were isolated and a hearing scheduled for May 5 and 6, 1994, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. The petition of appeal was amended by order signed on February 14, 1994.

As a result of settlement conference held between the parties on May 5, 1994, a settlement was agreed to subject to ratification by respondent and the hearing was adjourned. The parties have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. In addition, the agreement received formal ratification by respondent Board of Education on May 9, 1994.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 27, 1994
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/28/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 1994
DATE

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

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June 30, 1994

Via Lawyers' Service

Honorable Elinor R. Reiner
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Sue Janssen V. Board of Education of the West Essex Regional School District
OAL Docket No. EDU-6958-93
Agency Docket No. 252-7/93

Dear Judge Reiner:

Pursuant to our telephone conversation on this date, enclosed is another original, fully executed Stipulation of Settlement in connection with the referenced matter. As discussed, this Stipulation was previously forwarded to you on May 10, 1994, via Lawyers' Service. I have enclosed a copy of my previous correspondence and the signed Lawyers' Service receipt, for your information.

I trust this matter can now be brought to closure. However, if anything further is needed, please do not hesitate to contact me.

Respectfully submitted,

Nathanya G. Simon

NGS/mm
Enclosures
CC: Alvin D. Hersh, Esq.

June 30, 1994 WE038
MM:NGS\LETS-JUN\REINER1.LTR

FILE COPY

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OF COUNSEL

May 10, 1994

Via Lawyers' Service

Honorable Elinor R. Reiner
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Janssen v. Board of Education of the West Essex Regional School District
OAL Docket No. EDU 6958-93
Agency Docket No. 252-7/93

Dear Judge Reiner:'

As a follow-up to the placement of the Stipulation of Settlement on the record on May 5, 1994, please be advised that at the Board meeting held on May 9, 1994, the settlement was approved by the Board. Accordingly, the Board President has affixed his signature to the settlement document, which is hereby filed with you for incorporation into an initial decision.

If anything further is needed, please feel free to contact me. Thank you very much for your consideration and assistance in bringing this matter to an amicable closure without the necessity of proceeding to trial.

Respectfully submitted,

Nathanya G. Simon

NGS/mm
Enclosure
CC: Alvin D. Hersh, Esq.
Gary Vitta, Superintendent

May 10, 1994 WP038
MM:NGS\LETS-MAY\REINER1.LTR

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

STIPULATION OF SETTLEMENT
OAL DKT. NO. EDU 6958-93
AGENCY DKT. NO. 252-7/93

SUE JANSSEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT,
Respondent.

This agreement is between Sue Janssen, petitioner, and the Board of Education of West Essex Regional School District, respondent (hereafter Board), and for the mutual promises and covenants contained herein, it is agreed as follows:

1. For the 1994-95 school year only, Sue Janssen shall be assigned to work (4) four consecutive hours (8:00 a.m to noon), within which time she will be assigned to teach such number of French classes as the student enrollment warrants and as determined by the Administration. The remainder of the time not spent teaching classes will be assigned by the administration, in its discretion and as needed.

2. Sue Janssen shall be reimbursed in the total amount of $600.00 for courses taken during the 1993-94 school year.

3. For the 1994-95 school year only, Sue Janssen will be enrolled in the Board's health insurance program as a full-time active member, with full payment of premiums paid by the Board. If possible, enrollment shall commence June 1, 1994. If not possible for enrollment to commence June 1, 1994, the Board shall reimburse Sue

Janssen the COBRA payments associated with such coverage to the date enrollment commences.

4. For the 1994-95 school year only, Sue Janssen shall be paid in accordance with the current formula for part-time teaching employees (i.e., # of classes divided by 5 times the salary associated with full-time status), regardless of the fact that she will be assigned to work on-site for four(4) hours per school day. However, if Sue Janssen is assigned the number of instructional classes which is considered full time under the Master Agreement between the Board and the West Essex Education Association, then she shall be paid in accordance therewith.

5. Except as contained herein, Sue Janssen shall receive only such other emoluments of employment to which she would otherwise be entitled as a part-time employee.

6. Nothing contained herein shall affect the managerial rights of the Board and Administration with respect to Sue Janssen's employment beyond the 1994-95 school year.

7. If Sue Janssen's employment during the 1995-96 school year results in a status for which health insurance is not provided by the Board, and, if Sue Janssen continues said benefits on COBRA, the Board agrees to reimburse the premiums associated with the first three (3) months of such coverage.

8. Each party agrees that there will be no unsubstantiated negative comments or criticisms concerning any aspect of Sue Janssen's employment or the Board's actions relating thereto.

9. This agreement constitutes the entire agreement between the parties on all issues and claims, including but not limited to those set forth in the instant matter (Dkt. No. EDU 6958-93), and the corollary matter pending before the Public Employment Relations Commission on behalf of Sue Janssen, and Sue Janssen does hereby expressly release and waive all such claims and agrees to dismiss all such actions.

10. This agreement shall be subject to formal ratification by the Board.

11. Each party represents that she/it has been duly represented by competent counsel, and that this agreement is entered into voluntarily. This agreement shall be governed by the laws of the State of New Jersey.

In witness whereof, the parties do sign on the date indicated.

Date: May 5, 1994

Sue Janssen
SUE JANSSEN

BOARD OF EDUCATION OF
THE WEST ESSEX REGIONAL
SCHOOL DISTRICT

Dr. Charles Goldberg
BY: **DR. CHARLES GOLDBERG**
BOARD PRESIDENT

DATE: May 9, 1994

OAL DKT. NO. EDU 6958-93

SUE JANSSEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

SEPTEMBER 2, 1994

DATE OF MAILING - SEPTEMBER 2, 1994

241-94

241-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MANNINGTON, SALEM COUNTY.	:	
	:	

SEPTEMBER 2, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4532-94
AGENCY DKT. NO. 91-4/94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF MANNINGTON, SALEM COUNTY,

---

George A. Nitshe, III, petitioner, pro se

John Bergh, Esquire, for respondent

Record Closed: July 14, 1994 Decided: July 20, 1994

BEFORE **JOSEPH E. KANE**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 11, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

July 20, 1994
DATE

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

7/26/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

psa

14 JULY 94

IN RE: ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF MANNINGTON

OAL DOCKET NO: EDU 04532-94 S
AGENCY REF. NO.: 91-4/94

BEFORE: HON. Joseph E. Kane, ALJ

This matter being opened to the Court by George A. Nitshe, III, Petitioner, with John E. Bergh, Esq. present, representing Mannington Township School District.

It is hereby agreed that this matter shall be settled with the following conditions occuring:

1. Superintendent of schools Joanne Mathers to place on the court record her apology for violating, albeit not in bad faith, NJSA 18A:42-4.

2. Superintendent of schools Joanne Mathers tendering, out of her own funds, one hundred eighty four dollars ($184.00) to the Mannington Township

Board of Education. A copy of said payment is attached hereto, designated check no. 4794. Said check shall be deposited into "Fund eleven" as a miscellaneus revenue.

George A. Nitshe, III,
petitioner

John E. Bergh, Counsel
for Manningtan Twp.
School District

OAL DKT. NO. EDU 4532-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MANNINGTON, SALEM COUNTY.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

SEPTEMBER 2, 1994

DATE OF MAILING - SEPTEMBER 2, 1994

240-94

280-97 R
(240-94)

SUE JANSSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

SYNOPSIS

Following a RIF in 1993, petitioner sought reinstatement as a full-time teacher. Matter was settled. Closed case, however, was remanded in 1996, pursuant to order of Superior Court, for limited purpose of clarifying settlement terms.

On remand, ALJ concluded that based upon the language of the stipulation of settlement, as well as the plain language of the collective bargaining agreements between the Board and the Education Association for the years covering 1991 to 1994 and 1994 to 1997, the Board complied fully with the terms of the settlement agreement between petitioner and the Board. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

MAY 27, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3568-96
AGENCY DKT. NO. 252-7/93
(EDU 6958-93 ON REMAND)

SUE JANSSEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

Alvin D. Hersh, Esq., for petitioner
(Hersh, Ramsey & Berman, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: March 4, 1997 Decided: March 14, 1997

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

Procedural History

On July 2, 1993, petitioner, Sue Janssen, filed a verified petition of appeal with the Commissioner of Education, alleging that respondent, Board of Education of the West Essex Regional School District, reduced petitioner in employment from a full-time French teacher to a two-fifths position as a French teacher in violation of *N.J.S.A.*

18A:28-9. Respondent filed an answer on July 22, 1993, denying the allegation and asserting affirmative defenses. On July 26, 1993, the Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

In May 1994, the parties entered into a stipulation of settlement with regard to the underlying merits. On July 27, 1994, the undersigned judge approved the settlement and ordered that the parties comply with the settlement terms. On September 2, 1994, the Commissioner of Education approved the settlement terms and adopted the settlement as the final decision in the matter.

After correspondence was exchanged regarding implementation of the settlement agreement, on or about November 3, 1995, petitioner filed a verified complaint along with a notice of motion to proceed summarily in the Superior Court of New Jersey, Law Division. The Board filed an answer on or about December 12, 1995, and a cross-motion for summary judgment on or about December 29, 1995. After oral argument, the Honorable Jack Kirsten, J.S.C., on January 30, 1996, ordered that the matter be remanded to the Commissioner of Education for proceedings as he deems appropriate. The matter was thereafter filed with the Commissioner of Education, who transmitted the case back to the Office of Administrative Law on March 29, 1996. The case was assigned to the undersigned judge on April 11, 1996, and a telephone settlement conference was scheduled for June 6, 1996. The telephone conference was adjourned at the request of the parties and settlement negotiations were held. A conference was held on July 17, 1996, at which time a hearing was scheduled for August 26, 1996. On that date, settlement conferences were held, and the hearing was adjourned. After additional settlement conferences, it became apparent that a settlement could not be reached and the matter was scheduled for hearing on November 18, 1996. The case was adjourned at the request of counsel for respondent to November 21, 1996, and proceeded to hearing on that date. Witnesses who testified and exhibits considered in deciding this case are listed in the attached appendix.

Issue

At issue is whether the assignment to in-school suspension (ISS) is a class under the terms of the parties' settlement agreement of May 1994.

Undisputed Facts

It became clear at the hearing that several facts were essentially undisputed. They may be summarized as follows:

1. In pertinent part, the settlement agreement between the parties provides as follows:

> 1. For the 1994-95 school year only, Sue Janssen shall be assigned to work (4) four consecutive hours (8:00 a.m. to noon), within which time she will be assigned to teach such number of French classes as the student enrollment warrants and as determined by the Administration. The remainder of the time not spent teaching classes will be assigned by the administration, in its discretion and as needed.
>
> . . . .
>
> 3. For the 1994-95 school year only, Sue Janssen will be enrolled in the Board's health insurance program as a full-time active member, with full payment of premiums paid by the Board. If possible enrollment shall commence June 1, 1994. If not possible for enrollment to commence June 1, 1994, the Board shall reimburse Sue Janssen the COBRA payments associated with such coverage to the date enrollment commences.
>
> 4. For the 1994-95 school year only, Sue Janssen shall be paid in accordance with the current formula for part-time teaching employees (*i.e.*, # of classes divided by 5 times the salary associated with full-time status), regardless of the fact that she will be assigned to work on-site for four (4) hours per school day. However, if Sue Janssen is assigned the

> number of instructional classes which is considered full time under the Master Agreement between the Board and the West Essex Education Association, then she shall be paid in accordance therewith.

2. The provision regarding health insurance was included in the settlement agreement because Ms. Janssen needed to be enrolled as a full participant in the health insurance plan during the 1994-95 school year in order to qualify for lifetime health insurance benefits upon retirement (J-1, Ex. 8).

3. In order to be eligible for the full health insurance benefits provided by the Board, an employee must work full time, which is defined as no less than twenty hours a week. Therefore, in order for the petitioner to obtain the health insurance benefits she desired, the settlement had to require that she work on-site for four hours a day (J-1, Ex. 8).

4. The collective bargaining agreement between the Board and the West Essex Education Association does not govern the terms and conditions of employment of part-time teachers. Therefore, but for the settlement agreement between the Board and the petitioner, Ms. Janssen would not have received either health benefits or tuition reimbursement pursuant to the collective bargaining agreement.

5. In March 1995, the West Essex Education Association filed a Petition for Clarification of Unit with the Public Employment Relations Commission seeking to include part-time teachers in the bargaining unit (J-1, Ex. 8(E)). After review and consideration of the petition by the Public Employment Relations Commission and the arguments in opposition presented by the Board, the petition was withdrawn (J-1, Ex. 8(F)).

6. The agreement between the Board and the West Essex Education Association expired on June 30, 1994 (J-1, Ex. 8(G)). Prior to its expiration, the parties commenced collective bargaining for a successor agreement. The West Essex Education Association's contract proposals, dated March 7, 1994, proposed a change

in Article 1 of the agreement in order to delete from the "Recognition" clause the term "full-time." This deletion would have ensured that the Association would have represented all certificated personnel, whether full-time or part-time (J-1, Ex. 8(H)). The Board opposed this language change throughout negotiations. When the final settlement was struck, the Association dropped this proposal. Accordingly, the collective bargaining agreement continued to contain the recognition of the Association as the representative for all "full-time" certificated teaching staff members.

7. During the 1994-95 school year, the petitioner was assigned two French classes. In addition, Ms. Janssen was also assigned to cover one period of ISS. The Board paid the petitioner two-fifths of her full-time salary, based upon her assignment of two instructional French classes. Ms. Janssen is only certified to teach French.

8. The ISS program was created as an alternative to out-of-school suspension. The in-school suspension is designed to be both educational and punitive. Students are assigned to ISS for one or more full days, depending on the offense that generates the assignment.

9. Every regular class teacher of each student in ISS is required to send an assignment for the day. The assignment must be completed during the period in which the student would have attended that class.

10. An ISS teacher need not have any specific teaching certification issued by the New Jersey Board of Examiners. The teacher assigned to cover ISS is responsible to see that each child is doing the work that has been assigned by the regular classroom teachers, and that the work is finished. Occasionally, the ISS teacher is asked to explain work to students. If a student has difficulty with a certain project and the teacher who gave the assignment is not available, the ISS teacher works with the student. There are no lesson plans for ISS.

11. The books used in ISS are the textbooks of the regular classes. The teacher covering ISS is responsible to approve that the work was completed at the end of the

day. However, the ultimate grading of the students remains the responsibility of the regular classroom teachers. Attendance reporting is the same for ISS and study hall.

12. On many of the 180 school days, ISS has no students. Most students assigned to ISS serve only 1 to 3 days. There are approximately 650 students in each of two schools. Only about 40 to 50 students are assigned to ISS each school year.

13. During the 1994-95 school year, ISS operated on 95 out of a possible 182 school days (J-2). On 34 of those days, only 1 student attended; on 26 days, only 2 students attended; on 24 days, only 3 students attended; and on the remaining 11 days, either 4 or 5 students attended (J-2). Therefore, ISS only operated for 52 percent of the school year, and on 88 percent of the days on which ISS operated, there were 3 or fewer students in attendance (J-2).

14. Pursuant to Article 8 of the agreement between the Board and the West Essex Education Association, effective 1991-94 (J-1, Ex. 8(G)), full-time status required assignment to five instructional periods per day. However, in order to retain full-time status, teachers with four instructional classes would be assigned ISS.

15. Under the subsequent contract, effective 1994-97 (J-1, Ex. 8(D)), teachers would be considered full-time only when assigned to five instructional periods per day. In addition, the 1994-97 agreement contained the following grandfather provision:

> Effective with the 1996-97 school year, in-school suspension shall be considered a duty assignment, only. However, for the 1994-95 and 1995-96 school years, status quo shall prevail.
>
> [J-1, Ex. 8(D).]

Therefore, although the new agreement required teachers to teach five instructional periods per day to maintain full-time status, the grandfather provision

permitted, for a two-year period, teachers to maintain full-time status by teaching four classes plus the assignment to ISS, as they had done under the former agreement.

Testimony

A teacher for twenty-six years in respondent's school district, Charles Small retired in June 1996. He is certified in English and general science, and holds an administrator's certificate. Small recalled that initially a different teacher taught each ISS period, and later two teachers each served for one-half day. In 1992 or 1993, the Board assigned him to serve as the full-time ISS teacher. He explained that a student in ISS received assignments from each regular class, and the student was required to complete each assignment. Noting that the Board wanted ISS to be educational as well as punitive, Small opined that he was chosen for the position because of his ability to discipline and to instruct in math, biology, chemistry, French, Latin and history. Many times a student needed help with an assignment, and he explained the work to the student. He said he held this job for two years, and recalled that the issue arose as to whether this would affect his pension. The State Division of Pensions indicated that this service would count towards his pension. Thus, he is on full retirement based on five periods of ISS, plus a duty period, for two years. After serving in that capacity for two years, he transferred to the junior high school as officer of attendance and discipline, a teaching position. He was also assigned to teach one class. In 1992-93, his assignment was ISS; in 1993-94, it was English. He noted that ISS is operational only for students on suspension. On days there were no students in ISS, he would help out in some other way.

On cross-examination, Small agreed that he did not prepare a lesson plan for ISS. He contended that ISS had a curriculum by policy. There are instructions on how to run ISS, which are not the same as for a study hall. Students read case studies of suspensions to determine how to better handle a situation. The ISS teacher keeps the students busy during the study period of ISS, and grades objective tests if requested to do so by the classroom teachers. The classroom teachers have the overall

responsibility for the students in their respective subjects, and are responsible for grading the students.

Small further explained that all teacher evaluations are done by the administration. As officer of attendance and discipline, he was not authorized to formally evaluate ISS teachers. However, he submitted evaluations of programs. The evaluations of the ISS teachers were done by the administration. He was responsible for the students in the ISS program, and would convey to a teacher if a student was not working.

Small explained that there was constant change in the ISS class. Noting that the average suspension ran from 1 to 3 days, he stated that repetitions were common and a student could serve 9 to 15 days. The number of ISS students could be 40 to 50 of the 650 students in the school, a small percentage of the student body. There could be up to 60 days when there were no students in ISS. In 1994-95 he taught five instructional classes of English and had no oversight responsibility for ISS. Joan Oakley, assistant principal at the junior high school, was responsible for supervising ISS. In 1995-96 he was on leave.

On redirect examination, Small contended that ISS duties are different from other duties. The ISS teacher works with students that are more difficult to work with. He alleged that ISS was an instructional period. He had to explain, show, and teach, when necessary, and keep the students working and busy. The students were confined to one room for the entire day. A different teacher supervised them for the lunch period.

On recross-examination, Small recalled that he had in the past been assigned to study hall. Although he contended that students in study hall can work on what they choose, he admitted that students in study halls also ask for help.

During the 1994-95 school year, Sue Janssen taught two French classes and had ISS and study hall for one period each. Janssen contended that because of the

settlement agreement in effect, she questioned Ms. Oakley about her schedule. Because she believed ISS was a class and she thought she was supposed to have a duty, Janssen asked Oakley to choose another assignment for her. Oakley said that she checked and that it did not matter in terms of the agreement. Janssen claimed that during study hall duty she could read the paper and correct papers. She was not responsible for overseeing whether the students finished their work. In ISS, she would not know what was "on the plate" for that day. Duties were posted in the room for each period. She had to be available to help the students and to see whether their work for each period had been completed. She admitted that there were days with no students in ISS. On those days she checked the office to see if they needed additional coverage or she worked in the MAC lab. During school years 1992-93 and 1993-94, she was a full-time teacher. ISS was her fifth class, and she had a duty period. Charles Small was responsible for ISS in 1992-93 and 1993-94.

On cross-examination, Janssen indicated that in 1994-95 there could have been 30 days or more without students in ISS. On most days there were 3 or 4 students; the average stay was 1 to 3 days. An attendance sheet was in the ISS room. She revealed that 90 percent of the work for the students came from the classroom teacher. If a teacher was absent or unavailable, Janssen would find appropriate work for the student. She would write a specific assignment and the student could utilize the books in ISS. In general, she would approve or disapprove the work by determining whether the classroom assignment had been completed and the directions followed, *i.e.*, if the student stayed on task. She would not grade the work unless it was an objective test and she was asked to. The classroom teachers evaluated the students' work. She would help a student who could not work on his own. She alleged that in study hall she had a roll book and had to make sure the students were there. She answered questions, although this was not part of the description of study hall. There was no attendance taken for hall or cafeteria duty.

Janssen agreed that she received health insurance benefits because of the settlement agreement. Under the agreement, her assignments other than the two French classes would be duty assignments, at the discretion of the administration. She

indicated that there could be 3, 4 or 24 students in study hall. Although there were usually students present, there could be up to 10 days without students. Janssen stated that if there were no ISS students, she was assigned elsewhere by the principal.

On recross-examination, Janssen admitted that she had been covered by the collective bargaining agreement in 1992-93 and 1993-94. In 1994-95 she was part time, and she was not sure whether she was covered by the collective bargaining agreement that year. (She paid dues to the association, but was not sure if she paid 100 percent.) On further questioning, Janssen indicated that in 1992-93 and 1993-94, if there were no ISS students she had a free period. Since there was an agreement for 1994-95, she made sure she reported if no students were present.

Dr. Gary Vitta, superintendent of schools since 1992-93, has a bachelor of science degree in chemistry and a master of science degree in biology education, a professional diploma in school administration, and a doctorate in education. He is certified in New Jersey in school administration and science, certified in New York in science, and holds a New York City license in biology, chemistry and general science. Vitta served as assistant superintendent in 1991-92 and assistant to the superintendent and science supervisor from 1989 to 1991, when J. Hand was the superintendent. Hand subsequently retired.

Vitta asserted that ISS is a structured duty assignment. He opined that it is not an instructional period; no certification is required. He pointed out that there were only six ISS sessions at the junior high school in 1996-97. There is no justification for paying one-fifth salary when no lesson plans are required, and there is no course of study or grading. He explained that before he became superintendent, if a teacher taught four-fifths the Board would allow the teacher to utilize the ISS period to add one-fifth to equal a full-time teacher. This was a courtesy by the Board. There are teachers with five instructional periods that had ISS as a duty period.

Vitta alleged that Small was given a full load of ISS to retain teachers. It was a courtesy by the superintendent to the union. He opined that this was wrong. ISS is

supervised study. Since 1992, it has been supervised on a period-by-period basis. He further indicated that a study hall teacher supervises students and does not read the newspaper; it is not a free period. A teacher prepares for lessons during a preparation period. He indicated that the high school has more students in ISS than the junior high school. The ISS teacher monitors students as in a study hall and performs a supervisory function. ISS is a more structured environment than study hall. Since the individual teacher is probably not certified in each area of study, he queried how the teacher could assist a student. The teacher can only make sure that the work gets done.

Vitta recommended the settlement agreement to the Board. He understood that Janssen was to teach two French classes. She would be in the building 8:00 a.m. to 12:00 p.m. and could be assigned any other assignment that he wished to give her. Therefore, Janssen could retain her health benefits. In 1994-95, under the collective bargaining agreement, part-time teachers were not eligible for benefits. Thus, without the settlement agreement Janssen would not have received health benefits or tuition reimbursement. He alleged that the Board agreed to the settlement out of kindness. He indicated that ISS and study hall are not instructional classes. An instructional class requires that a teacher be certified to teach a particular subject.

On cross-examination, Vitta admitted that in 1994-95, due to his kindness and without an agreement, other part-time employees received tuition reimbursement. He explained that Small was not in jeopardy of losing his job. However, due to declining enrollment and reductions, a position such as Small's was probably created to save another English teacher's job (with less seniority) or increase class size. He did not know how Small's position was reported to the State. He further explained that the Board, out of courtesy to the union, had been willing to allow a teacher to teach four instructional periods and have an ISS assignment to receive full-time status. This has since been negotiated out of the contract. Although in 1994-95 and 1995-96 the status quo remained in order to reach an agreement, for 1996-97 ISS is only a duty

assignment. He did not know the ISS attendance figures for 1994-95. An ISS teacher is free if there are no students in ISS.

Vitta recalled no discussions regarding the distinction between a class and an instructional class in the agreement. He opined that in 1994-95, Janssen was assigned to a duty. He understood that Janssen could be assigned to anything else, and that only French would count as an instructional period. Although he did not recall if Vice Principal Oakley called him, he recalled that he told August Belotti, the junior high school principal, that he could assign Janssen to anything. He did not recall Belotti saying that Janssen was concerned that ISS was an instructional period, and was totally shocked by her lawsuit. On redirect examination, he indicated there are teachers who teach three or less periods and are paid the same as petitioner. They do not receive health benefits.

Findings of Fact

I have considered the testimony adduced at the hearing and am persuaded by the testimony of Dr. Gary Vitta, who I found to be credible and worthy of belief. Dr. Vitta was in a position to observe ISS and had overall supervisory authority. As such, I found his view of ISS to be valuable and reasonable. I therefore make the following findings of fact:

Dr. Gary Vitta, the superintendent of schools for the West Essex Regional School District, presented the proposed settlement of the underlying litigation to the Board in the spring of 1994. Dr. Vitta told the Board that, pursuant to the terms of the settlement, Janssen would be teaching two French classes; she would be present in the district for four hours each day (8:00 a.m. to noon); the administration was free to assign Janssen to other duties in the best interest of the students; Janssen's health benefits would be paid by the district; and Janssen would receive tuition reimbursement for courses taken during the 1993-94 school year. Janssen was assigned to monitor ISS. ISS was considered to be a structured duty assignment. Supervision of ISS was

similar to supervision of the cafeteria or of study hall, in that the teacher supervised and assisted students and gave guidance upon request. ISS was not considered, for purposes of Janssen's assignment, to be an instructional "class."

Discussion

Petitioner argues that paragraph four of the stipulation of settlement provided that she would be paid for the number of classes divided by five and multiplied by the salary that she would have received had she been full-time. That language contains no modifier; it does not say the number of French classes, the number of teaching classes or even the number of instructional classes, merely the number of classes. Based upon this, petitioner argues that in 1994-95, ISS was "still being treated and considered as a class," not a duty. Thus, Janssen should have been paid three-fifths of her full-time salary. Respondent argues that ISS is not a class, and therefore petitioner cannot claim entitlement to an extra one-fifth salary. Respondent further argues that the collective bargaining agreement relied upon by petitioner to support the conclusion that ISS should be considered a class does not apply to part-time teachers and, even assuming *arguendo* that it does apply to petitioner, the Board has still complied with the terms of the settlement agreement.

I have considered the arguments of counsel and must agree with the position espoused by respondent. First, it is clear that based upon the undisputed facts and findings of fact, ISS is not a "class." Rather, the facts substantiate that ISS is a structured duty for which no additional compensation is warranted. The ISS teacher does not prepare lesson plans, curricula or courses of study for ISS. Rather, the ISS teacher is responsible to insure that each student is doing the work assigned by the regular classroom teachers and that the work is completed. Although the ISS teacher may be asked questions by the students, this does not make the ISS assignment a class. The ISS teacher is not certified to teach all of the subjects that the students in ISS are taking. The simple fact that the teacher may assist a student does not make

this assignment a class. Clearly, this duty is not even an everyday duty. If no students are assigned to ISS, there is no ISS.

Second, I am in agreement with respondent that the collective bargaining agreement relied upon by petitioner does not apply to part-time teachers. It is clear from the joint exhibits that part-time employees were not part of the unit represented by the association. As set forth by respondent, only full-time staff were covered by the agreement, and therefore the petitioner's reliance upon any clause in the agreement is without merit.

Third, and most important, I **CONCLUDE** that respondent has complied with the terms of the settlement agreement. This is true, as respondent points out, even if the collective bargaining agreement is applicable to petitioner. Clearly, the stipulation of settlement was specific to the parties. It set forth the specific terms of the resolution of the lawsuit brought by petitioner to challenge a reduction in force. As stated by respondent, one of the main interests on the part of petitioner, with respect to the resolution of the underlying litigation, was eligibility for health benefits in order to be eligible upon retirement for free lifetime health insurance benefits. However, in order to be eligible for health benefits, an employee of the West Essex Regional School District was required to work full time, defined as twenty hours a week or more. Clearly, it was believed that the maximum number of instructional classes anticipated for Janssen for the 1994-95 school year was two. Thus, paragraph one specified that Sue Janssen would be assigned to work four consecutive hours, which resulted in a work load of twenty hours per week and eligibility for health insurance.

Janssen's assignment would consist of such number of French classes as student enrollment warranted and as determined by the administration, with the remainder of the time not spent teaching French classes to be assigned by the administration in its discretion and as needed to benefit the students of the district. The payment to the petitioner for the classes assigned would be "in accordance with the current formula for part-time teaching employees (*i.e.*, # of classes divided by 5

times the salary associated with full-time status), regardless of the fact that she [would] be assigned to work on site for 4 hours per school day." This sentence specifies with clarity the financial obligation of the district to Ms. Janssen with respect to instructional classes assigned and the additional duties which could be incorporated in the four-hour work day.

The language in the stipulation of settlement was clear and specific with respect to the rights and obligations of the parties on the issue of monies owed and assignment of time. However, and as pointed out by respondent, petitioner's counsel wanted wording in the settlement agreement that would protect the petitioner in the remote event that a full-time position (or additional French classes) became available. A change in the financial obligation would only occur if petitioner was assigned "the number of instructional classes which is considered full time under the Master Agreement between the Board and the West Essex Education Association." As pointed out by respondent, this contingency was not met.

Clearly, respondent complied with the terms of the settlement agreement by assigning Janssen to other duties in the best interests of the students and paying Janssen for the number of classes divided by five times the salary associated with full-time status. Furthermore, and as pointed out by respondent, even if the collective bargaining agreement applied to Janssen, full-time status required assignment pursuant to that agreement to at least four instructional periods per day. During the term of that agreement, teachers would be assigned to cover ISS in addition to their four instructional classes. Under the subsequent contract, effective 1994 to 1997, however, teachers would be considered full-time only when assigned to five instructional periods per day. In addition, the latter agreement contained a grandfather provision allowing the status quo in regard to ISS to prevail for the 1994-95 and 1995-96 school years. Thus, although the new agreement required teachers to teach five instructional periods per day to maintain full-time status, the grandfather provision permitted teachers, for a two-year period, to maintain full-time status by teaching four classes as long as they were assigned to ISS, as under the former agreement. However, and as pointed out by respondent, under no circumstances did the

agreement contemplate that ISS would be considered an instructional "class." Janssen, certified to teach French and having been assigned to two instructional French periods per day, could not be the beneficiary of any language contained within Article 8 of the contract. Quite simply, she did not teach four or five instructional periods.

I therefore **CONCLUDE** that based upon the language of the stipulation of settlement, as well as the plain language of the collective bargaining agreements between the Board and the West Essex Education Association for the years covering 1991 to 1994 and 1994 to 1997, the Board complied fully with the stipulation of settlement between petitioner and the Board.

Order

It is hereby **ORDERED** that petitioner's petition of appeal is dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 14, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

4/18/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 21 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

Charles Small
Sue Janssen

For Respondent:

Gary Vitta

List of Exhibits

Joint:

J-1		List of documents one through eleven
J-2	(1)	Suspension reports provided to the West Essex Regional Board of Education on a weekly basis for ISS at West Essex Junior High School, 1994-95 (37 pages)
	(2)	Suspension report breakdown by days
	(3)	Suspension Reports Summary indicating monthly and yearly totals

OAL DKT. NOS. EDU 3568-96 and EDU 6958-93 (ON REMAND)
AGENCY DKT. NO. 252-7/93

SUE JANSSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge, for the reasons expressed therein, that the Board complied with the terms of the settlement agreement between petitioner and the Board by assigning petitioner to other staff duties and paying petitioner for the number of classes divided by five times the salary associated with full-time status.

Accordingly, the Commissioner affirms the initial decision of the OAL and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 27, 1997
DATE OF MAILING MARY 27, 1997

242-94

242-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF HADDON HEIGHTS,	:	
CAMDEN COUNTY.	:	
	:	

SEPTEMBER 2, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL

OAL DKT. NO. EDU 4529-94
AGENCY DKT. NO. 100-4/94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF HADDON HEIGHTS BOROUGH, CAMDEN COUNTY

Steve Dorsey, petitioner, pro se

Robert P. Becker, Jr., Esq., for respondent (Hannold, Marshall & Becker, attorneys

Record Closed: July 14, 1994 Decided: July 14, 1994

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

This matter arises out of a petition filed by Steve Dorsey and others alleging irregularities and/or violations of law in the conduct of the annual school election held in Haddon Heights Borough. On May 11, 1994, the matter was transmaitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A hearing was scheduled before the undersigned for July 20, 1994. The parties have submitted the attached, signed Stipulation of Dismissal which was received on July 14, 1994.

I CONCLUDE that the matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that this matter be **DISMISSED.**

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

July 14, 1994
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

July 20, 1994
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cc

HANNOLD, MARSHALL & BECKER
47 Cooper Street - P.O. Box 57
Woodbury, New Jersey 08096
PHONE (609) 845-1000 * FAX (609) 845-0265

Attorneys for Haddon Heights Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, NJ 07102

OAL Docket No.: 04529-94 S
Agency Ref. No.: 100-4/94
Transmitting Agency:
Department of Education

Judge: Duncan, M. Kathleen

ANNUAL SCHOOL LAW ELECTION IN HADDON HEIGHTS BORO

STIPULATION OF DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

Dated: 7/5/94

HANNOLD, MARSHALL & BECKER

BY: _____
ROBERT P. BECKER, JR., ESQ.
Attorney for Haddon Heights
Board of EducationBoro

Dated: 7.11.94

BY: _____
STEVE DORSEY, Complainant, Pro Se

LAW OFFICES
HANNOLD, MARSHALL, & BECKER
47 COOPER STREET
WOODBURY, NEW JERSEY
08096

OAL DKT. NO. EDU 4529-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF HADDON HEIGHTS,	:	
CAMDEN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law, incorporating a "Stipulation of Dismissal" based on the parties' having "amicably adjusted" their differences, have been reviewed.

Upon such review, the Commissioner finds no basis on which he can ascertain the terms of the "adjustment" reached by the parties in this matter. Because the case was transmitted to the Office of Administrative Law as a contested matter pursuant to N.J.S.A. 52:14B, the specific terms of any settlement must be spread on the record pursuant to N.J.A.C. 1:1-19.1 so that the Commissioner may review them prior to making a final decision on the recommendation of the ALJ.

Accordingly, the initial decision of the Office of Administrative Law is remanded for supplementation of the record consistent with N.J.A.C. 1:1-19.1.

IT IS SO ORDERED.

SEPTEMBER 2, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - SEPTEMBER 2, 1994

242-94

297-94R
(242-94)

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF HADDON HEIGHTS,	:	DECISION ON REMAND
CAMDEN COUNTY.	:	
	:	

NOVEMBER 10, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 8698-94
(EDU 4529-94 On Remand)
AGENCY DKT. NO. 100-4/94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY

Steve Dorsey, petitioner, pro se

Robert P. Becker, Jr., Esq., for respondent (Hannold, Marshall & Becker, attorneys)

Record Closed: October 3, 1994 Decided: October 5, 1994

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

The Commissioner of Education has remanded this matter to the Office of Administrative Law requesting that the terms of the agreement between the parties be placed upon the record. In July 1994 the parties had submitted a signed Stipulation of Dismissal, reciting only that the matter had been amicably adjusted between the parties, and based upon that document the undersigned had recommended that the matter be dismissed. The parties have now submitted a document entitled Release Agreement executed on July 11, 1994 which contains the terms of their agreement. A

copy of that document and the Stipulation of Dismissal originally submitted, are attached hereto and made a part hereof as if set forth herein at length.

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

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

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

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

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

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

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

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

Oct. 5, 1994
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10/7/94
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 13 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

HANNOLD, MARSHALL & BECKER
47 Cooper Street - P.O. Box 57
Woodbury, New Jersey 08096
PHONE (609) 845-1000 * FAX (609) 845-0265

Attorneys for Haddon Heights Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, NJ 07102

OAL Docket No.: 04529-94 S
Agency Ref. No.: 100-4/94
Transmitting Agency:
Department of Education

Judge: Duncan, M. Kathleen

ANNUAL SCHOOL LAW ELECTION IN HADDON HEIGHTS BORO

STIPULATION OF DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

Dated: July 5, 1994

HANNOLD, MARSHALL & BECKER

BY: _____
ROBERT P. BECKER, JR., ESQ.
Attorney for Haddon Heights
Board of EducationBoro

Dated: 7.11.94

BY: _____
STEVE DORSEY, Complainant, Pro Se

LAW OFFICES
HANNOLD,
MARSHALL, & BECKER
47 COOPER STREET
WOODBURY, NEW JERSEY
08096

RELEASE AGREEMENT

This RELEASE AGREEMENT dated 7/11/94, 1994, is given

BY the Releasor(s) **STEVE DORSEY** of 133 Third Avenue, Haddon Heights, New Jersey 08035, hereinafter referred to as "Dorsey",

and

EDWARD J. SNYDER, Superintendant, Haddon Heights School District, Administration Building, 300 Second Avenue, Haddon Heights, New Jersey 08035-1408, hereinafter referred to as "Snyder".

If more than one person signs this Release, "I" shall mean such person who signs this Release.

1. **RELEASE**. Dorsey and Snyder release and give up any and all claims and rights which either of them may have against the other. This Release applies to claims against either of the parties resulting from anything which happened up to now involving the 1994 annual school election of Haddon Heights Boro. Dorsey specifically releases the following claims:

Any and all claims arising from a dispute originating from the April 25, 1994, letter to Dr. Leo Klagholz, Bureau of Controversies and Disputes, from Dorsey, alleging violations of school law process. This letter was subsequently accepted as a claim and complaint by the Office of Administrative Law under OAL Docket No. EDU 04529-94 S with Agency Reference No. 100-4/94 with a filing date of May 11, 1994.

IT IS FURTHER UNDERSTOOD that Snyder, as Superintendant, shall not offer any type of incentives to individuals or groups of individuals, directly or indirectly, who are within the Haddon Heights Boro School District, for the purpose or intent of induceing voters to vote on any school issue in the future. Specifically, no pizza parties or other forms of inducement utilizing Haddon Heights students will take place in the Haddon Heights school system in order to encourage voters to vote on any school issue. Dorsey agrees to not publish, print or use the facts of this alleged incident, the Order dismissal or this Release Agreement in any public manner, nor publish or communicate the facts of this incident through any organization of which he is a member, nor will he distribute these forms and information to any organization in any manner.

IT IS EXPRESSLY UNDERSTOOD by Dorsey and Snyder and agreed by both that the acceptance of and the signing of this Release Agreement is in full accord and satisfaction and in compromise of all disputed claims that either may have against the other and that the signing of this Release Agreement is not admission of liability or wrongdoing on either parties' part, but is made expressly for the purpose of terminating all disputes between the parties.

IT IS FURTHER UNDERSTOOD that this Release Agreement releases the parties named above and any organization such as the Haddon Heights Board of Education in regard to Snyder and any voter's group represented by/or associated with Dorsey.

2. **WHO IS BOUND**. Both Dorsey and Snyder are bound by this Release Agreement. Additionally, anyone who succeeds to their interest, rights and responsibilities are also bound. This Release Agreement is made for their benefit and all who succeed to their rights and responsibilities.

LAW OFFICES
HANNOLD, MARSHALL,
McDONNELL & BECKER
47 COOPER STREET
WOODBURY, NJ 08096

3. SIGNATURES. Dorsey and Snyder agree to the terms of this Release Agreement. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

STEVE DORSEY

EDWARD J. SNYDER, Superintendant
Haddon Heights Board of Education

STATE OF NEW JERSEY, COUNTY OF CAMDEN

I **CERTIFY** that on 7/11/94, 1994, STEVE DORSEY personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his act and deed.

Barbara Klemmer
Notary Public of NJ
My Commission Expires
May 11, 1997

STATE OF NEW JERSEY, COUNTY OF CAMDEN

I **CERTIFY** that on 7/11/94, 1994, EDWARD J. SNYDER personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his act and deed.

Barbara Klemmer
Notary Public of NJ
My Commission Expires
May 11, 1997

Prepared by:

Robert P. Becker, Jr., Esq.

LAW OFFICES
HANNOLD, MARSHALL,
McDONNELL & BECKER
47 COOPER STREET
WOODBURY, NJ 08096

OAL DKT. NO. EDU 8698-94 (EDU 4529-94 ON REMAND)

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF HADDON HEIGHTS,	:	DECISION ON REMAND
CAMDEN COUNTY.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

NOVEMBER 10, 1994

DATE OF MAILING - NOVEMBER 10, 1994

243-94

243-94E

STEVEN W. LITWACK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY, ET AL.,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

SEPTEMBER 8, 1994

STEVEN W. LITWACK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY, ET AL.,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

For the Petitioner, Steven W. Litwack, pro se

For the Respondents, Russell E. Paul, Esq.

This matter having been opened to the Commissioner of Education by way of Petition and Motion for Emergent Relief filed on or about April 15, 1994, to require the Board and its superintendent to take certain actions relating to the development of various Educational Improvement Plans pursuant to N.J.A.C. 6:8-9.1 et seq. and to require the superintendent and the Board to submit names of teachers who could not be rehired for lack of funding for certain positions prior to a vote on April 18, 1994, the working day following the filing of the petition. The petition requested that the budget for 1994-95 be declared null and void as deceptive. The 1994-95 school budget election was scheduled for April 19, 1994. The emergent relief request as it relates to nonrenewal of staff and the 1994-95 budget election became moot on April 19, 1994.

In light of the nature of the allegations contained in the petition, the Board of Education was directed to, and did file, an Answer April 25, 1994.

In order to establish entitlement to interim relief, petitioner must meet the standards set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982).

In the present matter, petitioner alleges that irreparable harm will be experienced because the Board was presenting a knowingly deceptive budget for approval by the public. Petitioner alleges:

> ***The budget purports to cut seven teaching positions yet the administration has insisted, in public meetings, that no teachers would be cut. Trying to have it both ways the Board and Superintendent have initiated a scheme by which the EIP Funds, earmarked for local school allocation and designed NOT to be controlled by central administration, would be diverted to sustaining the seven "cut" teachers. The present course of conduct by the Board and Superintendent has already tainted the EIP process by predisposing the EIP Planning Teams towards one of the fifteen demonstrably effective improvement strategies and programs set out by the New Jersey Department of Education and having done so without input from the parents, staff, community members or students, in a "top down" management technique which presented the team with incomplete information and attempted to deal with system wide policy concerns instead of school oriented ones.
>
> (Petitioner's Memorandum, at pp. 1-2)

The Board, in response, asserts that petitioner has failed to meet all prongs of the Crowe standard. First, there will be no irreparable harm in that no teacher or other staff member has been harmed and that no student will be deprived of a thorough and efficient education. The Board, further, asserts that the legal right underlying petitioner's claim is unsettled and that all material facts are in dispute.

The Commissioner, having carefully considered the pleadings and briefs of the parties, hereby denies the Motion for Emergent Relief for the reasons set forth herein and failure to establish entitlement thereto under the standards articulated in Crowe, supra, and directs that this matter be transmitted forthwith to the Office of Administrative Law for plenary hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 8, 1994

DATE OF MAILING - SEPTEMBER 8, 1994

243-94

(243-94E)
425-95

STEVEN W. LITWACK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE ET AL., CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 5, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9859-94
AGENCY DKT. NO. 79-4/94

STEVEN W. LITWACK,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, ET AL, CUMBERLAND COUNTY,
Respondent.

Robert C. Litwack, Esq., for petitioner, (Litwack & Litwack, attorneys)

Russell E. Paul, Esq., for respondent

Record Closed: October 18, 1995 Decided: October 19, 1995

BEFORE **EDGAR R. HOLMES,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 11, 1994, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

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

10/19/95
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 06 1995
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

lmh

RUSSELL E. PAUL, ESQ.
39 South Broad Street
Woodbury, NJ 08096
(609) 848-2100

Attorney for Respondent

STEVEN W. LITWACK,
Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, ET. AL., CUMBERLAND COUNTY,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 9859-94
AGENCY DKT. N0. 79-4/94

THIS MATTER being brought before the Honorable Edgar R. Holmes, ALJ, by the parties, Robert C. Litwack, Esquire appearing on behalf of the Petitioner, Steven W. Litwack, and Russell E. Paul, Esquire, appearing on behalf of the Respondent, Board of Education of the City of Millville

AND IT APPEARING, that a Petition was filed in the above-captioned matter by Steven W. Litwack, Petitioner, and served on or about April 14, 1994 upon the Respondent, Board of Education of the City of Millville, and this matter is currently before this Court for a hearing,

AND IT FURTHER APPEARING, that the Petitioner, Steven W. Litwack, alleged that the Respondent, Board of Education of the City of Millville, had violated the provisions of N.J.A.C. 6:8-9.1 et seq in that Petitioner alleged that the Respondent had improperly adopted an Educational Improvement Plan (EIP) for the School Year 1994-1995,

AND IT FURTHER APPEARING that the Petitioner, Steven W. Litwack alleged that the Respondent, Board of Education of the City of Millville had placed a total of 7 teaching positions in jeopardy of being terminated as a result of the aforesaid alleged improper course of conduct as to the adoption of an EIP plan for the 1994-1995 School Year,

AND IT FURTHER APPEARING, that the Petitioner, Steven W. Litwack, alleged that various meetings of the EIP Planning Teams were either not held and/or were improperly held or that the public was excluded from said meetings, or that results of said meetings were ignored by the Respondent, Board of Education of the City of Millville,

AND IT FURTHER APPEARING, that the Petitioner, Steven W. Litwack, alleged that the Respondent, Board of Education of the City of Millville, in various manners as set forth in the Petition, did act arbitrarily and capriciously in an attempt to allegedly misuse and/or improperly allocate EIP funds,

AND IT FURTHER APPEARING, that the Respondent, Board of Education of the City of Millville, has denied all of the aforesaid allegations by the Petitioner, Steven W. Litwack, and a hearing has been scheduled in this matter,

AND IT FURTHER APPEARING, that the Petitioner, Steven W. Litwack, and the Respondent, Board of Education of the City of Millville, have held discussions concerning an amicable resolution of this case without the need for said hearing and without the need for further contentious litigation,

AND IT FURTHER APPEARING, that on April 18, 1994 the School Budget was adopted by a majority of the voters at the regular School Election,

AND IT FURTHER APPEARING, that during the 1994-1995 School Year same was completed without any reduction in teaching staff or dismissal of any teachers in any way related to EIP funding,

AND IT FURTHER APPEARING, that this year's (1995-1996) Educational Improvement Plan (EIP Plan) has been submitted to the EIP Planning Teams with appropriate public input, public hearings, etc. in a manner that is acceptable to the Petitioner, Steven W. Litwack and that certain alleged changes in the procedures for adopting and implementing the 1995-1996 EIP Plan were used by the Respondent, Board of Education of the City of Millville, as set forth in this action and as recommended by the Petitioner, Steven W. Litwack,

AND IT FURTHER APPEARING, that the Petitioner, Steven W. Litwack, believes that the Respondent, Board of Education of the City of Millville, has reacted to his recommendations as set forth in this action in a positive fashion, and has adopted same as to the 1995-1996 EIP Plan, and that continuation of this litigation would be adverse to the goals espoused by the Petitioner, Steven W. Litwack, that the Respondent, Board of Education of the City of Millville, has shown good faith, and for good cause shown

IT IS ORDERED this 19th day of October, 1995, by way of a Preliminary Recommendation to the Commissioner of Education by Edgar R. Holmes, ALJ , both the Petitioner, Steven W. Litwack and the Respondent, Board of Education of the City of Millville, consenting thereto as follows:

1. The above-captioned matter shall be and is hereby dismissed with prejudice.

2. The Respondent, Board of Education of the City of Millville, agrees that it shall strictly adhere to all requirements for the adoption of an Educational Improvement Plan as set forth in N.J.A.C. 6:8-9.1 et seq, together with any other applicable laws, rules, or regulations appropriate for the adoption and implementation of Educational Improvement Plans.

EDGAR R. HOLMES, ALJ

Dated: October 19, 1995.

The Petitioner and the Respondent have read the above-captioned proposed Order and consent to entry of same, both as to content and as to form.

STEVEN W. LITWACK, Petitioner

By: _____
ROBERT C. LITWACK, ESQ.

BOARD OF EDUCATION OF THE
CITY OF MILLVILLE, Respondent

By _____
RUSSELL E. PAUL, ESQ., Solicitor

OAL DKT. NO. EDU 9859-94

STEVEN W. LITWACK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE ET AL., CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

DECEMBER 5, 1995
DATE OF MAILING DECEMBER 6, 1995

244-94

244-94

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF COLTS NECK	:	DECISION
TOWNSHIP, MONMOUTH COUNTY.	:	
	:	

SYNOPSIS

Petitioning citizens requested election inquiry, alleging improprieties in building referendum sufficient to affect outcome of the voting. Petitioners alleged violations of N.J.S.A. 18A:14-63.12 and 18A:42-4.

ALJ concluded that the record did not substantiate that the irregularities established affected the outcome of the election within the meaning of that standard as interpreted by the courts. Moreover, ALJ concluded that although the irregularities in the election were not sufficient to require a new election, the Board was ordered to review and receive instruction on school election statutes well in advance of the next school election.

Commissioner, in considering the nature of the irregularities which occurred, deemed it appropriate to direct the Monmouth County Superintendent of Schools to conduct a review of the practices and procedures utilized by the Board in this election and to report to the Board such corrective action in policy and procedure for its implementation as will assure the proper conduct and integrity of all future elections. Commissioner dismissed petition.

SEPTEMBER 6, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3069-94

AGENCY DKT. NO. 57-3/94

IN THE MATTER OF THE SPECIAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF COLTS NECK TOWNSHIP

Vincent W. Domidion, II, for petitioners, *pro se*

Francis J. Campbell, Esq.. for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: June 30, 1994 Decided: July 18, 1994

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

In November 1993 and March 1994 the Colts Neck Board of Education put bond issue referendums before the public. The November referendum lost. The March referendum, held on the 22nd, was approved by a margin of four votes.

On March 25, a group of Colts Neck residents called the Colts Neck Citizens Alliance filed a request for an inquiry per *N.J.S.A.* 18A:14-63.12 with the Commissioner of Education. The group alleged violations of *N.J.S.A.* 18A:14-7, Printed matter in elections to show source of payment and printer, and of *N.J.S.A.* 18A:42-4, Distribution

of literature as to candidacy, bond issues, or other public question to be submitted at election; prohibited.

The Department of Education transmitted to the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The matter was set down for hearing on May 31, 1994, at the Freehold Township Municipal Court. Upon convening the hearing, I asked the petitioners if the Colts Neck Citizens Alliance was a corporation. The group's representative said that it is. Pursuant to *R.* 1:21-1 and *N.J.A.C.* 1:1-5.4, I informed the petitioners that they could not appear as a corporation without counsel and gave them seven days in which to decide on a course of action. The petitioners timely submitted a certification to the effect that they are bringing the action as private citizens and not as the incorporated Alliance.

While the petitioners considered their options, I received a copy of a Commissioner of Education decision dated May 17, 1994 and announcing a recount of the votes cast on March 22, showed no change. The totals were 1,152 yes votes and 1,148 no votes.

The matter was heard on June 30, 1994, at the Freehold Borough Municipal Court. Six persons testified and thirty-nine documents were entered in evidence.

From the evidence adduced, I **FIND**:

1. At least four pieces of literature favoring passage of the referendum were mailed by the Coalition for Colts Neck Schools, an unincorporated group of residents. The pieces do not bear adequate identification per *N.J.S.A.* 18A:14-97.

2. At least twenty pieces of literature, including a poster, were distributed in the period February 1992 - April 1994 by the Board and/or the Parent-Teacher Organization.

3. Some of the twenty distributed pieces were given to and carried home by pupils.

4. Some of the twenty pieces are content neutral, and some are arguably pro-referendum.

5. Exhibits P-1, P-2, P-3, P-4, P-10, P-11, P-12, P-21, P-24, P-29 and P-39, in whole or in part, urge support of budgets and referendums.

6. Exhibit P-39, a poster, apparently was produced using school equipment and supplies.

7. The superintendent approved circulation of Exhibit P-10.

8. After reflection, the superintendent believed the flyer (P-10) could be construed as an attempt to influence votes.

9. He contacted the P-TO president and informed her the piece had to be changed, that any meeting on school grounds had to be for information purposes only and that materials carried home by pupils had to be content neutral per Board policy.

10. The superintendent credibly testified that it was his responsibility to ensure that P-TO documents do not violate Board policy and that he was not sufficiently vigilant as to Exhibit P-10. He apologized for this lapse at a public meeting.

11. No evidence was adduced tending to show that any of the above circumstances led to the casting of unlawful votes or barring lawful ballots to be cast.

DETERMINATION

This decision addresses two issues. First, is whether unlawful votes were cast or lawful votes were prevented in the March 1994 referendum by the forces in play. Second, whether Board policy, State administrative code or statues, or any of these, were violated in connection with the referendum.

For the reasons that follow, I **CONCLUDE** that no lawful votes were prevented and no unlawful votes were allowed. The law in this area is well settled. In an action for declaratory judgment that a school bond election was invalid on the grounds that expenditures of money for distribution of booklets advocating a favorable vote at election and that the exposure of school children to a pre-election radio broadcast by the district board of education were illegal, even if the acts were illegal they were insufficient to invalidate an election already held. Therefore, any issues relating to the election were moot. *Citizens to Protect Public Funds v. Board of Education Parsippany-Troy Hills*, 13 *N.J.* 172, 98 A.2d 673 (1953).

In the same year, the New Jersey Supreme Court approved a decision of the Law Division in *Wene v. Meyner*, 13 *N.J.* 185, A.2d 573 (1953). In the Law Division decision, Joseph L. Smith, JSC, stated:

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to adjudged to have the affect of invalidating a vote or an election, were the statute does not so expressly provide, *there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity had not taken place, and to an extent to challenge or change the*

> *result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.* Nothing of this kind is even charged or suggested in the instant case. 26 *N.J. Super.* at 383; 97 A.2d 748.
> [Emphasis supplied]

The petitioners in this case are sure that the irregularities found influenced the election so as to have repressed a full and free expression of the popular will. What they have shown, however, is at best a possibility. In a matter of this type, the standard is probability, not possibility. Nothing in this record shows that any of the irregularities produced illegal votes or defeated legal votes.

The subject referendum apparently aroused high feeling in segments of the community. High feeling and a sense of unfair treatment may not substitute for carrying the burden of persuasion. In short, there is no nexus between the irregularities noted and thwarting the will of the electorate. Accordingly, that part of the petition that speaks to the irregularities as being the definitive cause of votes that helped to carry the referendum is **DISMISSED**.

There remain, however, several disquieting conclusions that must be addressed. It is clear that the Board and its agents were less the diligent concerning adherence to Board policy and *N.J.S.A.* 18A:14-97 and more particularly *N.J.S.A.* 18A: 42-4. The Coalition for Colts Neck Schools is not before me. It must be noted that that group failed to show sufficiently the source of payment and the printer on printed matter that it distributed.

The Board's lapses cannot be overlooked. As the Commissioner of Education has often stated, a great responsibility rests with schools officials for the proper conduct of all elections. *See, In the Matter of the Annual School Election Held in the School District of the City of Camden*, 1977 *S.L.D.* 927. I **CONCLUDE** that, although the irregularities in the election were not sufficient to require that a new election be held, they be addressed as follows. It is **ORDERED** that the Colts Neck Township

Board of Education and superintendent confer with the Monmouth County superintendent of schools well in advance of the next school election to review and receive instruction on the school election statutes. The Colts Neck Board of Education and all boards of education are reminded that assiduous adherence to the election statutes is the minimum, not that maximum, required.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

18 JULY 1994
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

July 20, 1994
DATE

Hon R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

List of Witnesses

On behalf of petitioners:

Melanie Hosch
Eugene Carola
Theodore Crater
Lynne Smith
Ann Hager
Gregg Hauser

On behalf of respondent:

None

List of Exhibits

On behalf of petitioners:

P-1 PTO Circular, April 1994, 2 pages
P-2 PTO Partyline, April 1994, 3 pages
P-3 Postcard to residents
P-4 Letter from PTO president, March 15, 1994
P-5 PTO Partyline, March 1994, 2 pages
P-6 Letters, Crater to Neighbors, February 22, 1994, 2 pages
P-7 Coalition for Schools circular, 6 pages
P-8 Coalition for Schools circular, "Common Sense," 4 pages
P-9 PTO Partyline, January 1994, 5 pages
P-10 PTO Referendum Meeting Notice for January 27, 1994
P-11 Notice rescheduling PTO meetings to February 2, 1994
P-12 Letter, PTO president and superintendent, February 23, 1994, including absentee ballot application
P-13 Board Newsletter re: March 22, 1994 referendum, 4 pages
P-14 Letter, Board president to Citizens, March 1994, 4 pages
P-15 Board Newsletter re: March 22, 1994 referendum, 2 pages
P-16 Board Newsletter re: March 22, 1994 referendum, 8 pages
P-17 Facility Analysis, Cedar Drive School, 12 pages
P-18 Facility Analysis, Conover Road School, 12 pages
P-19 New Jersey Department of Education 1992-93 School Report Card, Conover Road School
P-20 New Jersey Department of Education 1992-93 School Report card, Cedar Drive School
P-21 Bond Referendum Information from Board, 6 pages
P-22 PTO Partyline, October 1993
P-23 Board Newsletter, Fall 1993

P-24 PTO flier re: 1992-93 budget, 8 pages
P-25 Outline of building plans
P-26 PTO Partyline, April 1991, 1 page
P-27 RAP Reminder for March 1992 meeting
P-28 Board Budget Brochure, 1991-92, 1 page
P-29 PTO Executive Board letter, April 29, 1991, 2 pages
P-30 Letter, Citizens Alliance to Commissioner, July 22, 1991
P-31 Letter, Weiss to Citizens Alliance, August 13, 1991
P-32 Letter, Citizens Alliance to Commissioner, April 27, 1992
P-33 Letter, Commissioner to Domidion, August 12, 1992
P-34 PTO Partyline, February 1992, 1 page
P-35 Conover Road and Cedar Drive Schools Needs Assessment, undated, 6 pages
P-36 District Enrollment Tables, 1985-2002, 5 pages
P-37 Cedar Drive School Room Utilization, 1993-94, 2 pages
P-38 Cedar Drive School Room Utilization, 1996-97, 4 pages
P-39 Poster, "Vote Yes March 22"

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF COLTS NECK	:	DECISION
TOWNSHIP, MONMOUTH COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners except to the ALJ's conclusion that "***there is no nexus between the irregularities noted and thwarting the will of the electorate." (See Initial Decision at page 5.) They contend that Exhibits 10, 11, 12 and 39 clearly had an impact on the understanding of issues in the community sufficient to influence the decision of the voters. (Petitioners' Exceptions, at p. 1) Petitioners argue that in an election decided by merely four votes, they are certain of the probability that the referendum would have been defeated if the irregularities demonstrated in this matter had not occurred and the public had been accurately informed. Petitioners, therefore, urge the Commissioner to overturn the ALJ's decision.

In reply, the Board asserts that in order to reject the initial decision, the Commissioner would have to ignore long-established standards as to the type and quality of proofs required

to set aside results of an election in New Jersey. (See In re Wene, 26 N.J. Super. 363 (Law Div. 1953), aff'd sub nom Wene v. Meyner, 13 N.J. 185 (1953).) It contends that competent proofs, that charged violations altered the election outcome which otherwise would have resulted, are necessary to impugn election results, not merely petitioners' unsubstantiated "assumptions" as to how anyone voted. The Board avers there was no proof whatsoever presented by petitioners that any individual was prevented from voting or that any individual's vote was changed by any of the irregularities alleged in this matter.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the within record does not substantiate that the irregularities found to have occurred in this matter affected the outcome of the election within the meaning of that standard as long interpreted by the courts. Notwithstanding petitioners' assertions that such irregularities necessarily tainted the results of the election, it must be emphasized that in order for the extraordinary remedy of a new election to be granted, petitioner must prove that the violations at issue either produced illegal votes which would otherwise not have been cast, or defeated legal votes which would have been counted but for the violation, and which would, if counted, have changed the outcome of the election. See In re Wene, supra. Mere speculation that results might have been different if conditions had been different, will not suffice to meet this standard. See Matter of Mallon, 232 N.J. Super. 249 (App. Div. 1989); In the Matter of the Annual School Election Held in the School District of the Township of Pennsauken, Camden County, 92

N.J.A.R. 2d (EDU) 396; and In the Matter of the Annual School Election in the School District of Riverside Township, Burlington County, 1968 S.L.D. 73.

In arriving at the above determination, however, the Commissioner cannot ignore those findings in the initial decision which clearly reveal that the Board was less than diligent in its adherence to Board policy and certain statutory requirements governing school elections. It is axiomatic that a great responsibility rests with boards of education and their agents with respect to assuring the proper conduct and integrity of school elections. As such, boards and their agents must be fully familiar with all facets of their duties and the specific statutes which control election violations. Therefore, in considering the nature of the irregularities which occurred in the instant matter, the Commissioner deems it appropriate to direct the Monmouth County Superintendent of Schools to conduct a review of the practices and procedures utilized by the Board in this election and to report to the Board such corrective action in policy and procedure for its implementation as will assure the proper conduct and integrity of all future elections. It is so directed.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and the instant Petition of Appeal is hereby dismissed.

SEPTEMBER 6, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - SEPTMEBER 8, 1994

245-94

245-94

IN THE MATTER OF THE TENURE :
HEARING OF ELLEN RUBIN, STATE- : COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE : DECISION
CITY OF PATERSON, PASSAIC COUNTY. :
:

SYNOPSIS

Petitioning District certified Four Charges (incompetence, use of profane language, unjustified physical contact with pupils and dereliction of duties/insubordination) against tenured elementary teacher.

In light of testimony of witnesses and written evaluations, ALJ found that the petitioning district met its burden of proof in most respects. ALJ affirmed Charge One (incompetence) except that pertaining to allegations of poor relations of parents and staff members, affirmed Charge Two (conduct unbecoming a teacher), dismissed Charge Three (unjustified physical contact), dismissed the allegation of dereliction of duty pertaining to January 10, 1992 in Charge Four and dismissed the allegation of insubordination referenced in Charge Four but affirmed the charge of dereliction of duty pertaining to January 21, 1993. ALJ ordered respondent dismissed from her employment.

Commissioner adopted findings and determination in initial decision as his own. Commissioner ordered respondent dismissed from her teaching position as of the date of this decision and referred matter to State Board of Examiners for appropriate action.

SEPTEMBER 12, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10753-93

AGENCY DKT. NO. 344-10/93

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,

Petitioner,

v.

ELLEN RUBIN,

Respondent.

Gregory G. Johnson, Esq., for petitioner

Gregory T. Syrek, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: June 7, 1994 Decided: July 22, 1994

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

PROCEDURAL HISTORY

On September 1, 1993, a statement of charges pertaining to Ellen Rubin (Rubin or respondent) was issued to the State Operated School District of the City of Paterson (District or petitioner). On September 30, 1993, the District certified charges to the Commissioner of the State Department of Education (Department) and suspended Rubin without pay. Respondent requested a hearing. The matter

was transmitted by the Department to the Office of Administrative Law on November 8, 1993 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Telephone conferences were conducted throughout the proceedings. Hearings were held on February 10, February 16, March 8, March 10, March 11, March 15, April 22, April 28, and May 12, 1994. The parties thereafter filed post-hearing briefs. The record was closed on June 7, 1994, the date of receipt of the last document.

NATURE OF THE CASE

Rubin is charged with being incompetent, use of profane language, unjustified physical contact with pupils, and dereliction of duties/insubordination. Prior to the commencement of hearings, respondent moved for dismissal of certain of the charges, alleging that they, in effect, constituted charges of inefficiency and that petitioner did not comply with procedural requirements pertaining to such charges. I denied this motion. That ruling is incorporated herein.

Charge One alleges incompetence during the period from September 1991 to June 1993. More specifically, the District alleges that respondent failed to enforce school policies and procedures; failed to maintain effective classroom control, risking the safety and health of students; failed to manage behavior of students through effective classroom discipline, requiring significant administrative intervention; failed to improve the delivery of instruction despite significant assistance from administrative staff; failed to effectively plan classroom instruction; failed to maintain a climate conducive to effective classroom instruction; and demonstrated poor relations with parents and staff members and made inappropriate and inflammatory remarks.

Charge Two alleges use of profane language, more specifically, that on October 26, 1992, respondent called a student, D.J., an "ass" during class and that on March 24, 1993, she referred to another student, S.R., as an "f---ing, brat" during class.

Charge Three alleges unjustified physical contact on January 10, 1992. More specifically, petitioner alleges that respondent physically grabbed and scratched a

student, R.C., in efforts to discipline him, that respondent used physical force on students on other dates, and that respondent's actions were unwarranted under the circumstances and in violation of school policies.

Charge Four alleges dereliction of duties/insubordination, more specifically, that on several occasions, Rubin risked the safety of students and exhibited disrespect to follow teaching staff members. Petitioner alleges that on January 10, 1992, Marion Rabel (Rabel), principal of the District's School No. 8 (School 8), relieved respondent of classroom teaching duties for failure to supervise her (Rubin's) class. It is charged that respondent permitted students in her fifth-grade class to play, dance on tables, move furniture, and engage in dangerous behavior, causing excessive noise, disturbing other classes. Finally, it is alleged that on January 23, 1993, respondent allowed a student, J.I., to light and play with matches in class and failed to take action.

At the commencement of hearings, petitioner moved to amend Charge One to reflect allegations of incompetency commencing January 1989. This motion was opposed by respondent, and I denied it. That ruling is incorporated herein.

STIPULATIONS

The parties entered into the following stipulations of facts:

1. The District hired respondent as an unassigned teacher on December 1, 1987. Respondent was assigned to District School No. 18. Peter J. Wild was the building principal, and Anthony Martucci was the vice-principal.

2. On April 28, 1989, the District Superintendent advised Rubin that she would not be reappointed for the 1989-1990 school year.

3. On September 1, 1989, the District Superintendent transferred respondent to School 8 as an elementary teacher-unassigned. George Roberto was the principal, and Lourdes Rodriguez was the vice-principal.

4. On September 14, 1989, the District Superintendent recommended, and the Board of Education approved, respondent's reappointment as an unassigned teacher.

5. On October 23, 1989, Rubin was assigned to the position of elementary teacher.

6. On September 1, 1990, respondent was transferred to School No. 5. Ronald Sherman was the principal, and Anabel Saal (Saal) was the vice-principal.

7. Respondent received tenure as a teacher on December 2, 1990.

8. On January 31, 1991, respondent was transferred back to School 8 to a Basic Skills Instructor (BSI) position. On February 1, 1991, Rabel was promoted from mathemathics resource room teacher to vice-principal at School 8.

9. During the 1991-1992 school year, Rabel was appointed principal at School 8. Michael Osofsky (Osofsky) became the new vice-principal. Rubin was assigned to teach a fifth-grade class at School 8. Respondent was observed on the following dates:

   a. December 5, 1991 (Ex. J-1),
   b. December 11, 1991 (Ex. J-2),
   c. December 13, 1991 (Ex. J-3), and
   d. January 8, 1992 (Ex. J-4).

10. On January 10, 1992, Rabel relieved respondent of the latter's teaching duties (Ex. J-5).

11. On January 14, 1992, Rabel completed a year-end evaluation of respondent. (Ex. J-6).

12. On May 27, 1992, Rabel recommended to the District's Superintendent Albert Vasquez (Vasquez) that respondent's increment be withheld (Ex. J-7). On June 1, 1992, State District Superintendent Dr. Laval S. Wilson

(Wilson) acted to withhold respondent's salary increment for the 1992-1993 school year (Ex. J-8). Due to procedural deficiencies, the increment was later restored (Ex. J-9).

13. On September 1, 1992, respondent was transferred to School No. 4 (School 4) to an at-risk adjunct teacher position, Paradigm Pioneer (Paradigm) Program. During the 1992-1993 school year, Richard Garibell (Garibell) was the principal, and Sarah Finney (Finney) was the vice-principal.

14. During the 1992-1993 school year, Rubin was observed on the following dates:

    a. September 11, 1992 (Ex. J-10),
    b. September 22, 1992 (Ex. J-11),
    c. November 16, 1992 (Ex. J-12), and
    d. January 5, 1993 (Ex. J-13).

15. On March 24, 1993, Garibell and Finney completed a year-end evaluation of respondent (Ex. J-14).

16. On March 3, 1993, Garibell wrote a memo to respondent (Ex. J-15).

17. A professional improvement plan (PIP) was prepared for Rubin by Garibell. On March 4, 1993, respondent attended a conference with Garibell to discuss her evaluation, suggestions, and PIP (Ex. J-16).

18. Finney provided respondent with classroom behavior instructions (Ex. J-17).

19. Finney assigned security guard Elbert Pittman (Pittman) to Rubin with classroom control of teacher Betty Harrell's (Harrell) fifth-grade class.

FINDINGS OF FACT

Based upon a review of the entire record, including credibility assessments of the witnesses, I **FIND** the following to be **FACTS**.

Rubin is certified as an elementary grade school teacher and as a reading specialist. She has a Master's Degree in reading and has taken graduate level courses. Rubin has been employed in the past as a supplemental teacher in other school systems and as an adjunct instructor at William Paterson College in New Jersey and has also engaged in volunteer teaching work.

Osofsky has been employed in the District for 17 years. He holds a supervisor's certificate. Rabel has been employed in the District for 25 years. As vice-principal at School 8, her duties involve observing classroom teachers, evaluating classroom and non-classroom teachers, assisting the principal, ordering and distributing supplies, safety of students, conducting conferences, directing grade level and cross-grade level meetings, etc. Rabel is certified in elementary education, as a supervisor, and in administration. She has a Master's Degree in urban education and community affairs. Prior to her assignment as principal of School 8, Rabel knew Rubin as part of the former's duties as vice-principal and also when Rabel was a mathematics resource teacher.

Sharon Hancock (Hancock) is employed by the District in the capacity of a BSI teacher. Hancock has a B.S. degree from Seton Hall University in New Jersey and some 30 graduate credits. She has a New Jersey certification as an elementary teacher.

Hancock has been assigned to School 8 for the past eight or nine years. During the 1991-92 school year, Hancock was assigned to provide BSI services to certain designated students in all three fifth-grade classes at School 8. Hancock taught language, reading and mathematics as part of the BSI program.

With commencement of the Paradigm Program, Hancock was given a portion of Rubin's class, but did not have her own register. Hancock took approximately 10 to 12 students from Rubin's class to provide instruction in reading and mathematics. As of January, Rubin had a total of 14 students in her class. Hancock provided

services to approximately half of them. If Hancock were late coming to retrieve her students, Rubin was in charge of the entire class. Fifteen students were below the average for School 8. All the students were on Rubin's "register," assigned to her. (Tr., 5/12/94, p. 69). They were removed from class for supplemental instruction. Supplemental and regular classroom teachers were required to work closely together. If Hancock were absent on any given day, her students remained with Rubin, and respondent had responsibility for the subject matter that Hancock would have addressed. As of January 10, 1992, Hancock was a non-classroom teacher.

Vincent Bruno (Bruno) has been employed by the District for 20 years. During the 1991-92 school year, he was assigned as an art teacher at School 8. He was also a union and grievance delegate for School 8. His duties in the latter respect included involvement in grievances and contract violations, as well as participating in meetings with teachers and the administration at the request of the teachers.

Judith Kalmanson (Kalmanson) is employed by the District as a Learning Disability Teacher Consultant (LDTC). She has been employed by petitioner for 14 years. During the 1991-92 school year, she was an eighth grade teacher at School 8. Her classroom was located below that of respondent.

The Paradigm Program is an intense instructional approach, eliminating certain courses, including music and art, and focussing on language arts, reading, and mathematics. Implementation of the Paradigm Program started in November 1991; there was a transition period, and the Paradigm Program was implemented fully commencing December 1991.

As of the fall of 1991, respondent was assigned to teach a group of students deemed to be lower scoring students based upon standardized tests. The afternoon session of the school day concentrated on mathematics skills.

During the 1991/92 school year, respondent taught the full fifth-grade curriculum and was assigned to Room 201 at School 8. School 8 has kindergarten through 8th grade classes. The fifth-grade classrooms were on the third floor, adjacent to each other.

During the school year, parents, teachers, and members of the school Child Study Team complained to Rabel regarding respondent and the situation in Rubin's classroom. During the week of approximately September 23, 1991, a parent orientation meeting was conducted at School 8. Parents complained to Rabel regarding respondent, specifically, regarding the lack of educational progress and discipline. Many parents requested that their children be removed from Rubin's class.

Shortly thereafter, one mother, Mrs. M., complained to Rabel regarding a lack of homework and safety in respondent's class. Rabel discussed the matter with Rubin.

Rabel again met with Rubin in October 1991 to discuss discipline problems. In this time frame, Mrs. Davis (Davis), the computer teacher, complained of noise when respondent's class traveled from Rubin's classroom to Davis' room.

Rabel again met with Rubin in October 1991 regarding discipline problems and specifically told Rubin to stop blaming other people, including Davis, for her lack of discipline control. In total, three to four conferences were held with Rubin regarding lack of classroom control in October 1991.

Also, in October 1991, Rabel, on one occasion, was in the room connecting to Rubin's classroom getting supplies. The door was ajar, and Rabel heard respondent and her students screaming and yelling.

On one day in October 1991, a fire drill was conducted at School 8. Students were required to exit the building from the back on the Main Street side. Respondent's class was among the groups so exiting. Her students were very noisy and disorderly. Respondent was leading one student, R.V., by the arm, "quite forcibly." (Tr., 3/11/94, p. 63). Respondent had her left hand on R.V.'s right wrist area clutched tightly. Respondent was not merely walking R.V., but was "leading him quite strongly." (*Id.* at p. 64). Rabel, who observed the situation from approximately six feet away, quietly asked Rubin to let go of R.V., with no response from Rubin. Rabel then asked Rubin to do so twice more, moving closer towards respondent as she (Rabel) did so. The last time she spoke to respondent, Rabel was less than two feet from Rubin. Rabel advised respondent that that was not the

proper manner in which to deal with a student.

The next day, R.V.'s grandmother and uncle came to the building to complain about what happened. Rabel, anticipating this, had told respondent that they would probably be in school. R.V.'s uncle and grandmother asked Rabel if they could speak with Rubin. Rabel communicated via the intercom system with Rubin to this effect and advised that R.'s relatives would be coming to respondent's classroom. Rabel subsequently received calls from throughout the building to the effect that Rubin was yelling, R.V.'s grandmother was screaming back, and R.V.'s uncle was becoming very angry because of the situation. Rabel went to respondent's room. As she approached the classroom, R.'s grandmother and uncle were in the hallway. The grandmother was extremely upset, indicating that she was tired of R.V. being "harassed" by respondent, that Rubin had no right to touch R.V., and that if it ever happened again, she (the grandmother) would "take matters into her own hand." (*Id.* at p. 69). The uncle tried to calm the grandmother and eventually spoke with Rabel and left. R.V.'s relatives also told Rabel that they had wanted to take R. home, but that Rubin refused to let him out of the classroom.

Throughout the school year, R.V. was removed from Rubin's classroom frequently. Rubin often sent out him to the office, and Rabel would assign him temporarily somewhere else. R.V. was a student of respondent until December 5, 1991, when the Paradigm program commenced, students were assigned a classroom teacher, who may not have been their original teacher, based on their academic performance. R.V. was a good mathematics student and a poor reading student. As such, he was moved into Mrs. Kelter's mathematics classroom. Both Hancock and Rubin were assigned low performance reading students. R.V. was assigned to Hancock in the Paradigm Program. Rubin's relationship with R.V. was initially "rough." (Tr., 3/15/94, p. 76). R.V. had difficulty adjusting to the fact that he had been retained in fifth grade. Rubin initially met with family members several times regarding behavior modification efforts.

Meetings were held with respondent in November 1991, some of which were attended by Bruno, at which Rubin was advised of complaints by parents, teachers, and students. At this time, Rubin was occasionally sending students to other classrooms. Rabel informed her that this was against policy. However, this

continued to occur on several occasions, and Rabel instructed other teachers not to take students from Rubin's classroom.

The form represented by Exhibit P-11 was designed by Rabel and Osofsky to function as an observation form to memorialize matters of concern to the administration. The observations reflected in such documents do not constitute formal evaluations, but "an informal observance." (Tr., 3/10/94, p. 85). The practice was to provide a copy to the teacher to bring concerns to his/her attention. It was Osofsky's practice at the time in question to prepare observation forms at any given time. Such might be completed during the course of a day and given to the teacher on the same or the next day.

Osofsky prepared an administrator's observation report pertaining to Rubin dated November 22, 1991. The content of this document is as stated in Exhibit P-11. The report indicates that respondent needed improvement in the areas of classroom control, classroom environment, pupil discipline procedure, and supervisory responsibility. He wrote a notation to the effect that there was a lack of classroom discipline which contributed to less effective instruction. It is reasonable to infer that Osofsky did not observe Rubin on November 21 or 22, 1991, but that he did do so some time in November 1991, and that Exhibit P-11 constitutes his observation report of that occurrence.

One of Osofsky's duties as vice-principal is to give supplies to teachers. At the time in question, one entry to the supply room was through Rubin's classroom. The November 22, 1991 report was prepared by Osofsky as a result of observations he made while walking through her classroom. Students were "up and about," not attentive, and having "personal conversations." Rubin was not at her desk but among the students and was not "oblivious" to what was occurring. (*Id.* at p. 88).

Rubin received a copy of Osofsky's observation report some time after November 22, 1991. She did not subsequently speak to Osofky regarding it.

Osofsky commenced a formal, unannounced observation of Rubin on December 5, 1991, the first day of the Paradigm Program, at approximately 2:00 p.m. Osofsky was present for approximately 15 minutes. Osofsky did not know at the time that Rubin was a tenured teacher. A large amount of paper, as well as

books, were on the floor. There was no apparent desk order or groupings, several desks being very close together. Approximately two to three students were moving about the classroom at any given time, on occasion walking in front of Rubin. One student, without any warning, got up to sharpen a pencil and meandered about the room. One child in particular was very disruptive. Rubin went over to the student, a male, who was turning to talk to the child behind him. She bent over him very close, with her finger pointed very close to his face. The child took on a defensive stance, "verbally retaliating back," (Tr., 3/10/94, p. 121), telling Rubin, in effect, to get away from him. Rubin "backed off," and the child turned in his seat. (*Id.* at p. 122).

When Osofsky entered the classroom, the lesson was already in progress. Osofsky reviewed a lesson plan prepared by Rubin, who was generally very prompt in submitting her plans. It was part of his responsibility as vice-principal to review lesson plan books. The lesson did not proceed as Rubin apparently intended, largely because of discipline problems. Respondent stopped several times to discipline students, directing them, for example, to sit down or turn around. Some students did not have texts open on their desks, and some had no papers at all on their desk. When students proceeded to walk around the room, Rubin stopped her lesson and directed them to sit down.

Rubin presented a mathematics assignment and, after asking if there were any questions, walked about the room to see how the students were progressing. Rubin did not assign homework because it was the first day she was working with this group of students. She had previously requested new mathematics workbooks because she felt that concepts would have to be entirely retaught. She never received them.

At the time of the observation, Rubin was responsible for her class and that of Hancock, who was absent. There were a total of approximately 25 students. Approximately 16 were assigned to Rubin. There were approximately 22 desks. Some of the students utilized another table located in the room, although there were not sufficient chairs for all of them.

Osofsky prepared a classroom observation report pertaining to respondent for December 5, 1991. The content of this document is as stated in Exhibit J-1. Osofsky noted that Rubin's performance needed improvement in the following areas:

physical status of the classroom, acceptance of responsibility by students, clearly defined discipline procedures, enthusiasm for teaching, understanding child and adolescent behavior, alertness to physical needs of students, classroom control, demonstration by students of self-control, learning atmosphere, stimulation of original thinking, clearly defined aims and procedures, sufficient teaching aides, full class participation, quality of voice, and summary of lessons. Osofsky noted that Rubin's lesson was continuously interrupted because of discipline efforts and a lack of discipline. However, he also noted that December 5 was the first day of the Paradigm Program and that the students were her 'new' group. (Ex. J-1, p. 2).

Rubin received a copy of Osofsky's evaluation report shortly after December 5, 1991. Rubin wrote notations on the evaluation report, essentially in rebuttal. She referenced the fact that the group consisted of two classes, that there were insufficient desks and chairs, that homework was not assigned because it was a new group, and that she requested new mathematics books. It did not change Osofsky's evaluation. Rubin did not request that Osofsky speak with her regarding the evaluation, and the two never did.

Osofsky subsequently observed Rubin on December 9, 1991, to determine if his first impressions were correct. To his perception, there was some improvement in classroom control. However, Hancock was in a corner of Rubin's room with a group of her (Hancock's) students. Rubin was responsible for approximately eight to ten students. She did not have a full class of students that day. Osofsky still did not believe that the lesson was sufficiently presented. Osofsky was present from approximately 9:15 a.m. until 9:55 a.m. Rubin presented a reading lesson. After reading a story, respondent asked students questions to determine if they understood the content.

Osofsky prepared an evaluation report pertaining to his observation of December 9, 1991. The content of this document is as stated in Exhibit P-4. He noted that Rubin needed improvement in the following areas: availability of materials, clearly defined discipline procedures, understanding of child and adolescent behavior, classroom control, demonstration of growth and self-control of pupils, use of motivational factors, appropriate variety of activities, and full class participation. His notations reference the fact that a story was orally read and discussed and that

context clues were utilized by respondent. Osofsky also noted that on several occasions, Rubin had to stop to discipline students and suggested that she discipline on a one-to-one basis rather than having the entire class hear a reprimand. Rubin subsequently wrote comments on the evaluation form, in which she, in part, agreed that it would be better to discipline students individually. She and Osofsky did not subsequently discuss the evaluation.

During the 1991-92 school year, there was a hall-pass procedure at School 8. Some time during the school year, new color-coded passes were utilized, depending upon where a student was going. The latter policy was implemented by Osofsky. Rubin learned of it at a faculty meeting.

It was Rubin's practice to generally keep passes in the classroom. Students were expected to use them and return a pass when they left the room. Periodically, passes were lost. At approximately the time frame of December 11, 1991, Rubin, on one occasion, mentioned to Osofsky that some students had not returned with passes and that some passes were missing. At some point, Osofsky told Rubin that with the new pass procedure, students would get different color-coded wooden passes which would allow the passes to be more noticeable if lost.

Osofsky prepared an administrator's observation report pertaining to Rubin on December 11, 1991. The content of this document is as stated in Exhibit J-2. He noted that respondent was deemed to be unsatisfactory in the areas of classroom control, classroom environment, and pupil discipline procedure. Handwritten notations referenced Osofsky's conclusions that students frequently left Rubin's classroom without required passes, noting that School 8 policy was that passes be used to control students leaving rooms. Rubin received a copy of the observation report. She did not discuss it with him.

Students were required to ask permission of the classroom teacher before they were allowed to leave. If approved, students were required to sign a daily sign-in/sign-out sheet, indicating the t[illegible]es they left and returned. The purpose of the form was to allow administrators to monitor the whereabouts of students and to maintain responsibility with the classroom teacher. The form used also contained a space for the destination to be written. Copies of the forms were kept on a counter in the main office, where they could be obtained by teachers. Completed forms

could be retained by teachers in their files for their own records. The general practice was for teachers to keep the forms in proximity to their desks. The content and form of the hall pass sign in/sign out document used at School 8 during the period in question is as stated in Exhibit P-13.

Rubin's practice was to have forms completed by students and to keep copies of the forms by the doors to the classroom. She used the forms throughout the 1991-92 school year, unless she did not have blank copies. It was her experience that on occasion, blank forms were not available in the office.

On December 12 or 13, 1991, Rabel observed Rubin's class in the hallway. Consistent with general rules, the students were required to be walking through the building in a quiet, orderly manner, staying to one side of the hall. Rubin's students were jumping and making noise, in "complete disarray." (Tr., 3/11/94, p. 44). Rabel told the students to line up and be quiet. She did not speak to respondent at the time, not wanting to communicate in front of the students.

Rabel prepared an administrator's observation report, dated December 13, 1991, regarding her observations. The content of this document is as stated in Exhibit P-3. Rabel noted that respondent needed improvement in the area of escorting classes through the hallway and wrote notations to the effect that she (Rabel) observed students dancing and jumping, that there was no apparent method for moving through the hallway, and that students must be organized when in the hall. Respondent was provided a copy of the observation report, and Rubin subsequently discussed it with Rabel.

On December 16, 1991, Osofsky was advised that several students were stopped in the building without passes and that they had come from Rubin's class. Osofsky escorted them back to respondent's classroom. The students did not have passes. One of the students had the wrong pass. As he approached respondent's classroom, Osofsky heard noise coming from it from the hallway. When he returned students to her class, he observed that the class was not quiet and instruction was not occurring. Osofsky asked to see Rubin's sign-in/out sheet. She did not have one for the day in question.

Osofsky completed an administrator's observation report pertaining to his December 16, 1991 observations. The content of this document is as stated in Exhibit P-12. He noted that respondent needed improvement in classroom control, classroom environment, and pupil discipline procedures, with a reference to the hall pass procedure. His comments referenced School 8's pass procedure not being implemented, noting that several students were given the wrong pass for the bathroom, that some students were frequent users, and that respondent should use the sign-in/out sheets so students would be more accountable.

During the 1991/92 school year, Osofsky frequently returned students to Rubin's class because they did not have passes and learned that the pass procedures had not been followed. Respondent did not have available completed sign-in/out sheets. On occasion, students left respondent's class and came to Osofsky's office, because of various problems, without passes. From December 16, 1991 to January 10, 1992, Osofsky returned students to Rubin's class because of non-compliance with the hall procedures several times a day, in total, somewhat less than 50 or 60 occasions. It was Osofsky's opinion that if Rubin had established a classroom procedure to which children were required to adhere, incidents in the hallway would not occur. On occasion, Osofsky asked the students how they had gotten into the hallway. Responses included statements to the effect that they left on their own or took a pass from another student returning to the room. Observation reports were not written regarding all incidents, because of manpower and time constraints.

Between December 6, 1991 and January 10, 1992, Osofsky devoted a substantial portion of his time every day to concerns pertinent to respondent, including students leaving her class and complaints from other teachers regarding noise and other disturbances emanating from Rubin's classroom. Osofsky would go to the classroom to investigate several times a day. In addition, complaints were made to the office of objects being thrown out of the windows in Rubin's classroom. Complaints of this nature came from a kindergarten teacher, as well as parents of kindergarten children who came to pick up their children. There were split session kindergarten classes, and the first session was released at approximately 10:00 a.m. Parents came to the back door of the class, an area directly under Rubin's classroom.

Parents complained to the administration that objects were being thrown out at them and that on one occasion, students in Rubin's class spit out the window. On one occasion in this time frame, Osofsky went outside to investigate and saw something, possibly a piece of chalk or a pencil, being thrown out of a window in Rubin's class. Osofsky also received reports of objects being thrown inside Rubin's classroom.

During the same time period, parents on occasion requested transfers of their children out of Rubin's class and transferred their children from the school. One particular incident, which emphasized the situation to Osofsky, was communications from the head custodian at East Side High School, to which Osofsky had previously been assigned, who told Osofsky that he (the custodian) was removing his child from School 8 and would return her the next year because he did not believe the child would learn anything during the school year.

During the same time period, students were removed from Rubin's class for various reasons, including discipline and behavioral problems. Some of the moves were temporary. For example, students were periodically required to bring their work and remain in Osofsky's office. Students were also put into other classrooms temporarily, on a day-to-day basis, to "diffuse" problems occurring in Rubin's class (Tr., 3/10/94, p. 110). As of September 1991, Rubin had a total of 18 assigned students. This number decreased to 14 by January 1992.

Between the months of November 1991 and January 1992, Osofsky routinely met with Rabel, partly to obtain information regarding the school. He had no preconceptions regarding Rubin, nor her classroom. During the 1991-92 school year, Rubin never initiated discussions with Osofsky regarding classroom observations. As time went on, he discussed the situation more specifically with Rabel.

During the beginning of the school year, Hancock spent 40 to 120 minutes a day in each fifth grade classroom, working with a designated group of students. Subsequent to implementation of the Paradigm Program, Hancock was usually in Rubin's class, still providing BSI to a designated group of students, which changed over time according to the needs of the children.

Initially, Hancock worked with children at a table in Rubin's classroom. Rubin conducted her regular lessons with the other children. Both teachers taught the

same subject area at the same time, Hancock reinforcing what was being taught in the regular classroom instruction.

During the 1991-92 school year, Hancock was present in Rubin's class every day. Prior to implementation of the Paradigm Program, Hancock was present in Rubin's class every day in the morning from approximately 40 to 80 minutes and at least 40 minutes every afternoon. Subsequent to commencement of the program, Hancock was in Rubin's classroom for almost the entire day on a daily basis. When present in respondent's classroom, Hancock was not responsible for maintaining general classroom control

Prior to the Paradigm Program, Hancock heard noise and other disruptions emanating from Rubin's classroom when she was in other fifth grade classrooms. During the months in question, Hancock also observed children assigned to Rubin's classroom walking in the hallways.

Upon numerous occasions, Hancock observed that students were not seated when Hancock initially went into Rubin's classroom. Instead, the students were walking around the room, yelling, congregating near windows, etc. Hancock often had to spend a lot of time settling the children down before she could begin instruction.

Rubin appeared to Hancock to have difficulty controlling her (respondent's) voice. She often screamed at the children, with counter-productive results. The children usually screamed back. Rubin often prefaced her remarks to the children by telling them that they were stupid and using other such "derogatory terms," which had a tendency to undermine their self-image. The children retaliated, resulting in a "screaming match" between them and respondent. (Tr., 3/10/94, p. 11). To Hancock, it seemed to be an "unhealthy" and "very antagonistic" atmosphere. The "turmoil" in the room was more evident as the school year progressed. (*Id.* at p. 12). As Hancock approached Rubin's classroom, she often heard Rubin telling the children to settle down because Hancock was coming.

Hancock did not initially report her concerns to the administration because she hoped that the matter would improve. In approximately December 1991 or January 1992, she spoke to Rabel regarding her concerns. At this time, there were a lot of

"physical problems" occurring in Rubin's classroom, *i.e.*, items being thrown, including books and chairs, people being pushed, etc. (*Id.* at p. 14). The students also fought among themselves. Hancock felt that it was an unsafe environment.

In this general time frame, Hancock removed a student, Ro. V., from Rubin's classroom because she (Hancock) feared that Ro.V. would "react violently" to Rubin's "attitude and actions with him." *Ibid.* Ro.V. did not present behavioral problems when he was with Hancock's group of students. Hancock observed respondent using inappropriate "body language" with Ro.V., that is, standing very close to him and telling him that he was stupid and "no good," that he would never amount to anything. (*Id.* at 29). Rubin did this in front of the other students, and Hancock feared that if respondent continued doing so, Ro.V. might react by pushing or hitting Rubin. She therefore removed Ro.V., on her own, from respondent's class and reported the incident to Rabel. Hancock told Rabel that it was Hancock's opinion that respondent was trying "to incite him to hit her." (*Id.* at p. 49). Ro.V.'s class assignment was subsequently changed by Rabel. He was thereafter with Hancock for part of the day and with Kelter for the rest of the day.

In mid-December 1991, the room adjacent to Rubin's classroom, a resource room, became vacant. There was a connecting door between respondent's classroom and the resource room. At Rabel's suggestion, Hancock commenced using that room for her BSI group. Hancock had previously experienced difficulty teaching her group of students because she had to keep interrupting her lessons in order to restore order in the classroom generally. Hancock had as many as 15 children with her in the resource room. Over the months, Rabel kept assigning more children to Hancock in efforts to help Rubin with classroom control. Some time in approximately January 1992, Hancock stopped using the resource room.

Subsequent to commencing utilizing the resource room, Hancock heard noises emanating from respondent's classroom on a regular basis. This included children screaming, use of "inappropriate language," "crashing noises," "general outbursts of noise," as well as the constant drone of loud talking and/or laughing. The situation was extremely distracting to Hancock's students. (*Id.* at p. 17). Hancock often feared that someone in Rubin's classroom was hurt. The situation interfered with Hancock's teaching. Hancock often stood in the connecting doorway and looked into Rubin's class. When she did, the children in respondent's classroom went

back to their seats and become quiet. For a period of time, Hancock kept the door wedged open. Hancock overheard respondent telling the children that they were too stupid to learn. There was some type of disturbance in Rubin's classroom on a daily basis. Respondent appeared to have special problems in dealing with R.C. and L.T., often engaging in "screaming" matches with L.C., which were disruptive to the classroom as a whole. (*Id.* at p. 30). Respondent usually stood very close to the children when she interacted with them in this way, standing "right in their face with finger pointing." (*Id.* at p. 31).

Both classrooms were on the second floor of the building, in an extreme left corner, in the vicinity of a playground behind the school. To Hancock's knowledge, items, including apples, milk cartons and books, were thrown out of the windows in Rubin's room onto the playground area on a regular basis. The windows in Rubin's classroom were usually open. Hancock also heard, although she did not observe, that children were hanging out the windows in Rubin's classroom. Hancock was present when a parent came to school and identified a student in respondent's room who allegedly spit out the window.

In general conversation with Hancock and other teachers outside of the classroom, Rubin regularly referred to respondent's students as stupid, too stupid to learn anything. Hancock periodically spoke to Rubin regarding respondent's derogatory comments about the students. She also told Rubin that she (Hancock) felt the confrontations with the children were non-productive. Rubin generally denied that anything inappropriate had ever happened in her classroom. Hancock initially tried to give Rubin helpful suggestions, but Rubin was not receptive, indicating there were no problems. Rubin was not specifically told that Hancock had complained about Rubin's class, although respondent "might have made that assumption." (Tr., 4/28/94, p. 72). Respondent, however, did know that Davis had complained to Rabel.

A policy at School 8 was that classroom windows not be open more than 13 inches from the bottom. Hancock occasionally observed the windows in Rubin's room opened wider. The windows in Rubin's classroom were approximately six feet tall and 3-1/2 feet wide. They had mechanisms which prevented them from being opened more than approximately 15 inches. Respondent was not aware of any policies regarding windows. She never had any discussions with Rabel nor Osofsky.

Bruno attended meetings between Rubin and administrators on several occasions during the 1991-92 school year. He also spoke to Rubin alone on several occasions. Between September 1991 and January 1992, Bruno participated in two meetings with administrators. One occurred on approximately October 21, 1991, and the other on January 10, 1992. It is also reasonable to infer that Bruno attended another meeting with Rabel and Rubin sometime in November 1991, at which time Rabel generally discussed the need for Rubin to have more classroom control to reduce noise.

In approximately November 1991, Bruno spoke with respondent regarding Rubin's refusal to sign an evaluation form, advising her that a signature only indicated receipt. He also recommended that Rubin ask the administration for help, perhaps requesting assistance from experienced teachers from different departments to provide demonstration lessons. Bruno also suggested that respondent speak with Pete Tirri, president of the local union. To Bruno's knowledge, Rubin did not ask the administration for help.

Bruno's classroom was located on the same floor as that of Rubin, down the hall and around the corner. Subsequent to approximately November 10, 1991, he at times heard noise emanating from Rubin's classroom when he was in the hallway near her room, noises such as loud talking, "shuffling around," "screaming," not the "ordinary noise" associated with a classroom, but noise of a "higher level." (Tr., 5/12/94, p. 41).

During the fall of 1991, Kalmanson frequently heard a great deal of noise emanating from respondent's classroom. On occasion, Kalmanson's lesson was interrupted because of loud noise. Kalmanson, at the time, had approximately 20 to 24 students. Prior to January 19, 1994, Kalmanson, occasionally, "informally" mentioned the noise in communications with the administration. (Tr., 5/12/94, p. 8). Kalmanson never wrote written complaints regarding the matter. The only contact that Kalmanson had with Rubin during the school year was in the teacher's room and at meetings.

Ada Messano (Messano) is a Designated At Risk teacher who has been employed by petitioner for 21 years. She is a mathematics resource teacher

overseeing the BSI program and is assigned to School 8. Her duties include testing all incoming students, including transfer students, and supplying materials needed in classrooms. Messano also does demonstration lessons upon request of teachers. It is also Messano's duty to contact a school from which a new student transfers. The purpose of student testing is to assign students into groups in terms of reading and mathematics levels and to determine if pupils are at risk. If they are, they are assigned support staff.

During the 1991-92 school year, Messano was a mathematic and reading resource teacher at School 8. Messano first met respondent at school in September 1991 and did not previously know Rubin. At the time, Messano was available, at Rabel's direction, to go into classrooms, including Rubin's classroom, to determine what was needed and provide assistance in terms of grouping of children. Messano was also available to teachers for any extra materials they needed. In addition, because Rubin had to go through Messano's resource room in order to go into her own classroom, the two women usually communicated briefly every morning, generally regarding any problems experienced by Rubin or materials she required.

In approximately October 1991, Messano, for the first time on her own, went into Rubin's classroom because of loud noise emanating from the room. She could hear Rubin screaming at a higher level than that of the children. Messano's classroom was two doors away. Rubin's classroom was "like chaos." (Tr., 3/11/94). Children were throwing paper airplanes, some of which went past Messano. Some of the students were hanging out windows, looking out and screaming at children in the playground. Students were sitting with their heads out the window. One leg of a child was over the window sill. Others were in another corner of the room screaming at each other. Rubin was "just screaming back at everything," generally telling the students to return to their places. (*Id.* at p. 8). Rubin was screaming in a "high-pitched voice." (*Id.* at p. 22). There were approximately 15 to 17 children in the room at this time. Upon entering the room, Messano asked what was happening, and the children quieted down somewhat. Messano subsequently spoke to Rubin regarding the situation that day, as well as on other occasions. Rubin generally responded favorably, "but nothing would change." (*Id.* at p. 10). Messano reported the incident to Rabel. Rabel, in turn, suggested that Messano go into Rubin's classroom more often, which she did.

Subsequently, in approximately October 1991, Rabel assigned Messano to specifically help Rubin because of the situation in respondent's classroom. Messano was asked by Rabel to assist Rubin with materials, lessons or groupings in any way possible. In general, it is not Messano's responsibility to assist other teachers with classroom discipline, however, she felt concern for the safety of Rubin's students so she assisted in this respect, although not specifically asked to do so. Messano frequently discussed the situation with Rubin, who often indicated "that's just the way they are." (*Id.* at p. 14). Messano reported her observations to Rabel. Messano never did a teaching demonstration in Rubin's class because respondent never requested one. On a daily basis, however, the two spoke regarding the needs of particular children, and Rubin had the opportunity to take whatever she needed from the resource room. Messano, in general, spoke to Rubin regarding groupings and materials, not discipline. Although Messano provided books for certain students, to Messano's knowledge they were never used, or Rubin would say the children were "too stupid, they can't do this anyway." (*Id.* at p. 24).

Subsequent to October, Messano went into Rubin's classroom on just about a daily basis in efforts to restore calm. She often passed through Rubin's room on the way to her own, solely to have a calming effect on the children, which it did. However, once Messano went to her own classroom, noise again commenced in Rubin's classroom. On one occasion, when she was passing through Rubin's classroom near lunchtime, respondent asked Messano to stay until the lunch bell rang "so that she could put herself together." (*Id.* at p. 14). A group of students were in the hallway, and the rest were sitting in corners in the classroom, doing whatever they wanted. Rubin was screaming at the children, with no reaction from them. Messano stayed for approximately five to ten minutes to help calm the class.

In January or February 1992, Messano responded to a telephone call from an individual at another District school, who requested to speak to respondent, referring to Rubin as the mathematics and resource teacher and advising that Rubin had called regarding a particular student. Messano informed respondent that it was Messano's duty to obtain test scores for students, and Rubin indicated that she was not aware of this. Rubin subsequently called the person in question on one other occasion.

Rubin often referred to her students as "stupid" in conversations with

Messano. (*Id.* at p. 15). In addition, on at least two occasions, Rubin referred to the students as "stupid" in their presence. The children, in turn, "responded with anger" and by calling Rubin names. (*Ibid.*) During the course of the school year, in addition, several parents came in from the playground below Rubin's classroom and complained to Messano that milk cartons and papers were thrown out of respondent's classroom. On at least two occasions, two of Rubin's students ran out of respondent's classroom, through Messano's room. Messano stopped them, inquiring what had happened. On one occasion, a female student, R., responded that Rubin had called her stupid. Messano heard Rubin call R. stupid while Messano was in the resource room. R. was a special education student receiving instruction assistance from BSI personnel.

Virginia Orbe (Orbe) is employed by the District as an LDTC. During the 1991-92 school year, she was assigned two days a week to School 8. Early in the school year, Rubin told Orbe that respondent believed one of her female students, J.W., who was a special education student, should be in a self-contained classroom. At the time, J.W. was removed for academic subjects to the resource room but occasionally was in Rubin's classroom. Orbe observed J.W. in Rubin's class, noting that the student did not behave in an improper manner, and so informed Rubin. When Rubin subsequently asked Orbe how Orbe felt the class had proceeded, Orbe told respondent that she (Orbe) felt that respondent did not present the material, which was a mathematics lesson, in a manner comprehensible to the students and that Rubin's style was too much of a lecture approach. It was also Orbe's impression that the students were not understanding the lesson.

Between September 1991 and January 10, 1992, on at least several occasions during meetings, Rabel told Rubin that respondent's performance had to improve in the area of minimizing noise because of complaints of other teachers. Rabel also informed Rubin that respondent had to have greater classroom control.

Between the fall of 1991 and early January 1992, Rabel constantly received calls from other classroom teachers with complaints pertaining to Rubin's classroom because of the "chaos" there. (Tr., 3/11/94, p. 46). Osofsky also received frequent complaints of this nature. In response, either Rabel or Osofsky would go to Rubin's classroom.

Rabel did so on January 8, 1992. Rubin's class was in "total chaos." (*Id.* at p. 46). The room was "in complete disarray," and Rubin was "not reacting to it." (*Id.* at p. 108). Every classroom has a telephone for use by teachers to call the office if there is a problem or emergency. Rubin did not do so on the date in question. As Rabel approached Rubin's classroom, Rabel could hear respondent screaming, telling the children to "shut up." (*Id.* at p. 109). When Rabel entered the classroom, Rubin was standing behind her desk. Rubin's general response to Rabel when such incidents occurred, and her response on January 8, 1992, was to indicate that there were no problems in the classroom. Although Rabel was seated in the back of the classroom, students did not pay attention to respondent's lesson. Rabel recommended to respondent that Rubin provide for spacing between student's desks and a more definitive grouping. Rabel was present at the beginning of the class, and there was no evidence of any homework assignment, contrary to the administration's policy.

By this time, Rabel was becoming concerned regarding safety in respondent's class because of the lack of classroom control, not only pertaining to students, but to Rubin. More specifically, she was concerned partly because of objects being thrown about the classroom. Rabel's general practice was to stand outside of Rubin's classroom, to observe the situation. She periodically observed students walking about the classroom, children yelling and screaming, books on the floor and being thrown about, etc.

Rabel prepared an administrator's observation report pertaining to Rubin on January 8, 1992. Rabel noted that Rubin needed to improve in the areas of classroom control and classroom environment, noting that classroom control was nonexistent, creating a "poor educational environment," that respondent had not improved, and that Rabel feared for the "safety of all involved!!" (Ex. J-4). Rubin received a copy of Rabel's January 8 observation report. Respondent did not ask to speak to Rabel regarding it, and they never did.

By December 1991, Rabel assigned Osofsky the task of reporting to Rubin's classroom, so that she had more time regarding other matters. From December 1991 until early January 1992, Osofsky had to go to Rubin's class on a daily basis. Rabel went several times a week, commencing in September 1991. On a daily basis, beginning in September, the office received calls from other teachers requesting that the situation in Rabel's class be mitigated. Rabel frequently spoke to Rubin

regarding the situation between September and December 1991, often informally when meeting respondent in the hallway. They also spoke in Rabel's office.

Rabel observed Rubin's classroom on January 9, 1991 from approximately 12:50 p.m. until 1:40 p.m. She subsequently completed a classroom observation. The content of this document is as stated in Exhibit P-15. Rabel noted that respondent needed improvement in the following areas: state of the room, acceptance of responsibility by students, clearly defined discipline procedures, understanding of child and adolescent behavior, alertness to the physical needs of the children, classroom control, demonstration of self-control by the students, learning atmosphere, stimulation of original thinking, provision for individual needs, introduction to the lesson, use of motivational factors, systematic and orderly progression, full class participation and method of homework and class assignment. Rabel also wrote a lengthy notation, indicating that Rubin had to gain control of the class. Rabel specifically noted that prior to entering the room, students were walking around and were very noisy; that although respondent indicated she was reviewing a lesson, it was an introduction; the students did not follow Rubin's presentation; other than respondent asking for answers, there was no activity for 40 minutes; Rubin had to consult her text several times to be certain of the assignment; there was no evidence of homework; there was no pattern to the groupings; and there was a lot of litter on the floor. At this time, respondent was a mathematics teacher. There were between 12 to 15 students in her class.

Rabel conducted a conference with Rubin subsequent to the classroom observation. Consistent with her practice, Rubin changed the subject from classroom environment and Rabel's observations. Rabel also told Rubin that she had to maintain discipline and get control of the class, that the room was always in "disarray," with "garbage all around." that homework was required but not evident, and that Rabel thought Rubin was not prepared for the lesson (Tr., 3/11/94, p. 127). Rubin indicated disagreement and felt that she was prepared. Respondent did not indicate any response verbally to Rabel's other suggestions, including that the classroom be reorganized. In general, Rubin disagreed with Rabel's evaluation. Rubin did not sign Rabel's observation report. The policy in the District was that teachers were required to sign such reports as a means of indicating receipt of the document and had an opportunity to write a rebuttal or make comments at any given time.

The following day, respondent established rows in the classroom that were more separated from each other. Respondent's general practice was to make efforts to have students clean the classroom at the end of the period.

During the 1991-92 school year, Rabel informed Rubin on various occasions that parents had complained regarding the manner in which respondent conducted her classes, expressing concerns for the safety of their children on at least four or five occasions. As found, several parents requested that their children be removed from Rubin's class because of a perceived lack of discipline, yelling in the classroom, and a lack of homework. On several occasions, one or more parents spent time in Rubin's room observing the class. In the October-November 1991 time period, Rubin conducted four to five conferences with parents, including formal and informal discussions. She was aware that at least one child, G.D., was removed from her classroom.

On some days, respondent sent four to five students to the office. Rabel eventually told respondent that Rubin had to begin taking reponsibility for her students, amplifying that based upon her own experience, there would always be several students who were "not in tune" with the rest and that respondent's responsibilities included classroom management and organization. (Tr., 3/11/94, p. 136). During this conversation, Rabel also suggested that respondent break her students into small groups for mathematics and give each materials commensurate, in effect, with their abilities.

During the morning of January 10, 1992, R.C., a student in Rubin's class, left the classroom without permission and went to the office. He told administrative personnel that Rubin had grabbed and scratched him. At the same time, R.C.'s mother had coincidentally also come into the main office. Rabel examined R.C. and observed a scratch-type mark on his arm. It was not a "serious wound." (Tr., 3/11/94, p. 61). Mrs. C. became upset. Rabel immediately conducted a conference with Rubin, Bruno, Osofsky and Mrs. C. Respondent denied grabbing and scratching R.C., but indicated that on several occasions she had physically guided a child into a chair, demonstrating with R.C. how she had done so. R.C. was "small framed," "wiry." (*Id.* at p. 61). Mrs. C. calmly told respondent that if Rubin ever again touched R.C., she (Mrs. C.) would report the matter to the central office. Rubin stated that she had

taken her hand and guided R.C., who was standing in class, back into a chair. She demonstrated how she had done so, putting her hand lightly on R.C.'s shoulder. Rubin also indicated that in the past, she had lightly touched students on their shoulder to provide positive reinforcement. Subsequent to the conference, Bruno advised respondent to never physically touch a student and indicated that she should not have mentioned that she had done so in the past. Subsequently, by memorandum dated January 13, 1992 to respondent, Rabel reiterated that the District's policy prohibits any physical contact with students, whether part of positive reinforcement or discipline. Respondent did not grab nor scratch R.C. on January 10, 1992.

After the conference with Mrs. C. on January 10, 1992, Kalmanson, while in her classroom, heard very loud, persistent noises emanating from respondent's classroom. The noise was not one occurrence, but continued for some time. Students in Kalmanson's class, whose lesson was interrupted, suggested that Kalmanson call the office. Kalmanson became concerned that a fight was occurring and called the office, suggesting that someone from administration inquire if respondent needed assistance.

On January 10, 1992, Hancock was in the resource room, with her class, adjacent to Rubin's classroom. She heard a loud noise and the sound of an item hitting the adjoining wall. It hit with such force that it knocked books off a shelf in Hancock's room, causing them to fall on the head of a student. Hancock opened the door connecting the two rooms and observed chairs out of place on the floor in respondent's classroom. The chairs were not in an upright position. There was a substantial amount of screaming occurring in respondent's classroom. Other teachers arrived. It is reasonable to infer that one of the students in respondent's class threw a chair against the door connecting the two rooms. Hancock took the child who was hit by books, L.A., who was screaming, to the nurse's office.

After receiving Kalmanson's call, Rabel called Osofsky's office. Both individuals immediately went to Rubin's classroom. Upon entering Rubin's classroom on January 10, 1992, Osofsky observed a female student, R.V., straddling an open window, that is, one leg was inside the room, and one outside. The student was "teasing" regarding an intention to jump. (Tr., 3/10/94, p. 101). Chairs were about in the room, and there was no order. The situation was "very chaotic." (*Id.* at p. 102).

The bottom portion of the window was sufficiently high that an individual could put his/her head out of the window. The student's upper torso was "fitting through the window." (*Id.* at p. 104). The window was sufficiently open so that R. V. was able to sit straight, from her torso to head, within the window. Some of the students were focussed upon the student at the window. Others were standing up in the classroom. Some were laughing and encouraging R.V., in a "kidding" manner, to jump. (*Id.* at p. 105). Rubin was standing near her desk, with a book "clutched" in her arms. It appeared to Osofsky as if she were "staring at nothing, as if nothing was going on in the classroom." (*Id.* at p. 105). He had never observed such a situation in his 17 years in a school district.

As Rabel approached Rubin's classroom, she (Rabel) observed one of respondent's students dancing in the hallway and another one preparing to do so. As Rabel entered the classroom, she observed Osofsky removing R.V., who was straddling a window. Desks were in disarray, books were on the floor, and students were all about the classroom, hurrying to get back to their seats. Rabel also observed students crawling and dancing on the floor. Some desks were turned over. Rubin was standing near her own desk, "clutching" a book, not responding to the situation. (Tr., 3/11/94, p. 78). Osofsky removed R.V. from the classroom and both he and Rabel spoke with her in an office. R.V. admitted that she had been "fooling around" in class and had no intention to jump but that she was trying to "stimulate" the class and "antagonize" Rubin. (*Id.* at p. 107). R.V., in general, wanted to be a "class clown," to create a "problem" in the classroom. (*Id.* at p. 135).

It was Rabel's professional judgment that she had to take immediate action because of concerns pertaining to the safety of students and other individuals. Rabel assigned the students to various other classrooms, asking respondent to wait in the teacher's lounge. Rabel subsequently spoke with Rubin in the former's office, in Osofsky's presence. Rubin expressed surprise at Rabel's actions, not acknowledging that anything improper had occurred. Rabel indicated that she did not understand what had occurred in the classroom and was concerned for respondent, as well as the childrens' safety. Rabel asked respondent why Rubin did not call the office. Respondent communicated that she did not believe there was a problem necessitating a call to the administration.

Rabel contacted Vasquez on or about June 10, 1992 regarding what

had occurred. Rabel thereafter sent a memorandum, dated January 15, 1992, to Vasquez regarding the incident, advising him that she had removed Rubin of her classroom duties and providing a summary of what had occurred. The content of this document is as stated in Exhibit J-5. The following week, another meeting was held among Rubin, Osofsky, Rabel, and Bruno. The purpose was for the administration to provide a copy of the letter being sent to Vasquez by Rabel and to advise Rubin as to what would happen. In early January 1992, Rubin met with Vasquez, telling him that she hoped for a transfer within the District. Respondent also met with Debby Bohannon, the administrative assistant to the personnel director. Respondent also inquired of the administration in the District if there were any other classroom assignments available for her within School 8 and learned that there were none. Prior to January 15, 1992, Rabel had spoken to Vasquez several times, both in person and via telephone regarding her concerns pertinent to Rubin. Vasquez advised Rabel to commence documenting the problem and also to do whatever was necessary to help Rubin.

Effective June 10, 1992 until June 30, 1992, Rubin was relieved of her teaching duties. Rabel was advised by Vasquez to assign respondent to the library or to Rabel's office. School 8 did not have a library, and Rubin therefore spent each day in the central office at School 8. Although Rabel was advised by District personnel that respondent would be transferred to another school, such did not occur during the 1991-92 school year. Rubin had no specific duties, occasionally giving late slips to students or putting mail in employees' boxes. Respondent generally spent her time at a small desk situated between Osofsky's and Rabel's offices. Occasionally, Messano requested that respondent assist Messano in the book room because it was "a very uncomfortable situation." (*Id.* at p. 81). Commencing in February 1992, respondent was asked to help supervise in the school cafeteria one period a day during lunchtime, which she did for a while. Rubin subsequently was assigned one period a day to station herself opposite the front door, answering a bell if anyone wanted to enter the building.

Rabel completed an administrative observation report pertaining to Rubin, dated January 11, 1992, a Saturday. It is reasonable to infer that this report was prepared regarding observations occurring prior to January 10, 1992. The content of this document is as stated in Exhibit R-19. Rabel noted that respondent needed to improve in the areas of classroom control, classroom environment, and escorting

classes through the hallway, and also made a notation that respondent had to get control of her students.

The content of the year-end performance report pertaining to Rubin prepared by Rabel dated January 14, 1992, is as stated in Exhibit J-6. Rabel rated Rubin as needing improvement in the following areas: knowledge of subject matter, skill in giving definite workable assignments; skill in use of a variety of methods (project or supervised study, recitation, appreciation, etc.), systematic preparation; organization of materials; effective use of text and resources; care of materials and equipment; record keeping, accuracy, neatness, and meeting deadlines; cooperation with staff members and administrators; effectiveness in communicating with parents; effectiveness in relating to students; initiative, industry, resourcefulness, and adaptability; and acceptance of criticism. Rubin was rated unacceptable in the areas of skill in adapting materials to class needs, skill in providing for individual needs, skill in motivating interest and holding attention, social controls, and provision for and maintenance of safe procedures. Rabel commented that Rubin failed to adapt respondent's program to the needs of students; that effective instruction was not occurring because of a poor educational environment; that discipline did not exist, resulting in ineffective teaching; that there was a lack in the area of communications with all involved; and that Rubin did not continue to grow professionally. Additional comments were to the effect that the situation in respondent's class had deteriorated, that there was absolute chaos at all times, that visible teaching was not occurring, and that conferences with parents and meetings with the administration had continuously addressed the situation. This document was prepared in conjunction with Osofsky.

A meeting regarding the year-end evaluation was conducted among Osofsky, Rubin, and Rabel on January 15, 1992. Respondent did not sign the document at that time. Rabel told Rubin to take her (respondent's) time in reviewing the document and to make any comments she wished to communicate. Respondent subsequently gave Rabel a letter, generally disagreeing with the evaluation and stating respondent's belief that many positive things had occurred in the classroom. Rubin subsequently gave Rabel a document to be signed, with Rubin's written comments.

In January 1994, Kelter told Rabel that she (Kelter) was so angry concerning remarks respondent had made in the faculty lounge that she felt that if she (Kelter) were not "professional," she would have hit Rubin. Kelter indicated that respondent had commented that Kelter was having a "bad day" with a fifth grade class, which Kelter viewed to be a sarcastic remark. (Tr., 3/11/94, p. 73). Rabel's perception was that Rubin, unfortunately, had knowledge pertaining to events occurring in the school because she was assigned to the main office.

Garibell has been employed by the District for 23 years. He has a B.A. Degree and a Master's Degree in Administration and Supervision from Seton Hall University in New Jersey. Garibell has certificates in social studies K-12 and English K-12, as well as a supervisor's certificate. Garibell was appointed principal at School 4 on August 28, 1992. Previously, commencing January 2, 1989, he was vice-principal at public school No. 15, and prior to that time, was a teacher. Garibell has previously taught sixth, seventh and eighth grades, and has also, in the past, been assigned as a mathematics resource teacher, a BSI teacher, and a computer teacher. As a youngster, he attended schools in the District.

Finney received a B.S. Degree from Chaflin College in South Carolina and a Master's Degree from William Paterson College in New Jersey in reading instruction. She has certificates as a reading specialist K-12 and administrator. Finney has been employed in Paterson since 1962. Finney has also taken post-graduate courses in urban education, administration, and supervision. Finney had not met Rubin prior to commencement of the 1992-93 school year and knew nothing about her.

Garibell first met respondent on September 7, 1992, when personnel initially reported to School 4 for orientation. Garibell also initially met in his office with Rubin, as well as another individual newly assigned to School 4. He generally discussed the nature of respondent's position. Garibell had never previously discussed Rubin with any other administrators in the District. When he met her, she was "a clean slate." (Tr., 1/10/94. at p. 73).

Respondent was a Paradigm specialist, with five assigned classes per day, out of a nine-day period. Rubin was required to travel to various classes to teach writing skills. Respondent was assigned to the following classes taught by other teachers: Arletta Salmond (Salmond) (grade 7), Barbara Spina (Spina) (grade 7), Vanessa Bunch

(Bunch) (grade 8), and Annie Hardiman (Hardiman) (grade 6). During the course of the day, one of the periods was lunchtime. Classroom teachers at School 4 were guaranteed, by contract, seven preparation periods per week. Classroom teachers averaged between seven to eight periods a day of teaching.

School 4 contains grades 5 through 8, with a total of approximately 500 students. There are approximately 80 staff people, including approximately 55 classroom teachers.

The students at School 4 generally all have serious problems. They dwell in "the most difficulty housing project in Paterson" and a number are on probation. A significant number of the students come from families in which parents or other family members have died from AIDS. (Tr., 2/10/94, p. 32.). As adolescents, the students were also subject to "mood changes" and resented being criticized in the presence of their peers. (Tr., 3/8/94, p. 54.) Ninety percent of the students are of African-American background, the balance being of Hispanic background. Most of the students come from homes receiving public assistance. Drug problems and unemployment are widespread in the nearby neighborhood.

It was Garibell's opinion that if teachers did not have knowledge regarding the background of students and their needs, they would not be able to address academic requirements. Rubin had difficulty establishing a rapport with the students. During all the time she was in School 4, Garibell never saw her smile at nor say good morning to students. She never exhibited "warmth" but was always "matter of fact." He felt that the students realized this immediately. (*Id.* at p. 32.)

Rubin was assigned to teach writing skills. This function was shared with the regular classroom teachers, who also taught writing. Rubin also had four periods per week which she could utilize to meet with students and/or parents. In addition, one period a week, designated the cluster meeting, was scheduled to allow Paradigm specialists to meet together to discuss concerns, etc. The Paradigm specialist position was as new one as of September 1992. Rubin also was assigned a small group meeting time weekly, during which Paradigm specialists could meet with students who were having difficulty academically or who had been absent and needed help. During the 1992-93 school year, six Paradigm specialist positions were assigned to School 4. All had schedules comparable to that of Rubin.

During the first week of school, the practice at School 4 was to give each student a handbook addressing rules and regulations, which were to be taken home for parents to sign. The handbook addressed tardiness, discipline, responsibility of students , the grading system, etc.

There was also a misconduct procedure at School 4, which was also addressed in the student handbook. This procedure addressed the methodology for sending students to the administrative office and to the guidance office, as well as for contacting parents. Misconduct reports could be filed by teachers in "routine cases" and were put in students' files, as well as in an "emergency case" if a student had to be seen by an administrator. (*Id.* at p. 81).

The Paradigm Program started in School 4 with commencement of the 1991-92 school year. Paradigm teachers had assigned students approximately one week prior to the commencement of classes, during which time they could prepare schedules and assignments. Actual teaching duties started on approximately September 14, 1992.

The practice at School 4 was for two classroom teachers to be observed by Finney and Garibell daily. The practice was also to observe an entire classroom period.

On September 22, 1992, Finney and Garibell both conducted unannounced classroom observations of respondent. These were scheduled coincidentally, without the knowledge of either administrator.

Garibell observed respondent during the entire classroom period. Rubin was teaching students assigned to Salmond. The room was very "chaotic" when Garibell initially entered and remained that way for the duration of the lesson. (Tr., 2/10/94, p. 18). Students were getting up out of their seats, shouting out, for example, that they needed a pencil. The students did not accept responsibilities directed by Rubin and, to Garibell, respondent did not seem to be interested in progressing with the lesson. There also appeared to be substantial hostility. Most of the students did not pay attention to Rubin. In Garibell's experience, there were a few discipline problems at the beginning of the new school year, but some developed

subsequently as students gained more information about teachers as the year progresses. Requirements regarding lesson plans were addressed at orientation, as well as during morning announcements. Teachers were also directed to have available any text being used in a lesson. On two mornings prior to September 22, staff members had all been asked to insure that their lesson plans were on their desks. Rubin had a lesson plan for that day, but it was not on her desk. She did not give it to Garibell.

Garibell did not fully comprehend the point of the lesson. Administration at School 4 had previously directed that all lesson plans be placed on the teacher's desk so they could be available during observations. Lesson plans were not available to Garibell on September 22. The only point he could ascertain to Rubin's lesson was that respondent was attempting to address sequencing. As the lesson progressed, students became less enthusiastic and more ambivalent towards respondent.

Garibell found that Rubin displayed sufficient knowledge of the subject matter but that her "pedological strategies" were inadequate. (*Id.* at. p. 21). More specifically, she presented the lesson essentially in lecture form.

Garibel could not ascertain the goals and objectives of respondent's lesson. Rubin did not, for example, ask the class if there were any questions before commencing the lesson. As the situation deteriorated, she kept telling them "I told you once, I am not telling you again what you have to do." (*Id.* at p. 83). Rubin did not indicate to Garibell efforts to investigate the reasons why the children were acting the way they were nor any understanding that certain types of behavior occur with preadolescent and adolescent children, nor how to successfully address certain behaviors. Respondent refused to answer students' questions and folded her arms in a "threatening manner," exhibiting a weak "body language," which the children, in Garibell's assessment, were quick to "pick up on." (*Id.* at p. 85). In addition, Rubin stood in one spot in the front of the room and did not walk up and down among the rows to direct the students. Consequently, not all children could pay attention to her. The lesson did not evidence any methods for facilitating original thinking on the part of the students, but just called for responses "in kind." (*Id.* at p. 87).

Respondent did not walk around the room to see if any children needed individual assistance. Special education students were mainstreamed into all classes at School 4. Such students generally needed more assistance than non-classified students. All classroom teachers were provided the identity of mainstreamed classified children and were to implement such student's individual needs. Rubin's lesson plan was not on her desk, and she did not give it to Garibell during his observation. Garibell did not ask to see it during the period, nor afterward.

In Garibell's general experience, it is sometimes necessary to commence a lesson with "motivational factors," that is, with materials based upon a student's prior knowledge in order to get them involved in the lesson. (*Id.* at p. 91). Garibell did not observe the use of any such techniques by respondent. She did not use motivational techniques, such as writing on the blackboard. Garibell also expected that teachers not simply lecture students, but utilize questions and answers and other techniques to elicit responses. Rubin's lesson was strictly a lecture one. If the students "didn't get it, they didn't get." (*Id.* at p. 93). The students were required to read a paragraph and to sequence the events referenced therein. However, the goal was not apparent to Garibell until approximately three-quarters of the way through the lesson. Because Rubin refused to answer questions and her posture, students became "angry and agitated" and disinterested in the lesson. (*Id.* at p. 97). Students verbalized comments, such as refusals to complete the assignment or inquiring why respondent would not answer questions.

Once a motivational strategy is used, methods should be used to get the students involved. The lesson should be presented in an organized manner so that students can follow along and understand what the lesson will be about, "the methodology and goals" of the lessons. Teachers should also inquire if there are any questions and if the assignment is understood. One technique is to provide a sample of what is expected, for example, sequencing of a paragraph, making efforts to get the children involved. Rubin, instead, went from giving directions to the assignment. It was the practice at School 4 to present new teaching strategies and workshops to teachers. These included whole language approaches and methodologies for eliciting better responses from students, and writing. Garibell did not observe any such techniques being used by Rubin.

Garibell also expected that teachers give some homework on a daily basis. Homework could be short, some ten minutes. In totality, he expected that a student in seventh and eighth grades would have an hour's worth of homework each night, given by all teachers. Rubin's assignment to the students that day was to complete the classroom work. Garibell felt that this was inappropriate, that homework should not be the completion of a class assignment, but something based upon classwork.

Rubin spent more time on attempting to enforce discipline than on the lesson. For example, she told the students that they should not call out responses. Some students raised their hand and made comments before being called on. Garibell felt that she did not address this in a way to elicit more positive behavior, but instead dampened the enthusiasm of the children by just repeating procedures to be followed. In fact, respondent did not tell the students specifically to raise their hands in Garibell's presence. She just refused to answer questions.

Finney observed respondent presenting a lesson, adjectives, on September 22, 1992. There were approximately 22 students in the class. Rubin wrote the definition of "adjectives" on the board, read it to the students, and distributed a ditto sheet pertaining to the lesson. She did not use other techniques, such as utilization of prior knowledge gained by the students. For example, she did not use nor ask them to use adjectives to describe her desk. Students completed the ditto in approximately ten minutes. Subsequent to completing the dittos, respondent had students read sentences out loud from their work. There was time remaining in the lesson. After Rubin presented the assignment, one of the male students, T.W., asked her to explain it again. Rubin replied: "You've gotten the only explanation you're going to get." Finney was "astounded" at this response and felt that the class was too. (Tr. 3/8/94, p. 29). The students looked at Finney, who was seated in the back of the classroom, as if to see her reaction. Finney said nothing, consistent with her practice of not interrupting a teacher during an evaluation, unless necessary.

Finney also found that the class was not attentive to Rubin. Some of the students were reading papers, for example. Students were noisy upon Finney's entry. One student was reading a newspaper, and others had books not relating to the lesson on their desk. Some of the students had unopened books on their desks.

Finney also felt that Rubin was not sensitive to the mood characteristics of children in middle school, who are entering puberty and dislike being discipline in the presence of peers. She reached this conclusion based upon the fact that the students were disruptive, and would not be so if Rubin displayed an understanding of child behavior. Some students raised their hand, evidently needing to use bathroom facilities, and were not acknowledged by respondent. Rubin did not call the roll in Finney's presence. The administration had previously suggested that all teachers, including Paradigm teachers, post their discipline procedures in classrooms in which they taught. There were none evident prepared by Rubin on September 22.

Garibell and Finney each prepared classroom observation forms pertaining to the September 22, 1992 observations of respondent. The content of the documents prepared by Finney and Garibell are as stated in Exhibits J-10 and J-11, respectively.

Finney noted that respondent needed improvement in the following areas: availability of materials, acceptance by students of responsibilities, clearly defined discipline procedures, learning atmosphere, stimulation of original thinking, provision for individual needs, use of motivational factors, appropriate variety of activities, systematic and orderly progression, and full class participation. Her comments referenced noise and inattentiveness in the classroom, a lack of participation by the students, and good planning but poor delivery of the lesson, and contained suggestions that respondent call the roll daily until she came to know the students and to make the learning experience more interesting.

Garibell rated Rubin as needing improvement in the following areas: acceptance of responsibility by students, clearly defined discipline procedures, understanding of child and adolescent behavior, alertness to physical needs of the children, classroom control, learning atmosphere, stimulation of original thinking, provision for individual needs, appropriate variety of activities, sufficient teaching methods, systematic and orderly progression, and method of homework or class assignment. His comments referenced his perceptions of hostility among the students, noting that they would not respond to only negative feelings, his lack of understanding of the goal of the lesson; lack of participation by students as the lesson progressed; a need for updating the pedological strategies; the lack of availability of lesson plans; poor inter-personal relations; and his conclusion that students became disinterested because of respondent 'dictating' to them. (Ex. J-11, p. 2).

Respondent received copies of Garibell's and Finney's observation reports. Garibell shortly thereafter met with Rubin regarding his observation. He generally advised that she get to know the students better so that they would accept her and that she use small group instruction and conference periods to meet with one or two students at a time. Rubin did not do that on a consistent basis. Garibell's observation report was discussed, with emphasis upon the narrative comments. Respondent expressed the viewpoint that the observations were based upon problems she had experienced at School 8. Garibell advised Rubin that he did not know what had happened at School 8. In fact, he had just then received Rubin's folder forwarded from her prior assignment and had not yet had time to review it, but indicated that he would do so. He felt that she was being "accusatory" without foundation. (Tr., 2/10/94, p. 105). Garibell did not ask the details of any prior problems, and Rubin did not volunteer such information. Rubin commented that the lesson plan was not available. Respondent told Garibell that she did not believe the students had exhibited hostility.

Respondent subsequently sent a note to Garibell, which stated the following:

> I will be working hard to improve my evaluation.
>
> Perhaps I can speak with you personally at your convenience next week. (Ex. P-2).

Garibell interpreted respondent's remark to indicate that Rubin would take some suggestions that he had made regarding student behavior and classroom order. Garibell did not respond to Rubin's request to meet with him, and Rubin never mentioned it to him.

Finney also conferred with respondent, on approximately September 23 or 24, 1992, regarding Finney's observation. They generally discussed what had transpired and how the lesson should be taught. Finney thought that Rubin was "quite receptive" to suggestions made. (Tr., 3/8/94, p. 32). The general concept of behavior modification was discussed. Finney also spoke to Rubin about respondent's refusal to respond to students' questions. Subsequent to September 22, Finney took Rubin

to the resource room to show respondent what materials were available on teaching writing. It was Finney's opinion that a ditto was not a good method for teaching a class. The conference with Finney focussed upon available materials and the manner by which respondent had to control her classes. At that time, Finney felt that Rubin's lesson planning was good but that not all students were involved in the lesson.

However, although the communications were amiable, Finney felt that Rubin was "perturbed" with Finney because of something that had transpired prior to the conference. (*Id.*, p. 33). Rubin had previously taught a lesson on writing letters in Bunch's class. She subsequently gave the letters written by the students to Finney, expressing pride. The next day, when Rubin asked Finney what Finney had thought of them, Finney responded that she had not yet had time to read them, but would that evening. Rubin asked about them the next morning, and Finney told her that she was disappointed by the letters. Rubin did not understand why, and Finney elaborated that she felt the letters did not conform to a format required for letter writing. Finney more specifically elaborated the formats for writing business and friendly letters, emphasizing that letter writing was a part of the early warning test which would be administered to the students. Required components of a friendly letter were missing from the samples, and Finney impressed upon respondent that Finney wanted the students taught the requirements.

On October 16, 1992, somewhat more than a month after Rubin had been assigned to School 4, several teachers asked Finney to remove respondent from their classrooms because of an "unbearable noise level." (Tr., 3/8/94, p. 19). More specifically, Spina, Bunch & Harrell asked Finney to remove Rubin from their classes. Salmond and Hardiman were making efforts to assist Rubin to calm classes, as were, to some extent, the other classroom teachers. In that time frame, Hardiman was staying in her classroom when respondent taught there. The other teachers were not present when Rubin was in their classes because it was their preparation periods. However, they too commenced telling Finney that they wanted to stay in their classes because it was too difficult to calm the students after Rubin's departure.

During this time frame, Finney also observed the situation when respondent was in classes. Finney, on almost a daily basis, went to classes in which respondent

was teaching and observed students talking loudly, walking around the classroom, throwing items, and engaging in other such behaviors. On occasion, Finney asked a custodian to go into Rubin's class to assist. Finney felt that she could not stay in every class where Rubin was on a daily basis. In October 1992, she assigned Roosevelt English (English), who held a position equivalent to that of head custodian, to assist with Spina's class. Finney subsequently asked a Mrs. Mandano (Mandano), the computer teacher at School 4, to assist with Harrell's class. Rubin taught approximately 12 students in Harrell's class, and Mandano took seven, leaving five. To Finney's perception, respondent "could not handle those five." (*Id.*, at p. 23). On one occasion in the fall of 1992, prior to October 16, 1992, Finney was in the stock room, several doors away from Harrell's class. Whoopie Gaston (Gaston), a matron employed at the school, was approaching. The students in Harrell's class were misbehaving to such an extent that Finney asked Gaston to go in and assist Rubin. English and Gaston would, as well as others subsequently so assigned later in the school year, merely sit in a classroom in which Rubin taught. Because of their mere presence, the students calmed.

It was Finney's impression that most of the children at School 4 respected adults. It was also her perception, however, that Rubin, immediately upon commencement of her assignment at School 4, gave the impression of being "intimidated" by students and that they took advantage of the situation. Respondent seemed to enter a classroom "acting somewhat afraid." (*Id.* at p. 25). During the fall of 1992, Finney had discussions with Rubin regarding the situation and made several recommendations. She suggested that Rubin solicit the support of parents. Rubin did communicate with parents via telephone from the school and informed Finney that respondent also called parents at night from home. Soon, parents started calling Finney, complaining that respondent was calling them two to three times a week, which they viewed as "harassment." (*Ibid*). Finney then suggested to Rubin that respondent not call parents every week, but perhaps once or twice a month, and that she open communications with them on a positive note, pointing out some good things that the students were accomplishing. Rubin's communications continued to irritate the parents, and by January 1993, several began coming to the school, upset with Rubin and requesting to see her. Finney did not allow them to because she was "afraid" to do so. (*Ibid*).

Bunch has been employed as a teacher in the District since 1992. During the 1992-93 school year, respondent taught writing to Bunch's class during the fourth period, 10:45 a.m. until 11:25 a.m. At the time in question, Bunch taught all subjects. As a classroom teacher, she had a roster of assigned students, including a homeroom class. On two days Rubin was there from 10:45 a.m. until 11:25 a.m., and on others, from 11:25 until 12:05 p.m. School started at approximately 8:45 a.m., and Bunch had the students for three periods, most of the morning, by the time Rubin arrived.

Commencing in September 1992, when Bunch returned to her classroom, students would be out of their seats, sitting in the wrong places, some with their heads down, and some asleep. The students "would be kind of wild," different than prior to Bunch's departure from the class. (*Id.* at p. 168). Paper would be all over the room, and children had moved their desks. Students behaved in a manner they did not in Bunch's presence. On one occasion, the class was agitated because of alleged treatment by Rubin of one of the male students, T.W. T.W. informed Bunch that he had asked Rubin about an assignment and she refused to explain it to him. When he insisted, she said something to the effect that "that's what I would expect from somebody such as you or your kind of person." (*Id.* at p. 180). The students were very upset, and one of the female students indicated that she was going to write a letter about the situation. When Bunch confronted Rubin regarding the matter, respondent focussed on disrespect by T.W. and did not respond regarding what she meant by the comment allegedly made to T.W. For the rest of the school year, Bunch's students felt that Rubin was prejudiced towards the children.

On one occasion, Bunch observed a female student call out to tell Rubin that respondent had spelled a word wrong in class. Rubin reacted extremely negatively, telling the student "never mind." (*Id.* at p. 186). The students advised Bunch that that sort of thing happened all the time, that they could never correct or point anything out to respondent because Rubin would get angry.

Bunch and Rubin generally met once a week at agreed upon times to confer regarding the students. Commencing in September 1992, Bunch communicated her concerns regarding the state of the students when she returned to class. The two also discussed ways in which Rubin could become more effective with the class and reduce disciplinary problems. Rubin's responses were usually "defensive," with a

focus on the "bad behavior" of students, rather than what Rubin could do to correct it. Respondent conveyed the impression that Rubin felt that it was sufficient that she was prepared with the lesson. In Bunch's view, instruction had to coincide with being able to discipline. (*Id.*, at p. 170).

Throughout the school year, Bunch communicated her concerns to Finney and, later, to Garibell. Bunch initially also communicated to Finney her concerns that the class was disrespectful to respondent, but that she felt Rubin also had to "be stronger." (*Id.* at p. 171). Both Garibell and Finney advised Bunch to make efforts to work with Rubin and to speak to the students, which Bunch did, and that, if necessary, at some point, Bunch would have to document her observations.

By memorandum dated October 22, 1992, Bunch communicated her concerns to Garibell in writing. The content of this document is as stated in Exhibit P-5. Bunch, at this time, did not perceive any improvement in the behavior of her students, nor their reaction to Rubin. Although she believed that Rubin's lessons were good, Bunch also felt that they were not being communicated to the students because of a focus upon discipline problems.

Prior to writing this memorandum, Bunch informally spoke with Finney and Garibell regarding the possibility of Bunch remaining in the classroom when Rubin was present. Garibell told Bunch that this could not be done because it would interfere with Rubin's responsibilities with the class. However, Bunch was willing to give up her preparation time. Bunch found that she was spending a whole period after Rubin left returning the class to order, thereby diminishing the time spent on instruction. Bunch spoke to Garibell regarding the matter. Garibell told her that the administration was trying to work on ways to help Rubin adjust to the school, and the students to her. He also advised Bunch that she could not take over Rubin's period and start teaching writing herself because Rubin was assigned to the class. He more specifically advised Bunch that Rubin could not be removed from her class. At some point, Bunch mentioned to Garibell that perhaps Rubin should not be assigned to an eighth-grade class because eighth graders are "rough." (*Id.* at p. 184). He responded in the negative, that Rubin was assigned to that class and would remain so. He also indicated that he could not tell Bunch what to do during her preparation period. Bunch did not subsequently discuss the matter much with

Garibell because she felt she understood his intentions. Her communications with respondent continued on a frequent basis throughout the school year.

During this time frame, other teachers complained to Bunch regarding Rubin. To Bunch's perception, they were not willing to remain in class when Rubin was present, although Bunch was. Bunch felt that Rubin had many ideas she wanted to utilize and that she (Bunch) wanted to help her. Some teachers mentioned the fact that Rubin had erased materials off the blackboards in their classrooms. Bunch responded that she didn't mind, as long as an effective lesson was presented to the children. Others expressed annoyance that Rubin hung charts in their classrooms, "all in a disarray." (*Id.*, at p. 175). Bunch responded that she did not mind if it would help keep the class under control. However, all the teachers complained regarding Rubin in some respect.

By the first week of October 1992, Bunch had given up her preparation periods and remained in the classroom when Rubin was present. This continued generally until the end of the school year. Although they never really discussed the issue, Bunch was sure that Rubin understood why Bunch was remaining in the class. It was Bunch's feeling that Rubin had good lessons to present and she would remain in the class if it would facilitate the students understanding it. The class was much more subdued when Bunch remained. If any of the students misbehaved, Bunch took actions to discipline them without interrupting the classroom. For example, she might tell a student to sit up in his/her seat, take his/her coat off his/her head, etc. Bunch had no other interaction with the class in Rubin's presence, because she did not want to take over the class.

Spina has been employed by respondent for ten years. She has a Bachelor's Degree from Wagner College, Staten Island, New York, and is certified in elementary and early childhood education. During the 1992-93 school year, Spina was assigned to School 4, teaching all subjects, except mathematics to a seventh grade class. Respondent taught Spina's class from approximately 10:05 a.m. to 10:45 a.m. on a daily basis. Spina had approximately 17 students.

Spina experienced problems with respondent from the beginning of the school year. It was Spina's belief that the class did not respond to Rubin well and that there was a negative attitude throughout the class. At some point, Spina requested to

Garibell that Spina be allowed to remain in the room while Rubin was there. There was a disruptive atmosphere after she returned to class. Spina sent Garibell quite a few notes, complaining about different matters that occurred in the room when she was gone and after she returned. One letter of complaint was sent in approximately October 1992. Spina expressed dissatisfaction about the condition of the room upon her return, the fact that students had complained regarding Rubin's class and informed Spina that respondent had gone into Spina's desk, etc. Upon return, Spina would find, for example, that her stereo in the classroom was playing loudly and papers were all over the floor. Spina would find rolled balls of paper on the floor as if they had been thrown, board erasers with chalk dust strewn about, etc. Spina often played her stereo softly; it seemed to help the children work. Students never touched it in Spina's presence but did when Rubin was present. The radio was so loud that other teachers closed their doors. Spina spoke to Rubin regarding that situation several times. On one occasion, when Spina walked into the room, papers were flying. It got to the point where Spina kept a daily log of occurrences.

Garibell told Spina to stop sending him notes, that he was doing the best he could. He also told Spina he had no other position to which to assign Rubin if he took respondent out of Spina's class.

Spina met several times with Garibell and Finney regarding her complaints. Early in the school year, she met with Rubin as well as with the principal and vice-principal, which meeting was scheduled by Garibell. At some point, Spina stayed in her classroom during preparation time. Initially, she was told by the administration that she could not do that because she might interfere with Rubin's teaching. Subsequently, Spina told Garibell that she was remaining because she was concerned for the children's safety. Spina was aware that Harrell, Bunch and Salmond also complained pertaining to Rubin.

Spina remained in the class approximately 12 times throughout the school year. She observed that the students reacted extremely negatively to Rubin. Many answered back and refused to do work. Some students threw papers on the floor and others told respondent "get out of my face." (*Id.* at p. 133).

It was Spina's opinion that much of this developed because of Rubin's initial negative attitude. Rubin responded by arguing with the children and yelling at

them. On several occasions, Spina tried to tell respondent that, based upon Spina's experience, it was counter-productive to scream at children when they yelled. More specifically, it was her experience that many of the children were not up to the level of seventh graders generally regarding emotional/social development.

On one occasion, for example, Spina observed S.B., a female student, hand a paper to respondent. Respondent indicated that it was not done correctly and should be redone. The child answered back. Rubin, who was standing approximately six inches from the student's face, yelled and screamed at the student, resulting in the child doing the same. On another occasion, security was called to Spina's room via the public address system. Spina rushed to the room and from the hallway, could hear screaming and yelling emanating from the class. She observed a radio playing at full volume and children running in circles around the room, throwing papers at each other and at respondent. Rubin was standing in the middle of the students, yelling at them to sit down. None listened. On this occasion, as on many prior occasions, the students indicated to Spina that respondent had shoved them, torn up their papers, etc. Spina felt that respondent was not bolstering the student's self esteem and communicated this to Garibell in one of her memorandum. When Spina asked respondent about tearing up papers, Rubin did not deny that such had occurred, but indicated that the papers were not acceptable.

On several occasions, students refused to do assignments for Rubin. Spina would later ask them to complete the papers, indicating that she would give them to respondent. The students responded that they would complete them only if Spina, not respondent, reviewed them. Spina never had a major problem with students refusing to do work she assigned. Only two or three students in the class were a problem in terms of negative behaviors. Spina made clear that the students would get an F for failure to complete work. Even her "worst student," a female student, whom Spina often sent to the office, would eventually complete work, apologizing to Spina. (*Id.* at p. 139). To Spina's perception, many of the children spoke a lot in class because it was the only time they had to express their feelings. She allowed this to occur, at a minimal level.

It was her opinion, that from the beginning, there were negative feelings. Spina recommended to Rubin that respondent not walk around the school "acting like you are afraid of the children because they pick up on that." To her perception,

Rubin walked down the hallway "clutching her purse, looking like she was afraid of every person in the building, and the children knew this." The children often made derogatory comments about respondent, both to respondent and to Spina. (*Id.* at p. 140). Two of the male students, E.J. and E.M. could not get along with Rubin. They were in Salmond's class and eventually were assigned to Spina when Rubin was in Salmond's class. They completed work assignments for Spina. Rubin's next class assignment was in Spina's class. On a daily basis, there was a confrontation between Rubin and E.M. and E.J.

On one occasion, one of the students put a bottle of "white out" two inches from Rubin's face, threatening to put it on her nose. Spina merely told E.M. to give her the bottle, which he did. To Rubin's perception, a teacher had to stand up to a child like that. There was also situations in the school generally where students had weapons. Spina tried to explain to Rubin that she could not back down in a threatening situation, acknowledging that there were times that even she felt threatened in the school. Spina also advised that respondent learn as much as she could about each child, reviewing cards maintained for teachers pertaining to the students. On one occasion, for example, respondent complained to Spina, in front of Spina's class, regarding inattentiveness of a student, R.C., commenting, "what's his problem, can't he hear?" R.C. is required to wear hearing aids because he is almost deaf. The apparent insensitivity of the remark disturbed both Spina and the students. In advising respondent to learn as much as possible about the students, Spina noted that nine out of the 17 students refused to wear required eye glasses and were probably telling the truth if they said they couldn't see the board. On one occasion, for example, Rubin used a projector in such a manner that many students complained they could not see it. When Spina returned to the class, Rubin commented that students would not do the required work and pretended not to be able to see.

The students often told Spina that Rubin was rude to them, that she spoke to them as if they were "spoiled children." (*Id.* at p. 185.) The students referred to her as being afraid and teased her, which they never did with Spina. Spina spoke to the students, telling them it was cruel and they should behave better. Students also complained that Rubin told them they were in effect stupid.

At one point, on one occasion, when Spina was present, one of the students got her finger stuck in a piece of machinery in the classroom. Spina looked to Rubin to assist the child, not wanting to interfere in the class. Respondent did not do so, and another student assisted. The first student's finger was slightly swollen, and Spina suggested that Rubin send the child to the nurse. Respondent did not do so, and Spina did. The child came back with an ice pack. Respondent would often, at the end of the day, berate the children for not having worked during the class. The children would respond by indicating they would not work for her and calling her names. Spina lectured the class regarding their behavior and kept them after school several times. Rubin often gave detention to 14 out of 17 students.

It was Spina's perception that her students did not learn a sufficient amount about writing from Rubin. There was no improvement in sentence structure, paragraphs, indenting a paragraph, etc. In addition, the students did not know how to proofread. There was no improvement with spelling and vocabulary. The students rarely completed assignments given by Rubin. It would take Spina 20 to 30 minutes to calm the class after Rubin left. The children were also upset before Rubin came, anticipating her arrival. On one occasion, when the students had a mathematics exam later in the day, Spina made an excuse so that Rubin did not come, in order to keep the children calm.

Finney wrote Garibell a memoorandum dated October 16, 1992, because Spina, Bunch and Harrell had requested that Rubin not come to their classrooms because of unbearable noise. Hardiman was staying in the class when Rubin was present. The noise was heard throughout the building. As found, teachers also offered to stay in their classrooms during preparation periods. Finney discussed the situation with Garibell. Finney also discussed the situtation with Rubin, advising respondent that many teachers did not want Rubin in their class and wanted to stay Finney also relayed complaints from other teachers that Rubin had been erasing materials from their boards. Rubin denied that there were any problems. Finney advised using positive motivational strategies with students, letting them know that respondent was really concerned about them and what they learned. Finney also told the other teachers to talk to their students, to impress that they had to work with Rubin and that respondent was trying to help them. Finney also spoke to the students directly.

On November 16, 1992, Spina was absent. A substitute, a Mr. Ware (Ware)

conducted the class. During her initial rounds in the building, Finney observed that students worked diligently when Ware conducted the class. The situation deteriorated when Rubin entered at approximately 10:05 a.m.

Finney completed an observation report, dated November 16, 1992. Rubin had initially called the office for help. The content of this document is as stated in Exhibit J-12. Finney rated Rubin as needing improvement in the following areas: availability of materials, acceptance of responsibilities by students, clearly defined discipline procedures, enthusiasm for teaching, understanding child and adolescent behavior, alertness to physical needs of students, classroom control, demonstration of self-growth by pupils, learning atmosphere, stimulation of original thinking, clearly defined aims and procedures, use of motivational factors, sufficient teaching aids, systematic and orderly progression, and full class participation. Comments noted that the class was quiet until Rubin entered, that the office was paged for a security guard, that Rubin yelled most of the time and the students failed to respond to her questioning, and that one student put a coat over his head. Pertaining to teaching effectiveness, Finney noted that instruction was poor and ineffective because of lack of discipline. She also noted that a ditto was used and that the students appeared to dislike respondent.

Rubin was screaming and yelling at the students when Finney entered the room. Students were raising their hands, but respondent did not respond. Students were screaming, playing, etc. Although respondent made efforts with each student, they all refused to positively respond. Finney also suggested that Rubin make efforts to follow the lesson plan, and noted that there was no improvement in respondent's teaching, and that respondent should meet with Finney. Rubin did not exhibit improved relations with the students. Both Rubin and the other adjunct teachers shared a classroom which they could use when not teaching. During this time period, Finney had suggested that respondent meet with students in small groups or individually during her free time to get to know them better.

Garibell performed a classroom observation of Rubin on December 7, 1992, while respondent taught Spina's class. He concluded that there was no improvement from his prior observation. Respondent's lesson plan called for the students to write two paragraphs after completing a chart of characteristics. Rubin

attempted to lead a discussion regarding characteristics of people, hobbies and interests but the students never got to the point of writing descriptive paragraphs. Much time was spent by respondent in refusing to answer questions and telling the students "I'll wait until you're ready." (Tr., February 10, 1994, p. 29.) Her lesson plan did not reflect any type of goal, objective nor procedure that would be utilized for using or evaluating techniques, merely that the students would be creating the chart and writing an assignment.

It was Garibell's opinion that respondent did not have good interpersonal relations with her students, which he felt was important for a teacher in order to help develop the students' positive self-image and develop lessons. While attemtping to lead a discussion and elicit responses, which she wrote on the blackboard, Rubin stopped after almost every sentence to wait because one student or another was talking or not listening. It was Garabel's opinion that such a technique would not work after the first or second time and that Rubin eventually "lost the students"; they paid no attention to her and she was not able to elicit responses. (*Id.* at p. 31.) A hostile environment still existed in the classroom.

The classroom was "chaotic." (Tr., 2/10/94, p. 118.) Rubin presented one lesson for the entire class, with no consideration of individual needs of students. Respondent used no motivational factors to commence the lesson, then immediately asked the students to compose a chart. As in prior evaluations, her approach was essentially a lecture. There was no orderly progression in the lesson, and many students did not participate. Garibell did not observe Rubin giving homework assignments, although he did not stay until the very end of the lesson. He was present when the class started and stayed for approximately 35 minutes.

Garibell prepared a classroom observation report pertaining to December 7, 1992. The content of this document is as stated in Exhibit P-3. He rated respondent as needing improvement in the following areas: acceptace of responsibility by students, clearly defined discipline procedure, understanding of child and adolescent behavior, demonstration of growth in self-control by pupils, learning atmosphere, provision for individual needs, lesson preparation, clearly defined aims and procedures, use of motivational factors, appropriate variety of activities, and systematic and orderly progression. The narrative comments indicated that much time had been wasted in class, considering that the observation occurred in

December; that the assignment was not completed in class; that pupils were not focused upon the lesson; that her teaching approach lacked effectiveness; that respondent's plans did not reflect goals, objectives, procedures, and evaluations; that respondent had poor interpersonal relations with the students; and that Rubin had limited knowledge of urban education. He requested that Rubin meet with him several days later. Respondent did not receive a copy of Garibell's observation report when it was completed, and the two never met regarding his observations.

In approximately early 1993, Garibell had to go into Rubin's class and take over a class because respondent was cornered by two male students, E.J. and E.M., in a seventh grade class. Garibell feared for her safety. The two students were subsequently removed from the class. In addition, on a frequent basis, responded contacted the office via the public address system. She was often barely audible because of the noise in her classroom. This occurred almost on a daily basis.

Finney observed respondent teaching Spina's class on January 5, 1993. Rubin presented a lesson on exploring ideas. At that time, there were approximately 30 classroom teachers, four adjunct teachers and two BSI teachers at the school. Tenured teachers were usually not evaluated formally more than twice a year unless there were significant problems.

When Finney entered the classroom at approximately 10:05 a.m., Rubin was yelling at the students, trying to secure order. The students were not paying attention. As was usual, the students quieted down when Finney entered the room. Rubin essentially presented a lecture, and the students ignored it. Some had their heads down or were not looking at her. Few students participated. Rubin gave an assignment for the class to complete. It was Finney's perception that most of them did not understand it. However, Rubin only stated the assignment once. Finney asked respondent to rephrase the assignment. Upon reviewing respondent's plans, Finney was satisfied that Rubin made efforts in this respect. However, the lesson plans were not related to motivational techniques. Finney's prior advice of relating a lesson to things the students knew of or were intrested in was not followed.

Rubin was attempting to use a text referred to as the MacDugel English book. Several students asked to leave the room for emergency purposes, and respondent

refused. Some students put coats over their heads, others turned around in their seats. Many students were not reading the material assigned.

Finney's classroom observation report regarding Januray 5, 1993 is as stated in Exhibit J-13. Finney rated respondent as needing improvement in the following areas: acceptance of responsibility by students, clearly defined discipline procedure, enthusiasm for teaching, understanding child and adolescent behavior, alertness to physical needs of students, classroom control, demonstration of growth in self-control by students, provision for individual needs, and systematic and orderly progression. Finney's comments summarized her observations. Finney also noted that Rubin accepted student answers that were articulated in phrases or single words and directed her attention to the few students who attempted to respond. Her recommendations were that respondent continue to work on order in the classroom and the use of regular procedures. Finney requested that respondent meet with her that afternoon.

Finney conducted a post-observation conference with Rubin on January 5, 1993. The two discussed what had happened in the classroom, and Finney asked respondent why Rubin felt the students were so hostile towards her. To Finney's perception, Rubin became "sarcastic." (Tr., 3/8/94, p. 57.) Finney told her that that was not necessary. Although two students were present when Rubin came into the office, Finney dismissed them and closed the door. No one else was present during the conference. Rubin made no remarks regarding how she would improve her performance. Rather, respondent "seemed to have resented" Finney's suggestions. (*Id.* at p. 57.) Finney also told respondent that the MacDugal text may have been too difficult for the students. Respondent had obtained the materials herself; the school did not provide them. They also discussed motivational techniques, and Rubin told Finney that she was going to contact an employee at the McDonald's hamburger chain, who was familar to Finney, to establish a sticker/motivational program. Rubin criticized Finney for holding the conference in the principal's office. Rubin subsequently sent Garibell a memo to the effect that two students were present during the conference.

Because of respondent's apparent resentment, and in order to provide written documentation and to "cover" herself, Finney, on January 17, 1992, wrote a memorandum to respondent. (Tr., March 8, 1994, p. 57) The content of this

document is as stated in Exhibit J-17. Finney addressed the need for improvement of classroom behavior. She set forth specific recommendations to respondent as follows:

1. Give the students a reason for learning information prior to commencing a lesson,

2. Present concrete materials first, so students can clearly understand and discuss the topic before asking for generalizations,

3. Help students improve their English by encouraging them to speak in complete sentences,

5. Plan questions that will be used and avoid those which can be answered "yes" or "no,"

6. Use behavior modification techniques, such as monthly charts with a reward system,

7. Conduct a small group discussion after school and solicit students' suggestions for improving class performance, refrain from calling parents for every small infraction, and when contacting a parent, try to say something positive,

10. Utilize instructional aids, such as overhead projectors and materials in the resource room by Prentice-Hall Publishing Company.,

11. Utilize film strips, tapes and other materials in the resource room to combat student boredom and provide variety,

12. Establish a class code of behavior cooperatively with the students, and post a chart with the rules. Solicit the assistance of classroom teachers to enforce the rules, and review them periodocially with students,

13. Give attention only to positive behavior,

14. Try to make positive remarks to the students on a daily basis and avoid negative remarks, and, be professional, do not hold a grudge, nor insist upon an apology. (Ex. J-17, p. 1.)

Respondent did not make any efforts to speak with Finney regarding the latter's suggestions. However, Finney subsequently communicated suggestions regarding the memorandum to Rubin. Finney had previously advised Rubin to talk with her students regarding their interests pertaining to a lesson or to ascertain what they already knew concerning the lesson. To Finney's observations, respondent never did so. Finney was aware that respondent had small group discussions with some of her students. However, they were not with the most troublesome students, as had been suggested by Finney.

Garibell also sent respondent a memorandum, dated March 3, 1993, with suggestions for improvement. The content of this document is as stated in Ex. J-15. He noted, in part, that effective teaching encompasses scholarship, lesson planning and teaching skills, management skills, skills in using various modalities, skills in encouraging relevant student activities, and the "Affective" aspect of teaching (Ex. J-15, p. 1). Each of these items was discussed in some detail. Pertaining to scholarship, Garibell referenced the availability of college courses, in-service courses, publications, seminars, workshops, etc. He also stressed the necessity of being flexible regarding lesson plans and to indicate what is being taught and the specific strategies to be utilized. The need for motivational tools was emphasized, as was the technique of good questioning of students. In this respect, Garibell amplified on the types of "PIVOTAL" questions that could be used. (*Id.* at p. 3.) Summary presentations and homework assignments were also referenced. Garibell also set forth specific routines necessary for classroom management. Garibell noted that his recommendations were presented as an aid to help Rubin complete her PIP, which had a target date of April 27, 1993. He closed by noting a scheduled March 4, 1993 annual conference and Rubin's right to have union representation present.

Rubin received a copy of Garibell's memorandum soon after it was prepared. She did not discuss it with him but made efforts to follow his recommendations. More specifically, she attempted to use more graphic materials, such as pictures, to illustrate points at the commencement of a lesson. She also attempted to make her questions more understandable, to use terminology which could be understood by

the students, and gave more thought to approrpriate questions. Respondent also administered more frequent quizzes and assigned tasks while she was writing material on the blackboards, to use time more efficiently.

On approximately March 4, 1993, Garibell prepared a PIP for respondent for the 1992-93 school year. The content of this document is as stated in Exhibit J-16. Stated goals were improvement in interaction with students utilizing a variety of techniques, improvement in use of various pedological strategies, improved planning, and improved interaction with staff and adminstration. Rubin's responsibilities were to avail herself of any service opportunities for improvement in urban education, teaching strategies, strategies for improving student behavior, etc.; to follow all suggestions referenced therein; to improve planning for instruction; and to improve group and personal dynamics with staff. Administrators' responsibilities were to provide information regarding courses offered by the District, to provide ongoing observations, to provide opportunities to observe master teachers (to be selected by the administration), to provide assistance as designated at-risk teachers, and to provide suggested strategies. Indicators of improvement were to be based upon direct observation, reduction of need for administrative intervention, improved planning, improvement in student performance data, and attendance at district in-service courses prepared for all staff members annually. The PIP estabished a target date of April 27, 1993.

The PIP for respondent was provided to her prior to her annual conference, in addition to other documents. The administration suggested that Rubin observe other staff members and try to be friendlier with students.

Garibell discussed the PIP with Rubin. He asked her to read the document first, which he had given her prior to the conference, and asked for any questions. Rather than discuss the document, respondent responded with her own comments concerning the administration's suggestions. Rubin essentially disagreed that she had problems in any of the areas noted. Finney also explained to Rubin that after reviewing respondent's personnel file, it appeared that administrations at prior schools to which respondent had been assigned were also not satisfied with her work. The participants at the conference in question discussed comments Rubin had received in the past which, to Finney's perceptions, were similar to the ones at School 4, as well as those in her current assignment.

Mrs. England (England) was the designated at-risk teacher at the time in question. She was responsible for testing, distribution information regarding funded programs, assisting teachers in selecting materials, and was in charge of the resource room. Teachers were generally advised to confer with England regarding materials. Rubin and England subsequently conferred, and England provided respondent with materials and suggestions. School-based half-day in-service courses were held in this general time period at the school. Rubin, as well as other classroom teachers, were required to attend, and respondent did so. The focus of the sessions was shared decision making, consensus building, and team cooperation. Portfolios of student work were not subsequently provided by respondent to the administration. Respondent's lessons plans did not change after the PIP. The plans still merely stated what respondent was going to teach, not the methods or measures for determining student change. Garibell informally spoke with Rubin subsequent to the PIP, generally regarding the requirements of the PIP. Respondent continued to dispute that any problems existed. Garibell often went to respondent's classroom to intervene between March 24, 1993 and the end of the school year. Finney performed at least one evaluation.

Rubin submitted a written response. Respondent indicated that she attempted innovative methods, that her lesson plans were good, that her management techniques were adequate, that there were no problems with social control, and that she did not believe she needed to improve her teaching style.

Respondent subsequently attempted to obtain information on relevant in-service courses but none were offered by the District at the time in question. Rubin commenced using a behavior modification chart, with a reward system. She also utilized the overhead projector and prepared a code of behavior. Rubin did not request a demonstration by a master teacher, and none was provided by the administration. Respondent was also asked to observe other staff members. She did not do so.

Finney and Garibell prepared a year-end performance report pertaining to respondent, which was dated March 24, 1993. The content of this document is as stated in Exhibit J-14. Rubin was rated as needing improvement in the areas of knowledge of subject matter, systematic preparation, effective use of text and

resources, care of materials and equipment, cooperation with staff members and administrators, effectiveness in communicating with parents, effectiveness in relating to students, initiative, industry, resourcefulness and adaptability, and acceptance of criticism. She was rated as unsatisfactory in the areas of skill in adapting materials to class needs, skill in providing for individual needs, skill in giving definitive workable assignments, skill in motivating interest and holding attention, skill in the use of variety of methods, organization of materials, social control, care of materials and equipment, and provision for and maintenance of safe procedures. Comments indicated that Rubin needed improvement in relating to and understanding urban education, that she had been unsuccessful in her pedological strategy and failed to utilize suggestions made by the administration, and that she was unable to provide for the safety and well-being of students, with a reference to time spent by the administration in assisting her with discipline and organization. Garibell recommended termination, with reference to the fact that this was the second such recommendation. The major concern for the administration was classroom control, including a concern for the safety of students and Rubin. It was Garibell's opinion that Rubin was incapable of causing a positive change in the students assigned to her because too much time was spent on ineffective classroom control techniques. Rubin also was resistent to efforts to establish better relations with colleagues.

By letter dated March 31, 1993 to Garibell, respondent filed a detailed rebuttal to the administration's performance evaluation report. She addressed the areas of scholarship, teaching techniques, classroom organization and management, professional relationships, as well as other various matters. The content of this document is as stated in Exhibit R-1. Pertaining to scholarship, she disputed the suggestion that she had insufficient knowledge of subject matter and believed that she received no specific suggestions regarding urban education. Rubin also offered a detailed defense of her teaching techniques, noting a variety of materials utilized. She also noted that her lesson plans were not unduly criticized and asserted that she was cooperative with colleagues, and made efforts to meet with small groups of students. Rubin concluded that she felt, since her assignment at School 4, she was not treated impartially.

By memorandum dated April 1, 1993, the security guards complained about being assigned to assist Rubin. Garibell responded that they had to perform assignments given by the administration.

D.J. was a student in Salmond's seventh-grade class during the 1992-93 school year. Rubin required that students raise their hands prior to submitting completed work. One day early in the school year, D.J. attempting to give respondent a paper he had completed by calling her name several times. He did not raise his hand. Rubin, who was standing in proximity to D.J., called him an "ass." The other students laughed and told D.J. to tell Salmond, which he did when Salmond returned to the class.

S.R. was in Spina's class during the 1992-93 school year. On March 24, 1993, respondent assigned S.R. to after-school detention. Respondent subsequently observed S.R. in the school lobby, apparently not going to detention. She queried the student, and S.R. responded that she (S.R.) could not go right away because she (S.R.) had to pick up her brother at school. Rubin called S.R. an "f---ing brat." S.R. thereafter wrote a note to Finney about this occurrence, stating that she (S.R.) did not want to remain in Rubin's class. The content of this document is as stated in Exhibit P-8. Finney held a conference with S.R. and respondent the following day. Rubin denied calling S.R. names. In the past, when assigned detention, S. R. would first meet her brother and then bring her brother, who was five years old, to detention with her. Many other students followed a similar practice.

During the 1992-93 school year, Rubin told another student, T.J., to shut the "f---- up."

One day during the 1992-93 school year, J. I., a student of Spina, lit matches in the classroom during the period respondent was assigned, while Rubin was present in the class. Spina was not present at the time in question. Rubin made no efforts to take the matches from J.I. When Spina returned to the classroom, several of the students told her that J.I. had lit matches. Spina detected a smell of sulphur in the room. In response to a directive from Spina, J.I. gave the matches to her. Spina asked Rubin if J.I. had been "playing around with the matches," and Rubin responded in the affirmative. (Tr., 2/15/94, p. 152). Spina then asked why respondent had not taken the matches from J.I. Rubin replied to the effect that J.I. would not

give the matches to respondent anyway in, what appeared to Spina, to be a "snotty tone of voice." (*Id.* at pp. 156-157). Respondent then left the room. Spina thereupon wrote a note regarding what had happened and sent J.I. with the note and mathbook to Garibell's office. The content of Spina's note is as stated in Exhibit P-10. Finney conducted a conference with respondent, J.I.'s mother, and J.I. the following day. J.I. admitted that she had lit matches in class.

By April 1993, Rubin was advising the administration that she felt fearful. The administration asked Vasquez for special security for Rubin near the end of the year. They also requested that Rubin be assigned to a different site for the last couple of weeks of school because respondent was telling Garibell and Finney that she (respondent) feared for her safety and that of her automobile. Vasquez advised that additional security would be provided for the school's parking lot, but that never occurred.

Rubin had disagreements and arguments with other staff members throughout the 1992-93 school year. When Finney and Garibell attempted to intercede, Rubin resisted.

Spina and Salmond were initially supportive of Rubin, but the situation quickly deteriorated. They both complained to the administration regarding the manner in which Rubin disciplined students. Spina also complained, as found, to the administration that Rubin, on occasion, went through Spina's desk and that respondent did not coordinate lessons with Spina. Spina also complained regarding the class situation when she returned when Rubin was present. Spina also advised Garibell on occasion that students disciplined by Rubin when Spina was present did not really misbehave in class. Nevertheless, the administration generally supported Rubin in any efforts to suspend students. Harrell communicated complaints, including written ones, of a similar nature to those of Spina. From October 1992 until she assumed a new position in January or February of 1993, Hardiman remained in her classroom when Rubin was present on a regular basis.

For the past ten years in February of each school year, when Black History Month occurs, Spina assigned black history reports to her students. She did so in February of 1993. Rubin gave the students some more assignments, and Spina mentioned the situation to her. Respondent offered to revise her assignment, and

Spina concurred that this should be done. Spina intended to use her lesson to teach the techniques of writing a report by using an outline, researching material in the library, etc. Spina conferred with Garibell, who indicated that Rubin could give her assignment. Spina later heard that Rubin complained about Spina's communications with Garibell. This incident was an example of a lack of coordination between the two teachers. The two never discussed or planned a joint lesson. By October 1992, Rubin's relationship with Spina was poor. In that month, Spina and Rubin met with Garibell and Finney regrding the situation.

In April or May of 1993, respondent and Salmond had an argument about Rubin erasing material on blackboards in Salmond's class. Respondent had inadvertently done so. Salmond became upset and shouted at Rubin because a radio was blasting. Salmond characterized the situation as one of stupidity, and indicated she was tired of dealing with Rubin, in front of the students. Salmond also made a derogatory comment pertaining to Rubin in the presence of students when Rubin acidentally erased a part of a blackboard.

DISCUSSION

The Commissioner of the Department of Education generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A. 18A:6-9.* Discipline of tenured school employees is addressed in the pertinent statues.

A tenured local school employee shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, "or other just cause". *Id.* at §*6-10* If a charge is one of inefficiency, prior to making a determination regarding certification of charges to the Commissioner, the local school 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. *Id.* at §11. Procedural requirements pertinent to a charge of inefficiency are addressed in *N.J.A.C. 6:24-5.1(c).* The rationale of this regulation is that a teacher whose teaching effectiveness is called into question after years of meritorious service should be afforded an opportunity to demonstrate that he/she is still capable of effective teaching. *In the Matter of Tenure Hearing of April Renee Bradley, 1991 S.L.D. at 2524 (Bradley).*

In *Bradley, supra*, the Commissioner noted that a charge of incompetency, in contrast to a charge of inefficiency, assumes that the proofs in support of the charge will demonstrate that a teacher is so lacking in competency to perform the responsibilities of a classroom teacher that requirements of the 90-day improvement would be a useless exercise. A charge of incompetency requires proof that the individual in question, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. 1990 *S.L.D.* at 821-822. The State Board of Education (State Board), although reversing the Commissioner's ultimate conclusion, agreed with the standard utilized by the Commissioner in differentiating between incompetency and inefficiency. 1991 *S.L.D.* at 2522-2523. The State Board noted that the nature of a teacher's entire years of service is relevant as to whether or not he/she lacks the ability to be an effective teacher. *Id. at 2524.*

The Commissioner in *Newark Bd of Ed v. Burnside,* 13 *N.J.R.* 867 (Oct. 25, 1988) *(Burnside)*, upheld a determination that the local school board had proven charges of incompetency and unprofessional conduct pertinent to charges that the respondent was unable to control and educate students despite supervisor conferences, had made insulting and degrading remarks about students, had gotten into arguments with students, and that students engaged in fighting and left the classroom. An evaluation of such charges is a matter of "total impression" based upon observations made over a period of time. *Burnside* at 886. The need to remove a teacher may be demonstrated by one incident, "if sufficiently flagrant." *In re Fulcomer,* 93 *N.J. Super.* 404, 421 (*Fulcomer*), (1967).

In determining the appropriateness of a teacher's fitness, it has been noted that teachers must exercise '. . . a degree of self-restraint and control behavior rarely requisite to other types of employment.' *In re Tyler,* 13 *N.J.A.R.* 297, 309 (citation omitted). 'While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self control'. *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County,* 1969, *S.L.D.* 159, 173, aff'd, State Board, 1970 *S.L.D.* 448 (citation omitted) (*Appleby*).

Inappropriate physical contact between a teacher and student constitutes unbecoming conduct. *See, Fulcomer, supra*. Students have a right to be free not only from bodily harm but from "offensive bodily touching, even though there be no actual physical harm." *Appleby* at 173. Teachers who resort to unnecessary and inappropriate physical contact face dismissal 'or other severe penalty.' *Ibid* (citation omitted). Factors relevant to a determination of penalty include the nature and length of a teacher's prior service and whether there is any indication that the acts in question were "premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment." *Tyler* at 318. A teacher with an "uncontrollable temper" who verbally and physically abuses students engages in unbecoming conduct, *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super*, 737, 741 (App. Div. 1988), as does one who uses "violent profanity" (*Id*. at 749.)

A failure by a teacher to follow a lawful directive of superiors constitutes insubordination. *See, Cheesemen v. Gloucester City*, 1 *N.J. Misc.* 318 (1923).

CONCLUSIONS

As both parties recognize, the burden of proof is upon petitioner by a preponderance of the credible evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962). I am persuaded that petitioner has made its burden of proof in most respects.

Respondent, on a consistent basis, at both Schools 4 and 8 failed to maintain effective classroom control, shouted at students, spoke to children about students in a derogatory manner, refused to answer students' questions, and did nothing to individualize her presentations of lessons, consistent with individual needs of students. The situation resulted in not only risks to petitioner's safety, but to those of her students. It also resulted in a failure by respondent to provide adequate instruction to her students, nor to maintain a climate conducive to classroom instruction. The fact that students were not attentive, even in the presence of administrators, highlights respondent's inability to teach and maintain discipline.

Although respondent Rubin's lesson plans were minimally sufficient, and there is no evidence that they were ever rejected by administrators, they were not available as required and they did not address methodology and evaluation

techniques. In addition, respondent's teaching approach was one of lecture, with little strategy used to motivate and encourage participation by students.

The situation existing in Rubin's classroom on January 10, 1992, although addressed as a separate charge, falls within the time period referenced in Charge One and, in my judgment, constitutes evidence of incapacity. Similarly, respondent's failure to enforce the pass procedures highlights her general inability to impose effective discipline and lend support to petitioner's case.

Respondent's entire career in the District was fraught with problems. Her behavior was consistent at both Schools 4 and 8, although the ages of the students differed and although she functioned as a regular classroom teacher in one school and as a more mobile teacher in the other. The requirement that a teacher maintain his/her self control is recognized in the Commissioner's decisions. It is also, however, self-evident that a teacher should not scream at students, make derogatory remarks to and about students, curse at students, etc. Remarks by respondent regarding hearing impaired students and calling and referring to students as "stupid" constituted insensitivity at the least and incapacity at the worse In any event, administrators at both schools in question, as well as other teachers, spent an inordinate amount of time discussing problems with Rubin and offering suggestions on how to deal with the situation. Respondent's stance throughout the years in question, as was her position during the hearings, was consistently that there were no problems and everyone but she was at fault.Respondent's performance did not improve, although towards the end of the 1992-1993 school year she belatedly made some efforts to change, supporting the conclusion that petitioner has proven incapacity.

Administrators provided Rubin with formal evaluations, conducted formal evaluation conferences, and met with her on many occasions informally and more informally. In adddition, administrators made efforts such as removing students from respondent's classes, both on a temporary and more permanent basis. Respondent's classes were of a small size, generally smaller than those of other teachers. Indeed, administrators supported Rubin even in the face of consistent complaints of other teachers. Respondent rarely asked questions at meetings and made no efforts to arrange for a demonstration lecture nor to observe other

teachers. Until late, during the second year, respondent made minimal efforts to meet individually with more troublesome students, although she had sufficient time built into her schedule to do so.

Although concluding that petitioner has proven the charges referenced in Charge One generally, I am not persuaded that the District has demonstrated poor relations with parent and staff members to an extent constituting incapacity. Petitioner made efforts to meet with parents and confer with staff members, although at times she showed poor judgment, and the record does not demonstrate a level of such poor relations, which petitioner caused, justifying a conclusion of incompetency in this respect. To some extent, poor relations with some teachers, for example, were the fault of all. Some of the disagreements pertaining to erasure of blackboards, for example, appear to be the result of misunderstandings, rather than incompetency by respondent.

It is reasonable to conclude that poor relations with colleagues largely resulted from the negative impact upon them because of respondent's failure to effectively control her classroom. Respondent came to both schools in question with a clean slate. There is nothing in the record to indicate bias or preconceived notions on the part of any of the administrators. Colleagues were initially amiable to making efforts to assist respondent but, somewhat understandably, lost patience in this respect as time progressed and they were negatively impacted by problems associated with the situation in her classrooms.

Alluding to the problems which many of the students brought to school with them, as referenced in the above findings of fact, respondent argues, in part, that responsibility is being placed upon her for problems of society. I am not persuaded by this argument. It is a teacher's obligation to tailor his/her teaching methodology to the individual needs of the students. In addition, it is reasonable to conclude that respondent's own actions caused and exacerbated what may have been a difficult situation to begin with. It is also noteworthy that other teachers were able to deal effectively, even with the most disruptive students, and that none experienced problems to the extent that Rubin did. For whatever reason, it is clear that Rubin was unable to deal with the situation. Her inability to do so not only negatively impacted upon the students whom she taught, but as reflected in the above findings

of fact, interfered with the teaching of colleagues and consumed an inordinate amount of her superiors' time.

It is clear that respondent's use of profanity pertaining to D.J. and S.R. constitutes conduct unbecoming a teacher and serious infractions, warranting discipline. However, I am persuaded that petitioner has not proven that respondent physically grabbed and scratched R.C. on January 10, 1992. The record indicates that any contact was totally inadvertent. I am also not persuaded that respondent's failure to contact the school office on January 10, 1992 constitutes insubordination. Although administrators may have had difficulty in striking a reasonable balance, it is clear that conflicting communications were given to respondent. On the one hand, she was chastised for calling the office too much and consuming an inordinate amount of supervisory time; on the other, she was directed to contact the office if problems arose.

The sustained nature of respondent's inability to improve her performance and the serious nature of the infractions pertaining to D.J. and S.R., lead me to conclude that, as argued by the District, termination is appropriate. As noted, respondent's inability to maintain discipline resulted in a situation where there was no effective teaching of students and where their safety was put at risk, as highlighted by incidents of students leaning out of open windows and respondent's failure to even attempt to deal with a student lighting matches in class. Considering the totality of the circumstances, I am persuaded that termination is warranted.

I **CONCLUDE** that the District has proven by a preponderance of the credible evidence that Charge One, incompetency, except for that aspect alleging that respondent demonstrated poor relations with parents and staff members; that petitioner has proven by a preponderance of the credible evidence Charge Two, conduct unbecoming a teacher; that the District has not proven, by a preponderance of the credible evidence, Charge Three; that the allegations in Charge Four pertaining to dereliction of duties pertaining to January 10, 1992 are subsumed in Charge One; that respondent has proven by a preponderance of the credible evidence that Rubin permitted J.I. to light and play with matches in class during the 1992-93 school year and failed to take action and that such constitutes other just cause for discipline; and that the District has not proven by a preponderance of the

credible evidence the charge of insubordination in Charge Four. I also **CONCLUDE** that respondent should be terminated.

ORDER

It is hereby **ORDERED** that all aspects of Charge One except that pertaining to allegations of poor relations of parents and staff members be and is hereby **AFFIRMED**; that Charge Two be and is hereby **AFFIRMED**; that Charge Three is be and is hereby **DISMISSED**; that the allegation of dereliction of duty pertaining to January 10, 1992 in Charge Four be and is hereby **DISMISSED**; that the allegation of insubordination referenced in Charge Four be and is hereby **DISMISSED**; and that the charge of dereliction of duty pertaining to January 21, 1993 be and is **AFFIRMED**. I also **ORDER** that respondent's employment as a teacher in the District be and is hereby **TERMINATED**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 22, 1994
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

7/27/94
Date

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 1994
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

LIST OF WITNESSES

For Petitioner:

Richard B. Garibell
Sarah D. Finney
Vannessa Bunch
Barbara Spina
Arletta Salmond
Maryann Rabel
Michael Osofsky
Ada Masdano
Sharon Hancock
Vincent Bruno
Carol Twilliger
Judith Camoson
Virgina Orbe
S.F.
D.J.
S.R.

For Respondent:

Ellen Rubin

LIST OF EXHIBITS IN EVIDENCE

P-1	Respondent's class schedule for 1992-93 school year.
P-2	Respondent's note, September 25, 1992
P-3	Classroom Observation, December 7, 1992
P-4	Letter to Garibell, October 16, 1992
P-5	Memo to Garibell, October 22, 1992
P-6	Memo to Garibell, March 29, 1993
P-7	memo by Security Guards, April 1, 1993
P-8	Letter to Finney, March 24, 1993
P-9	Letter to Garibell, Octrober 20, 1992
P-10	Note from Spina
P-11	Administrator's Observation Report, November 22, 1991
P-12	Administrator's Observation Report, December 16, 1991
P-13	Sample Daily Student Sign Out Sheet
P-14	Classroom Observation, December 9, 1991
P-15	Classroom Observation, January 9, 1992
P-16	Letter of Reprimand, January 13, 1992
P-17	Parent/Teacher Conference Summary Report
P-18	Rabel's Notes
P-18a	Rabel's Notes (typed)
P-19	Chart for the 1991-92 school year
P-20	Chart for the 1992-93 school year
P-21	Respondent's Record for Attendance for the 1991-92 Chool Year
R-1	Rebuttal memo, 3/31/93

R-2	10/18/92 memo
R-3	1/5/93 memo
R-4	1/7/93 memo
R-5	2/4/93 memo
R-6	3/5/93 memo
R-7	Memo referencing 3/5/93
R-8	3/9/93 memo
R-9	3/18/93 memo
R-10	3/23/93 memo
R-11	Memo pertaining to 4/6/93
R-12	4/7/93 memo
R-13	4/7/93 memo
R-14	5/10/93 memo
R-15	Letter, "Dear Parents" (undated)
R-16	Letter, dated 3/15/93
R-17	6/16/93 letter
R-18	Document titled Math/Science Summer Training Institute
R-19	Administrator's Observation Report dated 1/11/92
R-20	Memo from Vice Principal Finney without date
R-21	1/8/93 Misconduct Report
R-22	1/21/93 Misconduct Report
R-23	1/17/93 Misconduct Report
R-24	2/4/93 Misconduct Report
R-25	2/25/93 Misconduct Report
R-26	3/17/93 Misconduct Report
R-27	3/18/93 Misconduct Report
R-28	3/22/93 Misconduct Report
R-29	3/23/93 Misconduct Report
R-30	4/ /93 Misconduct Report
R-31	4/6/93 Misconduct Report
R-32	5/14/93 Misconduct Report
R-33	5/17/93 Misconduct Report
R-34	5/18/93 Misconduct Report
R-35	5/19/93 Misconduct Report
R-36	5/ /93 Misconduct Report

OAL DKT. NO. EDU 10753-93

IN THE MATTER OF THE TENURE HEARING OF ELLEN RUBIN, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions essentially recast and reiterate her arguments advanced before the Administrative Law Judge, again contending, inter alia, that Charges One and Four constituted allegations of inefficiency rather than incompetence and, therefore, must be dismissed as she was not afforded the opportunity of a 90-day period within which to take remedial action as required by N.J.S.A. 18A:6-11. Respondent further objects to the ALJ improperly accepting the biased testimony presented by the District as fact rather than her credible testimony. The Commissioner finds that these and respondent's remaining exception arguments were fully and fairly considered and addressed at length by the ALJ in her initial decision and need not be herein reviewed.

Upon a careful and independent review of the record in this matter, which includes transcripts of the nine days of hearings at the Office of Administrative Law, the Commissioner agrees with the findings and conclusions of the ALJ with respect to each of the

charges for the reasons clearly articulated by her in the initial decision. Further, the Commissioner is fully satisfied that the ALJ carefully measured conflicts, inconsistencies, and potential biases in deciding which testimony to credit in reaching her findings of fact and he finds no cause to question such credibility assessments.

The Commissioner also concurs with the ALJ that, considering the totality of the circumstances existing in this matter, dismissal of respondent from her tenured teaching position in the State-operated School District of the City of Paterson is warranted.

Accordingly, for the reasons well expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law. Respondent is hereby dismissed from her teaching position as of the date of this decision. Additionally, this matter will be referred to the State Board of Examiners for any action it deems appropriate pursuant to N.J.A.C. 6:11-3.6(a).

COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1994

DATE OF MAILING - SEPTEMBER 13, 1994

245-94

EDU #10753-93
C # 245-94
SB # 44-94

IN THE MATTER OF THE TENURE HEARING OF ELLEN RUBIN, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, September 12, 1994

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

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

On September 30, 1993, the State-operated School District of the City of Paterson (hereinafter "State-operated District") certified tenure charges against Ellen Rubin (hereinafter "respondent"), a tenured teaching staff member who had been employed in the district since December 1987. Those charges alleged respondent's unbecoming conduct in using profane language to students, in particular, that she had called one student an "ass" and referred to another as a "f---ing brat"; unjustified physical contact with a student; dereliction of duties/insubordination; and incompetency

3/6/96

during the period from September 1991 to June 1993.[1] The dereliction of duties/insubordination charge cited an incident which occurred on January 10, 1992 in which the school's principal had relieved respondent of her classroom duties after respondent had allowed students to play, dance on tables, move furniture and engage in dangerous behavior, and also alleged that respondent had permitted a student to light and play with matches in class on another occasion without taking any action. The incompetency charge alleged that respondent had failed to enforce school policies and procedures relating to her teaching duties, failed to maintain effective classroom control, thereby risking the health and safety of her students, failed to manage behavior of students, failed to improve the delivery of instruction, failed to effectively plan instruction, failed to maintain a climate conducive to effective instruction and demonstrated poor relations with parents and staff members.

On July 22, 1994, an Administrative Law Judge ("ALJ") concluded that the State-operated District had proven by a preponderance of the credible evidence the allegations of unbecoming conduct, dereliction of duties and incompetency, except for respondent's alleged poor relations with parents and staff members. The ALJ found that the incident in which the school's principal relieved respondent of her classroom duties for failing to supervise her class constituted evidence of incapacity. She concluded that respondent had:

> failed to maintain effective classroom control, shouted at students, spoke to students about students in a derogatory manner, refused to answer students' questions and did

[1] We note that the Administrative Law Judge denied the State-operated District's motion to amend the incompetency charge so as to reflect allegations of incompetency commencing in January 1989. The District has not challenged that ruling on appeal.

> nothing to individualize her presentations, consistent with individual needs of students. The situation resulted in not only risks to petitioner's [sic] safety, but to those of her students. It also resulted in a failure by respondent to provide adequate instruction to her students, nor to maintain a climate conducive to classroom instruction.

Initial Decision, slip op. at 61.

The ALJ found that respondent had frequently referred to students as "stupid" in conversations with other staff members, and noted that it was "self-evident that a teacher should not scream at students, make derogatory remarks to and about students, curse at students, etc. Remarks by respondent regarding hearing impaired students and calling and referring to students as 'stupid' constituted insensitivity at the least and incapacity at the worse [sic]." Id. at 62. She found, however, that the State-operated District had not proven the charges of insubordination and unjustified physical contact with a student.

In view of the "sustained nature of respondent's inability to improve her performance and the serious nature of the infractions" pertaining to her profane remarks to students, id. at 64, the ALJ recommended that respondent be dismissed from her tenured employment. She stressed that "respondent's inability to maintain discipline resulted in a situation where there was no effective teaching of students and where their safety was put at risk, as highlighted by incidents of students leaning out of open windows and respondent's failure to even attempt to deal with a student lighting matches in class." Id. at 62.

On September 12, 1994, the Commissioner of Education adopted the findings and conclusions of the ALJ and directed that respondent be dismissed from her tenured employment.

Respondent has filed the instant appeal to the State Board of Education.

After a thorough review of the record, including the transcripts of the hearings held in the Office of Administrative Law, we affirm the decision of the Commissioner dismissing respondent from her tenured position. However, we modify the Commissioner's decision only to the extent that he found that the State-operated District had proven "incompetency."

> The charge of incompetence, as distinguished from the charge of inefficiency, requires that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. Incompetency requires proof that the affected person regardless of assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

In the Matter of the Tenure Hearing of Renee Sokolow, decided by the Commissioner, 1982 S.L.D. 1358, 1362, aff'd by the State Board, 1983 S.L.D. 1645.

In In the Matter of the Tenure Hearing of Edna Booth, decided by the Commissioner, 1985 S.L.D. 722, aff'd by the State Board, 1987 S.L.D. 2541, aff'd, Docket #A-3985-86T8 (App. Div. 1987), incompetency charges were dismissed against a tenured teacher where the deficiencies relating to the charges of incompetency in respondent's job performance were restricted to the 1982-83 and 1983-84 school years. Prior thereto, the respondent had received favorable evaluations related to her

job performance. Consequently, it was concluded that the record did not demonstrate that respondent was so lacking in competency that the 90-day improvement period would have been a useless exercise. See also In the Matter of the Tenure Hearing of Frank J. Napoli, decided by the Commissioner, February 16, 1988, aff'd by the State Board, December 1, 1988, aff'd, Docket #A-2301-88T3 (App. Div. 1990); In the Matter of the Tenure Hearing of Millicent Smith, decided by the State Board, April 15, 1994, appeal dismissed, Docket #A-5301-93T3 (App. Div. 1995); In the Matter of the Tenure Hearing of April Renee Bradley, decided by the State Board, February 6, 1991.

In view of respondent's previous service, we cannot conclude that the State-operated District has demonstrated that she lacked the ability to be an effective teacher. Although respondent had been employed in the district since December 1987, the incompetency charge certified by the State-operated District and the evidence presented thereon by the District at hearing were limited to the period between September 1991 and June 1993, subsequent to respondent's achievement of tenure.[2] The record does not demonstrate a long-term recurring problem with incompetency. See Booth, supra. Nor is there any evidence indicating the existence of some underlying condition which undermined respondent's abilities and rendered her incapable of effectively performing her duties.

Consequently, we conclude that the State-operated District has failed to satisfy its burden of proof in demonstrating those allegations involving respondent's incompetency. In this regard, we stress that while the record herein may well support a

[2] See, n.1, supra.

same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control." In the Matter of the Tenure Hearing of Thomas Appleby, 1969 S.L.D. 159, 173, aff'd by the State Board, 1970 S.L.D. 448, aff'd by the Appellate Division, 1972 S.L.D. 662 (App. Div. 1972). The record herein establishes that respondent not only failed to exercise the high degree of self-control expected of teaching professionals, but also permitted serious, disruptive and dangerous student behavior to persist in her classroom.

Consequently, as modified herein, we affirm the decision of the Commissioner dismissing respondent from her tenured employment.

Attorney exceptions are noted.

March 6, 1996

Date of mailing MAR 08 1996

246-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF NEW PROVIDENCE, UNION COUNTY.	:	
	:	

SEPTEMBER 12, 1994

a/

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4658-94

AGENCY DKT. NO. 112-4/94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF NEW PROVIDENCE BOROUGH, UNION COUNTY

Louise R. Verrico, *pro se*

Martin R. Pachman, Esq., for respondent

Record Closed: July 20, 1994 Decided: July 25, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Louise R. Verrico, a defeated candidate for reelection to the Board of Education of New Providence (Board), seeks a delay in the swearing in of successful candidate Board members scheduled on April 28, 1994. Petitioner alleges irregularities and/or violations of law in the conduct of the annual school Board election. On May 12, 1994, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52 :14B-1 to-15 and *N.J.S.A.* 52:14F-1 to -13.

On June 10, 1994, I held a telephone conference with the parties. Mrs. Verrico informed the Board attorney, Mr. Martin R. Pachman, that the allegations of illegal conduct of the school election were directed against individual candidates--Linda B. Handler, Timothy Barnes, and Mike Gavini--and not the New Providence Board of Education. Thereafter, in a letter to Mrs. Verrico dated June 10, 1994, Mr. Pachman explained the substance of the telephone conference.

On June 20, 1994, the Board filed a motion seeking summary decision dismissing the appeal on the ground that petitioner failed to state any claim against the Board upon which relief may be granted.

When no responsive filing was received from Mrs. Verrico by July 20, 1994, the record on the motion was closed without notice to either party. The case is presently scheduled for plenary hearing on July 26, 1994.

The undisputed facts relevant to the Board's motion are adopted as **FACT**.

1. The alleged violations are against individual candidates for the school Board.

2. The alleged illegal conduct, inserting literature into the Star-Ledger newspaper, occurred prior to the election and the swearing in of the successful candidates.

3. Petitioner does not allege that the Board acted improperly or in violation of the law.

Petitioner alleges that individual candidates improperly had campaign literature inserted into the Newark Star-Ledger newspaper. *N.J.S.A.* 2A:170-77 provides that any person who places an advertisement or circular in a newspaper without the consent of the owner or publisher of the newspaper is a disorderly person. However, petitioner does not implicate that the Board has engaged in any misconduct or illegal campaigning activities at or about the polling place, "or in any other matter which either involves the Board as the agent responsible for conduct of the election or about which

the Board has any knowledge" (Board correspondence to ALJ, June 7, 1994). Further, the alleged illegal conduct by individual candidates occurred prior to the date of the election and prior to the date of the swearing in of the successful candidates (respondent's letter memorandum, June 20, 1994).

Thus, the Board submits that it is not accused of permitting, countenancing, or having any specific knowledge of any alleged violation committed by any candidate for the office of school Board member. Further, the Board asserts that there is no allegation of a violation of any school election law which the Board can be held accountable.

Therefore, it is submitted that the petition against the Board should be dismissed.

Based on the foregoing, I **CONCLUDE** that the individual candidates, rather than the Board, are the indispensable parties to this proceeding. An indispensable party is one who has an interest in the matter and a disposition cannot justly be made between the litigants "without either adjudging or necessarily affecting the absentee's interest." *Jennings v. M & M Transportation Co.*, 104 *N.J. Super.* 265, 272 (Ch. Div. 1969).

I further **CONCLUDE** that petitioner has not charged the Board with illegal or improper conduct. Therefore, the petition against the Board of Education must be **DISMISSED.**

It is so **ORDERED**.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 25, 1994
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

7/27/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 1994
DATE

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

OAL DKT. NO. EDU 4658-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF NEW PROVIDENCE, UNION COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by petitioner.

Upon review, the Commissioner cannot agree that a request for inquiry duly filed pursuant to N.J.S.A. 18A:14-63.12, where a specific violation of election law is alleged and a claim is made that such violation influenced the outcome of the election, can be dismissed solely because the violation is ascribed to individual candidates rather than to the Board of Education and pertains to conduct occurring prior to the actual election.

In election inquiries, the Board is not a respondent per se, but rather a party of interest generally taking the position, whether on behalf of itself as a corporate entity or on behalf of newly elected members against whom allegations of election impropriety have been made, that violations did not occur, or if they did, that they did not affect the outcome of the election. To hold that inquiries cannot go forward when the allegations are

against an individual candidate rather than the Board, effectively insulates from the Commissioner's purview, and from his ability to order a new election, voter outcomes which may have been influenced by improper actions on the part of candidates, notwithstanding that such candidates may also be subject to individual civil or criminal penalties by the terms of particular statutes violated.

Accordingly, the initial decision dismissing the Petition of Appeal is reversed and the instant matter is remanded to the Office of Administrative Law for hearing on the merits of petitioner's claims. In so ruling, the Commissioner stresses that his decision above in no way constitutes a judgment on the merits of petitioner's claims, but merely affirms petitioner's right to an evidentiary hearing and determination by the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1994

DATE OF MAILING - SEPTEMBER 13, 1994

246-94

128--95R
(246-94)

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF NEW	:	COMMISSIONER OF EDUCATION
PROVIDENCE BOROUGH, UNION	:	DECISION ON REMAND
COUNTY.	:	
_____	:	

SYNOPSIS

Petitioning defeated candidate sought inquiry into alleged irregularities and/or violations of law in conduct of annual school election. ALJ concluded that petitioner had not charged the Board with illegal or improper conduct and granted the Board's motion to dismiss the petition. Commissioner reversed initial decision and remanded matter to OAL for hearing on the merits, finding request for inquiry could not be dismissed solely because the election violations were ascribed to individual candidates rather than to the Board and they pertained to conduct occurring prior to the actual election.

On remand, ALJ found that there was no evidence that the will of the electorate had been thwarted. ALJ concluded alleged conduct by the candidates (inserting improper campaign literature into newspapers), even if deemed a violation of the election law, did not affect the outcome of the election and, thus, the election should not be overturned. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

APRIL 18, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
REMAND
OAL DKT. NO EDU 9177-94
AGENCY NO. #112-9/94

OAL DKT. NO EDU 4658-94 (ON REMAND)
AGENCY NO. #112-4/94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF NEW PROVIDENCE BOROUGH, UNION COUNTY

Louise R. Verrico, *pro se*

Martin R. Pachman, Esq., for respondent

Record closed: January 24, 1995 Decided: March 9, 1995

BEFORE **MUMTAZ BARI-BROWN**, ALJ

STATEMENT OF THE CASE

Petitioner, Louise Verrico, a defeated candidate for reelection to the Board of Education of New Providence (Board), alleges that individual candidates for election to the Board inserted campaign literature into Sunday editions (April 10 and 17, 1994) of The Star-Ledger newspaper without authorization from the publisher. Consequently, petitioner contends that the candidates conduct improperly affected the outcome of the election. At the time of the alleged acts, the individual candidates were citizens seeking election to the Board.

Petitioner's allegations do not involve the Board as a public body, its employees, its facilities or the conduct of the election. The Board appears as a party of interest on behalf of the newly elected members. The Board takes no position as to the veracity of petitioner's allegation but submits that even if true, the alleged violations did not affect the outcome of the election.

PROCEDURAL HISTORY

On May 12, 1994, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52 :14B-1 to-15 and *N.J.S.A.* 52:14F-1 to -13.

On June 20, 1994, the Board moved for a summary decision on the ground that petitioner failed to state any claim against the Board upon which relief may be granted. Petitioner did not respond to the Board's motion.

On July 25, 1994, I concluded that petitioner had not charged the Board with illegal or improper conduct and granted the Board's motion to dismiss the petition.

The September 13, 1994 decision of the Commissioner remanded the matter to the OAL for a hearing on the merits of petitioner's claim that voter outcome has been influenced by the improper actions of the candidates. Thus, on September 19, 1994, the matter was remanded to the OAL for hearing.

A hearing was held on November 2, 1994. Petitioner presented two witnesses, Mary DeFillippis and Robert Enlow. The Board neither presented witnesses nor did it cross-examine petitioner's witnesses. The parties submitted a post-hearing positions and the record closed on January 24, 1995.

ISSUE

The issue is whether the candidates violated the school election law and if so, did their conduct affect the outcome of the election?

FINDINGS OF FACT

Based on the evidence I **FIND** the following as **FACT**:

1. Linda B. Handler, Timothy L. Barnes, Mike B. Gavini, Stephen Vidal, Allen Morgan and Louise Verrico were candidates for the New Providence Board of Education. Total votes received were: Barnes- 961; Handler- 948; Vidal-761; Morgan- 723; Gavini- 594; and Verrico-567. (J-1)
2. During the campaign, successful candidate Handler and unsuccessful candidate Gavini inserted campaign literature in The Star-Ledger newspaper promoting their candidacies.
3. Robert Enlow purchased The Star-Ledger newspapers, on April 10 and 17 from neighborhood newsstands and found hand inserted campaign literature for Handler and Gavini. Enlow believes that the owners of the newsstands whom he referred to as the "Calcutta Persuasion" inserted the literature into the papers as a favor for Gavini. Enlow then notified The Star-Ledger circulation department about the inserts.
4. The Star-Ledger replied to the managers of the newsstands as follows:

> We have received a complaint that circulars promoting the candidacy of an individual in a local election were found in copies of the Sunday Star-Ledger sold in your store on April 17, 1994.
>
> The Star-Ledger did not authorize the insertion of such a circular. The unauthorized insertion of materials in a newspaper is a violation of New Jersey law and is punishable by imprisonment of up to six months. Copies of this law and the applicable penalty provisions are attached.

> Accordingly, please take all necessary steps to insure that copies of the Star-ledger sold in your store do not have any unauthorized materials placed upon, affixed to, or inserted in them. If we receive further complaints of this nature in the future, we will take appropriate action.
>
> [P-2, P-3]

Positions of the Parties

Petitioner alleges that two candidates for election placed flyers or campaign literature into editions of The Star-Ledger at certain newsstands in New Providence. The evidence does not reveal whether the candidates paid the newsstand operators for allowing them to insert the campaign material. However, neither the candidates nor newsstand operators obtained permission from or paid The Star-Ledger for the inserts. Petitioner, an unsuccessful candidate for reelection, now challenges the validity of the election results.

Petitioner asserts that candidates for the Board of Education must demonstrate virtues of honesty, good judgment and integrity. Board members have a duty to ensure that the students receive a good education. They are also role models for the children and therefore should exemplify moral and ethical principles. Board members should abide by rules and regulations in their campaign conduct. Petitioner believes that Handler should be penalized for violating *N.J.S.A.* 2A:170-77 and *N.J.S.A.* 2C:43-8. Further, the Board should issue a policy that such conduct in the future will not be condoned.

The Board takes no position on whether the alleged conduct occurred. It does note, however, that the candidates should have obtained permission to insert the flyers from The Star-Ledger and paid the appropriate fee for the advertisement. Thus, any negative impact of the alleged conduct falls on the "coffers" of The Star-Ledger. (Respondent's Letter Brief of November 2, 1994.) Nevertheless, the Board submits that

there is insufficient evidence to conclude that the outcome of the election would have been different based on distribution of the flyers with or without payment to the newspaper publisher. Therefore, if the alleged conduct occurred, it did not affect the outcome of the election.

LEGAL DISCUSSION AND CONCLUSIONS

If it is established that the candidates acted without the consent of the newspaper publisher, the actions may constitute a violation of *N.J.S.A.* 2A:170-77 which provides:

> Any person who places upon, affixes to or places in, or causes to be placed upon, affixed to or placed in a newspaper, magazine, periodical or book, any notice, circular, pamphlet, card, handbill, printed book or notice of any kind without the consent of the owner or publisher of such newspaper, magazine, periodical or book, is a disorderly person.

The testimony of Enlow seeks to infer that the newspaper vendors inserted the campaign flyers into the newspapers as a favor to Gavini based on their common ethnicity. The record, however, reveals that The Star-Ledger did not authorize the inserts. Apparently, the candidates obtained permission from the vendors to insert the campaign material.

Neither the candidates nor the newspaper vendors were charged with violating *N.J.S.A.* 2A:170-77. Assuming that the candidates engaged in the conduct alleged, their action may have constituted a disorderly persons offense.[1] However, a conviction under *N.J.S.A.* 2A:170-77 must be determined by a court of competent jurisdiction, not the OAL.

[1] A person who has been convicted of a disorderly persons offense or a petty disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall not exceed 6 months in the case of a disorderly persons offense or 30 days in the case of a petty disorderly persons offense. *N.J.S.A.* 2C:43-8

Petitioner also avers that the candidates conduct was unethical. The concept of a board candidate's "fitness of character" is not addressed by the statutes concerning the qualification and election of board members. *N.J.S.A.* 18A:12-1 to- 20; *N.J.S.A.* 18A:14-1 to- 104. However, in *Cullum v. Bd. of Education of Tp. of North Bergen*, 15 *N.J.* 285, 292 (1954) the Supreme Court stated that board members "hold positions of public trust and must faithfully discharge their functions with the public interest as their polestar." [Citation omitted.] These notions of public trust and fidelity imply that board members should possess suitable character traits. See also *N.J.S.A.* 18A:12-21 to -34, the "School Ethics Act".

Fitness of character standards are also implicit in *N.J.S.A.* 2C:51-2, which requires forfeiture of public office upon conviction of certain criminal offenses. *N.J.S.A.* 2C:51-2a provides in part that a person holding public office shall forfeit that position upon his/her conviction of: (1) an offense involving dishonesty or a crime of the third degree or above, or (2) an offense "involving or touching such office, position or employment." Since neither candidate was convicted of any crime in relation to this matter, the statute does not apply.

On the other hand, even if a conviction under *N.J.S.A.* 2A:170-77 is deemed to "involve and touch" the office of a school board member, the conduct may not warrant forfeiture. *N.J.S.A.* 2C:5-2d.

N.J.S.A. 2C:51-2d provides:

> Any forfeiture or disqualification under subsection a., b. or c. which is based upon a conviction of a disorderly persons or petty disorderly persons offense may be waived by the court upon application of the county prosecutor or the Attorney General and for good cause shown.

Forfeiture of public office under *N.J.S.A.* 2C:51-2 is based upon a conviction under *N.J.S.A.* 2A:170-77. The successful candidate, Linda Handler, has not been convicted by a court of competent jurisdiction. Therefore, the forfeiture statute is not applicable.

Assuming that the candidates' action violated school election law, are there sufficient grounds to void the election results? Generally, a school board election will not be set aside unless it is clearly demonstrated that "the will of the electorate . . . has been thwarted." *In re Annual Sch. Elec. of the Borough of Fort Lee*, 1986 *S.L.D.* 1557, 1561 quoting *In re Annual Sch. Elec., Greater Egg Harbor Reg. Sch. Dist.* 1978 *S.L.D.* 11, 20. Cases addressing whether an election should be overturned typically involve procedural defects which directly violate the school election statute, *i.e.*, procedures regarding absentee ballots, polling places and equipment, information on voting machines, registration requirements, residency, *etc.*

In re Wene, 26 *N.J. Super.* 363 (Law Div. 1953) sets forth the standard for overturning an election as follows:

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

Elections are to be given effect whenever possible. *Wene v. Meyner*, 13 *N.J.* 185 (1953). Even gross irregularities, not amounting to fraud, will not vitiate an election. *Stone v. Wyckoff*, 102 *N.J. Super.* 26 (App. Div. 1968). There must be concrete evidence that the will of the people has been suppressed, rather than speculation that improved conditions would have afforded a different result. *In the matter of the Annual School Election Held in the Borough of Ringwood, Passaic County,* 1974 *S.L.D.* 591. Absent a prima facie case that the will of the electorate has been thwarted and the outcome of the election changed, the election will not be overturned. *See, In Re Clee,* 119 *N.J.L.* 310 (1938). Broad and vague allegations of fraud and illegal conduct,

including unauthorized assistance in ballot preparation and electioneering at polling places, is not sufficient to vitiate the election results, absent any allegation that invalidating the illegal votes would change the result of the election. It is the duty of the court to uphold an election unless it clearly appears that it was illegal. Public policy so ordains. *Clee* at 330. However, when an election result is very close, and irregularities or the absence of regularity infect the contest, the court has held that the full and free expression of the popular will had been subject to interference. *In re Klayman,* 97 *N.J. Super.* 295 (Law Div. 1967).

Here, petitioner does not allege that improper votes were cast nor that the electorate was somehow misinformed of material facts. There is no evidence that the will of electorate has been thwarted. Instead, the alleged irregularity involves the candidates' failure to procure permission from the publisher to insert otherwise appropriate campaign literature into newspapers.

Based on the above, I **CONCLUDE** that the alleged conduct by the candidates, Linda Handler and Mike Gavini, even if deemed a violation of the election law, did not affect the outcome of the election. Therefore, I **CONCLUDE** that the election should not be overturned.

It is **ORDERED** that the petition be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 9, 1995
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

3/15/95
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1995
DATE

JUDGE
OFFICE OF ADMINISTRATIVE LAW

MBB

APPENDIX

Witnesses

For Petitioner:

Louise R. Verrico
Robert Enlow
Mary DeFillippis

For Respondent:

None

Exhibits:

J-1 The New Providence School District Annual School Election, Final Copy dated April 19, 1994.

P-1 Letter from Louise R. Verrico dated April 27, 1994, addressed to Dr. Leo Klagholz, Commissioner of Education.

P-2 Letter from The Star Ledger's Circulation Department dated April 21, 1994, addressed to Manager, Modern South Street Market.

P-3 Copy of Letter (unsigned) from The Star Ledger's Circulation Department dated April 21. 1994, addressed to Manager, Modern South Street Market.

P-4 Campaign Flyer of Linda B. Hander, Candidate for the New Providence Board of Education (undated)

P-5 Campaign Flyer of Mike Gavini, Candidate for the New Providence Board of Education (undated)

P-6 Affidavit of Mary DeFillippes dated April 21, 1994.

P-7 Affidavit of Robert Enlow dated April 21, 1994.

P-8 Copy of *N.J.S.A.* 2A:170-77.

P-9 Copy of *N.J.S.A.* 2C:43-8.

P-10 Copy of 2-page Letter from Louise Verrico addressed to "Judge" (undated)

P-11 Copy of Check to Independent Press from Stephen and Susan Simone Vidal for $234.00 dated April 8, 1994.

P-12 Copy of the State of New Jersey Required Oaths for School Board Members

OAL DKT. NO. EDU 9177-94 (EDU 4658-94 ON REMAND)

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF NEW	:	COMMISSIONER OF EDUCATION
PROVIDENCE BOROUGH, UNION	:	DECISION ON REMAND
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that even assuming, arguendo, that the alleged conduct by the candidates were to be deemed a violation of the election law, petitioner has not established that the outcome of the election was affected. Therefore, the election should not be overturned.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1995
DATE OF MAILING APRIL 18, 1995

247-94

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF LAKEWOOD,	:	DECISION ON MOTION
OCEAN COUNTY.	:	
	:	

SEPTEMBER 14, 1994

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF LAKEWOOD,	:	DECISION ON MOTION
OCEAN COUNTY.	:	
	:	

This interim matter comes before the Commissioner of Education by way of a Motion to Participate as Amicus Curiae filed on August 2, 1994 by the Lakewood Education Association, wherein the Association seeks leave to submit briefs and participate in oral argument on the above-captioned cap waiver appeal.

In its supporting memorandum, the Association argues that, as the majority representative of all teaching staff members employed in both professional and support staff capacities in the Lakewood Public Schools, which has as its purpose the promotion of the educational interests of Township residents as well as of its own members, it is greatly concerned that, absent approval by the Commissioner of the cap waiver monies requested by the Board, the district will be unable to provide the thorough and efficient system of education ("T & E") guaranteed by the State Constitution to the children of New Jersey. Moreover, the papers contend, Association participation will both assist the Commissioner and serve the public interest in that the Association is in the unique position of being able to analyze the cap waiver questions at issue from the perspective of staff members who work on a day-to-day basis with the children of Lakewood and whose positions

will be directly affected by the inevitable reductions in force that will result from alteration of a budget plan that was already zero-based when proposed by the Board to the voters.

Although both the Board and the Township were served with the motion to participate and advised of their opportunity to respond, no replies to the motion were received. Accordingly, upon expiration of the designated reply period, the Commissioner proceeded to decision herein.

Upon review and consideration of the Association's motion in light of the standards for participation set forth at N.J.A.C. 1:1-16.6 and the long-standing body of case law associated with appeals of school budget questions, the Commissioner determines to deny the Association's motion.

While the Association by its very nature has a real and obvious interest in the outcome of the instant appeal, it fails to meet the criterion of being "likely to add constructively to the case without causing undue delay or confusion." (N.J.A.C. 1:1-16.6(b)) In terms of constructive addition to the record of a budget appeal, the perspectives of students and staff are properly presented through the Board of Education, which bears the express obligation to demonstrate the necessity of disputed monies for T & E in any proceeding before the Commissioner. In terms of procedural delay, participation by the Association would encumber the record with additional filings on matters properly and ordinarily addressed by the Board, and would, through the necessity to permit responsive briefing consistent with the

schedule of N.J.A.C. 6:24-7.8, further defer closing of the record and determination by the Commissioner in a matter of the type where expedition of proceedings is both inherent in currently applied regulation (N.J.A.C. 6:24-7.1 et seq.) and mandated by the Court in various recent pronouncements on the school district budget process. Nor has any special circumstance been advanced by the Association that would cause the Commissioner to alter his stance based on specific grounds unique to this case.

Accordingly, for the reasons set forth above, it is ORDERED this 14TH day of September 1994 that the Association's Motion to Participate as Amicus Curiae is hereby DENIED.

COMMISSIONER OF EDUCATION

SEPTEMBER 14, 1994

DATE OF MAILING - SEPTEMBER 14, 1994

247-94

C #247-94
SB # 42-94

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : STATE BOARD OF EDUCATION
OF THE TOWNSHIP OF LAKEWOOD, : DECISION
OCEAN COUNTY. :

Decision on motion by the Commissioner of Education, September 14, 1994

For Appellant, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of Counsel)

This appeal arises from proceedings now pending before the Commissioner of Education with respect to the Board of Education of the Township of Lakewood's (hereinafter "Board") budget for the 1994-95 school year. Those proceedings were initiated by the Board following voter defeat of the education budget, to which the municipal governing body then made reductions, and voter defeat of the Board's proposal to exceed the District's maximum permissible budget ("cap waiver" proposal).

On August 2, 1994, the Lakewood Education Association (hereinafter "Association") filed a motion with the Commissioner seeking to participate in the proceedings.

The Commissioner denied the Association's motion under the criteria for participation set forth in N.J.A.C. 1:1-16.6. The Association has appealed that decision to the State Board.

We affirm the Commissioner's decision.

N.J.A.C. 1:1-16.6 provides in pertinent part that:

JAN. 4, 1995

> (a) Any person or entity with a significant interest in the outcome of a case may move for permission to participate.
>
> (b)...In deciding whether to permit participation, the judge shall consider whether the participant's interest is likely to add constructively to the case without causing undue delay or confusion...

We find that the Commissioner properly concluded that the Association's participation at this juncture would not be likely to add constructively to the case without causing undue delay or confusion. We also agree with him that because the District has the responsibility for demonstrating that any additional monies are needed in order for it to provide a thorough and efficient education to its students, the interests of students and staff are represented by the Board in this context. The Association has not convinced us that the Board will fail to properly represent those interests in the proceedings before the Commissioner or that it will fail in any way to adequately pursue the budget appeal that it initiated.

January 4, 1995

Date of mailing JAN 06 1995

248-94

S.G., on behalf of her minor child, R.G.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SEPTEMBER 15, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 8168-94

AGENCY DKT. NO. 348-8/94

S.G., ON BEHALF
OF HER MINOR CHILD, R.G.,
Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH BRUNSWICK,
MIDDLESEX COUNTY,
Respondent.

S.G., petitioner, pro se

David W. Carroll, Esq., for respondent

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

Petitioner challenges the action of respondent refusing to place her daughter, R.G., in the school of prior assignment for the 1994-95 school year.

During the 1993-94 school year, R.G. was in fifth grade and her brother,K.G. was in third grade at the Greenbrook Elementary School. Their placement at this school was pursuant to a policy of open enrollment since their appropriate zoned or neighborhood school was the Brunswick Acres School. S.G. explained that the children's placement at Brunswick Acres in the prior school year was found to be unacceptable because the school has open classrooms and this resulted in distractions and lack of educational progress. As a result, S.G. applied for and was given approval for the enrollment both children at Greenbrook. Greenbrook has traditional closed classrooms.

The Greenbrook School principal, Patricia D. Holliday, testified that open enrollment children are not assigned to a class at the close of the prior school year because of the school district's policy of annual review of open enrollment of placements and issues such as overcrowding and availability of classroom space. This is made known to the parents in advance and the school district policy is to make open enrollment decisions by mid-August prior to the commencement of the school year.

On August 5, 1994, Greenbrook School notified petitioner that R.G. would not be placed at Greenbrook School. Ms. Holliday testified that the reasons for this included R.G.'s lack of academic progress, social difficulties and R.G.'s behavioral problems involving interaction with other children in the classroom. She also indicated that R.G. was referred to the Child Study Team for evaluation but that the parents refused to consent to the referral. In any event, she concluded that it was not in the best interest of R.G. to remain at Greenbrook because her attempts to break into the peer group would interfere with her academic progress and there was no fair opportunity for her to be accepted.

As a result of the denial of placement of R.G. at the Greenbrook School, the school district, in an effort to accommodate petitioner, agreed to permit R.G.'s placement at Indian Fields School, a school with closed classrooms. Petitioner requested that if R.G. were to be placed at Indian Fields that her son, K.G., who will be in fourth grade, also be permitted to be placed there since it would be impractical and impossible for her to transport her two children to two different schools. It is noted that the parents of open enrollment children are responsible for

transportation. The school district has taken the position that petitioner may either accept the placement of R.G. at Indian Fields and K.G. at Greenbrook or may place one or both of her children at the Brunswick Acres School, which is the neighborhood zone school for petitioner's neighborhood.

S.G. testified that the Brunswick Acres School is not acceptable because of its open classrooms and distraction to her children. She indicated that she was making this application because the fact that her daughter had been "kicked out" of Greenbrook had been leaked to other children, and there were endless phone calls and confrontations with parents, teachers and other children questioning this. She also takes the position that if R.G. is not permitted to remain at Greenbrook, she will be ridiculed. Finally, she indicates that transporting R.G. to Indian Fields would be impossible if K.G. remains at Greenbrook. She also feels that separating the two children into two different schools will be psychologically chaotic and troublesome to the children.

LEGAL DISCUSSION

Emergency relief is authorized by N.J.A.C. 6:241.5 and N.J.A.C. 1:1-12.6. The standards applicable to a request for emergency relief in administrative proceedings are analogous to those applied in courts of law and equity. The most recent statement of these standards is found in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), and may be summarized as follows:

1. The relief should not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy.

2. The relief should not be granted when the legal right underlying the applicant's claim is unsettled.

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits.

4. The relative hardship to the parties in granting or denying relief must be considered.

(Id. at 132-3.)

In this matter, I completely understand the serious concern of the parent with respect to a change in placement for R.G., particularly when it is clear from the testimony that she is not doing well in school. I also understand the concern of the parent with respect to the impracticability of transporting the two children to two different schools, which are located over five miles apart when the parent is required to report for work at 9 a.m. However, I **FIND** that the petitioner in this matter has not presented any testimony or evidence to establish that irreparable harm or injury will occur unless the emergency relief she is requesting is granted. The fact that petitioner feels that her child will suffer ridicule and be harmed is nothing more than speculation. In addition, the school principal indicated that a before school program exists where petitioner will be able to drop her son off at the Greenbrook School earlier in the day, where he will be able to remain until classes start. In any event, I **CONCLUDE** that petitioner has shown no irreparable harm.

In addition, I agree with the statements of attorney for respondent that a school district has the right to strictly enforce its attendance zones and that there is a presumption of validity as to the school district's actions with respect to placement. I certainly do not have sufficient information before me from which I am able to determine that petitioners have a reasonable probability of ultimately succeeding on the merits with respect to the placement issue.

At the present moment, the school district has placed both children at specified schools pursuant to its open enrollment policy. The fact that these schools are two separate schools is not relevant. The fact is that both children are being provided with the opportunity for an education. If transportation is a severe practical problem to petitioner, she has the opportunity to place either or both children at their neighborhood school, where transportation will be provided by the school district.

Under all of the circumstances, I **CONCLUDE** that there has been no showing that petitioner is entitled to emergency relief in this matter.

ORDER

For the reasons stated above, it is hereby **ORDERED** that petitioner's request for emergency relief is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issues of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 30, 1994
DATE

JOSEPH F. MARTONE, ALJ

jz

OAL DKT. NO. EDU 8168-94

S.G., on behalf of her minor child, R.G.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter and the initial decision on motion of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that petitioner has not shown an entitlement to emergent relief in this matter in that she has failed to meet the standards of Crowe v. DeGioia, 90 N.J. 126 (1982).

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision denying emergent relief in this matter, which shall duly proceed to hearing at the Office of Administrative Law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 15, 1994

DATE OF MAILING - SEPTEMBER 15, 1994

249-94

PETER GRANALDI AND JANICE SZAKALY,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,

RESPONDENT.

AND

JOHN P. HOLCROFT,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, three school administrators (consolidated matters), alleged Board's action to require co-payment towards the cost of their medical insurance and increase their work days was in contravention of N.J.S.A. 18A:6-10 and 28-5.

ALJ concluded parties never reached agreement on contract and the Board never formally acted to adopt contracts that were intended to be binding and effective or otherwise even to stand as a last offer to the employees. Thus, subsequent actions of the Board effectuating provisions of the contracts, such as deduction of co-payment monies from petitioners' pay, are not lawful actions. Therefore, petitioners must be reimbursed for any monies they would have received under the past practice that was never formally abrograted.

Commissioner adopted findings and determination in initial decision and ordered Board to reimburse petitioners all monies to which they would have been entitled under past practice altered as a consequence of the Board's improper implementation of the "contract."

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NOS. EDU 8107-92 & EDU 8108-92
AGENCY DKT. NOS. 433-9/92 & 448-9/92
CONSOLIDATED

PETER GRANALDI AND JANICE SZAKALY,
Petitioners,
v.
BOARD OF EDUCATION OF EASTAMPTON TOWNSHIP, BURLINGTON COUNTY,
Respondent.

AND

JOHN P. HOLCROFT,
Petitioner,
v.
BOARD OF EDUCATION OF EASTAMPTON TOWNSHIP, BURLINGTON COUNTY,
Respondent.

Margaret C. Murphy, Esq., for John P. Holcroft
Robert M. Schwartz, Esq., for Peter Granaldi and Janice Szakaly (Lake and Schwartz, attorneys)
John T. Barbour, Esq., for the Board of Education of Eastampton Township

Record Closed: June 23, 1994 Decided: July 27, 1994

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

In this consolidated action the petitioners claim that the respondent Board of Education improperly reduced their compensation in violation of the Tenure Act, *N.J.S.A.* 18A:6-10 and 28-5. The specific matters in question relate to a requirement for a co-payment toward the cost of medical insurance coverage and a requirement that the petitioners work an additional 14 days a year beyond the work schedule that they were expected to follow before the changes were put into effect.

The cases were transmitted separately to the OAL and later were consolidated for hearing. A prehearing order was issued on January 12, 1993, following a prehearing conference held on January 6. Thereafter the parties actively sought to resolve the dispute and the case was carried on the inactive list for this purpose. However, the case was ultimately brought to hearing at the Eastampton Municipal Court on April 27, 1994. The parties filed briefs and reply briefs after the hearing and the record closed upon receipt of the last reply, on June 23, 1994.

At the prehearing the parties identified two issues for determination. They were

> (1) Do the facts indicate that the Board of Education actually reduced health benefits and /or leave days and/or increased the work day for any of these employees?
>
> (2) If any working conditions and benefits were changed as alleged, did such changes constitute violations of the tenure rights held by these individuals? Did the Board's policy therefore violate the applicable statutory protections?

At trial of the case, another issue emerged. This related to the question of whether the purported action of the Board approving the terms and conditions of a contract for these employees was actually a legally valid Board action, or whether the vote of the Board was simply in regard to a set of proposed contract terms which were to be presented to the employees and which were never adopted as the final and supposedly binding contract through lawful Board action. Although the respondent objects that this issue was not properly identified in the prehearing order (or in the original petitions for hearing filed by the petitioners), the record, (and the briefs of all counsel), does contain discussion and evidence relevant to this issue and it appears to be a vital concern, for if the Board never took the necessary legal steps to put the supposed

contracts into effect for these petitioners, then the subsequent actions of the Board effectuating provisions of the contracts, such as the deduction of co-payment moneys from the employees' pay, are not lawful actions.

THE PETITIONERS

Dr. John R. Holcroft is the Chief School Administrator for the Board of Education of Eastampton Township. He holds a Ph.D. in Educational Administration from Temple University. He has been employed by the Board since July 1, 1971, serving as both the Superintendent for the district and as the principal of the Middle School. He held both positions until last year. The district now has a Superintendent, Assistant Superintendent/Curriculum/Principal of the Middle School, an Elementary Principal, and a Board Secretary/Business Administrator. When the prior Board Secretary left, Dr. Holcroft filled in at this position when the part time replacement was not at work, and he occasionally took Board minutes. He also filled in the curriculum coordinator's role for a time in the 1992-93 school year when that incumbent left the district.

When Dr. Holcroft was hired by the Board as Superintendent he was told that he would receive the same benefits as the teachers, who were the largest group of employees in the district. He was also told that at those times when school was closed he was not required to be present. Over the years, as the health benefits package changed for the teachers, he also received the added benefits. The coverage for Major Medical and Prescriptions was 100% paid for by the Board. As for his work schedule, if he desired to come in to the office during the Easter and Christmas recesses, he could, but he was not required to be in attendance. The matter was left to his discretion. He received 20 vacation days and could accrue them from year to year without limit. No written contract ever existed between Dr. Holcroft and the Board of Education after he received tenure, before that he did have a written contract.

In 1992 the situation purportedly changed. Dr. Holcroft received a purported contract of employment (H-1) for himself. He believes that he probably first saw the document around the 17th of July. Under the terms of this document, he was required to co-pay for the

medical coverage if he elected the dependent's coverage and in addition, he was only allowed to accumulate one years vacation time during the next year, up to a maximum accumulation of 40 vacation days. The Holiday provision of the contract did not continue the prior practice of allowing him the discretion to decide whether to work during Christmas and Easter vacation periods, and also required that he work on other former holidays, such as Columbus Day and the days of the New Jersey Education Association ("NJEA") convention in November, as well as one of the two days of President's Weekend. The contract increased the Dr.'s salary from $68,132.00, which he received in the 1991-92 school year, to $69,632.00 for the 1992-93 school year, but he received no salary increase in the 1993-94 school year. The effective financial impact of the co-pay provision of the contract was approximately $1200.00 for the first year, when his salary increase amounted to $1500.00.

According to the witness, he was presented with an undated and unsigned contract by the Board Secretary after July 13, 1992. This was after the regular Board meeting held on July 13. He denied that he had ever discussed anything about this contract or the terms contained therein with any member of the Board. The insurance terms became effective in August, 1992, the other terms were effective as of the time that he received the document.

The witness was queried about the Board meeting held on June 17, 1992. He described this as a special meeting at which Vice President Sheppard took the minutes, which were made available at the July 13 meeting. Dr. Holcroft was not at the entire June 17 meeting, because after he arrived he was asked to attend another meeting at the Township Council to present information regarding the expansion of the middle school. This meeting was held at the same time as the Board's special meeting.

The minutes of the June 17 meeting (H-5) indicate that the Board was talking about contracts for administrators and that the Board was to meet with Dr. Holcroft about these. There was no specific agenda for this meeting. The agenda simply referred to general personnel matters. Dr. Holcroft was not told that his contract would be discussed. He met with the Board regarding evaluations on June 29, but that meeting was declared by the Burlington County Prosecutor's Office to have been held in violation of the Sunshine Law. After the June 29

meeting Dr. Holcroft went on vacation and did not return until July 13. He was never told that the Board wanted to formalize a contract with him.

Although the contract purported to require that Dr. Holcroft work on Columbus Day and President's Day, he learned that these were State legal holidays and he did not work. He was not penalized for not working on these two days. Neither Ms. Janet Szakaly or Mr. Peter Granaldi worked these two days and they similarly were not penalized.

Dr. Holcroft acknowledged that he could have reduced the health benefits available to him and thus could have avoided having to pay any money as a result of the institution of the co-pay requirement. He has not received any notification from the Board about the fate of his accumulated 96 1/2 vacation days and is unsure as to whether the Board will allow these vacation days.

Questioned on cross-examination about his presence at a Board sponsored call-in program in early June, 1992, the witness agreed that he was present, but he was unable to recall if the then Board President, Walter A. Stark, was also present. He has no recollection of speaking with Mr. Stark about a contract.

The witness is not an NJEA member and last attended the NJEA convention in 1993-94, before that he last attended when he was teaching before 1976.

Petitioner Janet Szakaly retired from the employ of the school district on December 31, 1992. She did not appear at the hearing, however, her counsel called Dr. Holcroft to testify that her contract contained the same co-pay requirement and that prior to the contract she had enjoyed the same benefits as he had, also without any written contract. The parties stipulated that Ms. Szakaly had enjoyed the same holidays as Dr. Holcroft did and had the same work year as he did.

The parties also stipulated that the contracts which the Board presented for Ms. Szakaly and for Peter Granaldi were prepared without the recommendation of Superintendent

Holcroft. He testified that he was not consulted regarding these contracts prior to June 30, 1992. He denied that he was ever given contracts for Mr. Granaldi and Ms. Szakaly to review with them before the June 30 meeting. In fact, he claimed that he first learned that they had been sent to Granaldi and Szakaly after the July 13 meeting.

There was a 3% increase factored into the budget for administrative salaries and he had recommended that it be provided. In fact, the increases granted for the 1992-93 school year amounted to 4% for Ms. Szakaly, 3% for Mr. Granaldi and 2% for Dr. Holcroft.

Peter F. Granaldi testified that he is employed by the Board of Education as Principal of the elementary school. He was first employed in the district October 1, 1974 as the assistant to Dr. Holcroft, with the title of Assistant Principal. He became the elementary school principal two years later. By the 1991-92 school year his salary was $59,715.00 and it increased for the 1992-93 year to $61,518.00. He received no additional compensation for the 1993-94 school term. He also was required to co-pay for medical insurance under the terms of the contract presented to him by the Board and to work the holidays that were described by Dr. Holcroft, days which he too had not been required to work in the past.

The witness is not a member of NJEA, but he frequently attended the NJEA convention with his wife and daughter who are teachers. He acknowledged that the amount of his co-payment in 1993-94 will not exceed the $1,700.00 amount of the salary increase that he received when his salary was raised for the 1992-93 school year.

THE BOARD'S PROOFS

Walter A. Stark, formerly the President of the Board of Education, but no longer a member of the Board, testified on its behalf. Mr. Stark is a graduate of the United States Naval Academy and holds a B.S. degree in Systems Engineering. He is employed as a senior engineer at Princeton University, working on new products in fusion research.

Mr. Stark recalled that in early June, 1992 the Board held a series of call-in shows in anticipation of a referendum. He was present for one of these sessions, either on June 2 or 9. The session was scheduled to run from 7 to 9 P.M. He and Dr. Holcroft were the only persons present at the time and during the scheduled time no telephone calls were received. During the evening, the two discussed contracts since the Board had to hire a new business administrator. He said that the Board had discussed the concept of cost sharing in regard to medical insurance costs. The Board was also concerned that there were no contracts in existence for the district's administrators. They wanted to create one and use it as "template" for all. Dr. Holcroft agreed that cost sharing was inevitable. The discussion turned to the negotiations with the teachers concerning their contract. The talk continued

> We discussed issues of management by objectives, which was one of the important aspects. We felt that administrators really needed to have their own contract-review period, if you will, because as he pointed out in that meeting, George Thick, who was, I guess a member of the Board back in the late 80's, he had mentioned that in that late meeting that George made a comment to him about a crack, that that in fact negotiated for the administration, and he thought that that was unfortunate.

In response to a question as to whether this discussion included the fact that there had been no written contracts before for administrators, Mr. Stark responded

> I voiced concern that we do not have contracts for the employees of the district, and it was the Board's intention to insure we had contracts prior to July 1st.

Asked if specifics were discussed, Stark said

> Yes, we discussed issues of 25 percent of the remaining coverage as a reasonable cost to buyer, by an employee.

According to Mr. Stark, this discussion did not touch on the question of the work year.

Mr. Stark denied that the discussions at the call-in session were only a few minutes in length. Indeed, he recalled that he and the Superintendent spoke continuously for 2 hours in his

office "across my desk." He asserted that during this discussion Dr. Holcroft had a copy of the contract for the Business Administrator and was told that it was a "template" for "the health benefit aspect, the cost-sharing aspect became a template." It also listed holidays and vacations.

> . . . What we spoke about at that meeting was the fact that we should have had contracts for all personnel in the district, and that that Board's intent was to use that as a template.
>
> And I asked Dr. Holcroft to please talk to the administrator for two important parts of that contract. One, what to do with health, cost-sharing; the other had to do with the management team for the district, and I asked for feedback for our next meeting from administrators via Dr. Holcroft.

The teachers' contract negotiations were under way at the time that the early June meeting purportedly occurred. The Board's proposal to the teachers included a cost sharing element.

Mr. Stark contended that the June 17 meeting was originally called to consider secretarial evaluations. Minutes of the Board's meetings of June 17 and June 30 were introduced. According to the witness, the Board personnel committee, of which he was a member, had developed the administrators' contract and Tom Sheppard had prepared it. Mr. Stark received it the weekend before June 17 and had it at the meeting. It was available to Dr. Holcroft at the June 17th meeting, when, according to the witness, the Board received feedback from Dr. Holcroft regarding his discussions with the administrators and then ratified the administrator's contracts. As he recalled the evening, Dr. Holcroft was present at the meeting, left and then returned from the other meeting that he had to attend (apparently the Township Council meeting). Dr. Holcroft provided feedback from Granaldi and Szakaly to the effect that they wanted to see what happened with the teachers' negotiations.

The minutes of the Board's June 17 meeting show that a motion was made to table approval of contracts for the administrators. This motion was not approved and a motion was then made to approve the administrator's contracts. This too was defeated and a motion to move

into closed session followed. Minutes of the closed session reveal that a discussion occurred regarding the administrator's contracts. The minutes read

> Mr. Ritti suggested that we add a statement on vacation leave in case someone leaves before the contract expires. All were in agreement. It was suggested that we add the six month review to the principal and curriculum coordinator's contracts.

The continued minutes of the public session show that after the closed session ended the Board considered a motion to "ratify the contract as amended to be submitted to the administrators." This motion was approved. The minutes then read

> A discussion of how to present the contract to the administrators was initiated. The evaluation committee along with Mr. Blew will meet with Dr. Holcroft.

Minutes of the June 30, 1992 meeting in executive session show that this session took place beginning. at 9:30 P.M., in the middle of the public meeting. The minutes read

> Dr. Holcroft indicated the response from Mr. Granaldi and Mrs. Szakaly regarding the proposed contracts. Their concerns include 1) wording with regard to contract term, i.e., "as principal;" 2) no contract settlement prior to settlement with teacher association; 3) compensation and cost sharing of health insurance; 4) school holidays/vacation days; and 5) vacation accrual allowance. A discussion followed regarding whether utilization of vacation and school holidays allowances were written policy or common practice.

Further discussion followed regarding a request for recognition by the administrators. Different approaches were suggested to the administrators' request. Mr. Stark said that it would be

> counterproductive not to negotiate with the administrators. A review of prior Board discussions followed in an attempt to gain consensus of Board members regarding the issue of instituting a management by objective philosophy as well as cost sharing of

health insurance costs. A discussion of what items Board members would be willing to negotiate ensued.

The parties agree that there are no further entries in this or any subsequent meeting minutes which refer to the contracts for either Dr. Holcroft or Mr. Granaldi or Mrs. Szakaly.

Mr. Stark was not able to recall if the agenda for the June 30 meeting included any reference to the consideration of the contracts for the administrators, and he could not recall if *Rice* notices were sent to them prior to the meeting.

DISCUSSION

WERE THE CONTRACTS LEGALLY EFFECTIVE?

The initial question to be addressed is whether the Board of Education ever acted in the appropriate manner so as to legally adopt the contracts for Dr. Holcroft, Mrs. Szakaly and Mr. Granaldi. The petitioners argue that the Board's June, 1992 actions constituted nothing more than the adoption and presentation of a contract proposal and that since the minutes of the Board do not reflect any Board action as to these contracts after the June 30 meeting, the contracts never actually were legally adopted by the Board. Any co-payment deductions from the petitioner's salaries were therefore improper and must be refunded. In addition, any other terms of the contract are without legal effect, as the petitioners never agreed to accept the contracts as they were proposed. In essence, the petitioners argue that there never was any effective offer and acceptance of a contract, no "meeting of the minds" and therefore no agreement ever reached.

A review of the testimony and the minutes of the Board's June 17 and 30 meetings does not offer a clear cut picture of exactly what occurred or what was intended. According to Mr. Stark, he spoke to Dr. Holcroft about the Business Administrator's contract and about its use as a template for other contracts during the two hours that the two men sat around waiting for telephone calls on the 2nd or 9th of June. Mr. Stark recalled reference having been made to the "inevitable" nature of cost-sharing. However, he did not suggest any conversation about the work year. Dr. Holcroft denies that any such conversation occurred.

The minutes of June 17 are of key importance. Apparently the Board's meeting records do not show anything in regard to the consideration of the possible written contracts for administrators prior to this meeting, or if they do, nothing about these prior references has been offered at trial. Thus, the first references are in the June 17 minutes. These show that the Board was asked to "table approval of the contracts for administrators," the minutes reflecting that these "administrators" did not include the Business Administrator. This motion failed. The reason why Mr. Ritti wanted these contracts tabled is not revealed. Thereafter, a straightforward motion to approve the contracts failed. Again, no evidence as to the reasons why those voting against this motion did so is revealed. After this action, the Board apparently saw fit to deal with the contract issue in closed session. The discussions reported at the closed session are limited in scope, dealing only with the addition of a statement regarding vacation leave when someone leaves before the expiration of the contract and a review period for two of the contracts. The remaining item listed, back on the public meeting minutes, reflects that the Board ratified the amended contract, which was then "to be submitted to the administrators," and the Board then discussed how to present the contracts. It appears, but is not absolutely clear, that the second sentence in the last paragraph of the minutes, which says that the evaluation committee and Mr. Blew, would "meet with Dr. Holcroft," is related to the first sentence's reference to "how to present" the administrators' contracts, but the exact relationship of the two sentences is not certain.

While the Board argues that the above minutes reflect the adoption of the actual contracts, not of a preliminary contract proposal for submission to and negotiation with the administrators, the minutes of the June 30 executive session reflect "feedback" which Dr. Holcroft is said to have "received from Mr. Granaldi and Mrs. Szakaly regarding contract proposals . . . ." The discussion shades off into concerns regarding the demand for recognition and possible responses. Interestingly, the Board engages in a "review of prior Board discussions" and attempts to "gain consensus" regarding issues, including the issue of cost sharing. This discussion closes with discussions of what the Board was willing to negotiate.

In order for there to be a contract between the respondent and any of the petitioning employees, there needed to be a "proposition of one party . . . met by an acceptance of

the other, which corresponds with it entirely and adequately . . . ." *First Presbyterian Church, Newark v. Howard Co. Jewelers*, 12 *N.J.* 410, 413-414 (1953) (citations omitted).

The minutes of the June 30 meeting do not suggest that the contract issue was as finalized as the Board contends. They reflect that after the purported formal adoption of the contracts for the three administrators on June 17, we have the Board on June 30 discussing "feedback" received regarding "proposals," and talking about negotiations and strategies, attempting to reach consensus on issues, including cost sharing, an issue that was apparently of real concern to all parties and is one of the very subjects of controversy in this case. The "feedback" suggests that the Board knew that its "proposals" had not been accepted by the administrators, and in the absence of full and complete acceptance of the proposed contract by the administrators "subsequent words or acts of the parties cannot create a contract" 17 *C.J.S.* §42. These discussions give the previous motions and discussions of the 17th the flavor of preliminary action, rather than of final resolution, suggesting that the Board on the 17th did nothing more than ratify the proposal that was then to be conveyed to Dr. Holcroft and possibly by him to Granaldi and Szakaly. As for Holcroft himself, the concern about how to present the contract to the administrators, without distinguishing between he and his fellows, would suggest that the ratification of proposals was as to all three, not simply as to Granaldi and Szakaly. Further, the very concern as to how to present the contract to Holcroft confirms his testimony that he was not present when the vote took place. This also suggests very strongly that he was not present during any other discussions regarding the issue of administrators' contracts that evening.

The action by the Board on June 17 to "ratify the contract to be presented" was a formal action of the Board.. However, given both the factual and the legal context, it is was not the type of final action on the subject which the Board now asserts, that is, the formal adoption of the actual contracts under which the administrators would be required to work in the coming contract year. Instead it appears to have been a preliminary action, a formal vote by the Board on the nature of the proposal to be presented for comment and response by the administrators, subject to further refinement later as deemed necessary after review of the proposals by the administrators and consideration of their responses to the proposed terms. Given what occurred on the 30th, I **FIND** that the action on the 17th was not so final as the Board now asserts. The

fact that the Board ultimately went ahead without any further vote and began to deduct the co-payment and implement other terms of the proposal does not raise the adoption of the proposal "to be presented" to the level of a lawfully adopted, legally binding contract. Had the Board determined not to negotiate, but to reject the concerns expressed on the 30th and insist on the terms originally "presented" for comment and "feedback," then a subsequent vote to adopt the final language of the contract would have been necessary. Apparently no such action occurred. Even then, without agreement no contract would have existed, although of course if the Board insisted on its terms and the petitioners refused to accept, then, in the absence of legally required bargaining requirements, the Board and administrators might have parted ways.

I CONCLUDE that the parties never reached agreement on a contract and the Board never formally acted to adopt contracts that were intended to be binding and effective or otherwise even to stand as a last offer to the employees. Given this, the deductions were improper. Since the contract never became legally effective, the administrators must be reimbursed for any moneys that they would have received under the past practice that was never formally abrogated. As for the alleged violation of tenure, given that the action undertaken by the Board was not effective, any concern as to effective Board action of the sort herein challenged is at least premature.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New**

Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7-27-94
DATE

JEFF S. MASIN, ALJ

8/1/94
DATE

Receipt Acknowledged:
Hope R Blackwell
DEPARTMENT OF EDUCATION

AUG 04 1994
DATE

Mailed to Parties:
Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBITS

H-1	Employment contract (6 pages)
H-2	1992 Pay Stubs (3)
H-3	Pay check 1/15/94
H-4	Calendar
H-5	Minutes June 17, 1992, Special Meeting (2 pages)
R-1	Job Description Superintendent of Schools (2 pages)
R-2	Self Evaluation, dated May 26, 1992
R-3	Memo from John Holcroft to the Faculty, dated 3/15/72
R-4	Response re: contract, dated 8/14/92
R-5	Section of Bylaws of the Board
R-6	Minutes of Board meeting on June 30, 1992 (2 pages)
J-1	Open enrollment period memo, dated October 2, 1992
J-2	Medical Cost Sharing Matrix (Monthly) (4 pages)
J-3	Employment Contract Szakaly (6 pages)
J-4	Employment Contract Granaldi (6 pages)
J-5	Pay stubs 8/16/92-8/31/92, 8/1/92-8/15/92, 5/16/92-5/31/92
J-6	Calendar 1992-93
J-7	Calendar 1993-94
J-8	Job Description Elementary School Principal (2 pages)
J-9	Job Description T & E Coordinator (2 pages)
J-10	Pay stub Granaldi 7/16/92-7/31/92, 8/1/92-8/15/92, 6/8/93-6/22/93
J-11	Szakaly memo
J-12	Memo to Peter Granaldi, dated June 28, 1991
G-1	Pay stub 1994

PETER GRANALDI AND JANICE SZAKALY, PETITIONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY, RESPONDENT. AND JOHN P. HOLCROFT, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions of Petitioners Granaldi and Szakaly and those of Petitioner Holcroft were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioners' exceptions, while agreeing with the ultimate determination reached by the Administrative Law Judge in this matter, urge that it is incumbent upon the Commissioner to clarify the relief accorded them. Specifically, they request the Commissioner to enumerate, with specificity, the remuneration each

of them is entitled to receive under the ALJ's initial decision directive, i.e., "***the administrators must be reimbursed for any moneys that they would have received under the past practice that was never formally abrogated.***" (Initial Decision, at p. 13)

Upon a careful and independent review of the record, the Commissioner agrees with the findings and conclusions of the ALJ for the reasons clearly articulated by him in the initial decision. With respect to the exception argument advanced by petitioners, the Commissioner is satisfied that the initial decision is sufficiently clear that because the contract at issue in this matter never became legally effective, petitioners are entitled to recover all monies lost as a result of the Board's implementation of provisions of such "contract" which altered then existing past practice. The Commissioner finds that it is neither necessary nor appropriate, based on the record before him, to make specific categorical or dollar determinations and such calculations are, therefore, left to the parties. If there are unreasolvable disputes as to the specific remuneration due each of the petitioners, these can be addressed through the filing of a new petition of appeal.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter. The Board is hereby ordered to reimburse petitioners all monies to which they would have been entitled under past practice altered as a consequence of the Board's improper implementation of the "contract."

SEPTEMBER 15, 1994

DATE OF MAILING - SEPTEMBER 15, 1994

COMMISSIONER OF EDUCATION

250-94

MICHAEL R. SANTOMENNA, T/A L.A. PHOTOGRAPHY STUDIO, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, AND JOHN R. GARRABRANDT, SENIOR ASSISTANT SUPERINTENDENT, RESPONDENTS.	:	

SYNOPSIS

Petitioning photography studio challenged Board's policy limiting inclusion in the senior section of the high school yearbook to photographs by one contractor.

Citing Nicastro, ALJ concluded that the Board's action in permitting each school in the district to contract with one studio for its yearbook photographs was not in any manner illegal, discriminatory, arbitrary or capricious. No pupil was required to purchase portraits from the designated contractor; use of a single photographer was dictated by the necessity of maintaining a reasonable timetable and uniform standards. Summary decision was granted on behalf of the Board and the petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

SEPTEMBER 15, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7261-93

AGENCY DKT. NO. 246-6/93

MICHAEL R. SANTOMENNA,
T/A L.A. PHOTOGRAPHY STUDIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, AND JOHN R. GARRABRANDT, SENIOR ASSISTANT SUPERINTENDENT,
Respondents.

Michael R. Santomenna, petitioner, pro se

Nicholas Stevens, Esq., for respondents (Slavitt, Simon & Neuer, attorneys)

Record Closed: May 5, 1994 Decided: August 1, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges an alleged policy of the Toms River Regional School District Board of Education (Board) which provides that only those photographs taken by the contracted photographer may be used and appear in its high school yearbooks. The Board denies it has established a policy as alleged by petitioner. The Board also advances seven affirmative defenses in which it asserts the Commissioner of Education lacks jurisdiction to hear and determine the instant matter, among other things.

This matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held, at which the following issues were identified:

1. Whether the matter presented involves School Law under Title 18A and, therefore, is within the jurisdiction of the Commissioner of Education (Commissioner)?

2. Whether the Board may limit access to the senior section of the high school yearbook to photographs by one contractor?

In his Petition of Appeal, petitioner alleges that the Board's purported "policy" to require senior pupils to use the services of Lorstan Studios in order for the pupils photograph to appear in the high school's yearbook, . . . "creates a Monopoly on graduation photographs (yearbook style) for Lorstan Studios." Petitioner subsequently amended his Petition to read, "This creates an unfair trade advantage for the sale of graduation photographs for Lorstan Studios."

Petitioner also propounded a request for Emergency Relief, pursuant to N.J.A.C. 1:1-12.6, seeking to temporarily restrain the Board from signing contracts with Lorstan Studios or any other photography company until this matter is finally determined.

The Board now moves to dismiss the Petition of Appeal, by way of Summary Decision, pursuant to N.J.A.C. 1:1-12.5. Petition opposes the Board's Motion:

THE BOARD'S LEGAL ARGUMENT

POINT I

THE PETITION FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Respondent, John R. Garrabrant, Senior Assistant Superintendent, Should Be Dismissed From The Petition As An Unnecessary Party.

The Board of Education of the Toms River Regional School District ("The Board") is a board of education formed and governed pursuant to N.J.S.A. 18A:13-1 to -65, and also governed by N.J.S.A. 18A:10-1 to -7. The Board may be sued in its own corporate name. N.J.S.A. 18A:11-2; 18A:13-6.

Respondent, John R. Garrabrant, the Senior Assistant Superintendent, is not alleged in the Petition to have engaged in any wrongdoing. He need not be named in a Petition against the Board itself. Therefore, John R. Garrabrant should be dismissed from the Petition.

B. The Petition Fails to State Any Statute That The Board Violated Or Any Conduct That Would Violate A Statute.

Neither the Petition nor the amendment to the Petition set forth that the Board violated any specific statute. (See Exhibit A and Exhibit C hereto.) The Petition and amendment include words and phrases like "arbitrary, capricious and unreasonable", "monopoly" and "unfair trade advantage", thus, the apparent violation is of the New Jersey Anti-Trust Act. N.J.S.A. 56:9-1 to -19. However, the petition does not allege any conduct by the Board that would amount to a violation of the Anti-Trust Act.

The gravamen of the petition is that the Board has created a "policy" that one photography studio is to take senior portraits for all of the high school yearbooks. First, the petition is factually inaccurate for three reasons: (1) The Board has not created such a "policy"; (2) there are four separate contracts, one for each school; and (3) one school, Toms River West, uses a photography studio different from that used by North, South and East. Thus, the factual allegations of the petition are unfounded.

Second, pursuant to N.J.S.A. 18A:18A-1 to -59, Public Schools Contract Law, the Board is authorized to enter into contracts. It is unreasonable for the petitioner to argue that because the Board enters into one contract, a monopoly or an unfair trade advantage is created in favor of the contractor. That is how contracts work, otherwise, contracts would have no meaning and there would be no need for the Public Schools Contract Law.

Therefore, because the petition fails to state a claim for which relief may be granted, it should be dismissed.

POINT II

THE BOARD IS AUTHORIZED TO ENTER INTO THE PHOTOGRAPHY CONTRACTS PURSUANT TO N.J.S.A. 18A:18A-3.

N.J.S.A. 18A:18A-3 provides:

> a. Any purchase, contract or agreement for the performance of any work or the furnishing or hiring of materials or supplies, the cost or price of which, together with any other sums expended or foreseeably to be expended for the performance of any work or services in connection with the same project or the furnishing of similar materials or supplies during the same fiscal year paid with or out of school funds, does not exceed the total sum of $7,500.00 or the amount determined pursuant to subsection b. of this section, in the fiscal year or, in the case of purchases that are not annually recurring, in a period of one year may be

> made, negotiated and awarded by a contracting agent when so authorized by resolution of the board of education without public advertising for bids and bidding therefor.
>
> b. Commencing January 1, 1983 and every two years thereafter, the Governor, in consultation with the Department of the Treasury, shall adjust the threshold amount set forth in subsection a. of this section in direct proportion to the rise or fall of the consumer price index for all urban consumers in the New York City and the Philadelphia areas as reported by the United States Department of Labor. The Governor shall notify all local school districts of the adjustment. The adjustment shall become effective on July 1 of the year in which it is reported. (emphasis added).

The present threshold amount payable with or out of school funds pursuant to subsection b. is $11,300.00. As made evident by the contract, no school funds are paid by the Board to the contracted photography studio, thus, these contracts fall under N.J.S.A. 18A:18A-3 and may be awarded by the Board without public advertising for bids and bidding therefor.

Because N.J.S.A. 18A:18A-3 gives the Board the same discretion and authority as does N.J.S.A. 18A:18A-5, the Board's award of the photography contracts may only be set aside "upon a showing of abuse of discretion or fraud." F.S.D. Industries, Inc. v. Bd. of Ed. of Paterson, 166 N.J. Super. 330, 334-335. (See discussion at POINT III of this brief, infra.) The Board does not abuse its discretion, as it takes into account consistency, organization and efficiency (See Exhibit B, p. 3, ¶s B and C.), and spends no school funds, the awarding of the photography contracts should not be set aside.

Therefore, the Petition should be dismissed.

POINT III

ALTERNATIVELY, THE BOARD IS AUTHORIZED TO ENTER INTO THE PHOTOGRAPHY CONTRACTS PURSUANT TO N.J.S.A. 18A:18A-5a.(5).

If the photography contracts do not fall under N.J.S.A. 18A:18A-3, then they fall under N.J.S.A. 18A:18A-4, which states:

> Every contract or agreement for the performance of any work or the furnishing or hiring of any materials or supplies, the cost or the contract price whereof is to be paid with or out of school funds, not included within the terms of N.J.S.A. 18A:18A-3, shall be made and awarded only by the board of education after public advertising for bids and bidding therefor, except as is provided otherwise in this chapter or specifically by any other law.
>
> No work, materials or supplies shall be undertaken, acquired or furnished for a sum exceeding in the aggregate the amount set forth in, or calculated by the Governor pursuant to N.J.S.A. 18A:18A-3, except by contract or agreement.

However, even if that were so, the photography contracts would be exempt from the requirements of N.J.S.A. 18A:18A-4 by virtue of N.J.S.A. 18A:18A-5a.(5) which provides:

> Exceptions to requirement for advertising. Any purchase, contract or agreement of the character described in N.J.S.A. 18A:18A-4 may be made, negotiated or awarded by the board of education by resolution at a public meeting without public advertising for bids and bidding therefor if
>
> a. The subject matter thereof consists of:
>
> (5) Textbooks, copyrighted materials, kindergarten supplies, and student produced publications and services incidental thereto; (emphasis added).

In F.S.D. Industries, Inc. v. Bd. of Ed. of Paterson, 166 N.J. Super. 330 (App. Div. 1979), the New Jersey Appellate Division rejected an action like the Petition at bar,

relying on the exclusionary provisions of N.J.S.A. 18A:18A-5. The Board of Education of the City of Paterson ("Paterson Board") requested solicitation of bid proposals for a pre-plated lunch program to be conducted for students of the school district. Id. at 332. The Paterson Board determined that it would "award a contract which, in its judgment, might be deemed in the best interest of the Board and the students to be served." Id. at 333. The plaintiff submitted the bid with the lowest per meal price, however, the Paterson Board awarded the contract to the second lowest bidder without stating any reason for rejecting plaintiff's bid. Id.

The plaintiff brought a proceeding in lieu of prerogative writs and the trial court found that the contract should have been awarded to plaintiff as the lowest bidder. Id. The Appellate Division found the trial court to be in error and reversed. It recognized that, by virtue of the specific statutory language in N.J.S.A. 40A:11-2(1)(c), N.J.S.A. 40A:11-1 to -49, the Local Public Contracts Law, does not apply to boards of education which have administrative jurisdiction over school districts. Id. Thus, the legislative intent is that boards of education are except from the advertising requirements generally established by N.J.S.A. 40A:11-4. Id. at 333-334.

Consistent with such legislative intent is N.J.S.A. 18A:18A-5(b), now N.J.S.A. 18A:18A-5a.(6), which allows boards of education to award food supply contracts without public advertising for bids. Id. at 334. The Appellate Division in Paterson, cited A.C. Schultes & Sons v. Haddon Twp., 8 N.J. 103, 107 (1951), where the New Jersey Supreme Court "observed that in instances where no statutory requirement exists for competitive bidding, a municipality has the 'right to award the contract in question to the bidder it felt would best serve the interests of its taxpayers.'" Id. The State Supreme Court concluded in A.C. Schultes that:

> ***Even though the municipality actually advertised as it did here, nevertheless, if the statutes are inapplicable, there is no obligation upon the city to award the contract to the low bidder. Unless the statute controls, the advertisement, specifications, opening the bids

> and other formal procedures are not legally required.*** (At 108; emphasis supplied) Id.

Most importantly, in ruling in favor of the Paterson Board, the Appellate Division set forth the following standard regarding contracts awarded under N.J.S.A. 18:18A-5:

> In such instances an award of the contract to a higher bidder should not be set aside except upon a showing of an abuse of discretion or fraud. Id. at 334-335; citing, 10 McQuillin, Municipal Corporations, (3 ed. 1966, rev. vo.1.), §29.73a at 431, 432.

As shown above, in the case at bar, the Board is authorized by N.J.S.A. 18A:18A-5a.(5) to award contracts regarding "student produced publications and services incidental thereto" without public advertising for bids or bidding therefor. The Board's award of a contract to one photography studio to take all senior portraits for the student yearbook falls into that category. Such award need not be given pursuant to the formal bidding requirements and may not be set aside "except upon a showing of an abuse of discretion or fraud." The discretion of the Board, as stated in its Answer, is properly directed toward consistency, efficiency and organization. (See Exhibit B, p. 3, ¶'s B and C). The petitioner has no right to interfere with the Board's discretion simply because he disagrees with it (as would any potential contractor who is not awarded a contract).

According to the petitioner's reasoning, any disc jockey who shows up at the senior prom with acceptable music should be allowed to play that music, or any food service company that offers milk in the typical school cartons should be allowed to go to the school cafeteria and sell it. Obviously, the concerns of consistency, organization, and efficiency require contracts and do not allow for such situations. More importantly, the Board properly within its discretion, has decided to use contracts.

Therefore, the Petition should be dismissed with prejudice.

POINT II

THE BOARD OF EDUCATION AND JOHN R GARRABRANT, SENIOR ASSISTANT SUPERINTENDENT ARE IN DIRECT VIOLATION OF THE EQUAL RIGHTS AND PRIVILEGES LAW IN THE STATE OF NEW JERSEY.

In its adoption, publication and enforcement of the Closed Yearbook Policy the Board and Mr. Garrabrant are in violation of N.J.S.A. 10:1-2, equal rights and privileges of all persons in public places.

The equal rights and privileges of all persons in public places reads:

> "All persons within the jurisdiction of this State shall be entitled to full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitation established by law and applicable alike to all persons."

Students exercising their own civil rights in selecting the photographer of their choice, are being denied the advantages and privileges of being included in their High School Annual.

By restricting inclusion in the yearbook to only those students who are photographed by the contracted photographer, the students who choose a photographer of their own liking are being denied an advantage and privilege of being included in their High School Yearbook. The law reads: "All persons. . . shall be entitled. . .", NOT ALL persons being photographed by Lorstan Studio (the contracted photographer).

In N.J.S.A. 10:1-4, written announcement of discrimination; presumption, we read: "The production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any civil or criminal action that the same was authorized by such person."

The letters printed on school letterhead, distributed to the students, detailing the Closed Yearbook Policy (Exhibit P-6, P-7, P-8, and P-9) clearly indicate a violation of N.J.S.A. 10:1-2.

POINT III

THE BOARD OF EDUCATION AND JOHN R. GARRABRANT, SENIOR ASSISTANT SUPERINTENDENT ARE IN DIRECT VIOLATION OF N.J.S.A. 18A:7A-7; 18A:7A-8; 18A:7A-9; 18A:7A-10.

As outlined in N.J.S.A. 18A:7A-7; 18A:7A-8; 18A:7A-9; and 18A:7A-10, the basic function of the Board of Education is policy-making.

In establishing policies the Board must follow a set formula: assess the need for a policy, establish the policy, review said policy and evaluate policy performance.

Mr. Garrabrant and the principals of the High Schools have discussed this only within the confines of administrators of the Board. The Closed Yearbook Policy, was penned by Lorstan Studios, but clearly embraced, published and enforced by the administration. Furthermore, no discussion of this policy was ever heard by the Board in a public forum.

POINT III

THE RESPONDENTS HAVE NOT VIOLATED N.J.S.A. 10:1-2.

The petitioner alleges that an alleged "Closed Yearbook Policy" violates N.J.S.A. 10:1-2, a statute regarding access to public places. However, as shown, there is no such policy. Further, the petitioner's argument is misplaced. All seniors have access to the contracted photographer. In fact, P-8 and P-9 to the petitioner's response brief, appointment forms sent to all seniors, are evidence of the access. Further, the contracted photographer comes to the high schools to provide convenient access. Race, religion or other classification is not an issue.

POINT IV

THE RESPONDENTS HAVE NOT VIOLATED N.J.S.A. 18:7A-7 THROUGH -10.

In reply to Point III of the petitioner's response brief, again no policy exists. Further, regarding N.J.S.A. 18A:7A-7 through -10, the decision of the Board to allow each high school to select its photography studio "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious and unreasonable." Parsippany-Troy Hills Ed. Ass'n v. Bd. of Ed., 188 N.J. Super. 161, 167 (App. Div. 1983) (citations omitted). An "action of the local board which lies within the area of its discretionary powers may not be upset unless potentially arbitrary, without rational basis or induced by improper notices." Id., citing Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 188, 294 (App. Div. 1960).

As shown, pursuant to N.J.S.A. 18A:18A-3 or 18A:18A-5a.(5), the photography contacts are within the Board's powers. Those contracts are not arbitrary, are with rational basis, and are not induced by improper motives. (Aff. ¶9) Thus, there is no violation of N.J.S.A. 18A:7A-7 through -10.

For the reasons set forth in the respondents' moving papers and reply papers, the respondents respectfully request that the petition be dismissed with prejudice.

DISCUSSION AND CONCLUSIONS

I

The Board seeks to dismiss the instant matter by way of summary decision, pursuant to N.J.A.C. 1:1-12.5. Petitioners oppose the Board's motion contending, among other things, that the instant matter is not ripe for summary decision.

The Administrative Rule, N.J.A.C. 1:1-12.5, concerning summary decision is substantially similar to New Jersey Court Rules, R. 4:46-1 ---, R. 4:46-2, which has been subject to judicial interpretation and provides that upon motion duly filed, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

In Judson v. Peoples Bank & Trust Company of Westfield, 17 N.J. 67 (1954), the Supreme Court set forth the purpose of the Summary Judgment Rule and established the standards a court should follow in applying the rule. The Court emphasized that the movant has a very heavy burden to clearly establish that no genuine issue of material fact exist. Justice William J. Brennan, writing for the Court observed, among other things, that the role of the judge on a motion for summary disposition is first to determine whether there is a genuine issue of material fact, but not to decide the issue if he/she finds it to exist. Judson at 73.

Justice Brennan continues in Judson to observe that summary judgment procedure is designed to provide for the prompt, businesslike and inexpensive method of disposing of any cause which clearly shows no genuine issues of material fact requiring disposition at a trial, after a discrimination search of the merits of the pleadings, depositions and admissions on file, together with affidavits submitted. Id. at

74. The Court also held, among other things, that where the party opposing a motion for summary disposition offers only facts which are immaterial or of an insubstantial nature, the court may grant summary judgment," . . . taking as true the statement of uncontradicted facts in papers relied upon by the moving party, such papers themselves not otherwise showing the existence of any issue of material fact." Id. at 75.

More recently, the Supreme Court noted that "excessive caution would undercut the purposes of a motion for summary judgment, which provides a means for piercing the allegations in the pleadings to determine whether there are issues requiring disposition at trial." Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980).

Having carefully examined the whole record before me, I **CONCLUDE** there are no genuine issues of material fact extant in the instant matter.

Accordingly, I **CONCLUDE** that the herein matter, pursuant to the Board's motion, meets the Judson criteria for summary disposition.

II

It is well settled that the Commissioner and the State Board of Education have jurisdiction to interpret the statutes which constitute Education Law, under Title 18A. The statute, at N.J.S.A. 18A:6-9, provides that: "The Commissioner shall have jurisdiction to hear and determine. . . all controversies and disputes arising under the school laws. . ." See Fisher v. Bd. of Educ. Union Tp. et al., 99 N.J. Super. 18 (App. Div. 1968).

The Commissioner has dealt with the issue of high school yearbook photographs in the past. In the matter of Peter Nicastro, t/a Garfield, Bergen County, 1977 S.L.D. 213, the Commission determined that the Garfield Board's bidding and contract

procedures, which awarded the yearbook photograph contract to a competitor of Nicastro, were neither a violation of statute nor arbitrary, capricious or monopolistic. Id. at 217. From 1965 to 1972, Nicastro was awarded contracts for the high school yearbook photography on the basis of bids issued by the high school itself. The Garfield Board required that all photographs of senior pupils appearing in the annual yearbook be taken by the successful bidder. The contract required the successful bidder to do additional photographic work without cost to the Board, yearbook staff or pupils of the high school. No pupil was required to purchase any portraits or pay a sitting fee. The successful bidder's sole income was from orders placed by pupils for photographic portraits.

Nicastro lost the bid for the 1972-73 school year and then asserted that the Garfield Board had no right to appoint one photographer to take all senior portraits and other yearbook pictures. He argued, among other things, that the selection of one contracted photographer created a monopoly and abrogated the right of a pupil to select freely among photographs of differing quality, characteristics and prices. These arguments are similar to those made by petitioner Santomenna herein.

The Garfield Board argued, among other things, that its right to appoint a single photographer was dictated by the necessity of maintaining both a reasonable timetable and uniform quality standards of photographic recordation for yearbook copy. the Board also asserted that no pupil was required to purchase portraits from the successful bidder.

The Commissioner said, in Nicastro, that:

> Pupils are not required to purchase portraits and are free to procure them elsewhere if they so choose. Accordingly, absent compulsory participation, petitioner's charge that the procedure is monopolistic is similarly without merit. The record is replete with evidence that pupils, class officers, yearbook staff, advisors and administrators review and reach a determination as to who shall be the successful bidder. Such procedure exemplifies the life situations with

> which pupils will be confronted in our democratic society and, as such, is deemed beneficial. Id. at 217.

Thus, in Nicastro, the Commissioner found no impediment, legal or otherwise, with the Board engaging a single photographer for the purpose of taking photographs of its senior pupils for publication in the high school's annual yearbook. The Commissioner specifically found that this practice was not a monopoly, therefore, defeating petitioner Santomenna's claim of unlawful activity of restraint of trade by the Toms River Board of Education. In addition, the Commissioner found a salutary effect when he said:

> The production of a high school yearbook, although not typically a curricular offering, offers valuable opportunity for pupils to apply academic skills in such areas as marketing, journalism, layout, creative writing, advertising, group dynamics, budgeting, and creative design. While it is necessary to provide faculty advisors and sponsors for such a complex activity, the process offers an ideal opportunity for upperclassmen to enter into vital decision making processes. Such activities are to be encouraged since they furnish opportunity for pupils to use many of the skills taught in curricular offerings. One such area is creative layout which is typically an evolving expression of a selected theme. Id. at 216.

Petitioner's misapprehended the language and application of N.J.S.A. 10:1-2, N.J.S.A. 10:1-4 and N.J.S.A. 10:1-5. The New Jersey Law Against Discrimination (LAD) provides, among other things, that individuals may not be denied access to places of public accommodation based upon race, sex, marital status, religious beliefs, age, national origin, creed, color or ancestry. It does not mean that any vendor may enter the schoolhouse to solicit or sell its wares, without the explicit permission of the local board of education. There is no discriminatory exclusion where the Board has elected to contract with a single photographer to take photographs of pupils for use in the school's yearbook, unless it can be shown that the selection was based upon proscribed reasons; i.e., race, sex, creed, color, etc. There has been no such showing here. See State v. Rosecliff Realty, 1 N.J. Super. 94 (App. Div. 1948).

I **CONCLUDE** that petitioner has failed to demonstrate that the action by the Board to contract with Lorstan Studios was in any manner illegal, discriminatory, arbitrary or capricious. Nicastro, supra.

I **CONCLUDE**, therefore, that the Board's Motion to Dismiss the herein matter must be granted.

ORDER

Accordingly, it is **ORDERED** that the Board's Motion to Dismiss the herein matter is hereby **GRANTED** and **SUMMARY DECISION** is **ENTERED** on behalf of the Toms River Regional School District Board of Education.

It is therefore **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 1994
DATE

Lillard E. Law
LILLARD E. LAW, ALJ
By: Joseph E. Martone AL

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

8/1/94
DATE

Mailed to Parties:
Joanne M. Restivo
OFFICE OF ADMINISTRATIVE LAW

AUG 05 1994
DATE

cc

OAL DKT. NO. EDU 7261-93

MICHAEL R. SANTOMENNA, T/A L.A. PHOTOGRAPHY STUDIO, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, AND JOHN R. GARRABRANDT, SENIOR ASSISTANT SUPERINTENDENT, RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon such review, the Commissioner concurs that the Board's manner of contracting for high school yearbook photographs was not demonstrated to be in any way improper, discriminatory or an abuse of discretion.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 15, 1994

DATE OF MAILING - SEPTEMBER 15, 1994

251-94

SYDNEY J. GUNDERSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning resident appealed Board's determination that child living with her did not meet requirements of N.J.S.A. 18A:38-1(b) so as to qualify for free attendance in schools of the district as an "affidavit student."

ALJ found that child's parent was not supporting him and was incapable of providing the requisite affidavits of family or economic hardship, and that petitioner's credible testimony as to her support of and responsibility for the child stood in lieu of such affidavits. Accordingly, child was entitled to free public education in district.

Commissioner affirmed ALJ's recommendation, modifying the initial decision's analysis to apply and interpret N.J.S.A. 18A:38-1 as amended by P.L. 1993, c. 380.

SEPTEMBER 15, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2000-94

AGENCY DKT. NO. 23-2/94

SYDNEY J. GUNDERSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,

Respondent.

Sydney J. Gunderson, petitioner, pro se

Maurice Y. Cole, Jr., Esquire for respondent (Cole and Cole, attorneys)

Record Closed: June 28, 1994 Decided: July 27, 1994

BEFORE **JOSEPH E. KANE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed the within appeal when the respondent refused to admit J. F. to the Brigantine school system on the grounds that he had not complied with N.J.S.A. 18A:38-1. Upon filing of this petition on February 15, 1994, J. F. was admitted to the Brigantine school system and the within appeal was transmitted to the Office of

Administrative Law (OAL) on March 2, 1994. A hearing was conducted at the Atlantic City OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on June 28, 1994. The record was closed on the same date with a decision being rendered on July 25, 1994.

ISSUE

WHETHER J.F. SHOULD BE PREVENTED FROM BECOMING A STUDENT OF THE BRIGANTINE SCHOOL SYSTEM PURSUANT TO N.J.S.A. 18A:38-1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

J.F. is 14 years old and resides with Mrs. Sydney Gunderson in a parens patriae relationship. In November 1993, attempts were made to enroll J.F. in the Brigantine school system (hereinafter referred to as the School). The School refused to admit J.F. on the grounds that he was unable to provide an affidavit from his natural father which would indicate that custody had been relinquished and turned over to Mrs. Gunderson.

But for this affidavit required by N.J.S.A. 18A:38-1, the School concedes that J.F. has met all the requirements necessary for school enrollment.

Petitioner claims that she cannot obtain this affidavit on behalf of J.F. because J.F.'s natural father has been declared mentally incompetent and is unwilling, or incapable of giving such an affidavit.

The statutory scheme set forth at N.J.S.A. 18A:38-1 requires several items of proof to be presented to the school board in addition to the affidavit from J.F.'s natural father. The provision of this information to the board enables any individual to receive a free and appropriate education.

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not supporting the child, accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. . .
>
> N.J.S.A. 18A:38-1(b).

The board concedes that it has all the information set forth in the above cited statute with the exception of the affidavit from J.F.'s father. Without this affidavit, the School refused admittance to J.F. in November 1993 and as a result, until the filing of this petition, J.F. was deprived of an education.

Petitioner has known J.F. since he was six months old when her sister-in-law, Ethel Bunkis baby-sat for J.F. At the age of eight years, J.F.'s mother passed away. Thereafter, Mrs. Bunkis was parens patriae to J.F. because his natural father became mentally ill and was diagnosed as paranoid schizophrenic.

In 1993, petitioner and her family, together with Ms. Bunkis, her family and J.F. rented a two family home in Brigantine, New Jersey. Mrs. Bunkis attempted to register J.F. in the Brigantine school system in November 1993. One week later, Mrs. Bunkis passed away.

Since J.F.'s mother passed away, J.F. never lived with his father and after the death of Mrs. Bunkis, he asked petitioner if he could remain with her. Petitioner testified that J.F. did not want to enter a foster home nor did he want to live with his natural father.

J.F.'s natural father, Steven Fishman, has a long history of mental illness dating back to 1988. Petitioner testified that her son, who is a New York City police officer takes J.F. to visit his father approximately once a month for several hours. J.F. testified that his father lives in a very run down neighborhood, in a room with crumbling walls and a bed that is taped together.

Petitioner noted that J.F.'s father has a great deal of affection for him and calls him every day at approximately 6:00 p.m. According to petitioner, Steven Fishman believes that his son is eight years old and that when he sends cards to J.F., he signs both his name and his deceased wife's name.

Petitioner has attempted to speak with Steven Fishman on several occasions in order to obtain the affidavit required by N.J.S.A. 18A:38-1(b). Petitioner stated that despite the fact that Steven Fishman has always requested that she take care of J.F., he refuses to relinquish legal custody and claims that "no one will ever take his son away from him". Petitioner testified that whenever she attempts to broach the subject, Steven Fishman screams that she can contact his barrister, at which time he hangs up the phone.

Petitioner was able to obtain a statement from Steven Fishman which she filed with the School. The statement reads:

> Steven Fishman being duly sworn does depose and say:
> I am the father of Joseph Fishman, born October 15, 1979. I hereby give permission to Ms. Sydney Gunderson to take my son to and from school effective as of this date.

Petitioner stated that she is the sole financial support of J.F. She noted that despite Steven Fishman's apparent love for his son, he is incapable either mentally or financially to provide support to J.F. She stated that he never provides financial support, and except for the daily phone calls, gifts are rarely given by him to J.F.

Petitioner is now the representative payee for J.F.'s social security survivor's benefits. She has advised J.F. that he can remain with her all during high school, and for any time thereafter.

J.F. testified that he considers himself to be part of the family and intends to remain with Mrs. Gunderson in Brigantine, New Jersey. He does not want to return to his father, nor is his father making any attempts, either through the court system or otherwise to have his son returned to him in Brooklyn, New York. On the contrary, Steven Fishman specifically asked petitioner at the funeral of Ethel Bunkis if J.F. could remain with the petitioner.

J.F. graduated eighth grade in 1994 and intends to attend Atlantic City High School. From the date he was admitted into the Brigantine school system, he has not been absent even once. He testified that he enjoys school and wants to go to school.

The solution to this matter is simple. Steven Fishman needs to provide an affidavit to the school which indicates that he is no longer supporting J.F. Considering the mental condition of Steven Fishman, I question the validity of such a sworn statement. Petitioner testified that she believed that Steven Fishman had been declared mentally incompetent and was receiving social security disability income.

As set forth in N.J.S.A. 18A:38-1(b), the burden of proof remains with the petitioner to demonstrate each and every element of the statute. Since the School has contended that all other requirements have been met, the only issue remaining is whether Steven Fishman is no longer supporting his son J.F.

I **FIND** that petitioner has demonstrated by a preponderance of the credible evidence that J.F. is entitled to a free and appropriate education within the Brigantine school system.

For whatever reason, known only in the mind of Steven Fishman, he does not want to sign an affidavit. In every other way, he has relinquished control of his child to the petitioner and has relegated the everyday care and maintenance of J.F. to the petitioner. His only contact with J.F. are the daily calls at 6:00 p.m. and the occasional visit when J.F. travels to Brooklyn to visit his father.

Given Steven Fishman's apparent mental incapacity, I **FIND** that the sworn testimony of the petitioner, which I **FIND** to be credible, shall stand in lieu of the affidavit requirement set forth in N.J.S.A. 18A:38-1(b).

Having found that J.F.'s natural father is no longer providing financial support to his son and additionally having found that J.F. is domiciled in the City of Brigantine, I herein **GRANT** petitioner's request for relief that J.F. is entitled to a free and appropriate education within the Brigantine school system.

Additionally, I note as a matter of future clarification, that this **ORDER** shall apply to J.F.'s high school education which will commence in September 1994 since the Atlantic City High School is the receiving district with the Brigantine school system, the sending district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 27, 1994
DATE

JOSEPH E. KANE, ALJ

8/1/94
DATE

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

AUG 04 1994
DATE

Mailed to Parties:
Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

psa

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

NONE

FOR RESPONDENT:

R-1 NOTARIZED STATEMENT
R-2 AFFIDAVIT OF SETTLEMENT
R-3 LETTER DATED DECEMBER 1, 1993(CONSISTING OF 4 PAGES)
R-4 COPY OF UNITED STATES TREASURY CHECK
R-5 LETTER DATED DECEMBER 22, 1993

WITNESSES

FOR PETITIONER:

SYDNEY GUNDERSON
CARRIE ANN GUNDERSON
J.F.

FOR RESPONDENT:

JUDITH BEW
CAROL J. CALLOWHILL

OAL DKT. NO. EDU 2000-94

SYDNEY J. GUNDERSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board of Education pursuant to N.J.A.C. 1:1-18.4. No reply was filed by petitioner.

In its exceptions, the Board first argues that the ALJ erred in applying N.J.S.A. 18A:38-1 as it existed prior to being amended in January 1994, when, in addition to the requirement of gratis support, a requirement was added for the parent or guardian of a so-called "affidavit student" to provide a "sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district." (P.L. 1993, c. 380, effective January 11, 1994)

The Board next contends that petitioner failed to carry her burden of proof under this statute, in that she was not only unable to provide the required affidavit, but offered no competent evidence that J.F.'s father was mentally or financially unable to

support his son, or that he was mentally incompetent and receiving social security disability income on that basis. The Board further argues that the missing affidavit is not the sole deficiency in petitioner's claim, as petitioner cannot meet the requirement of gratis support of J.F. due to her undisputed receipt of the boy's social security survivor benefits.

Finally, the Board objects to the ALJ's having extended his recommendation to J.F.'s entire high school education, on grounds that such extension is premature and without basis in law or fact.

Upon careful review and consideration, the Commissioner affirms the ALJ's ultimate conclusion that J.F. is entitled to a free public education in the Brigantine school district, but modifies the initial decision to the following extent.

Initially, the Commissioner concurs with the Board that this matter, filed on February 15, 1994, must be decided under the statute as amended in January 1994. Therefore, as the Board correctly states, at issue herein are both the parent's inability to care for the child due to family or economic hardship and gratis support of that child by another person. The Commissioner does not agree, however, that under the particular circumstances of this case, the statute, as amended, acts as a bar to J.F.'s entitlement to attend school in the district.

In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the

spirit of the law will control over its letter. N.J. Builders, Owners & Managers Association v. Blair, 60 N.J. 330, 333 (1972). Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy. Brewer v. Porch, 53 N.J. 167, 174 (1969); San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148, 155 (1958).

The amendments to N.J.S.A. 18A:38-1 effectuated by P.L. 1993, c. 380 were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. (See Sponsor's Statement, Senate Education Committee Statement and Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as c. 380)

The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the non-parent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, due to particular circumstances, cannot produce such an affidavit

but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children. Sabella v. Lacey Tp., 204 N.J. Super. 55, 60 (App. Div. 1985); Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co., 52 N.J. 73, 77 (1968)

Under circumstances such as are presented herein, where petitioner receives no aid or support from J.F.'s father or other responsible adult, petitioner's being the representative payee of social security survivor benefits does not, in itself, disqualify J.F. from school attendance within the intendment of the law's gratis support requirement. Social Security payments do not represent compensation to petitioner for caring for J.F.; rather, they are a direct government benefit to J.F. arising from the death of his mother, with petitioner merely acting as payee for a minor child.

Moreover, while petitioner may not have presented written documentation as to the mental or financial status of J.F.'s father, it is clear that her testimony and that of J.F, both accepted as credible by the trier of fact, are based on long-standing and direct personal knowledge. Therefore, the Commissioner accepts such testimony as competent evidence of the status of J.F.'s father, and also as a sufficient demonstration that the underlying requirements of N.J.S.A. 18A:38-1 are being met. That petitioner was unable to comply with the Board's

requirement for a parental affidavit is of no import in this proceeding, as such affidavit is simply a means permitted by N.J.S.A. 18A:38-1 to aid local boards of education in accomplishing the statute's end, and the Commissioner may, on appeal, look to other indicia to see that the statutory purpose is being effectuated and accept such indicia in lieu of the affidavit required by the Board.

Finally, the Commissioner finds the ALJ's recommendation regarding J.F.'s continuing entitlement to a free public education in Brigantine to be nothing more than an attempt to ensure the orderly progression of that education. However, in response to the Board's concerns, the Commissioner clarifies that J.F.'s continuing entitlement is premised on there being no change in his own or petitioner's circumstances that would alter such entitlement.

Accordingly, as modified herein, the initial decision of the Office of Administrative Law, determining that J.F. is entitled to a free public education in the School District of the City of Brigantine, is affirmed for the reasons set forth above.

IT IS SO ORDERED.

SEPTEMBER 15, 1994 COMMISSIONER OF EDUCATION

DATE OF MAILING - SEPTEMBER 15, 1994

251-94

EDU #2000-94
C # 251-94
SB # 43-94

SYDNEY J. GUNDERSON,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 15, 1994

For Petitioner-Respondent, Sydney J. Gunderson, pro se

For Respondent-Appellant, Cole & Cole (Maurice Y. Cole, Jr., Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner. We do so based on the facts of this particular case as established by the evidentiary hearing conducted before the Administrative Law Judge.

January 4, 1995

Date of mailing JAN 06 1995

252-94

252-94

R.K., on behalf of her minor child, D.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 15, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8095-93

AGENCY DKT. NO. 208-6/93

R.K. ON BEHALF OF THEIR MINOR CHILD D.K.

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

Respondent.

J. Paul Mohair, Esq., for petitioner, (Cape Atlantic Legal Services)

Bruce Gorman, Esq., for respondent

Record Closed: July 14, 1994 Decided: July 26, 1994

BEFORE **EDGAR R. HOLMES,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 26, 1993, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms on the record.

1. D.K. has already served a one day suspension. That suspension will remain of record.
2. The Board has reduced the initial penalty from three days to two days suspension.
3. The remaining one day suspension shall be reduced to four detention (1/2 hour per day) to be served at the beginning of the 1994-95 school year.
4. No social probation shall attach to the four day detention.

After being placed under oath, the parties stated that they fully understood and consented to all of the terms and conditions of this settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

26 July 1994
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

8/1/94
DATE

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

AUG 04 1994
DATE

Mailed to Parties:
Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 8095-93

R.K., on behalf of her minor child, D.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

SEPTEMBER 15, 1994

DATE OF MAILING - SEPTEMBER 15, 1994

* It is noted that the settlement terms in this matter are embodied in the initial decision rather than in a separate attachment as stated in the decision at page 2.

253-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WINSLOW	:	DECISION
TOWNSHIP, CAMDEN COUNTY.	:	
	:	

SEPTEMBER 15, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 4534-94

AGENCY DKT. NO. 87-4/94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF WINSLOW TOWNSHIP, CAMDEN COUNTY

Elaine A. Iacuzio, petitioner, *pro se*

Ronald Sahly, Esq., on behalf of respondent, School District of Winslow

Record Closed: July 25, 1994 Decided: July 29, 1994

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of the conduct of an annual school election. On July 6, 1994, notices were sent to the parties notifying them that a telephone conference was to take place at 3:00 p.m. on July 13, 1994. Ms. Iacuzio did not provide a telephone number, and therefore the matter was adjourned and a letter was sent to petitioner requesting a telephone number within ten days if she wished to pursue this matter (letter attached). Having received no correspondence, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that this matter be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/29/94
DATE

SOLOMON A. METZGER, ALJ

8/1/94
DATE

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

AUG 04 1994
DATE

Mailed to Parties:
Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625
(609) 588-6519

SOLOMON A. METZGER
ADMINISTRATIVE LAW JUDGE

July 13, 1994

Elaine A. Iacuzio
22 Randolph Lane
Sicklerville, NJ 08081

Re: In the Matter of the Annual School Election Held in the School District of Winslow Township, Camden County
OAL DKT. NO. EDU 4534-94
AGENCY DKT. NO. 87- 4/94

Dear Mrs. Iacuzio:

On July 13, 1994, at 3:00 p.m. there was to be a telephone conference call in the above matter. You have not provided me with a telephone number to initiate the call. You must provide a telephone number within ten (10) days or I will assume that you no longer wish to proceed and the matter will be dismissed.

Very truly yours,

Solomon A. Metzger
Administrative Law Judge

/cae

c: Ronald Sahly, Esq.
P.O. Box 601
Hammonton, NJ 08037

New Jersey Is An Equal Opportunity Employer

OAL DKT. NO. EDU 4534-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF WINSLOW	:	DECISION
TOWNSHIP, CAMDEN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner has filed no explanation for her failure to provide a telephone number necessary for the scheduled telephone conference.

Accordingly, the Commissioner concurs with the ALJ that petitioner no longer seeks relief in this matter, which is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 15, 1994

DATE OF MAILING - SEPTEMBER 15, 1994

254-94

DON WILSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 16, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 9815-93

AGENCY DKT. NO. 339-9/93

DON WILSON,

Petitioner,

v.

BOARD OF EDUCATION OF

THE BOROUGH OF BERNARDSVILLE,

Respondent.

Randi Doner, Esq., on behalf of petitioner (Balk, Oxfeld, Mandell and Cohen, attorneys)

Nicholas Celso, III, Esq., on behalf of respondent (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Record Closed: July 25, 1994 Decided: July 29, 1994

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out respondent's decision to withhold petitioner's pay increment. Based on the attached stipulation of dismissal, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the matter be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/29/94
DATE

SOLOMON A. METZGER, ALJ

8/2/94
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

AUG 05 1994
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

cad

BALK, OXFELD, MANDELL & COHEN
A Professional Corporation
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Petitioner

OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET# EDU-09815-93

AGENCY REF. NO. 399-9/93

DON WILSON,

Petitioner,

-vs-

STIPULATION OF DISMISSAL

BOARD OF EDUCATION OF THE BORO OF BERNARDSVILLE, SOMERSET COUNTY,

Respondent.

It is hereby stipulated that the matter in difference in the above entitled action is hereby dismissed.

Randi Cohen
Attorneys for Petitioner

DATED: 7/19/94

Attorney for Respondent

DATED: 7/14/94

OAL DKT. NO. EDU 9815-93

DON WILSON,	:	
PETITIONER,	:	
		COMMISSIONER OF EDUCATION
V.	:	
		DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law, incorporating a "Stipulation of Dismissal" jointly signed by the parties, have been reviewed.

Upon such review, the Commissioner cannot accept this stipulation, which amounts to a settlement of an increment withholding matter, the terms of which have not been spread on the record pursuant to N.J.A.C. 1:1-19.1 so that the Commissioner may review them prior to making a final decision on the recommendation of the ALJ.

Accordingly, the initial decision of the Office of Administrative Law is remanded for supplementation of the record consistent with N.J.A.C. 1:1-19.1.

IT IS SO ORDERED.

SEPTEMBER 16, 1994

DATE OF MAILING - SEPTEMBER 16, 1994

COMMISSIONER OF EDUCATION

255-94

LONGO ASSOCIATES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, FARIDY, THORNE & FRAYTAK, P.C., AND DEAN EQUIPMENT AND FURNITURE CO., INC., MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	

SEPTEMBER 16, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6488-94
AGENCY DKT. NO. 195-5/94

LONGO ASSOCIATES, INC.,
Petitioner,
v.
BOARD OF EDUCATON OF THE MORRIS SCHOOL DISTRICT, and FARIDY, THORNE & FRAYTAK, ARCHITECTS, PLANNERS, and DEAN EQUIPMENT AND FURNITURE CO., INC.,
Respondents.

Gina A. Calogero, Esq., for Longo Associates, Inc.

Fredric J. Sirota, Esq., for Board of Education of the Morris School District (Wiley, Malehorn & Sirota, attorneys)

Jon C. Martin, Esq., for Faridy, Thorne & Fraytak, P.C. (Fox, Rothschild, O'Brien & Frankel, attorneys)

James J. Ross, Esq., for Dean Furniture and Equipment Co., Inc. (Wolff & Samson, attorneys)

Record Closed: July 21, 1994 Decided: August 2, 1994

BEFORE **RICHARD McGILL,** ALJ:

This matter involves a challenge by Longo Associates, Inc. (petitioner) to the award of a contract to another bidder. Petitioner was the low bidder, but its bid was rejected because it did not

propose the brand name products specified in the contract. The matter was transmitted to the Office of Administrative Law on July 7, 1994 for determination as a contested case.

While the application for emergent relief was pending, the parties agreed to an amicable resolution of the matter and submitted a Stipulation of Dismissal. Having reviewed the record and the settlement terms, I **FIND**:

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** and that the proceedings in this matter be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug. 2, 1994
DATE

RICHARD McGILL, ALJ

RECEIVED AUG 0 4 1994
DATE

Receipt Acknowledged:

Hope R Blackburn
DEPARTMENT OF EDUCATION

AUG 09 1994
DATE

Mailed to Parties:

Wilma Szymanski
OFFICE OF ADMINISTRATIVE LAW

am

OFF
JUL 21 11 25 AM '94

GINA A. CALOGERO
Attorney at Law
87 Essex Street
Hackensack, NJ 07601
201-996-1771
fax 201-487-0441
Attorney for Petitioner

LONGO ASSOCIATES, INC. Petitioner -vs- BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, and FARIDY, THORNE & FRAYTAK, ARCHITECTS, PLANNERS, and DEAN FURNITURE & EQUIPMENT CO, INC., Respondents	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **DOCKET NO. EDU-6488-94** **STIPULATION OF DISMISSAL**

This matter having come before the Commissioner by way of Verified Petition and Request for Emergency Relief, and having been transferred to the Office of Administrative Law for decision and being scheduled for a hearing before the Hon. Richard McGill, A.L.J., and the disputes between and among the parties having been amicably resolved,

It is hereby stipulated and agreed among the parties that the Petition of Longo Associates, Inc. ("Longo") be and hereby is dismissed with prejudice and without costs.

BY: GINA A. CALOGERO
Attorney for Petitioner Longo Associates

DATED: July 15, 1994

WILEY MALEHORN & SIROTA
Attorneys for Respondent Morris School District Board of Education

BY: FREDERICK J. SIROTA, ESQ.

DATED: 7/14/94

WOLFF & SAMSON
Attorneys for Respondent Dean Furniture & Equipment Company, Inc.

BY: JAMES J. ROSS, ESQ.

DATED:

FOX, ROTHSCHILD, O'BRIEN & FRANKEL
Attorneys for Respondent Faridy Thoma & Fraytak

BY: JON C. MARTIN, ESQ.

DATED: July 15, 1994

OAL DKT. NO. EDU 6488-94

LONGO ASSOCIATES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, FARIDY, THORNE & FRAYTAK, P.C., AND DEAN EQUIPMENT AND FURNITURE CO., INC., MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law, incorporating a "Stipulation of Dismissal" based on the parties' having "amicably resolved" their differences, have been reviewed.

Upon such review, the Commissioner finds no basis on which he can ascertain the terms of the resolution reached by the parties in this matter, notwithstanding that the specific terms of any settlement must be spread on the record pursuant to N.J.A.C. 1:1-19.1 so that the Commissioner may review them prior to making a final decision on the recommendation of the ALJ.

Accordingly, the initial decision of the Office of Administrative Law is remanded for supplementation of the record consistent with N.J.A.C. 1:1-19.1.

IT IS SO ORDERED.

SEPTEMBER 16, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - SEPTEMBER 16, 1994

255-94

57-95R
(255-94)

LONGO ASSOCIATES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, AND FARIDY, THORNE & FRAYTAK, P.C., AND DEAN EQUIPMENT AND FURNITURE CO., INC., MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

FEBRUARY 22, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9256-94

AGENCY DKT. NO. 195-5/94
(Remand of OAL Dkt. No. EDU 6488-94)

LONGO ASSOCIATES, INC.,

Petitioner.

v.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, and FARIDY, THORNE & FRAYTAK, ARCHITECTS, PLANNERS, and DEAN EQUIPMENT AND FURNITURE CO., INC.,

Respondents.

Gina A. Calogero, Esq., for Longo Associates, Inc.

Fredric J. Sirota, Esq., for Board of Education of the Morris School District (Wiley, Malehorn & Sirota, attorneys)

Jon C. Martin, Esq., for Faridy, Thorne & Fraytak, P.C. (Fox, Rothschild, O'Brien & Frankel, attorneys)

James J. Ross, Esq., for Dean Furniture and Equipment Co., Inc. (Wolff & Samson, attorneys)

Record Closed: December 13, 1994 Decided: January 5, 1995

BEFORE **RICHARD McGILL,** ALJ:

This matter involves a challenge by Longo Associates, Inc. (petitioner) to the award of a contract by the Board of Education of the Morris School District (School District) to another bidder, Dean Furniture and Equipment Co., Inc. (Dean). Petitioner was the low bidder, but its bid was rejected because it did not propose certain brand name products contained in specifications developed by Faridy, Thorne & Fraytak, Architects, Planners (Faridy).

The original transmittal to the Office of Administrative Law was received on July 7, 1994, and the matter was scheduled for an oral argument on an application for emergent relief. While the application for emergent relief was pending, the parties submitted a Stipulation of Dismissal, which was approved in an Initial Decision-Settlement dated August 2, 1994.

By Decision dated September 16, 1994, the Commissioner of Education remanded the case to the Office of Administrative Law to supplement the record consistent with *N.J.A.C.* 1:1-19.1, which requires the parties to disclose the full settlement terms on the record. The remand was received by the Office of Administrative Law on September 20, 1994, and a telephone conference was scheduled for December 7, 1994. As a result of the conference, counsel agreed to file written submissions.

The submissions of the parties indicate that petitioner and Faridy reached an agreement related to specifications for future similar projects. As set forth in a letter dated July 14,1994 from counsel for petitioner to counsel for Faridy, petitioner and Faridy agreed as follows:

> This will confirm that the above matter has been resolved by agreement between our mutual clients that future similar projects designed by Faridy Thorne Fraytak will offer owners the option of two casework specifications either "Sheldon systems or approved equal" or "Campbell Rhea or approved equal."

There were no other terms in the agreement between petitioner and Faridy. The School District and Dean were not parties to the above-quoted agreement between petitioner and Faridy. However, all parties agreed to the stipulation of dismissal with prejudice.

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

1. Petitioner and Faridy have voluntarily reached the above-quoted agreement concerning specifications prepared by Faridy for future similar projects.

2. The parties have voluntarily agreed to the stipulation of dismissal as evidenced by their signatures or the signatures of their represenatives.

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 5, 1995
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

1/9/95
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 1995
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

am

LAW OFFICES

FOX, ROTHSCHILD, O'BRIEN & FRANKEL

KATZENBACH, GILDEA & RUDNER, P.C.
1905-1993

PRINCETON PIKE CORPORATE CENTER
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(609) 896-3600 FAX (609) 896-1469

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SAMUEL E. DENNIS
JAY G. OCHROCH
LOUIS W. FRYMAN
STANLEY S. COHEN
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JOSEPH SMUKLER
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EDWARD J. HAYES
ROBIN B. MATLIN
JOSEPH V. SOUTHERN*
ELAINE N. MORANZ
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JAMES F.X. RUDY*
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MARK L. MORRIS
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ROBERT F. ZIELINSKI*

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NORMAN LEIBOVITZ
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AARON JAY BEYER*
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EZRA D. ROSENBERG*
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SANFORD K. MOZES
MARK L. SILOW
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SIMON KIMMELMAN*
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MARVIN L. WEINBERG
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MICHAEL C. McBRATNIE*
D. JEFFRY BENOLIEL
KEVIN B. SCOTT*
TRISTRAM R. FALL, III
SCOTT L. VERNICK*
LESLIE M. GERSTEIN
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MARTHA B. CHOVANES*
THOMAS D. PARADISE*
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JON C. MARTIN*
H. LEE SCHWARTZBERG, JR.*
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ROBERT W. GUNDLACH*
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DAVID B. SNYDER*
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BARBARA FLACKER-ELIMELECH*
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DEBORAH R. POPKY*
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SPECIAL COUNSEL

GEORGE R. BURRELL, JR.
BRIAN J. O'NEILL
ALAN E. CASNOFF
ELAINE CALCOTE BRITT*

SENIOR COUNSEL

JEROME B. WEINSTEIN
MURRAY H. SHUSTERMAN

Δ RESIDENT LAWRENCEVILLE PARTNER
* ADMITTED TO PRACTICE IN NJ
(OTHER ATTORNEYS NOT ADMITTED TO PRACTICE IN NJ)

OFFICE OF ADMINISTRATIVE LAW
RECEIVED
DEC 13 11 49 AM '94

December 9, 1994

Honorable Richard McGill, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: Longo Associates, Inc. v.
Board of Education of Morris School District
OAL Docket No. EDUOT 09256-94N

Dear Judge McGill:

We represent Respondent Faridy, Thorne & Fraytak, P.C. in the captioned matter.

After our recent telephone conference, I reviewed the file and discovered the enclosed July 14, 1994 letter from Petitioner setting forth an accord reached by our clients in connection with the Stipulation of Dismissal. I telephoned Petitioner's attorney, Ms. Calogero, and we felt it appropriate to forward the letter to you and request your guidance. Perhaps because the arrangement was reached directly by our clients, neither Ms. Calogero nor I recalled it during the telephone conference. We apologize for any inconvenience. I will contact your office to discuss.

Very truly yours,

Jon C. Martin

JCM/kam
enc.
cc: Gina A. Calogero, Esq. (Via Telecopier)
James J. Ross, Esq.
Frederick J. Sirota, Esq.

GINA A. CALOGERO
Attorney at Law
87 ESSEX STREET
HACKENSACK, NEW JERSEY 07601

TEL. (201) 996-1771
FAX (201) 487-0441

July 14, 1994

Mr. Jon C. Martin, Esq.
Fox, Rothschild, O'Brien & Frankel
Princeton Pike Corporate Center
997 Lenox Drive Building 3
Lawrenceville, NJ 08648-2311

re: **Longo Associates, Inc. v. Morris School District Board of Ed.**
File No. 1324.2

Dear Mr. Martin:

This will confirm that the above matter has been resolved by agreement between our mutual clients that future similar projects designed by Haridy Thorne Fraytak will offer owners the option of two casework specifications: either "Sheldon Systems or approved equal" or "Campbell Rhea or approved equal." I will notify the Court and all counsel, and am enclosing a proposed stipulation of dismissal for your execution and return. By copy of this letter, I am submitting same to all counsel and asking that they sign their respective signature page and return. Thank you for your anticipated cooperation.

Very truly yours,

GINA A. CALOGERO

GAC/bms

cc: Frederick J. Sirota, Esq.
James J. Ross, Esq.

LONGO ASSOCIATES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, AND FARIDY, THORNE & FRAYTAK, P.C., AND DEAN EQUIPMENT AND FURNITURE CO., INC., MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 22, 1995

DATE OF MAILING - FEBRUARY 22, 1995

256-94

256-94

ELIZABETH RAINONE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SEPTEMBER 16, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 9227-93
AGENCY DKT. NO. 315-9/93

ELIZABETH RAINONE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Rubin, Malgran, Kaplan & Kuhn, attorneys)

Record Closed: July 25, 1994 Decided: August 1, 1994

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

This matter was transmitted to the Office of Administrative Law on September 27, 1993, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

Aug 1, 1994
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

8/4/94
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

AUG 09 1994
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

cc

RUBIN, RUBIN, MALGRAN KAPLAN & KUHN
501 Hoes Lane
Piscataway, New Jersey 08854
(908) 463-7500
Attorneys for Respondent

Petitioner,	
ELIZABETH RAINONE,	OAL Dkt. No. 9227-93
vs.	Agency Ref No. 315-9/93
Respondent,	
PISCATAWAY TOWNSHIP SCHOOLS.	STIPULATION OF SETTLEMENT

The parties having amicably resolved their differences, the petition of appeal herein is dismissed, with prejudice, on the following terms:

1. On or before January 31, 1995, petitioner's supervisor, employing good faith professional judgment, will advise the Superintendent of Schools whether petitioner's performance merits reinstatement to the step on the salary guide where petitioner would have been absent the withholding of her 1993-94 increment.

2. If petitioner's supervisor submits such an affirmative recommendation, petitioner shall be restored to that step of the salary guide retroactive to commencement of the 1994-95 school year.

3. Petitioner abandons her claim to her 1993-94 increment.

WILLS, O'NEILL & MELLK
Attorneys for Petitioner

BY: _____
ARNOLD M. MELLK

RUBIN, RUBIN, MALGRAN, KAPLAN & KUHN
Attorneys for Respondent

BY: _____
DAVID B. RUBIN

Dated: May 4, 1994

OAL DKT. NO. EDU 9227-93

ELIZABETH RAINONE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1994

DATE OF MAILING - SEPTEMBER 16, 1994

257-94

RICHARD HARRIS AND KENTON P. GARAY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners, fully certificated teaching staff members employed by respondent Board of Education, claimed, in petitions originally filed in the 1991-92 school year, that Board violated N.J.A.C. 6:29-3.3 by appointing the holder of a county substitute certificate to a coaching position for which they were qualified.

ALJ found that petitioners met the district's written qualifications for the coaching appointment at issue, so that the Board could not properly appoint an alternate candidate, other than a qualified and certified district employee, regardless of any belief on the Board's part that such candidate was more qualified than petitioners. (Norcross, Capraro, Daniel) Board was directed to review petitioners' applications and select one of them to be paid the applicable stipend plus interest. ALJ limited relief to the stipend for the 1991-92 season because petitioners did not amend their pleadings to include subsequent years.

Commissioner affirmed determination that N.J.A.C. 6:29-3.3 had been violated and directed implementation of the relief recommended by the ALJ. However, the Commissioner also remanded this matter for limited fact-finding and argument on petitioners' entitlement to additional relief for subsequent seasons.

SEPTEMBER 16, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 1945-92 and
EDU 2223-92 (Consolidated)
AGENCY DKT. NOS. 40-2/92 and
35-2/92

RICHARD HARRIS AND
KENTON P. GARAY,

Petitioners,

v.

BOARD OF EDUCATION OF
THE HUNTERDON CENTRAL
REGIONAL HIGH SCHOOL
DISTRICT,

Respondent.

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

Stephen E. Klausner, Esq., for petitioner Garay (Klausner, Hunter, Cige and Seid, attorneys)

James P. Granello, Esq., for respondent

Record Closed: June 16, 1994 Decided: August 2, 1994

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

Richard Harris and Kenton Garay, petitioners, teaching staff members employed by the respondent Hunterdon Central Regional High School District Board of Education, respondent, seek an order vacating the head wrestling coach position, awarding the position to "a fully qualified permanent staff member who applied for the position" and full back pay and emoluments to that person.

This matter was opened on two separate petitions before the Commissioner of Education. The matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. The matters were consolidated for hearing and were heard on March 16 and 28, 1994, at the Clinton Municipal Building.

Certain facts are uncontroverted and revealed the context of the case. In October 1991, the Board issued a job posting for a head wrestling coach. The Board had adopted a written job description containing the required qualifications, including possession of proper certification, background, experience and skills to organize, supervise and direct the entire program involved. Exhibit D.

The Principal and Director of Student Administration interviewed four candidates, including the petitioners. The petitioners were tenured teaching staff members and the two other candidates were from outside the district. Each candidate was interviewed and was asked the same questions pertinent to a wrestling program, such as relations with parents, philosophy of weight loss and why the candidate should be offered the position. Both interviewers believed these questions brought out the qualities a head coach needed to possess in order to continue the school's reputation for an excellent wrestling program.

Neither petitioner had served as a head wrestling coach during his employment with the district. Each had extensive assistant coach experience. Mr. Keith Holcombe

served as a head wrestling coach a private school, but was not employed as a teacher and did not want a teaching position in the district.

Mr. Stephen Gibble, based upon the interviews, was selected by the principal and director for recommendation to the superintendent.

On or about November 21, 1991, the superintendent contacted the Hunterdon County Office of the New Jersey Department of Education and obtained the necessary application form for approval to hire an athletic coach holding a substitute teacher certificate. Exhibit A. The superintendent included a letter attesting to Gibble's knowledge and experience and referring to the fact that Gibble had already had been approved as an assistant wrestling coach for the 1991-92 school year. The Acting County Superintendent of Schools, Mr. Bruce Quinn, approved the application.

Neither petitioner attempted to seek an assistant wrestling coach position for the 1991-92 school year. Exhibit E.

Harris holds a masters degree in education and the following teaching certificates and endorsements: teacher of health and physical education; driver education; teacher of the handicapped; supervisor, and principal. Garay holds a teaching certificate with teacher of the handicapped and teacher of industrial arts endorsements. Gibble holds a county substitute teacher certificate.

At hearing, the petitioners testified concerning their experience with school and community wrestling programs. There are three programs at Hunterdon Central High School in addition to the varsity program. There are freshman, freshman-sophomore and junior varsity (JV) programs. Harris has been an assistant wrestling coach and a part-time physical education teacher. During his interview, the petitioner and the administrators discussed program mechanics, especially weight loss, budget and community involvement. Although the witness has headed the JV and freshman programs, he has not headed the entire program.

Garay testified similarly. In addition to his teaching credentials, Garay holds certification as a wrestling official.

Garay heard Harris testify and stated that he would say basically the same things Harris said. He, as did Harris, assisted the head coach at tournament time.

The superintendent since July 1990 testified that he became involved in the head wrestling coach appointment in the fall of 1991. He charged David D. Myers, the high school principal, to make a recommendation to the superintendent. The principal told him that there were four or five people under consideration. The superintendent told the principal to hurry.

The principal recommended Stephen Gibble. The superintendent recommended Gibble to the Board and requested the County Office to approve some one not employed in the district. When that approval was received, the Board appointed Gibble head wresting coach. Gibble was the only applicant who had head coaching experience, albeit at the junior high school level. However, leadership and ability to keep a good program moving were his most important criteria for a new coach.

The school, which has enjoyed great wrestling competition success, was involved in a scandal during a trip to George Mason University. The former head coach and one assistant were suspended. The witness believed that it was important to make an appropriate appointment as quickly as possible. He conceded that he did not know whether Pennsylvania, where Gibble had his experience, recognizes the position of head junior high school wrestling coach.

The principal testified that he has been at Hunterdon Central Regional High School since the summer of 1980. He and the director of student activities interviewed the persons who responded to the posted vacancy for head wrestling coach. Of the four candidates, Garay, Harris, Gibble and Holcombe, Garay and Harris were district

employees, Gibble held a county substitute certificate and Holcombe was employed at a private school.

Gibble had been a member of the school's coaching staffs for football, wrestling and lacrosse beginning in the 1989-90 school year. The witness and the director discussed the recent incident at George Mason University and how candidates would handle the questions of controversy and atmosphere. They agreed that this was an atypical situation.

The witness stated that he knew Harris had been head football and assistant wrestling coach, Garay was an assistant wrestling coach and Gibble had headed a junior high school wrestling program in Pennsylvania. The witness believes that he and the principal were looking for the best qualified person, giving particular attention to how they answered questions during the interview and how they would deal with colleges. Their consensus was that Gibble had experience, had kept current by attending summer college clinics, gave sincere responses and had quickly outlined what he would do if he were given the position. The interviewers did not rank the candidates on paper, but discussed each candidate after his interview. After the last interview, they agreed that Gibble was the best candidate. Holcombe, although he had many desirable qualities, was not in the same group as the others. Gibble had thought out what he would do and gave his answers without hesitation when asked.

The interviewers reported their recommendation to the superintendent. After the County Office approval and board appointment, the principal notified the unsuccessful candidates.

There was additional testimony concerning selections of coaches in other sports and use of persons holding county substitute teacher certificates.

The Director of Student Administration testified substantially as did the principal. He stated that, under qualifications listed in the job posting candidates were advised

that they must possess proper certification, background, experience and skills to organize, supervise and direct the entire program. When the district advertises a position, it may or may not require head coaching experience in the sport. In this case, the district did require head coaching experience. Harris and Garay do not have head coaching experience.

Holcombe, although well qualified, did not interview as well as Gibble. He did have head coaching experience and was qualified as to certification. Harris and Garay were considered unqualified because they lacked head coaching experience and they did not go through the interview as well as Gibble.

The former Acting County Superintendent of Schools testified that he received an application to approve Gibble in November 1991. Attached to the application for approval were a copy of the advertisement posting the position, Gibble's county substitute certificate and a letter from the superintendent. He stated that he had earlier approved Gibble as an assistant wrestling coach. In addition, he was provided a job description.

The witness discussed the matter with the superintendent before he received the application. The witness was aware of problems the former head coach had been involved with. The witness approved Gibble's appointment and believes he rightly did so.

The witness cannot recall all discussions surrounding the appointment. He does recall the district represented that there were no other qualified candidates. It is not his responsibility as County Superintendent to second guess the local superintendent. *N.J.A.C.* 6:29-3.3(c) provides procedures to use when there is no qualified in-district candidate.

In addition to the facts found above, I also **FIND**:

1. The superintendent asked the director for verification of Gibble's background in Pennsylvania. The director contacted someone at Central Columbia High School in Pennsylvania. However, he did not know if the district has a junior high school as such. The interviewers did not attempt to verify any of the applicants' representations. Garay and Harris did all of their work in the district. It was there to be seen, board minutes exist and there were persons available who had observed the program, including Harris and Garay, for several years.

2. The Hunterdon Central Regional High School District assured the County Office that there was no other qualified candidate than Gibble. It provided the County Office a statement of assurances. Gibble had not completed his college degree as of 1991.

3. Counsel were directed to contact the Columbia School District in Pennsylvania within a stated time to ascertain Gibble's experience there in the 1985-89 school years. Nothing has been presented to me indicating any contact with that district. Accordingly, the Board's Exhibit H is accepted into evidence.

DETERMINATION AND ORDER

The **petitioners** in the main rely on the language of *N.J.A.C.* 6:29-3.3. That rule provides:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.
>
> (b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.

> (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:
>
> i. The vacant coaching position had been advertised; and
>
> ii. There was no qualified applicant based on the written standards of the district board of education;
>
> 2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and
>
> 3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in *N.J.A.C.* 6:11-4.4(l) shall not apply to such coaching situations.

The Commissioner has consistently held that the priority *of N.J.A.C.* 6:29-3.3 requires that where a full-time, district employee applies for and is qualified for a coaching position, he or she must be given that position before an out-of-district employee can be hired.

In this case, the Board violated *N.J.A.C.* 6:29-3.3 by appointing Gibble, holder of a county substitute certificate, when there were qualified and certified applicants. As *N.J.A.C.* 6:29-3.3 (c) provides, the holder of a county substitute certificate is authorized to serve as an athletic coach only in the event that there is no qualified or certified applicant from within the district.

The hearing produced significant testimony that the principal and director were the two people who interviewed applicants. The testimony showed that the principal and director made a recommendation to the superintendent who testified that he adopted that recommendation. The principal plainly stated that while he considered all of the applicants qualified for the position, he considered Gibble most qualified. That

testimony alone should demonstrate that the Board violated the Administrative Code when it hired Gibble. The inquiry is not who is most qualified. If any of the certified, in-district teachers were qualified, the Board would not be entitled to seek or hire the holder of a county substitute certificate. Moreover, the application for approval to hire an athletic coach contains a statement of assurance that indicates no applicants holding New Jersey state teacher certification qualified for the position based upon written standards.

Petitioners urge that this statement of assurance, necessary to properly execute the application for approval to hire an athletic coach holding a substitute certificate, is in direct contradiction of the plain testimony that there were applicants holding New Jersey teacher certifications who were qualified for the position. As such, the application was improper executed.

One of the interviewers stated that Gibble was the only qualified applicant, in his opinion. However, he was unable to say on cross-examination in what ways the petitioners were not qualified. Nor could he point to any written standards that the petitioners had not met which would have rendered them unqualified. The written standards listing the qualifications for the head coach position do not call for pervious head wrestling coach experience. Exhibit D.

No witness was able to point to any written standards whatsoever that required previous head wrestling coach experience in order to be qualified for the subject position. The evidence indicates that the Board clearly violated *N.J.A.C.* 6:29-3.3 by failing to appoint one of the petitioners to the position of head wrestling coach.

The petitioners ask that they be made whole for the moneys they would have earned if selected as head wrestling coach at Hunterdon Central Regional High School.

The Board asserts that the phrases "qualified and certified applicant" and "qualified applicant based on written standards" came under review *in Norcross v. Board of Education, North Hunterdon Reg'l High School Dist.*, 93 *N.J.A.R.* 2d (EDU) 613. In that case, petitioner applied for the open positions of head and assistant girls' basket ball coach. However, the board hired the holder of a county superintendent certificate, without obtaining the county superintendent's approval. Further, the Board did not have written qualifications for the position, but only an explanation of the duties to be formed. Norcross previously served as head girls' basketball coach in the district. The Commissioner upheld the ALJ finding that the Board violated *N.J.A.C.* 6:29-3.3 by appointing a person holding a county substitute certificate without permission. The Commissioner stated that, in the selection of coaches, there are two threshold criteria: one, whether the person is certified as a teacher and two, whether the person is employed by the Board. If the applicant meets these standards, then a third criterion may be applied; that is, the Board's written policy of qualifications it wants in its coaches.

The Commissioner elaborated on *Norcross* in *Vincent J. Capraro v. Woodbridge Township Board of Education*, 91 *N.J.A.R.* 2d. (EDU) 17. In *Capraro*, the Board appointed an out-of-district certified teacher as head baseball coach over an in-district certified teacher who had experience as an assistant baseball coach. Several board members, but not the rejected applicant, challenged the action. The ALJ found the in-district applicant was improperly denied the position, but was not entitled to relief because he was not a named petitioner. The Commissioner agreed with the ALJ, but added:

> A properly certified in-district candidate could, conceivably, be passed over in favor of an out-of-district candidate, who was likewise properly certified, if the in-district candidate did not meet previously established written qualifications for the coaching position pursuant to *N.J.A.C.* 6:29-3.3.

The Commissioner also found, as in *Norcross*, that the Board did not have written performance standards and qualifications. In the absence of these, the Board could not bypass certified, in-district persons.

Reading *Norcross* and *Capraro*, makes clear that an in-district certified candidate does not have automatic priority over an out-of-district candidate where the board has adopted written standards and qualifications which the in-district candidate does not meet.

In the present matter, the Board did have a written set of qualifications for the position of head coaching existence prior to the interview process. Exhibit D. These qualifications call for possession of the proper certificate, background, experience and skills to organize, supervise and direct the entire program of the sport. Second, the board applied for and received approval to hire a person holding a county substitute certificate as an athletic coach. This approval was not received in *Norcross*. When the State Department of Education approved the Board's application, it acknowledged that the district had met the Administrative Code requirements for the approval including demonstrating it had a written copy of standards for the position.

In 1993, the Commissioner reviewed the provisions of *N.J.A.C.* 6:29-3.3. *Daniel and Moxley v. Board of Education of the Township of Irvington*, 93 *N.J.A.R.* 2d (EDU) 613. The ALJ found the district failed to advertise for the vacant assistant football coaching positions as required by law. The ALJ also found the district failed to received County Superintendent approval prior to employing four assistant football coaches. The Commissioner adopted the judge's determination that the district violated applicable law and directed one of the petitioners, Daniel, be compensated in the amount of the appropriate stipend for the 1991-92 school year.

The Commissioner also stressed that the intent and proper operation of the regulation is well established, that athletics is part of the total educational program and, in hiring coaches, a board must first look at in-district staff, then to fully certificated staff

from outside the district, and only then to holders of county substitute certificates as approved by the County Superintendent.

In the present case, the Board advertised within and outside the district and did seek and receive County Superintendent approval prior to employing Gibble. Gibble then served as head wrestling coach during the year in question under the approval of the State Department of Education. The petitioners' delay bringing this matter forward should preclude the award of moneys for any alleged violation of the administrative rules. Both petitioners did not seek to coach as assistant wrestling coaches for the year in question. Thus failing to mitigating their damages. Nor should this tribunal consider any other year but the year in question in assessing whether a violation of the code took place. The pleadings were not amended and no additional discovery was conducted into the circumstances which existed in any future wrestling season. The only facts the petitioner present were limited to the 1991-92 wrestling season.

The Hunterdon Central Regional High School District complied with State regulations pertaining to the approval of hiring the holder of a county substitute certificate as head wrestling coach for the 1991-92 wrestling season. Therefore, the petitioners have no legal basis for challenging that decision and their petitions must be DISMISSED.

From the evidence adduced, I **FIND**:

1. The district suspended three wrestling coaches in 1991 after a rules infraction was discovered.
2. The district posted and advertised the positions head wrestling coach and assistant wrestling coach on October 1, 1991.
3. There were several applications received and reviewed by the high school principal and the director of student administration.
4. Four persons were interviewed: Gibble, Garay, Harris and Holcombe.

5. The interviewers reached a consensus. They recommended Gibble to the superintendent.
6. The superintendent accomplished the necessary application via the county superintendent of schools because Gibble, although he had worked for the district, held only a county substitute certificate.
7. There is no procedural defect in the approval process

In *Daniel*, above, the Commissioner emphasized that the intent and proper operation of the subject regulation is well established, that athletics is part of the total school program and, in hiring coaches, a board must first look to in-district staff, then to fully certificated staff from outside the district and only then to holders of county substitute certificates as approved by the County Superintendent. 93, *N.J.A.R.* 2d (EDU) at 618.

In the present case, the petitioners were not deemed unqualified candidates, merely less qualified. The Board has failed to articulate any reason why the petitioners are unacceptable. The Board has shown only that Gibble was the preferred choice of the screening committee. The is no argument, however, about Gibble's lesser qualifications. The superintendent's letter to the County Superintendent dated November 21, 1991 states, "In the opinion of the administration, he is the best qualified candidate to meet the needs of the athletes and school district. Mr. Gibble holds a valid Substitute Teacher certificate endorsed in Hunterdon County. He was approved on October 15, 1991 by you as an assistant wrestling coach for the 1991-92 season." Exhibit C. The letter goes on to provide additional background on Gibble.

Although this decision stops short of finding that the Board acted in bad faith, the selection process was seriously flawed. Harris and Garay remained applicants throughout the final selection process, but Gibble was selected. In deciding that the petitioners were not qualified, the Board relied on recommendations of the superintendent who, in turn, relied on recommendations of the selection committee. At some point, a decision was made to pass over Harris and Garay who, while qualified, were less attractive candidates than Gibble. There was a problem, however, in that the

law does not permit a Board to pass over certified, in-district persons unless that decision is based on clearly articulated and properly advertised criteria. According to *Daniel*, above, the question to be addressed is whether the Board's finding the petitioners unqualified was a sustainable judgment. This, in turn, depends on whether the Board's requirement of head coaching experience is valid. Although it is beyond argument that a Board's actions are presumed valid, the actions are not unimpeachable when, as here, specifications are drawn so as to circumvent State Board of Education rules. Harris', Garay's and Gibble's qualifications were known before the job posting (Exhibit E) was created. It is likely that Holcombe's qualifications were not known at that time. Whether his qualifications were known, or not, is not necessary to this analysis.

The only ways a Board can hire a head coach with head coach experience are to hire one of its own teaching staff members with such experience or to locate such a person and satisfy *N.J.A.C.* 6:29-3.3. But before that step can be taken, there must be no qualified and certified applicant. *N.J.A.C.* 6:29-3.3(c).

Whatever the Board's reasons for not selecting Harris or Garay, they have not been sufficiently articulated to show that the petitioners are unqualified. Going to the holder of the county substitute certificate is a big step. It must not be taken until qualified and certified in-district applicants had been legitimately ruled out. On this record, I **CONCLUDE** that Harris and Garay were not legitimately ruled out. In short, the district has not articulated sufficient reason to employ a county substitute certificate holder.

Based upon the foregoing, it is **ORDERED** that the relief the petitioners seek be granted subject to the following conditions. First, the Board must review the applications of both petitioners and, if necessary, interview both petitioners. The Board must then select one of the two petitioners based on its assessments of their backgrounds and abilities. That person then will be paid the stipend lost, plus interest since the last day of the 1991-92 wrestling season. No other monies will be paid

because the petitioners have limited their petition to the 1991-92 season. The Commissioner of Education shall specify the date by which these actions shall be accomplished in the final agency decision. If no final agency decision is rendered and this initial decision becomes final by operation of law, the actions ordered shall be completed by November 1, 1994.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2 AUGUST 1994
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

8/2/94
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 08 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

Richard Harris
Kenton P. Garay
Raymond Farley
David D. Myers
Dennis McAuliffe
Bruce M. Quinn

LIST OF EXHIBITS

Joint Exhibits:

- J-A Application for Approval to Hire Athletic Coach Holding Substitute Certification, November 21, 1991
- J-B County Substitute Teacher Certificate, Stephen Gibble, December 13, 1989
- J-C Letter, Farley to Quinn re: Gibble, November 21, 1991, 2 pp.
- J-D Job Description, Head Coach, adopted December 10, 1990, 4 pp.
- J-E Job Posting, October 1, 1991
- J-F Application for Employment at Hunterdon Central High School, submitted by Stephen Gibble, November 24, 1989, 2pp.
- J-G Myers' notes concerning Gibble (undated)
- J-H Letter, Engle to Farley, May 26, 1992
- J-I Holcombe Resumé

For Petitioner Garay:

- PG-1 Chronology of Events, appendix to Board's brief
- PG-2 Excerpt from interrogatories

OAL DKT. NOS. EDU 1945-92 AND EDU 2223-92 (CONSOLIDATED)

RICHARD HARRIS AND KENTON P. GARAY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioners, as was a reply thereto by the Board of Education. No exceptions were filed by the Board.

In their exceptions, petitioners urge acceptance of the initial decision's findings in the main, but contend that the ALJ erred in limiting petitioners' relief to the 1991-92 wrestling season. While conceding that their pleadings were not amended to include years subsequent to 1991-92, petitioners argue that they notified both the Court and counsel at hearing that they intended to present, and ultimately did present, testimony with respect to the two subsequent wrestling seasons, and that the parties' determinations with regard to a concurrent grievance procedure caused a significant delay in the hearing of this matter, during which petitioners continued to apply and be improperly rejected for the coaching positions at issue. Given the basis for the ALJ's determination that Stephen Gibble's 1991-92 appointment was

invalid, and given that petitioners continued to apply for Gibble's position during the two subsequent seasons, petitioners contend, their relief should extend up to the time, if any, when Mr. Gibble remedied the defect in his certification.

In reply, the Board argues that it would unfairly be prejudiced by any attempt to expand petitioners' claims beyond the 1991-92 school year. The Board stresses petitioners' failure to amend their pleadings, and observes that, notwithstanding the recitation of facts embodied in petitioners' exceptions, the ALJ made no findings of fact regarding years subsequent to 1991-92 on which any entitlement to relief might have been based. The Board also contends, citing Riely v. Hunterdon Central Regional High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980), that local grievance/arbitration procedures do not toll the time for appeal to the Commissioner pursuant to N.J.A.C. 6:24-1.2(c), and that petitioners clearly had sufficient notice of their non-appointment for 1992-93 and 1993-94 to timely amend their pleadings.

Upon review of the record and consideration of the parties' filings in response to the initial decision, the Commissioner concurs with the ALJ's conclusion that the Board violated applicable regulation in hiring Stephen Gibble for the 1991-92 wrestling season. However, on the question of the relief to which petitioners are entitled, the Commissioner determines to remand this matter for further proceedings as set forth below.

Under the particular circumstances of this matter, the Commissioner is not satisfied that relief should necessarily be limited to the 1991-92 school year. However, on the basis of the present record, the Commissioner can make no factual determination that would permit him to conclude that petitioners, assuming they can overcome the hurdle of not having amended their pleadings, are entitled to relief for subsequent school years as a result of continuing violation.

Accordingly, the Commissioner remands this matter to the Office of Administrative Law for fact-finding necessary to determine whether the Board's 1992-93 and 1993-94 head wrestling coach appointment continued to violate petitioners' rights and for consideration of argument, and evidence as necessary, on the question of whether petitioners' failure to amend pleadings is a bar to their ability to claim further relief under the circumstances. Nothing herein, however, alters the Commissioner's affirmation of the ALJ's recommended decision in other respects, so that the Board is directed, in accordance with the Initial Decision at pp. 14-15 above, to select one of the petitioners for payment of the 1991-92 stipend plus interest by November 1, 1994.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1994

DATE OF MAILING - SEPTEMBER 19, 1994

258-94

IN THE MATTER OF THE TENURE HEARING OF THOMAS SELLEROLI, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SEPTEMBER 19, 1994

IN THE MATTER OF THE TENURE HEARING OF THOMAS SELLEROLI, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Board, Gregory G. Johnson, Esq.

This matter having been opened before the Commissioner of Education on June 7, 1994 through certification of tenure charges of other just cause (excessive absenteeism, insubordination and abandonment of position) against respondent, a tenured custodian in the District's employ; and

The Commissioner having directed respondent by printed notice on June 13, 1994, and July 11, 1994, and, again, by letter dated August 10, 1994, all sent via both regular and certified mail, to file a formal Answer to the District's charges, which certified notifications were returned by the Post Office; and

As of this date, neither respondent nor any attorney on his behalf having so filed an Answer to the charges levied against him; and

Given that respondent has failed to properly respond to the tenure charges by way of an Answer, as directed, each count of the charges against him is deemed to be admitted; now therefore

IT IS ORDERED on this 19TH day of September 1994 that summary decision shall be granted to the District and respondent shall be dismissed from his tenured position as a custodian in the District's employ as of the date of this decision.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1994

DATE OF MAILING - SEPTEMBER 19, 1994

260-94

M.P.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	
	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	
KATZENBACH SCHOOL FOR THE DEAF, DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SEPTEMBER 21, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CONSOLIDATED MATTERS:

M.P., Petitioner, v. **TRENTON BOARD OF EDUCATION,** Respondent.	**DECISION** **SPECIAL EDUCATION CASE SETTLEMENT** OAL DKT. NO. EDS 4181-94 AGENCY DKT. NO. 94-6056
TRENTON BOARD OF EDUCATION, Petitioner, v. **KATZENBACH SCHOOL FOR THE DEAF, DEPARTMENT OF EDUCATION,** Respondent,	**INITIAL DECISION** **WITHDRAWAL** OAL DKT.NO. EDU 7877-94 AGENCY DKT. NO. 417-12/93

Linda S. Williams, Esq., for M.P. (Public Advocate of New Jersey, attorney)

Thomas W. Sumners, Jr., Esq, for Trenton Board of Education (Sumners, Council, George & Dortch, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent Katzenbach School for the Deaf (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: August 18, 1994 Decided: August 19, 1994

BEFORE **JOSEPH LAVERY,** ALJ:

The above captioned cases, **consolidated by order of July 14, 1994**, incorporated here by reference, are resolved today as follows:

I - SPECIAL EDUCATION CASE

***M.P. v. Trenton Board of Education,* OAL DKT. NO. EDS 4181-94, brought pursuant to *N.J.S.A.* 18A:46-1 through 18A:46-46 (See also, *N.J.A.C.* 6:24-1.1 through 6:24-12.1):**

The parties have agreed to settle this matter and have prepared a stipulation of settlement dated August 18, 1994, indicating the terms thereof, which is attached and fully incorporated herein. the document was executed in my presence, on the record, at the hearing site on that date.

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

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

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

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

This decision is final pursuant to 20 U.S.C.A. §1415(e) and 34 C.F.R. §300.509 (1993) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. 20 U.S.C.A. §1415(e)2, 34 C.F.R. §300.511. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Division of Special Education.

August 19, 1994
DATE

JOSEPH LAVERY, ALJ

II - SCHOOL LAW CASE

***Trenton BOE v. Katzenbach School for the Deaf, Department of Education*, OAL DKT. NO. EDU 7877-94, pursuant to *N.J.A.C.* 6:24-1.1, *et seq.*:**

This matter, brought on appeal before the Commissioner of Education, has been withdrawn by petitioner. This withdrawal was announced orally today by the Board, in my presence, and that of all the parties, on the record.

I ORDER therefore that this case be returned to the Department of Education.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 19, 1994
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

8/19/94
DATE

Hope L Blackman
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

SUSAN L. REISNER
PUBLIC DEFENDER
BY: Linda S. Williams
Assistant Deputy Public Defender
Office of the Public Defender
Division of Mental Health Advocacy
CN-850
Trenton, New Jersey 08625
(609) 292-1750
Attorney for M.P.

M.P.by her parent M.R. Petitioner, vs. TRENTON BOARD OF EDUCATION Respondent	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO: EDS- 04181-94 S AGENCY DOCKET NO. 94-6056

STIPULATION OF SETTLEMENT

Petitioner, M.P., by her mother M.R., and Respondent, Board of Education, City of Trenton, Mercer County, (hereinafter "Board"), desiring to resolve this matter that is before this Court, in an amicable fashion hereby agree and stipulate as follows:

1. Trenton Board of Education agrees to place and pay for M.P.'s placement at the Charles Hayden Goodwill Inn School, a residential facility located in Dorchester, Massachusetts, for the 1994-1995 school year and for so long as it remains appropriate. Placement at the Charles Hayden Goodwill Inn School should occur as soon as possible but no later than September 12, 1994.

2. All parties reserve the opportunity to exercise all rights afforded by state and federal laws to continue or alter M.P.'s

placement for the 1994-1995 school year and any time thereafter.

3. Upon execution of this Stipulation, the Petition shall be withdrawn and the case dismissed.

4. This Stipulation represents the full and entire agreement between the parties.

5. The Trenton Board of Education agrees to compensate, M.R., mother of M.P., for transportation and hotel accomodations for initial placement visit and two (2) visits during the school year at a reasonable cost to be determined. TWS J. LSW

Thomas W. Sumners, Jr.
Sumners Council George & Dortch, P.C.
Attorney for Respondent

Date: 8/18/94

Linda S. Williams
A.D.P.D.
Attorney for Petitioner

Date: 8/18/94

OAL DKT. NO. EDS 4181-94 AND EDU 7877-94 (CONSOLIDATED)

M.P.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	
KATZENBACH SCHOOL FOR THE DEAF, DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record and notice of withdrawal of the school law issue of this matter transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

With respect to the special education portion of this matter, the Commissioner notes that the initial decision finds this to be settled by a Stipulation of Settlement between the parties.

IT IS SO ORDERED.

SEPTEMBER 21, 1994

DATE OF MAILING - SEPTEMBER 21, 1994

COMMISSIONER OF EDUCATION

263-94

263-94

FRANK JAMES WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former supervisor, alleged Board's failure to appoint him to position of administrative assistant to the superintendent for the 1992-93 school year following a RIF was a violation of his tenure and seniority rights.

ALJ found, and petitioner did not dispute, another individual, Graef, had greater seniority and, thus, a superior claim to the position at issue. ALJ further found that there was no support for petitioner's contention that the Board's action recognizing Graef's entitlement to this particular position rather than other supervisory positions to which she also had claim was done in bad faith to thwart his claim to this particular position. Thus, petitioner had no claim to the position of administrative assistant to the superintendent for the 1992-93 school year. Board's motion for summary decision was granted and the petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 5, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8236-92
AGENCY DKT. NO. 437-9/92

FRANK JAMES WHITE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner
(Lake & Schwartz, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 18, 1994 Decided: August 19, 1994

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted by the Department of Education to the Office of Administrative Law as a contested case on October 22, 1992 following the filing of a petition of appeal by Frank James White against the Bloomfield Board of Education wherein he alleged that the Board's failure to appoint him to the position of

"administrative assistant to the superintendent" for the 1992-93 school year following a reduction in force which eliminated the supervisory position he held in 1991-92 was a violation of his tenure and seniority rights. The Board's answer maintained that White's assignment for the 1992-93 school year to a physical education classroom teacher position was proper.

In March 1993, White's petition was consolidated with a contested case which previously had been transmitted to the Office of Administrative Law entitled *Graef v. Board of Education of Bloomfield*, OAL Dkt. No. EDU 6562-92. That case involved tenure and seniority claims by another person holding administrative certification arising out of the same reduction in force which led to petitioner's reassignment to a classroom position for the 1992-93 school year. Graef, too, claimed entitlement to the position of administrative assistant to the superintendent, as well as others. When the *Graef* case was settled it was agreed among counsel for Graef, White and the Board that the settlement did not preclude White from continuing to pursue his claim. Indeed, counsel for White made clear during the course of the *Graef* settlement hearing on September 30, 1993 that whatever agreement the Board reached with Graef with respect to her entitlement, it did not bind his client.*

Thereafter, in October 1993, White expanded his pending claim by filing a new petition of appeal with the Commissioner alleging that by virtue of his tenure and seniority he now was entitled to the position of "supervisor of elementary education." That new petition, which was transmitted by the Department to the Office of Administrative Law as a contested case on January 20, 1994, was assigned OAL Dkt. No. EDU 540-94 and is scheduled for a plenary hearing on November 22 and November 23, 1994.** Recently, White moved to amend that new petition to add a generalized claim, based upon his supervisor's certification, to any administrative

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* The Graef-Board settlement recognized a superior claim by Graef to the administrative assistant position. However, since that position no longer existed as of 1993-94, Graef was appointed to another supervisory position, director of personnel.

** That case was preheard in April 1994 at which time I reserved decision on White's motion to consolidate it with the instant matter pending my disposition of the present motion for summary decision.

position held by a nontenured teaching staff member which requires an endorsement "subsumed within the administrative certificate." The Board does not oppose the amendment, except it insists that the claim be articulated more precisely as required by *N.J.A.C.* 6:24-1.3 and that the prehearing order be amended.

STIPULATION OF FACTS

The parties have agreed to stipulate to the underlying facts and they are set forth verbatim below:

1. The petitioner, Frank James White, is a tenured teaching staff member in the employ of the respondent, the Board of Education of the Township of Bloomfield.

2. From November 1, 1989 to June 30, 1992, the petitioner served as a supervisor of physical education and health.

3. Prior to his service as a supervisor of physical education and health, the petitioner served as a regular classroom teacher of physical education.

4. The position of supervisor of physical education and health (K-12) was abolished by the Board of Education at the end of the 1991-92 school year. This position was consolidated into the position of supervisor of athletics, health (9-12) and physical education (K-12). Such action was taken by the Board pursuant to a legitimate reduction in force effective at the conclusion of the 1991-92 school year. By resolution of the Board on April 13, 1992, Petitioner White was listed under the category "positions abolished--tenured staff to be reassigned." (See attached.)

5. For the 1992-93 school year, the petitioner was transferred to the position of high school teacher, physical education (9-12), which was his last tenured position.

6. On or about September 17, 1992, the petitioner commenced the within action before the Commissioner of Education [OAL Dkt. No. EDU 8236-92], wherein he alleged claims of tenure and seniority entitlement to the position of administrative assistant to the superintendent.

7. The position of administrative assistant to the superintendent was created by Board action on May 4, 1992, effective July 1, 1992. The position was abolished at the end of the 1992-93 school year.

8. Lois Capabianco, hired effective December 16, 1991 as the supervisor of elementary education (K-8) was rehired July 1, 1992 to the position of administrative assistant to the superintendent.

9. Judy L. Graef is a tenured teaching staff member in the employ of the Respondent. From September 1, 1989 to June 30, 1992, she held the position of Director of Personnel.

10. Prior to her service as Director of Personnel, Ms. Graef held the position of acting administrative assistant to the superintendent from September 1, 1988 to June 30, 1989, and supervisor of home economics from September 1, 1986 to June 30, 1989.

11. The position of director of personnel was abolished, pursuant to a legitimate reduction in force, at the conclusion of the 1991-92 school year.

12. For the 1992-93 school year, Ms. Graef was transferred to the position of department supervisor, home economics and business (9-12) - High School, her last tenured position. She bumped Janis Maziarski, who was in the position of department supervisor during the 1991-92 school year, and since September 1, 1986. Effective for the 1992-93 school year, Ms.

Maziarski was transferred to a business education teaching position at the high school.

13. On or about July 30, 1992, Judy Graef commenced an action before the Commissioner of Education [OAL Dkt. No. 6562-92] asserting tenure and seniority entitlement claims to various positions in the respondent's school district, including that of the position of administrative assistant to the superintendent.

14. On or about September 30, 1993, the respondent executed a settlement agreement with Judy L. Graef, which was accepted by the Honorable Stephen G. Weiss, Administrative Law Judge, and approved by Mary Lee Fitzgerald, then Commissioner of Education. Under the terms of the settlement agreement, the respondent [Board], among other things, recognized Ms. Graef's tenure and seniority entitlement to the position of administrative assistant to the superintendent.

15. Although Ms. Maziarski never challenged her reduction in force from a supervisory position to a teaching position, her tenure and seniority as a supervisor is greater than that of the petitioner.

16. The tenure and seniority entitlement to the position of administrative assistant to the superintendent for the 1992-93 school year, was granted to Judy Graef. Ms. Graef's tenure and seniority entitlement to the position of administrative assistant to the superintendent is greater than that of the petitioner.

17. For the current 1993-94 school year, the position of administrative assistant to the superintendent no longer exists. Judy L. Graef was reinstated to the reestablished position of director of personnel, and Janis Maziarski was reinstated to the position of department supervisor, home economics and business education (9-12) - High School.

18. The petitioner remains on a preferred eligibility list for recall to the position of supervisor of physical education and health. The position of supervisor of athletics, health (9-12) and physical education (K-12) is held by George Middleton, who has greater tenure and seniority entitlement than the petitioner. *See, Joint Stipulation of Facts*, June 30, 1994.

DISCUSSION

In this matter petitioner not only claims he was entitled by virtue of his tenure and seniority to a supervisory position which no longer exists, he concedes that another Board employee (Graef) actually had a superior claim to the position by virtue of her own tenure and seniority. The case, however, is not moot since White maintains that despite Graef's superior claim to the administrative assistant position he should have been appointed to it for 1992-93 since Graef also had entitlement to other supervisory positions in the district in 1992-93 and the interests of both White and Graef could have been accommodated by his appointment to the disputed position and Graef's appointment to some other position. If that had occurred the person who actually was appointed and whom White claims had less entitlement than he (Capabianco) would not have been appointed. Since the position was abolished White's claim is for back pay.

In their briefs counsel refer generally to several major seniority cases, including *Dennery v. Passaic County Regional High School District No. 1*, 131 *N.J.* 626 (1992), *Ellicot v. Board of Education*, 251 *N.J. Super.* 342 (App. Div. 1989), *Bednar v. Westwood Board of Education*, 221 *N.J. Super.* 239 (App. Div. 1987), and *Capodilupo v. Board of Education of West Orange*, 218 *N.J. Super.* 510 (App. Div. 1987). In my view those decisions support the Board's position in this case since the law is well established that seniority accrues in specific categories of employment and is earned only through actual employment in that category. Thus, mere possession of a certificate endorsement is not always sufficient. In this case the only supervisory title under which petitioner actually served was "supervisor of health and physical

education" from November 1989 to June 1992. Graef on the other hand held supervisory positions within the district for three school years more than White, including "acting administrative assistant to the superintendent" from September 1, 1989 to June 30, 1990 and it is clear that as of the beginning of the 1992-93 school year Graef by virtue of her seniority had a greater entitlement to the supervisory position of administrative assistant to the superintendent.

Since, as noted above, White does not dispute Graef's greater seniority, his case rests upon the proposition advanced in his brief that the Board's settlement of Graef's claim in September 1993 deliberately was designed, at least in part, to interdict petitioner's claim. According to petitioner's theory since Graef also had a superior claim to other supervisory positions in the district besides that of administrative assistant to the superintendent, the Board's motive for specifically recognizing her entitlement to that particular position for 1992-93 was to "thwart" White's claim to that same job. Thus, petitioner argues that the language of the Board's settlement with Graef was tantamount to a bad faith exercise of the Board's discretion and intended to interfere with his tenure and seniority rights. According to White, the Board was obliged to assign Graef to some other position or title in 1992-93 to which she also had a superior right and thereby preserve petitioner's ability to "reap the maximum benefits" to which he was entitled by virtue of his own tenure. In other words, Graef should have been assigned during 1992-93 to a supervisory position other than administrative assistant to the superintendent, which appointment would have accommodated White's alleged entitlement during that same school year to that job.

While I compliment White's counsel for the ingenuity of his argument, I must reject it since there is no case law or other authority which supports his position. To the contrary, boards of education are vested with a great deal of discretion and a presumption of correctness attaches to their actions. Absent a clear showing of bad faith in the exercise of that discretion their acts must be upheld. There is nothing in the Joint Stipulation of Facts agreed to in this case which even indicates, no less supports, a "bad faith" contention. Simply put, the Board was free during 1992-93 to assign its tenured supervisors to whatever positions might be available and in accordance with

their seniority. Since the Board did not appoint either Graef or White to the administrative assistant's position in 1992-93, and since the clock cannot now be turned back, the parties must live with the facts as they exist today. Those facts clearly demonstrate Graef's superior entitlement over White by virtue of her seniority to the administrative assistant's position and her possible entitlement to other supervisory positions are irrelevant, as is White's claim *vis-à-vis* Capabianco.

I also should note that a secondary argument was offered by the Board in its brief; *i.e.*, that since substantial differences in job duties existed between the position of administrative assistant to the superintendent (the position which White claims) and the position of supervisor of physical education and health (the position which he held in 1991-92) he is precluded for that reason from making any claim to the former position. My difficulty with this argument is that it is particularly fact-sensitive and the Joint Stipulation of Facts does not contain nearly enough facts to constitute an adequate record and this issue cannot be determined in a vacuum based solely on counsel's argument and the inclusion of a job description as an appendix to her brief.

CONCLUSION AND ORDER

Accordingly, in light of the Joint Stipulation of Facts and discussion, I **CONCLUDE** that White has no claim to the position of administrative assistant to the superintendent of schools for the 1992-93 school year and the Board's motion for summary decision on that issue therefore should be granted for the reasons set forth above. I therefore **ORDER** that the petition of appeal should be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 19, 1994
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8-23-94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

amr

OAL DKT. NO. EDU 8236-92

FRANK JAMES WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record, including the exceptions advanced by petitioner, the Commissioner determines that such exceptions essentially recast and reargue issues which were fully and fairly considered and addressed by the Administrative Law Judge in his initial decision and need not be herein reiterated. The Commissioner is in full agreement with the findings and conclusions of the ALJ for the reasons clearly articulated by him in the initial decision.

Accordingly, the Board's motion for summary decision is hereby granted and the instant Petition of Appeal is dismissed.

OCTOBER 5, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 5, 1994

264-94

2
364-94

R.A., on behalf of her minor children, S.H. AND D.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent appealed Board's determination of nonresidency. Board contended petitioner and her children, D.A. and S.H., were not domicile in the district but in Trenton and, thus, were not entitled to a free public education in Ewing pursuant to N.J.S.A. 18A:38-1.

In light of evidence presented and testimony of the witnesses, the ALJ concluded petitioner proved that she and her children were domiciled in Ewing, although they did spend time at a Trenton apartment. Citing Matter of Unanue, Mercadante, and Fort Lee Board of Education v. Kintos, ALJ found petitioner's intent was determinative.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 5, 1994

265-94

CHARLES KASKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning school psychologist challenged the Board's withholding of his employment and adjustment increments for the 1993-94 school year for alleged unsatisfactory performance.

ALJ found petitioner failed to meet his burden of establishing by a preponderance of credible evidence that the Board's action was arbitrary, capricious or based on improper motive. ALJ found that petitioner was aware that the Board considered his performance in completing evaluations as unsatisfactory. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 6, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7263-93
AGENCY DKT. NO. 259-7/93

DR. CHARLES KASKA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Michael T. Barrett, Esq., for the petitioner (Bergman and Barrett, attorneys)

Thomas W. Sumners, Jr., Esq., for the respondent (Sumners, Council, George and Dortch, attorneys)

Record Closed: July 8, 1994 Decided: August 17, 1994

BEFORE **CAROL F. LASKIN**, ALJ, t/a:

Dr. Charles Kaska, petitioner, alleges and the Board of Education of the City of Trenton (Board), respondent, denies that the Board improperly withheld the petitioner's employment and adjustment increments for the 1993-94 school year.

This matter opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A prehearing conference was conducted on October 7, 1993. After adjournment requested by petitioner, this matter was heard on March 22 and 23, 1994 in the Office of Administrative Law, Mercerville, New Jersey.

Three witnesses appeared on behalf of the petitioner, two on behalf of the respondent. Petitioner offered three exhibits; respondent offered three exhibits and the parties jointly offered three exhibits. Upon request by the parties, the briefing schedule did not commence until receipt of the transcripts of the recorded proceedings of the hearing.[1] Thereafter, the time for post-hearing submissions was enlarged, for good cause shown, to permit the undersigned to review both the initial and the reply brief of the petitioner.

ISSUE PRESENTED AND STIPULATED FACTS

The issue for determination is whether the Board's action in withholding Dr. Kaska's 1993-94 increment was volatile of N.J.S.A. 18A:29-14. This statute, in pertinent in part, provides:

> "Any Board of Education may hold, for inefficiency or other good cause, the employment increment or the adjustment increment, or both, of any member in any year by recording role call majority vote on the full membership of the Board of Education."

Our courts have noted that the decision to withhold salary increments is a matter of managerial prerogative which has been vested in local Boards of Education by the legislature. As such, it is axiomatic that the determination of the Board to withhold such increments may not be set aside unless the action is found to be arbitrary, without rationale basis or induced by improper motives. *See*, i.e. *Bernards Tp., Bd. of Ed. v. Bernards Tp. Educ. Ass'n.*, 79 *N.J.* 311 (1979); *Bd. of Educ. v. Educ. Ass'n.*, 270 *N.J. Super.* 444 (App. Div. 1994); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294-96 (App. Div. 1960). And it is the petitioner who maintains the burden of production and persuasion to establish that the Boards' conduct herein was arbitrary, without factual basis or induced by an improper motive.

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[1] T1 and T2 refer to the transcripts of the hearing conducted on March 22 and 23, 1994, respectively.

A review of the petition of appeal, answer, and stipulations of the parties presented during the hearing establishes as uncontested the following:

1. Dr. Kaska, a school psychologist, is a long-term employee of the Trenton Board of Education assigned to the districts' child study program and was a member, in the school year 1992-93, of one of the districts fourteen (14) child study teams. In addition to case management responsibilities, a principle aspect of Dr. Kaskas' duties was to evaluate students referred to the team, and based on said evaluation, to produce a written report and recommendation of placement of the student in a particular program.

2. The Board is governed by the Special Education Procedural Safeguards of *N.J.A.C.* 6:28-2.1(c) which states, in pertinent part, "After parental consent for initial evaluation has been received, the District Board of Education shall ensure that within 90 calendar days, evaluation and determination of eligibility for special education and/or related services, and, if eligible, development and implementation of the individualized education program for the pupil shall be completed."

3. Beginning at the commencement of the 1992-93 school year until April 26, 1993, the date petitioner was informed that his salary increment would be withheld, petitioner evaluated and completed reports of twenty (20) students; thirteen (13) listed on J-2 and five (5) additional students evaluated during the period March 31, to April 26, 1993. (2T52 to 55)

4. In or around January, 1993, Dr. Kaska was directed by his supervisor, Alex Trento, to increase, by volume, the number of evaluations, reports and recommendations he produced (Petition of Appeal, para. 4).

5. On or about March 3, 1993, Dr. Kaska received a confirming memoranda from Supervisor Trento of a conversation regarding the back log of outstanding referrals at the Robbins School. In said memorandum, Mr.

Trento expressed, "in order to expedite the increasing backlog, I am requesting that you prioritize psychological testing as your primary function, until such time as the backlog is significantly reduced. This does not mean to infer that your other duties are to be curtailed." (See J-1)

6. On or about early April, 1993, in response to request by Supervisor Trento, Dr. Kaska reported that he had tested and submitted completed typed reports of thirteen (13) students from the period September 14, 1992 through March 31, 1993. (See J-2 - p. 2)

7. In or around mid April, 1993, Supervisor Trento acknowledged receipt of J-2-p. 2 identified above, and stated ". . . from September 1992 - March 31, 1993, there was approximately 26 school weeks excluding time off. At your own suggested rate of one case per week, your testing productivity would have increased 100% if you had at least followed your own guidelines . . . I find your performance in testing of students and bringing cases to closure totally unacceptable." (J-2 p. 1)

8. On or about April 26, 1993 at a conference held by and in Supervisor Trento's office, the petitioner was informed of the recommendation that his salary increment be withheld for the school year 1993-94 because of his unsatisfactory performance as it related to testing of students. Supervisor Trento in said evaluation stated, "Dr. Kaska, by his own admission, only tested thirteen (13) students. The case load at Robbins School is in non-compliance due to his failure to test students, as required by law, and bring cases to closure. His failure to perform his duties has denied students their rights to an appropriate educational program." (J-3).

9. The Board of Education upon recommendation by Supervisor Trento withheld the petitioner's increment for the 1992-93 school year.

Other aspects of Dr. Kaska's and Board representatives conduct during the 1992-93 school year was disputed by the parties and the subject of the extensive testimony and documentary evidence presented.

TESTAMENTARY AND DOCUMENTARY EVIDENCE

Petitioner, in addition to testifying in his own behalf, presented Joseph A. Minotti, Principal of the Robeson School and Geri Oliva, Learning Consultant member of his child study team during the school year 1992-93, to support his burden of production and persuasion. To support its position that it withheld petitioner's increments in compliance with *N.J.S.A.* 18A:29-14, the Board presented Frederick Prunetti, principal of the Board's Robbins Elementary School and Alexander Trento, Supervisor of the Board's Child Study Program during the period January through July 1993. Each of the above witnesses testified credibly as to the facts within their knowledge.

Based upon review of the testimony and documentary evidence entered and upon the reflection of the demeanor of the witnesses, on the basis of the preponderance of the credible evidence within the record, I **FIND** the following facts relevant to the determination of this dispute.

1. During the school year 1992-93, petitioner, a psychologist, was a member of one of the Board's fourteen (14) Child Study Teams. His team was assigned to two (2) elementary schools, Robbins and Robeson.

2. During the fall, 1992, Frederick J. Prunetti, principal of the Robbins Elementary School, advised Doctor Kaska's child study team, and Dr. Kaska particularly, that he was dissatisfied with the teams handling of student referrals and their inability to complete the evaluations in a timely manner.

3. Based on these communications, Dr. Kaska was aware of Mr. Prunetti's dissatisfaction with his work performance. Petitioner acknowledged that Prunetti expressed, "I am going to have to talk to your supervisor about it." (1T33).

4. During the period September 1992 until January 4, 1992, Bruce Gunther, another psychologist member of a Child Study Team, became acting supervisor for the child study program. In or around January, 1993, Alexander A. Trento was hired by the Board to supervise the districts child study teams as supervisor of the child study program.

5. Joseph A. Minotti, was the principal of the Paul Robeson School for the school year 1992-93. He was and remains pleased with the performance of Dr. Kaska particularly in regard to his case management duties.

6. In or around January, 1993, Supervisor Trento met with each of his child study teams. During their meeting, Dr. Kaska and his team members were advised that outstanding evaluations well beyond the 90 day period of N.J.S.A. 6:28-2.1 was unacceptable to Supervisor Trento. Supervisor Trento expressed that two completed psychological evaluations per week would be acceptable performance. Dr. Kaska indicated he could do no more than one evaluation per week due to his other case management duties.

7. On or about March 3, 1993, Supervisor Trento memorialized his communication with Dr. Kaska, J-1. While Supervisor Trento requested Dr. Kaska to prioritize his psychological testing, he did not give Dr. Kaska specific recommendations or assistance to accomplish this.

8. Geri Oliva, the learning consultant member of Dr. Kaska's child study team was a new employee during the school year 1992-93. Principal Prunetti, in the fall of 1992, informed Ms. Oliva that her work performance

Accordingly, I **CONCLUDE** that petitioner has not established by a preponderance of the credible evidence that the action of the Trenton Board of Education in withholding his employment adjustments for the 1992-93 school year was arbitrary, capricious, or based on improper motive. *See* i.e. *Philip v. Bd. of Educ. of North Hunterdon Regional High School District*, 1987 S.L.D. 139; *Kline v. Bd. of Educ. of the Borough of Rossell Park*, 1985 S.L.D. 193. Thus, the petition of appeal is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 17, 1994
DATE

Carol J Laskin, Ha
CAROL F. LASKIN, ALJ t/a

Receipt Acknowledged:

8/22/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 30 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

Joint Exhibits:

J-1 Memo to Dr. Kaska from Supervisor Trento, dated March 3, 1993

J-2 Two page document dated April 14 from Trento

For the Petitioner:

P-1 Charles Kaska, Psy D. Curriculum vitae

P-2 PIP, dated May 27, 1992

P-3 Certificate of Appreciation, dated June 19, 1993

For the Respondent:

R-1 January monthly status report Robbins School, two page

R-2 End of year report, Robbins School

R-3 End of year report, Robeson School

WITNESSES:

For the Petitioner:

Dr. Charles Kaska

Joseph A. Minotti

Geri Oliva

For the Respondent:

Frederick Prunetti

Alexander Trento

OAL DKT. NO. EDU 7263-93

CHARLES KASKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions submitted by petitioner were untimely pursuant to N.J.A.C. 1:1-18.4, having been filed on September 19, 1994 in response to an initial decision mailed on August 30, 1994. Therefore, these and the Board's reply thereto are not herein considered.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner has not met his burden of establishing by a preponderance of the credible evidence that the action of the Board in withholding his employment and adjustment increments for the 1993-94 school year was arbitrary, capricious or based on improper motive.

Accordingly, the Commissioner adopts the initial decision of the Office of Administrative Law and hereby dismisses the instant Petition of Appeal.

OCTOBER 6, 1994

DATE OF MAILING - OCTOBER 6, 1994

COMMISSIONER OF EDUCATION

267-94

BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

PETITIONER,

V.

GRISELDINA GUERRA AND CERBINO CABARCAS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 6, 1994

OAL DKT. NO. EDU 1398-94

BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

PETITIONER,

V.

GRISELDINA GUERRA AND CERBINO CABARCAS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 6, 1994

DATE OF MAILING - OCTOBER 6, 1994

CATHERINE ROWLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 6, 1994

OAL DKT. NO. EDU 11350-93

CATHERINE ROWLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 6, 1994

DATE OF MAILING - OCTOBER 6, 1994

269-94

EDWARD SABOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 6, 1994

OAL DKT. NO. EDU 9849-93

EDWARD SABOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 6, 1994

DATE OF MAILING - OCTOBER 6, 1994

270-94

270-94

DAVID C. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, unsuccessful candidate for provisional certification as a principal, challenged State Board of Examiners decision denying his application.

ALJ found that petitioner's attendance at and successful completion of courses, together with his work experience, was insufficient to meet the specific requirement of N.J.A.C. 6:11-9.5(a)1 that a candidate for provisional certificate as a principal hold a master's degree or an equivalent degree from an accredited institution in one of the recognized fields of leadership or management. ALJ concluded State Board of Examiners decision denying the certificate was not arbitrary or capricious and was a reasoned exercise of the Board's discretionary authority. ALJ affirmed the denial and dismissed the petition.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 12, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7551-94

AGENCY DKT. NO. 284-7/94

DAVID C. WILLIAMS,

Petitioner,

v.

STATE OF NEW JERSEY,

DEPARTMENT OF EDUCATION,

STATE BOARD OF EXAMINERS,

Respondent.

Lee A. Emmer, Esq., for petitioner (Rubin, Rubin, Malgran, Kaplan & Kuhn, attorneys)

Marlene Zuberman, Deputy Attorney General, for respondent (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: August 29, 1994 Decided: August 30, 1994

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the decision of the State Board of Examiners denying his application for a provisional certificate as a principal pursuant to N.J.A.C. 6:11-9.5 (Exhibit J-1). Petitioner appealed the denial by filing a petition on July 11, 1994, and respondent filed an answer on

August 11, 1994. The matter was transmitted to the Office of Administrative Law (OAL) on August 5, 1994, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge (ALJ) on August 16, 1994, and a telephone conference was held on August 24, 1994. An expedited hearing was scheduled for August 29, 1994, and on that date a hearing was held and concluded and the record closed.

FACTUAL DISCUSSION

The essential facts in this matter are not disputed.

Petitioner testified that the Piscataway Board of Education advertised for applicants for the position of principal of Piscataway High School, Piscataway Township Schools. Petitioner, who was residing in Tennessee and had just completed the requirements for a doctoral degree, applied for the position and went through the interview process. He indicated he understood that to be eligible for the position he would be required to obtain a provisional certification as a principal.

Margaret L. Smith, Planning Associate with the Department of Education testified that among her duties are the providing of staff support for the Board of Examiners. Ms. Smith indicated that her role is to assist applicants for certification by advising them of the requirements for certification, reviewing submissions, suggesting clarification or supplementation of submissions where the initial submissions are clearly deficient, and submitting complete packages of documents to the members of the State Board of Examiners. Ms. Smith made it clear that she makes no judgment as to the sufficiency of an application nor as to whether an application should be approved or denied.

Ms. Smith testified that the State Board of Examiners refused to issue a provisional principal certificate to petitioner because petitioner does not hold a master's degree or its equivalent in the specified fields of leadership or management as required by the provisions of N.J.A.C. 6:11-9.5. She also indicated that in three prior similar matters, the Board likewise denied a provisional principal certificate to applicants lacking a master's degree or its equivalent.

Ms. Smith explained that the State Board of Examiners has accepted courses of study such as that leading to a New York State certificate as the equivalent of the master's degree required by N.J.A.C. 6:11-9.5.

On cross-examination, Ms. Smith indicated that the State Board of Examiners requires an applicant to attend an integrated, coherent program as a requirement for complying with the regulation's requirement for a master's degree or its equivalent. She acknowledged that the petitioner in this matter had successfully taken various courses throughout his academic career and that he presented the courses that he took and correlated them to courses offered at Rutgers University leading to the required master's degree. She also acknowledged that petitioner provided letters and other documents which addressed petitioner's administrative experience. She acknowledged that petitioner fulfilled all other requirements but indicated that he failed to fulfill the requirement for attendance at an integrated, coherent program leading to a master's degree or its equivalent in the specified fields.

Petitioner testified and identified the package of documents (Exhibit J-2A through Q) which he submitted to the State Board of Examiners in support of his application for a provisional principal certification. He also identified the written instructions for credentials review given to him by respondent (Exhibit P-1).

Petitioner testified as to his work experience which is set forth in his resumé (Exhibit J-2K) as well as the various courses he has taken leading to the degrees which he does hold (Exhibit J-2P). He testified that he went to Rutgers University School of Educational Leadership and obtained a listing of course requirements leading to the required master's degreee (Exhibit J-2L). He then reviewed his courses and compared them to the courses offered by Rutgers. He took each course in the Rutgers Catalogue (Exhibit J-2M) and compared them to the courses that he successfully completed at the University of Tennessee (Exhibit J-2N) and at Austin Peay University (Exhibit J-2O). He submitted this documentation to the Board together with his written comparison (Exhibit J-2Q) showing that the courses taken by him were equivalent to courses which would have been taken leading to the required master's degree at Rutgers University.

Petitioner testified that when he appeared before the Board of Examiners they did not question him concerning course equivalency, his resumé, his publications or his doctoral dissertation.

LEGAL DISCUSSION AND ANALYSIS

Any teaching-staff member, tenured or otherwise, employed in the public schools must be the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of pupils in the public schools. N.J.S.A. 18A:26-2. Certificates are issued by the State Board of Examiners pursuant to rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. A comprehensive set of regulations found at N.J.A.C. 6:11-1.1 to -11.20 describes the various certificates which may be issued, sets forth the requirements for obtaining a particular certificate, designates which certificates are required for which positions, prescribes requirements for teacher education programs and otherwise fully regulates the issuance of certificates.

N.J.A.C. 6:11-9.3(b) provides that a principal endorsement may be issued on a New Jersey administrative and supervisory certificate. A principal endorsement is required for the positions of principal or vice principal, among others.

N.J.A.C. 6:11-9.5(a)1 provides:

> (a) Each candidate for the provisional certificate as a principal shall:
>
> 1. Hold a master's degree or its equivalent from an accredited institution in one of the recognized fields of leadership or management, such as educational administration, public administration, business administration, leadership or management science. Study shall be completed, either within the master's program or in addition to it, in each of the following topics which represent those areas of management that are directly related to education and the principalship. Degree programs may provide study in other areas at the discretion of the sponsoring institution and its faculties;
>
> i. Leadership and human resource management;
>
> ii. Communications;

iii. Quantitative decision-making; and
iv. Finance and law.

The crucial issue to be decided in this matter is the meaning of the first sentence found at N.J.A.C. 6:11-9.5(a)1. Petitioner argues that he is entitled to a provisional certificate as a principal because his work experience together with the formal courses he has taken in his academic career leading to a Bachelor's Degree in Political Science and History, a Master's Degree in Curriculum and Instruction, Social Science Education and his Doctor of Education Degree in Foundations, Curriculum and Instruction are the equivalent of a master's degree. On the other hand, the position of respondent is that successful completion of an integrated, coherent program in the areas specified by the regulation is required in order for an applicant to meet the requirement of the equivalent of a master's degree entitling the applicant to a provisional certificate as a principal.

Statutes and regulations promulgated pursuant to such statutes must be read so as to implement the Legislative intent to the extent permitted by the statute. Foreign Auto Prep. Service v. New Jersey Economic Development Authority, 201 N.J. Super. 428, 433 (App. Div. 1985). Administrative regulations which are duly promulgated under properly delegated authority have the force and effect of law. Cox v. Bon Transportation, Inc., 53 N.J. 186 (1969); State v. Van Riper v. Atlantic City Elec. Co., 23 N.J. 259, 270 (1957).

Administrative regulations are subject to the same rules of construction as a statute. State, Dept. of Health v. Tegnazian, 205 N.J. Super. 160, 175 (App. Div. 1985). In construing a statute or regulation, one generally looks first to its plain language, and if it is clear and unambiguous, one need not look beyond its terms to determine the Legislature's intent. State v. Sutton, 132 N.J. 471, 479 (1993). In this case, a candidate for the provisional certificate as a principal is required to hold a master's degree from an accredited institution in one of the recognized fields of leadership or management, such as educational administration, public administration, business administration, leadership or management science. An alternative provided by the regulation is that the candidate for the provisional certificate as a principal may hold the equivalent of a master's degree from an accredited institution in these same recognized fields of leadership or management. The language of this sentence clearly requires that an

applicant hold a master's degree or some equivalent degree from an accredited institution. In this regard, the decision of the State Board of Examiners indicates "the regulations are specific with respect to the requirement of a degree program in a particular field." The State Board of Examiner's decision goes on to state:

> The Board finds that the lack of a master's or higher degree in one of the recognized fields of leadership or management requires that the certificate sought not be issued.

Both of the parties to this proceeding took the position that in order for the decision of the State Board of Examiners to be overturned it must be shown to be arbitrary or capricious, and not a reasoned exercise of its discretionary authority, citing Babicz v. State Board of Examiners, 1978 S.L.D. 937, 940 aff'd State Board, 1979 S.L.D. 816; Marshello v. New Jersey State Board of Examiners, 92 N.J.A.R. 2d (EDU) 378, 381.

In this matter, I **FIND** that based upon the clear language of N.J.A.C. 6:11-9.5(a)1, it is required that a candidate for the provisional certificate as a principal is required to hold a master's degree or an equivalent degree from an accredited institution in one of the recognized fields of leadership or of management such as educational administration, public administration, business administration, leadership or management science. I **FIND** that work experience coupled with attendance and successful completion of courses at an accredited institutions which do not lead to a master's degree or its equivalent from an accredited institution in one of the specified fields is not sufficient to comply with this requirement. I **FIND** that petitioner's attendance at and successful completion of courses together with his work experience, is insufficient to meet this specific requirement of the regulation. Accordingly, I **CONCLUDE** that the decision of the State Board of Examiners dated April 8, 1994, denying the issuance of a provisional principal certificate to petitioner is not arbitrary or capricious and is a reasoned exercise of the Board's discretionary authority. Accordingly, I **CONCLUDE** that the actions of respondent denying petitioner the provisional principal certificate should be **AFFIRMED** and that petitioner's appeal should be **DISMISSED**.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that respondent's denial of petitioner's request for a provisional principal certificate is hereby **AFFIRMED** and petitioner's appeal is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 30, 1994
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

9/1/94
DATE

Hope Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 07 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jz

LIST OF WITNESSES

For petitioner:

David C. Williams
Gordon H. Moore

For respondent:

Margaret L. Smith

LIST OF EXHIBITS

Joint Exhibits:

J-1 State Board of Examiners decision, dated April 8, 1994

J-2A Memorandum, dated January 28, 1994

J-2B Certification Credentials Review Summary, dated January 5, 1994

J-2C Narrative describing equivalency of work experience

J-2D Maury County Public Schools correspondence of January 31, 1994

J-2E Maury County Board of Education evaluations

J-2F Brentonwood High School correspondence, dated January 31, 1994

J-2G Williamson County Schools materials

J-2H Correspondence from William Nolan and the Psychiatric Hospital at Vanderbilt

J-2I State of Tennessee certification

J-2J State of Tennessee certification

J-2K Petitioner's resumé

J-2L Rutgers University course of instruction to earn a master of education degree in administration and supervision

J-2M Excerpt from Rutgers University Catalogue

J-2N Successfully completed courses - University of Tennessee

J-2O Successfully completed courses - Austin Peay University

J-2P University of Tennessee and Austin Peay University Academic Transcripts

J-2Q Comparison of graduate course of study

For petitioner:

P-1 Procedures for Credentials Review

Accordingly, as the Commissioner may not substitute his judgment for that of the Board lawfully applied, the recommendation of the Office of Administrative Law dismissing the Petition of Appeal is adopted as the final decision in this matter for the reasons expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

271-94

271-94

THOMAS AND ROSEANN CONNELLY, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

:

OCTOBER 12, 1994

OAL DKT. NO. EDU 11872-93

THOMAS AND ROSEANN CONNELLY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

272-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
HOBOKEN, HUDSON COUNTY.	:	
	:	

OCTOBER 12, 1994

OAL DKT. NO. EDU 4659-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
HOBOKEN, HUDSON COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

273-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

OCTOBER 12, 1994

OAL DKT. NO. EDU 4537-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

274-94

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF HOBOKEN, HUDSON COUNTY.	:	
	:	

OCTOBER 12, 1994

OAL DKT. NO. EDU 4656-94

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF HOBOKEN, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

275-94

J.P. MC C., on behalf of his ward and grandson S. MC C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 12, 1994

OAL DKT. NO. EDU 2528-94

J.P. MC C., on behalf of his ward and grandson S. MC C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

276-94

EVA T. SZILLERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 12, 1994

OAL DKT. NO. EDU 4977-94

EVA T. SZILLERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

277-94

277-94

J.R., by his parents and legal guardians, AND J.H., by his parents and legal guardians,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 12, 1994

OAL DKT. NO. EDU 4539-94

J.R., by his parents and legal guardians, AND J.H., by his parents and legal guardians,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILNG - OCTOBER 12, 1994

278-94

278-94

FRANCES COLBY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATON
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 12, 1994

OAL DKT. NO. EDU 528-94

FRANCES COLBY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATON
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 12, 1994

DATE OF MAILING - OCTOBER 12, 1994

279-94

279-94

L.B., on behalf of her minor child, D.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent appealed expulsion of her child, D.B., from school for allegedly brandishing a weapon and attempting to assault another high school student.

In light of testimony and documentary evidence, the ALJ found the Board was justified in expelling D.B. under N.J.S.A. 18A:37-2 and peitioner failed to establish by a preponderance of credible evidence that the Board's action was improper. (Kopera)

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 14, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4975-94
AGENCY DKT. NO. 84-4/94

L. B., PARENT OF D. B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Ashton E. Thomas, Esq., for petitioner

Vito A. Gagliardi, Jr., Esq., for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: August 12, 1994 Decided: September 8, 1994

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

L. B., parent of D. B., a student at Elizabeth High School, appealed to the Commissioner of the Department of Education after the Board of Education of the City of Elizabeth, Union County, resolved on April 13, 1994, to expel D. B. for brandishing a weapon and attempting to assault another high school student on March 18, 1994, contrary to *N.J.S.A.* 18A:37-2. Her petition on his behalf was filed in the Bureau of Controversies and Disputes of the Department of Education on April 21, 1994. The

Board filed its answer there on May 16, 1994 contending that D. B.'s assaultive conduct was subject of a duly convened expulsion hearing on sworn testimony and that action taken was under the circumstances reasonable and proper. The Commissioner transmitted the matter to the Office of Administrative Law on May 19, 1994 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.* The petition sought judgment requiring reinstatement.

On notice, the matter came on for hearing June 29 and 30, 1994, and was concluded. It was stipulated procedural facts of the explusion process were not in dispute. Thus, there is no Tibbs issue: *i.e.*, petitioner did not allege any constitutional due process insufficiency or irregularity under the doctrine of *Tibbs v. Board of Ed., Franklin Township*, 59 *N.J.* 506 (1971), affirming 114 *N.J. Super.* 287 (App. Div. 1970); and see, most recently, decision of the Commissioner *in R. W. v. Board of Ed., Hunterdon Central Regional High School*, 93 *N.J.A.R.* 2d (EDU) 113, 114-5 (December 17, 1992) (suspension procedure reviewed and approved).

Remaining at issue, therefore, is whether petitioner shall have established by preponderance of credible evidence that action of the Board in expelling D. B. was improper, that is, patently arbitrary, without rational basis or induced by improper motive. *Kopera v. West Orange Board of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Action of a local school board that lies within its discretionary powers may not be upset otherwise. *Id.* at 294. Power to suspend or expel is delineated in *N.J.S.A.* 18A:37-2, which provides:

> Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, . . . or who shall cut, deface or otherwise injury any school property, shall be liable to punishment and to suspension or expulsion from school.
>
> Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
>
> (a) Continued and willful disobedience;

(b) Open defiance of the authority of any teacher or person, having authority over him;

(c) Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils;

(d) Physical assault upon another pupil;

(e) Taking, or attempting to take, personal property or money from another pupil, or from his presence, by means of force or fear;

(f) Willfully causing, or attempting to cause, substantial damage to school property;

(g) Participation in an unauthorized occupancy by any group of pupils or others of any part of any school or other building owned by any school district, and failure to leave such school or other facility promptly after having been directed to do so by the principal or other person then in charge of such building or facility;

(h) Incitement which is intended to and does result in authorized occupation by any group of pupils or others of any part of a school or other facility owned by any school district; . . .

According to L. B.'s petition for relief:

. . .

5. On or about March 18, 1994 [D. B.] completed his sixth period chemistry class. En route to seventh period class, he met two other students. The three walked together through the hallway of the high school. At approximately 1:30 p.m. a group of 15 students congregated around petitioner's son. There were no teachers or security guards present in the hallway at the time.

6. One of the students in the group drew a knife. [D. B.] retreated to his friends, one of whom passed him a knife.

7. A confrontation followed between [D. B.] and the group of students. No one was stabbed or cut with the knives. . . .

EVIDENCE AT HEARING

I

Called by petitioner, John Lopez, a graduating senior at Elizabeth High School and friend of D. B., testified that in early March, 1994 he and some friends were confronted by an angry group of other students who demanded to know who had stabbed another friend. Later, he said, rumors flew that friends in their group were seeking retaliation for the incident against him and D. B., all of which he said was mentioned to a security guard at the high school. Later, Lopez said, he borrowed a 12-inch-long knife from another friend and brought it, concealed, to the high school. On March 18, 1994 he was carrying it concealed when he was accosted by members of the same angry group he met with D. B. some days before. He thought they might start trouble, keeping knife concealed for fear they would hurt him. After a gym class, he met D. B. in a student lounge and recited what happened. In the hallway a commotion among the other students began. With D. B. in front, he took out the concealed knife and gave it to D. B. With between 15 to 20 other students, sparring broke out near classroom 112A. Someone threw a garbage can, he said. The window to the classroom door was broken, he said, but he did not know how. He did not see any more, nor, especially, what D. B. did. He identified a photograph of a machete knife (R-4) as the one he obtained from a friend and later gave to D. B. He admitted it measured more than 12 inches in length. He heard no glass breaking, he said. He and D. B. hid the knife and left the building at Lopez' suggestion.

In testimony, D. B. said he was a junior at the high school at time of the incident. Born July 2, 1976, he became 18 years old July 2, 1994. He is 5'9" tall and weighs 188 pounds; he played junior varsity and varsity football as middle linebacker and tailback. He said he was told by Lopez of an earlier stabbing incident in which an acquaintance

had stabbed a Haitian student outside school. On March 15, 1994, he spoke to a football coach in the school cafeteria who told them he heard there were "problems with Haitians." He said the coach said to watch himself and take care. On March 18, 1994, D. B. and Lopez were walking down a school corridor toward another building for their next classes when they were surrounded by a "group of Haitians." One of the group had a knife and threatened assault. Lopez gave him the 12-inch machete (P-4) just before someone threw a garbage can at him. He thought it was the garbage can that broke the window in the classroom door. As he and Lopez left the school, D. B. said he threw the machete in a snow bank. Later they were arrested by police and still later released to Lopez' mother. He identified the knife he wielded as that in the photograph (R-4). He admitted, on cross-examination, he may have broken the classroom door window accidentally with the butt of the knife.

Called by petitioner, Jeffrey Townsend, an 18-year-old 11th grade high school student testified that on March 18, 1994 between 1 p.m. or 1:30 p.m. in the hallway between buildings Dwyer and Dunn in company of Lopez, "a group of Haitians" started arguing with D. B. Townsend said he could not understand what was said. About 10 to 13 Haitian students seemed to surround him; one pulled out a knife. As D. B. stepped back, he said, Lopez passed him the machete knife (P-4) and with it D. B. approached the Haitian group, some of whom began fighting with Lopez. Townsend said he did not get involved.

He admitted he and D. B. could have left the scene without confrontation by going back down the hall from which they came.

One of the Haitian group, he said, threw a garbage can and struck D. B. D. B. said "If you're going to kill me, kill me" and "I'm gonna kill you, kill you." Moments later teachers and security personnel arrived. There were sounds of "code 9, code 9." Townsend said he grabbed D. B. and told him to leave and make sure no one got hurt. D. B. had the knife in hand. They walked to the exit door and left. On cross-examination, he conceded D. B. had used the knife with blade up to break glass in the

classroom door but denied D. B. was hacking at it. He identified the knife used as that in photo R-4.

II

Called by the Board, Domenico Servidio, employed by the district as a uniformed security guard, testified that about 1:35 p.m. on March 18, 1994 when he was in the administration office he heard a code 9 emergency call. Responding toward classroom 112A, he saw D. B. among a group of students, knife in hand, running after them with knife held blade up, shouting "I'm gonna kill you." By this time, he said, the hallway had become filled with security guards, teachers and numerous students. Servidio said he saw D. B. leave the building with his friend via exit 8 still holding the knife, blade up. Servidio said he was fearful D. B. was going to kill him or someone. He saw no other student with a knife. He saw Lopez, whom he knew, throw a garbage can against the classroom door, this before D. B. broke the glass in the door.

Called by the Board, Georgina Urbay, a bilingual teacher of history employed by the Board for 15 years, testified that on March 18, 1994 during a seventh period class she was in room 112, first floor, the classroom of teacher Mariceli Sanchez. Suddenly several students ran into the room excitedly. One locked the classroom door; she was screaming. Then someone slashed through the glass of the door but Urbay did not know who it was. One student had a small cut. Urbay said though she tried to calm the panic-stricken students, she herself was frightened by what she saw and heard. Though she did not know exactly what it was, she said the instrument used to break glass in the door was something long and metal. None of the students that ran into the classroom before then was carrying anything that looked like a knife or other instrument.

For the Board, Michael Beecher, employed as an ESL teacher at the high school, testified he was proceeding between buildings on change of sixth and seventh period classes toward his classroom, 113D, which adjoins classroom 112A.

Configuration of classrooms are shown on his sketches (R-6 and R-7). Two classroom doors, which open outward into the hallway, give access to classrooms 112A and 113. From those two classrooms, access by two interior doors open into classrooms 112 and 113A. Urbay's classroom is 112. Entering classroom 113D, Beecher put down his bags when some of his students ran to the open door. Running there himself, Beecher saw D. B. with a large knife in his hand just about two feet outside the door with a knife in hand (R-4) held up over his head. He yelled, "You're going to die, I'm going to kill you" into the classroom. By this time, he said, the door was closed. Beecher tried to keep his students from danger, pulling them back into the class. He held the classroom door shut: from inside it was not lockable, from outside it was locked. Through doorway glass Beecher could see D. B. hacking on the door and window frame of classroom 112A, breaking the wood with a chopping motion. D. B. struck the door about ten times. Several of Beecher's students were crying. Minutes later, he said, D. B. vanished; by this time there were almost 50 people outside, mostly students, teacher assistants and guards. Beecher saw Servidio and Effram Borgas, another teacher, across the hallway. He said D. B. used a lot of force, as much as he could muster. The scene raged for almost 15 seconds. Beecher said his mind was beset that his students would be injured.

For the Board, Mariceli Sanchez, a tenured history-bilingual teaching staff member, testified that on March 18, 1994 at 1:30 she was present with her class in room 112A just as class was about to begin. The door was still open. Urbay was present with her. She said she heard shouting and two of her students with their bookbags excitedly entered. One closed the door. Suddenly, someone from outside smashed the door window. She did not see who it was. She panicked, started screaming and ran to back of the classroom. The classroom door locked preventing access from outside. She and her students were badly frightened, she said.

For the Board, Herbert Hayward, employed by the Board as security guard for the past seven years and stationed at the high school, testified that a day or two before March 18, 1994 he talked casually with D. B. and Lopez when he questioned them in

the hallway about where they belonged then. D. B. said he thought some students were following him, pointed to a group of "Haitian students" and said he would defend himself if need be. Hayward told the other students to pass by and go the other way or he would have them suspended. He regarded the incident as not serious and of no consequence because, he said, he knew the students involved.

For the Board, Charles Saunders, a 20-year Board employee as assistant disciplinarian at Dunn Sports Center of the high school, testified that on March 18, 1994 at about 1:30 p.m. he had cafeteria duty in Dwyer. He heard "code 9" on the loudspeaker; he carried a walkie-talkie. He saw a commotion in the hallway as two teacher assistants tried to control a crowd gathered outside a classroom. He saw D. B. standing with a big machete 25 to 30 feet away staring at the door to classroom 112A. The door was locked; the door window was broken. He identified the machete as R-4. Saunders felt compelled to pick up a waste basket to protect himself from D. B., to whom he said, "Put the knife down, come with me." At the time three teaching assistants were present. The crowd of students numbered 100; they appeared afraid, as was Saunders, who said he feared for his life. He next saw D. B. and Lopez whispering together. As they left, D. B. threw the machete into a snow bank outside.

Inside the class, Saunders found Urbay so shaken she could not speak. Her students appeared terrified, their eyes wide in fear.

For the Board, Jerry Moore, a teaching assistant and head football coach employed by the Board, testified he was assigned to Dunn Center as security personnel. He has known D. B. and knew him as a football player for two years on sophomore and junior varsity teams who was permitted to dress as a linebacker for the varsity. He did not play the sport in 1993.

On March 18, 1994 at 1:30 p.m. Moore was en route to his post in Dunn Center when he heard a "code 9," assistance needed. He turned to see a crowd of students running and screaming towards him as D. B. wielded a knife, described by Moore as

15-inches long, blade up, swung horizontally back and forth. Moore hollered for help and tried to keep students back. Other teaching assistants arrived at the scene. Moore saw D. B. use the blade of his knife to chop at the window frame and break the window of the classroom door.

For the Board, David Costello, a 24-year employee of the Board as teaching assistant and assistant athletic director at the high school, testified that on March 18, 1994 at 1:30 p.m. he was in the front of the gym at his post when he heard a code 9 signal. He ran to Dwyer in time to see a crowd of some 20 to 30 students coming toward him. They were frightened. They came from around the corner of classroom 112A. There was chaos, students yelling "Knife, machete." D. B. stood near the classroom door with machete in hand, blade up, hacking at the classroom door. Door window glass was on the floor. D. B. yelled "I'll kill you, I'll kill all of you." He was in a rage. Costello said in all his career that was the scariest moment he ever had because he thought people would be hurt before his eyes.

He saw no one threatening D. B., who did not appear to listen and was unapproachable.

For the Board, Fred Cheski, employed as house director of Dwyer for 17 years, overseer of total operations of the House, who is tenured as administrator, testified that on March 18, 1994 at 1:30 p.m. he was in exit C of Dwyer when he heard a large noise and commotion, students screaming, rushing about, knocking people out of the way. He met other administrators and went to another room with Costello, where he was told of D. B.'s conduct. He later examined the classroom door and noted shattered glass, chop marks on the door frame, a desk and chairs turned over. He counted four chop marks on the door frame. One student was cut over the eye. Two others were crying and shaking. Teacher Urbay was so visibly shaken she had to be calmed by the school nurse.

Later investigation disclosed, he said, D. B. at time of the incident was supposed to be on the second floor of Halsey building, two floors and two buildings away. Thus, he said, D. B. was out of his way and could not normally have made a timely class change.

III

For the Board, Enid Golden, director of special education services for the past six years, holder of teaching certificates for teacher of the handicapped, supervisor and principal, school administrator and LDT/C, supervised reference of D. B.'s case to the child study team before Board hearing. According to the CST report (R-2), it was reported that on March 18, 1994 at approximately 1:30 p.m. D. B. tried to attack another student, J. S., by using a two-foot machete knife to break glass on teacher Sanchez' classroom door where [another student] was in class at the time. According to the CST (composed of an LDT/C, a social worker and a psychologist), the recommendation was:

> . . . [D. B.] does not meet eligibility criteria for special education and/or related services. Any academic weaknesses can be addressed in regular education.

In Golden's professional opinion, the CST assessment complied with *N.J.A.C.* 6:28-3.4 as an "initial evaluation" and *N.J.A.C.* 6:28-2.8(g).

Finally, for the Board, its administrative assistant to the superintendent/director of personnel, Thomas Ficarra, who has been with the district 19 years and two years in his present position, testified that a report of the March 18, 1994 incident was given to him by the school principal. He ordered an investigation and later scheduled a meeting preliminary to an administrative hearing, which on April 6, 1994 faculty members, D. B., his mother and his attorney, and Jeffrey Townsend and his mother, together with Board attorney, attended. Afterward, Ficarra said, he recommended to the superintendent a report to the Board to conduct formal expulsion proceedings. At that hearing on April 13, 1994, he said, ten witnesses were sworn, examined and cross-examined. D. B.

presented his case. Afterward, the superintendent with Ficarra's concurrence recommended to the Board D. B.'s formal expulsion. Basis for recommendation, he said, was evidence of an incident caused by D. B. with total chaos, D. B.'s violent actions with a machete, nearly 100 people endangered. His opinion was that that level of violence simply could not be tolerated in the schools.

When the Board acted, he noted, it had available both the CST report (R-2) and D. B.'s school disciplinary record (R-8).

DISCUSSION

D. B. argued principally that his actions were lawful and necessary in defense of himself and that the Board's expulsion was therefore arbitrary and unlawful. Key to D. B.'s theory of the case is in the petition: confrontation between him and "a group of students" followed when one of the students in the group drew a knife and D. B. retreated to his friends, one of whom passed him a knife. In the confrontation that followed, he said, "no one was stabbed or cut . . ." Petition at paragraphs 6, 7. But the theory is flawed.

Testimony at hearing readily showed a much different scenario on March 18, 1994. D. B.'s assaultive conduct upon students, teachers and administrators in the hallway outside classroom 112 was no last ditch effort to protect himself from harm. Not only had D. B. armed himself with a knife long before he and a friend arrived at the classroom but by all measure he could have avoided confrontation entirely by the simple expedient of retreat, that is, by leaving the scene and going elsewhere. Confrontation was of his own making. The expulsion statute in school law, *N.J.S.A.* 18A:37-2, 2.1, is expressly wedded *in pari materia* with New Jersey's Code of Criminal Justice, which prohibits both simple and aggravated forms of assault as attempts purposely, knowingly or recklessly to cause bodily harm to another, particularly with a deadly weapon. *Cf., N.J.S.A.* 18A:37-2.1 and *N.J.S.A.* 2C:12-1. To be guilty of either, depending upon the facts, one need inflict no actual bodily injury. More importantly,

however, principles of justification in the New Jersey Code of Criminal Justice carefully limit use of force for self-protection. Though justifiable when the actor reasonably believes it is immediately necessary for self-protection against use of unlawful force by another, deadly force is never justifiable if the actor knows he can avoid necessity of using it with complete safety by retreating or by complying with demand he abstain from any action that he has no duty to take. *N.J.S.A.* 2C:3-4b(2)(b). Violent force in defense of self has never been allowed under New Jersey law when the situation creating necessity for use of the force is itself created by the actor. *See, e.g., State v. Agnesi*, 92 *N.J.L.* 53, 56-7 (1918); affirmed, 92 *N.J.L.* 638 (E. and A. 1919). Evidence in the cause quite simply failed to substantiate D. B.'s claim he acted only to defend himself. Not only was that not so, but evidence was also clear his intention long before confrontation was upon a violence for which he carefully armed himself first. To that extent he was *provocateur* not victim.

D. B.'s claim is flawed even more fundamentally for another reason. Devoid of candor or contrition, his testimony like that of witnesses called to support him was not worthy of credence. It was to his obvious advantage to establish that others threatened him with a knife first. No knife was found nor was testimony of its existence convincing. His credibility was directly impeached by testimony of Board eyewitnesses.

Action of a local school board that lies within discretionary powers, like that under *N.J.S.A.* 18A:37-2, may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The burden is cast on D. B. as petitioner, therefore, to demonstrate the Elizabeth Board's decision to expel him was arbitrary, capricious and unreasonable. *K. L. v. Board of Ed. of Matawan/Aberdeen High School District*, 91 *N.J.A.R.* 2d (EDU) 74, 76 (October 24, 1991); *M. G. v. Board of Ed. West Deptford, Glouster County*, 1983 *S.L.D.* 359, 354.

I **FIND** from all the evidence the Board was fully justified in expelling D. B. for violent assaultive unprovoked behavior in the high school on March 18, 1994, under

N.J.S.A. 18A:37-2. The burden of proof has not been sustained. D. B. possessed and brandished a deadly machete knife in the hall of the high school with which he had armed himself beforehand in order indiscriminately to threaten other students, teachers and administrators, who were put in fear for their lives. The confrontation was of his own creation. It was not a response to any palpable threat by others. On the evidence any threat was not real but imagined for the self-serving purpose of avoiding the consequence of his acts, the last of which was to discard the incriminating weapon in a snow bank. His unprovoked behavior was not only assaultive but violent and disobedient, in open defiance of authority and destructive of school property. The tragedy is his dangerous rampage was avoidable.

The Board properly afforded D. B. due process of law at expulsion hearing and acted only then after having considered recommendation of the child study team that found no evidence he was educationally handicapped or, presumably, otherwise unable intelligently to conduct himself.

D. B. is no victim; he is a *provocateur* whose violent behavior cannot be tolerated in public schools. Action of the Elizabeth Board of Education in expelling him for egregious assaultive behavior in the high school was reasonable and proper. *Cf., Kobb v. Bd. of Ed. Township of Ocean*, 1980 *S.L.D.* 262-3 (welfare and safety of other pupils paramount).

CONCLUSION

For foregoing reasons, based on testimony and documentary evidence adduced, as well as memoranda of law by the parties, I **CONCLUDE** action of the Board of Education of the City of Elizabeth, Union County, in expelling D. B. for assaultive conduct violative of *N.J.S.A.* 18A:37-2 should be and is hereby **AFFIRMED**. The petition of appeal is **DISMISSED**.

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

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

OAL DKT. NO. EDU 4975-94

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 8, 1994
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

September 8, 1994
DATE

Hope R Blackston
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 08 1994
DATE

OFFICE OF ADMINISTRATIVE LAW
ADMINISTRATIVE LAW JUDGE

amr

EXHIBIT LIST

R-1 Resolution of Elizabeth Board of Education dated April 13, 1994, to expel petitioner as student of the district, effective April 14, 1994; review of child study team report noted

R-2 Child study team report after evaluations on April 4, 6 and 7, 1994, concluding D. B. did not meet eligibility criteria for special education and/or related services, any academic weaknesses addressable in regular education

R-3 Partial transcript of expulsion hearing before Board on April 13, 1994

R-4 Photograph of machete knife 10-inch blade, 4-inch handle

R-5 (For identification) Petitioner's notice of claim to Elizabeth Board of Education dated April 3, 1994

R-6 Sketch at hearing showing school hallway and entrance doors to classrooms 113 and 112A

R-7 Sketch at hearing showing hallway and doorway entrances to classrooms 112, 112A, 113 and 113A

R-8 Stipulation by parties that D. B. was suspended for three days in December 1993 during academic year 1993-94 for leaving high school during school hours without authorization

L.B., on behalf of her minor child, D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions submitted by petitioner were untimely pursuant to N.J.A.C. 1:1-18.4 inasmuch as the initial decision was mailed to the parties on September 8, 1994, and petitioner's exceptions were filed with the Commissioner on September 22, 1994. Therefore, neither the exceptions nor the reply thereto was considered.

Upon careful and independent review, the Commissioner concurs with the ALJ that the Board's decision to expel D.B. for his assaultive conduct was neither arbitrary and capricious nor unreasonable. The Commissioner finds and concludes that the record fully justifies the Board's use of its discretionary powers under N.J.S.A. 18A:37-2 and petitioner failed to establish by a preponderance of credible evidence that the Board's action was improper. Kopera, supra

Accordingly, the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 14, 1994

DATE OF MAILING - OCTOBER 14, 1994

279-94

EDU #4975-94
C # 279-94
SB # 47-94

L.B., on behalf of her minor child, D.B.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 14, 1994

For the Petitioner-Appellant, Randy Davenport, Esq.

For the Respondent-Respondent, Riker, Danzig, Scherer, Hyland & Perretti (Vito A. Gagliardi, Esq., of Counsel)

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

Orlando Edreira recused himself from proceedings in this matter.

June 7, 1995

Date of mailing JUN 09 1995

280-94

280-94

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DIVISION OF FINANCIAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 18, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10945-93

AGENCY DKT. NO. 280-7/93

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

Petitioner,

v.

DIVISION OF FINANCIAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

James T. Hundley, Esq., for petitioner (Hundley, Parry & Hopkins, attorneys)

David E. Powers, Deputy Attorney General, for respondent (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: August 30, 1994 Decided: August 31, 1994

BEFORE **LILLARD E LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 1993, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

August 31, 1994
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

9/12/94
DATE

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 15 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED
AUG 30

Hundley, Parry & Hopkins, P.C.
James T. Hundley, Esq.
35 Beach Road
Post Office Box 488
Ocean Grove, NJ 07756
(908) 775-3100
Attorneys for Petitioner

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, COUNTY OF MONMOUTH,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	OAL DKT. NO. EDU-10945-935 AGENCY REF. NO. 280-7/93
vs	
DIVISION OF FINANCIAL SERVICES, NEW JERSEY, STATE DEPARTMENT OF EDUCATION,	STIPULATION OF SETTLEMENT
Respondent,	

WHEREAS, on April 24, 1991, the Petitioner terminated the employment of eleven (11) educational aides employed by the District; and

WHEREAS, on May 13, 1991, the Petitioner filed an application with the New Jersey State Department of Education for a Quality Education Act Discretionary State Aid Grant for the 1991-92 school year; and

WHEREAS, the Petitioner's application for the Discretionary Aid Grant proposed the rehire of ten (10) educational aides; five (5) elementary library aides and five (5) elementary remedial aides; and

WHEREAS, the Petitioner's application for the Discretionary Aid Grant proposed to hire two (2) educational aides for the District's Pre-School Program; and

WHEREAS, the Petitioner's application for the Discretionary Aid Grant proposed to purchase school furniture, equipment, supplies and materials; and

WHEREAS, the Petitioner's application for the Discretionary Aid Grar proposed replacement of interior hallway ceilings at the District's Ridge Avenue Elementary School; and

WHEREAS, on or about July 30, 1991 the Petitioner was notified by the Department of Education that the District's application for a Discretionary Aid Grant had been approved in the amount of $1,207,297; and

WHEREAS, on August 28, 1991, the Petitioner rehired eleven (11) educational aides previously terminated by the Petitioner on April 24, 1991; and

WHEREAS, on August 28, 1991, the Petitioner assigned six (6) of the rehired educational aides to the elementary remedial/library aide positions funded by the Discretionary Aid Grant; and

WHEREAS, on August 28, 1991, the Petitioner transferred four (4) educational aides who were neither new hires or rehires to the four (4) remaining elementary, remedial/ library aide positions founded by the Discretionary Aid Grant; and

WHEREAS, on August 28, 1991, the Petitioner transferred one (1) educational aide who was neither a newly hired or rehired employee to one (1) of the Pre-School educational aid positions funded by the Discretionary Aid Grant; and

WHEREAS, during the 1991-92 school year, the Petitioner purchased school furniture from Kirsch's Office Furniture, Inc. in the amount of $3,413.00 and charged same against the Discretionary Aid Grant funds; and

WHEREAS, during the 1991/92 school year, the Petitioner purchased school supplies from the ABC School Supply Company in the amount of $3,264.53 and charged same against the Discretionary Aid Grant funds; and

WHEREAS, the Petitioner, during the 1991-92 school year, contracted with Fire Security Technologies, Inc. for the purchase and installation of a fire detection system required as part of the hallway ceiling replacement project at the Ridge Avenue Elementary School and charged same against the Discretionary Aid Grant funds; and

WHEREAS, on April 26, 1993, the Respondence issued a Report of Examination of Discretionary Aid Grant for the District's operations during the period July 1,

1991 to June 30, 1992; and

WHEREAS, the April 26, 1993 Report of Examination concluded that the payroll changes for the four (4) elementary, remedial/library aid positions and the one (1) Pre-School Program educational aide position that were filled by District employees who were neither newly hired or rehired were inconsistent with the District's Grant applications and disallowed the following payroll charges:

A. Remedial/Library Aides Program

Gannon, A.	$8,306.00
Moore, L.	8,860.00
Ruffin, J.	11,790.00
Tierney, E.	10,258.00
	$39,214.00

B. Pre-School Program (Teacher Aide)	$14,344.80
Cullenare, B.	$53,558.80

and

WHEREAS, the April 26, 1993 Report of Examination disallowed the following fringe benefits associated with the payroll changes:

A. Payroll Charges:

Gannon, A.	$5,518.00
Moore, L.	5,518.00
Ruffin, J.	5,518.00
Tierney, E.	5,518.00
	$22,072.00
B. Teacher Aide Pre-School	5,518.00
	$27,590.00

and,

WHEREAS, the April 26, 1993 report of Examination disallowed the following charges against the Discretionary Aid Grant against the Discretionary Aid Grant funds for failure of the District to obtain the minimum number of price quotes required by N.J.S.A. 18A:37:

1. Ceiling Project Fire Security Technologies, Inc.	$3,279.30
2. Furniture/Equipment	3,413.00
Kirsch's Office Equipment ABC School Supply	3,264.53
	$9,956.83

and

WHEREAS, on July 23, 1993, the Petitioner filed a Petition of Appeal before the Commissioner of Education contesting the disallowance by Respondent of the charges for salaries and fringe benefits for the five questioned educational aides; and

WHEREAS, the Respondent's Petition of Appeal further contested Respondent's disallowance of the charges for Fire Security Technologies, Inc., Kirsch's Office Equipment and ABC School Supply; and

WHEREAS, the matter was scheduled for a hearing before the Office Administrative Law on June 9, 1994; and

WHEREAS, the parties exchanged documents and other discovery prior to the June 9, 1994 hearing date; and

WHEREAS, the Petitioner and Respondent have settled all issues between the parties arising from the April 26, 1993 Report of Examination of the Discretionary Aid Grant prior to the June 9, 1994 hearing date;

NOW, THEREFORE, BE IT RESOLVED between the Petitioner, the Board of Education of the Township of Neptune, Monmouth County and Respondent, Division of Financial Services, New Jersey State Department of Education, as follows:

1. Respondent disallowed the following payroll charges:

A. Remedial/Library Aides Program

Gannon, A.	$8,306.00
Moore, L.	8,860.00
Ruffin, J.	11,790.00
Tierney, E.	10,258.00
	$39,214.00

B. Pre-School Program (Teacher Aide)

Cullinane, R.	14,344.80
TOTAL COSTS	$53,558.80

Had these five positions been filled by educational aides rehired by Petitioner on August 28, 1991, the payroll charges would have been as follows:

Gargan, L.	$7,682.00
Snider, S.	7,939.00
Roskowski, L.	8,737.00
Weaver, J.	10,907.00
Collins, N.	8,196.00
TOTAL COSTS	$43,461.00

The difference in payroll charges is thus:

	$53,558.80
	43,461,00
	$10,097.80 Difference

The Respondent will allow educational aide payroll charges against the Discretionary Aid Grant in the amount of $43,461.00. The Respondent will disallow educational aide payroll charges in the amount of $10,097.80 which will be refunded to Respondent by Petitioner.

2. The Respondent disallowed the following fringe benefits charges:

A. Remedial/Library Aides

Gannon, A.	$5,518.00
Moore, L.	5,518.00
Ruffin, J.	5,518.00
Tierney, E.	5,518.00
	$22,072.00

B. Teacher Aide, Pre-School

Cullinane, B.	5,518.00
TOTAL	$27,590.00

Had these five positions been filled by educational aides rehired by the Petitioner on August 28, 1991, the fringe benefit charges would have been the same

The Respondent will allow educational aide fringe benefit charges against the Discretionary Aid Grant in the amount of $27,590.00.

3. The allowance by Respondent of Educational Aide payroll charges of $43,461.00 and fringe benefit charges of $27,590.00 is conditioned upon Petitioner submitting and, the Monmouth County Superintendent of Schools approving, an amended application for the Quality Education Acct Discretionary State Aid Grant setting forth Petitioner's proposal to rehire eleven (11) educational aides, and further proposing that five (5) of the educational aide positions funded by the Grant will be staffed by current employees who are neither newly hired or rehired but transferred from other educational aide positions in the District.

4. The Respondent will disallow the following charges against the Grant for furniture and equipment:

Kirsch's Office Equipment	$3,413.00
ABC School Supply	3,264.53
Total	$6,677.53

5. The Respondent will disallow the following charge against the Grant associated with the Ridge Avenue ceiling project:

Fire Security Technologies, Inc. $3,279.30

6. The Respondent disallowed the following charges against the Grant for milk purchases:

Purchase Order	Amount
926297	$211.20
926313	364.80

926322	288.00
926344	384.00
926452	364.80
926453	103.85
926454	359.10
926585	442.40
TOTAL	$2,518.15

The Petitioner did not contest the disallowance of this charge in Petitioner's Petition of Appeal. Petitioner will refund $2,518.15 in milk purchase charges to the Respondent.

7. A fully executed copy of this Stipulation of Settlement will be filed w the Office of Administrative Law for inclusion in an Initial Decision which will be submitted to the Commissioner of Education, pursuant to the provisions of N.J.A.C.

Date: 8/24/94

FRANCES TAYLOR, President
Neptune Township Board of Education

Date: Aug 19, 1994

MICHAEL T. LAKE, Superintendent
Neptune Township Board of Education

Date: Aug 19, 1994

JAMES T. HUNDLEY, Attorney
Neptune Township Board of Education

Date: August 5, 1994

Division of Financial Services
New Jersey State Department of
Education

Date: 8 August 1994

DAVID E. POWERS, Deputy
Attorney General

OAL DKT. NO. EDU 10945-93

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DIVISION OF FINANCIAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

OCTOBER 18, 1994

DATE OF MAILING - OCTOBER 18, 1994

281-94

ROBERT L. EFFENBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner claimed tenure rights as a clerical worker and alleged Board violated those rights when it did not reemploy him for the 1993-94 school year.

Having considered testimony of witnesses and weight of evidence, the ALJ found that petitioner, whose duties included responsibility for all aspects of out-of-district transportation contracts and jointure agreements for special needs students, was not a clerical employee within the meaning of N.J.S.A. 18A:17-2(b) for the requisite period of time to obtain tenure. Moreover, ALJ found that the reduction in force was conducted properly and was a valid reduction for reasons of economy. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 18, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6095-93
AGENCY DKT. NO. 144-5/93

ROBERT L. EFFENBERGER,
Petitioner,
v.
BOARD OF EDUCATION OF
TOMS RIVER REGIONAL SCHOOLS,
OCEAN COUNTY,
Respondent.

Malachi J. Kenney, Esq., and Geraldine M. Lewis, Esq., on behalf of the petitioner (Kenney, Gross, McDonough and Stevens, attorneys)

Thomas E. Monahan, Esq. on behalf of the respondent (Gilmore and Monahan, attorneys)

Record Closed: June 8, 1994 Decided: July 20, 1994

BEFORE **CAROL F. LASKIN,** ALJ, T/A:

Robert L. Effenberger, a fifteen year employee of Toms River Regional Board of Education (herein Board or respondent), filed a petition with the Commissioner of

Education in May, 1993, pursuant to *N.J.S.A.* 18A:6-9, appealing the Board's decision not to reemploy him for the 1993-94 school year. After the Board filed a timely answer denying the substantive allegations of the petition, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:15F-1 to -13.

On October 1, 1993, a prehearing telephone conference was conducted wherein the issues for determination was delineated as follows:

> A. Was petitioner's duties throughout his term of service those of a clerical position within the meaning of *N.J.S.A.* 18A:17-2?
>
> B. Was petitioner on the date of termination a tenured clerical employee pursuant to *N.J.S.A.* 18A:17-2?
>
> C. Was petitioner's termination pursuant to a valid reduction in force?
>
> D. Did respondent terminate petitioner in violation of *N.J.S.A.* 18A:6-10?
>
> E. What remedy, if any, is appropriate?

A plenary hearing was conducted in this matter on January 19 and 21, 1994, in Pine Beach, New Jersey and on February 2 and 3, 1994, at the Office of Administrative Law, Mercerville, New Jersey. Eight witnesses were presented; four for the petitioner-four for respondent. Petitioner introduced sixteen exhibits, respondent introduced two and two exhibits were jointly introduced. After an extensive briefing schedule which was extended due to the unfortunate illness of petitioner's counsel, the record was closed on June 8, 1994.

FINDINGS OF FACT

A review of the pleadings, the petition of appeal and answer, reveals the following undisputed facts:

1. Robert L. Effenberger was employed by the Toms River Regional Board of Education in or about spring 1978, in the position of Purchasing Technical Assistant.

2. In this position, Mr. Effenberger had responsibilities for procurement of goods and services for the entire school district. His specific areas of responsibility included, among other things, transportation contracts for special education and jointure transportation contracts.

All other aspects of Mr. Effenberger's duties, the particulars of his job descriptions and assignments, and the Board's conduct during the 1992-93 reduction in force was disputed by the parties and the subject of the extensive testimony and documentary evidence presented.

Petitioner, Robert Effenberger testified both on his direct case and on rebuttal. To support his position that during the course of his employment he obtained tenure as a clerical employee pursuant to *N.J.S.A.* 18A:17-2 and that the Board violated his tenure rights by negligently failing to perceive those rights during the 1992-93 elimination of positions and by failing and refusing to place him in the position of Administrative Assistant to the Payroll Supervisor or Data Processing Programmer, petitioner presented numerous school officials. Robert Ciliento, Assistant Superintendent and Board Secretary; Board Superintendent Michael Ritacco; and John Garrabrant, Assistant Superintendent for Personnel were called. In its defense, the Board presented the testimony of Director of Transportation Gus Kakavas; Patricia Smith, Administrative Assistant to the Personnel Supervisor; Constance Collina, Special Education Secretary to the Transportation Department and Heike Graef, Buyer.

Upon review of the testimony and documentary evidence entered and upon reflection of the demeanor of the witnesses, on the basis of the preponderance of the credible evidence within the record, I **FIND** the following facts relevant to the determination of this dispute.

1. Petitioner, Robert Effenberger, was initially employed by respondent on May 15, 1978, in the position of Technical Assistant assigned to the Purchasing Department.

2. At the time of his employment, Mr. Effenberger had earned an Associate Degree from Ocean County College, a Bachelor of Science in Commerce with a major in Accounting from Rider College and in February 1977, a Masters of Business Administration from Rider College (P-4).

3. At the time of petitioner's employment, Mr. William Ashman was the Director of Purchasing. The centralized Purchasing Department serviced the entire district--all fifteen public schools, and administration; said district in 1992-93 having a student population in the neighborhood of 17,000 pupils. From the period of 1978 until the retirement of Mr. Ashman in 1986, petitioner was responsible for conducting bidding procedures in accordance with the statutory requirements of Title 18A. While Mr. Ashman performed purchasing for central administration and capital improvements, Mr. Effenberger was responsible for purchasing aspects of all support departments including custodial, transportation, maintenance, security, and cafeteria (with the exception of food).

4. As Director of Purchasing, Mr. Ashman would receive all requests for requisitions and would forward same to Mr. Effenberger if they involved support services. If the requisition request was for a product costing below the statutory figure necessitating formal bidding, Mr. Effenberger had the discretion to choose and

communicate with three vendors to seek the lowest of three bids for requisition of the product.

5. During the period of 1978 to 1986, Mr. Effenberger, as the Technical Assistant in the Purchasing Department, had discretion to communicate with the end user of the requested product to rewrite specifications which, in Mr. Effenberger's judgment, would result in obtaining the requested product in conformance with bidding procedures. During the same period of time, Mr. Effenberger had discretion to substitute a requested product for one that was less expensive, unless instructed otherwise on the requested requisition form.

6. During the period of 1978 to 1986, with respect to duties involving transportation, Mr. Effenberger was responsible for all out-of-district placement vendor contracts for special needs students. As such, the petitioner interfaced with the Child Study Team, developed routes, put together the bid packages, and in many instances negotiated a jointure agreement with other school districts to collectively transport handicapped students at a lower cost. The jointure documents necessitated approval by the respective Boards of Education.

7. During the period 1978 until 1986, Heike Graef, was employed by the Board as an Administrative Assistant in the Purchasing Department. Ms. Graef, acted as the Secretary to the Director and was also responsible for performing secretarial functions for Mr. Effenberger. These functions included, *inter alia,* typing all of his bid packages, filing, typing other correspondence and keeping track of petitioner's paperwork.

8. During the period 1978 to 1986, Mr. Ashman as Director of Purchasing signed off on all the requisition forms produced by Mr. Effenberger before submission to his supervisor. During the period 1978 to 1986, other clerical employees were added to the Department of Purchasing, Mrs. Nichols, Bernadette Lewis, and Diane Gabriel.

9. In 1986 at the retirement of Mr. Ashman, petitioner applied for but was not appointed Director. Rather, Mr. Charles Breslow was appointed Director of Purchasing, Mr. Rich Herber was transferred from the Transportation Department to the Purchasing Department in the job title of Buyer and Mrs. Heike Graef was promoted into the position of Buyer.

10. Due to a personality conflict between the petitioner and his new Director Charles Breslow, in around August 1987, the petitioner was transferred to the Transportation Department under the direction of it's Director, Gus Kakavas. The Board did not act on this transfer or change the petitioner's title. In the Department of Transportation, Mr. Effenberger's duties consisted of responsibilities for telephone, computer data input, and assisting the Transportation Supervisor of Special Education, Mr. Joseph Placenti, in conducting bus safety drills.

11. In January 1988, the petitioner was once again transferred. This time to the Maintenance Department under a Supervisor, Steven Pappalardo. Again, the Board failed to act on this transfer. Again, petitioner's duties were limited. The petitioner was informed by Board personnel that the transfers were not considered demotions but were rather lateral placements, without a loss in salary, in order to maintain his employment.

12. In around September, 1988, the petitioner was once again assigned to work under the direction of Gus Kakavas and within the Department of Transportation. Again, the Board did not act on this transfer. Prior to reassignment in the Department of Transportation, Director Kavakas spoke with petitioner to develop a position which would utilize petitioner's expertise and assist the Department of Transportation. From September 1988 until the reduction in force in June of 1993, petitioner's duties and responsibilities expanded within the Department of Transportation.

13. Initially, petitioner was assigned the responsibility for all aspects of out-of-district transportation contracts and jointure agreements for special needs students-the same duties he held within the Department of Purchasing. Thereafter, his duties expanded to include assisting Joseph Placenti-Transportation Supervisor of Special Education, who was increasingly absent from duties due to his utilization of compensation time, sick time and his impending retirement.

14. Director Kakavas annually prepared job descriptions for individuals within his department and under his supervision. These job descriptions were for internal use only and were not approved by nor in any way adopted by the Board. Thus, they were never placed within the Board's job description book (P-15).

15. For the 1992-93 school year, Mr. Effenberger's internal job description, P-1, evidences and his testimony affirmed that his duties included assignment for in-district as well as out-of-district special needs transportation. The Board utilized 30 to 40 minibuses daily for in-district special needs students whose routes changed frequently.

16. Commencing sometime during the 1988-1989 school year until this position was eliminated in June 30, 1993, petitioner was responsible for overseeing all aspects of the fuel island, including assuring that fuel was available for all the Board's vehicles-numbering in excess of 300.

17. During the period 1990 until June 30, 1993, petitioner was assigned back-up afternoon dispatcher responsible for the transport of approximately 10,000 students. While the job description indicates that Effenberger had second level responsibility "for hearing and resolving union and personnel problems" involving the bus transportation employees," the evidence does not support such a finding. Rather, I **FIND** that as part of his duties involving special transportation assignments, petitioner did interface with the bus drivers and did, in fact, direct them in emergent situations. Moreover, while petitioner had the authority to recommend to Director Kakavas that a bus driver be disciplined, he did not do so. He merely sent out memorandum to the bus drivers who conformed with his expectation and did not require discipline, see P-1 and J-2.

18. During the period September 1988 until his position was eliminated in June 1993, petitioner considered himself performing the function of Assistant Transportation Supervisor for Special Education Transportation, R-1.

19. At all times while working within the Department of Transportation during the period 1988 to June 1993, Mr. Effenberger was under the direction of Joseph Placenti, and ultimately under the direction of Gus Kakavas. During this same time period, Mr. Effenberger had the assistance of an employee assigned to perform his clerical work. During the period October 1991 until June 1993, Constance Collina, Special Education Secretary to the Transportation Department, in her terms "answered" to both Mr. Placenti and Mr. Effenberger. Ms. Collina clearly believed that Mr.

Effenberger was "her boss" that he had the authority to and did, in fact, direct her to type and perform other clerical functions. Ms. Collina's performance evaluations were prepared and conducted by Director Kakavas.

20. During the school year 1992-93, petitioner was employed within the Department of Transportation but was not so placed in the school board's annual reappointment report, P-6. In said report, petitioner was listed as an employee within the building Maintenance Department. See, P-6 pages 53, 66.

21. The Toms River Regional School Board of Education's Job Description Book does not contain a job description reflecting the duties and responsibilities assigned to the petitioner. Rather, a title of Transportation Department Technical Assistant appears without delineating any duties and responsibilities. See, P-15.

22. At all times material herein, petitioner was employed in a position governed by the collectively negotiated agreement between the Toms River Education Support System Supervisors an affiliate association (TRESSSAA, Unit B). Respondent's officials believed that employees in said bargaining unit were identified as middle-managers, non-clerical employees, and thus had no possibility of acquiring tenure rights under *N.J.S.A.* 18A:17-2(b), see J-1.

23. During the school year 1992-93, the Board determined, due to budget caps, that it must conduct a reduction in force. Prior to informing petitioner that he would be affected by the reduction in force, respondent concluded that he was not a tenured clerical employee within the meaning of *N.J.S.A.* 18A:17-2 and as such did

no review of his opportunity for placement in any positions then occupied by non-tenured clerical employees, see P-13.

24. On about February 16, 1993, the Board resolved to eliminate the position of Maintenance Technical Assistant which it considered the position occupied by petitioner. See P-3. The reasons for the reduction in force are outlined on said Resolution, P-3.

25. On or about March 2, 1993, the Board, by letter informed Mr. Effenberger of its decision to eliminate his position of Maintenance Technical Assistant effective June 30, 1993, due to economic reasons, P-2.

26. Following the reduction in force, the Board created two new positions; Administrative Assistant in the Payroll Department and Data Processing Programmer. See, P-8. Patricia Smith was hired by the Board to fill the position of Administrative Assistant to the Payroll Supervisor. While she is a New Jersey State Licensed Certified Public Accountant, that requirement is not one of the position. Rather, the position advertised required a minimum of three years experience in school board payroll and accounting procedures. Ms. Smith as an experienced school board auditor had said requirements and was appointed to said position. Petitioner did not apply to said position nor was he considered for appointment to said position. Likewise, petitioner did not apply for nor was he considered for the Data Processing position.

27. In his quest for subsequent employment, petitioner submitted a letter application to the Board of Education of Lakewood in or around late July 1993, outlining his work history with respondent, R-1.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:17-2, the tenure statute for secretarial and clerical employees provides as follows:

> 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, 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.

It is the interpretation of this statute and its application to petitioner, Robert L. Effenberger, which is at issue herein. Both respondent and petitioner rely upon the same school law decisions to support their respective positions. It is only in the application of those decisions to their respective interpretations of the testimony and documentary evidence which differ.

It is now axiomatic that tenure is perceived a 'statutory right" which our Supreme Court cautions "should be liberally construed to achieve its beneficent ends." *Spiwack v. Rutherford Board of Education,* 90 *N.J.* 63, 73 (1982); *Zimmerman v. Newark Board of Education,* 38 *N.J.* at 71 (1962) cert. den. 371 US 956(1962). Likewise, in the earlier decision of *Barnes v. Board of Education of Jersey City,* 85 *N.J. Super. 42 (App. Div. 1964),* the Appellate Division cautioned that in construing *N.J.S.A.* 18A:17-2 "the widest range should be given to the applicability of the law since...tenure statutes are intended to secure efficient public service by protecting public employees in their employment." See, Barnes at 45.

However, in order to obtain this valuable right of tenure, an employee must meet the specific conditions articulated in the statute. See, Zimmerman v. Newark Board of Education, 38 *N.J.* at 71 (1962) cert. den. 371 US 956(1962) cited in; *Hansen v. Board of Education of the Maywood School District,* 195 SLD 2106 (adopted by Comm'r of Ed., July 19, 1989). When the specific conditions are met, tenure is then acquired by operation of law irregardless of a school board's intent or the classification conferred by a collectively negotiated agreement. See, *Hansen v. Board of Education of the Maywood School District*, 195 SLD at 2111.

Both petitioner and respondent acknowledge that seniority rights do not accrue to tenured clerical employees. Rather, tenured clerical employees must only "be offered a position before non-tenured secretary/clerks." See, *Sheridan v. Board of Education of Ridgefield Park,* 1976 SLD 995 cited in *Hansen* at 2111. Likewise, both petitioner and respondent must recognize that the fact that petitioner was incorrectly identified as holding the position of Maintenance Technical Assistant and the fact that

the Board never approved a job description outlining the actual duties performed by petitioner is irrelevant to the issues herein. It is an evaluation of petitioner's actual duties performed which are controlling in the decision as to whether or not he acquired rights as a tenured clerical employee during his employment with Board. Thus, it is "the duties performed, rather than the title of the position, [that] is "controlling, based on substance rather than form." *Hansen* at 2111 citing *Beaute v. Board of Education of North Arlington, OAL* DKT. NO. EDU 295-80 (July 28, 1981, adopted Comm'r of Ed., September 14, 1981), aff'd State Board of Education (February 3, 1982).

Petitioner relies upon the decision *in Barnes v. Board of Education of Jersey City,supra*. and upon *Ramage v. Board of Education of the Borough of Franklin, Sussex County,* OAL DKT. NO. EDU 6732-82 (February 22, 1983) overruled Comm'r of Ed (April 13, 1983), for its position that *N.J.S.A.* 18A:17-2 requires the inclusion of "all "Board office employees, from the lowest ranking secretary to the Board Secretary" (Post Hearing Brief at page 15). Respondent, relies on the decision in *Barnes, supra*. and upon *Jacobson v. Board of Education of Union City*, OAL DKT. NO. EDU 10340-82 (August 1, 1983) aff'd Comm'r of Ed. (September 16, 1983) for its position that the statute should be construed narrowly finding only those employees recognized in the TRESSSAA Unit C collectively negotiated agreement holding the job titles of secretaries or clerks as those with potential rights to obtain tenure under *N.J.S.A.* 17-2(b).

The undersigned is not persuaded by either argument. Rather, the undersigned concludes that the statutory protections and subsequent court interpretations require a fact specific evaluation of the duties of a tenure claimant irrespective of the job assignment, job titles, or negotiated placement in a collectively negotiated agreement.

Based upon this review I **FIND**:

1. During the period of May 1978 until 1986 when Director of Purchasing Bill Ashman retired, petitioner was not a clerical employee within the meaning of *N.J.S.A.* 18A:17-2(b). With the exception of some buying duties of Heike Graef, (who during this period acted as petitioner's secretary) Mr. Effenberger was one

of only two individuals responsible for the procurement of all goods for the Toms River Regional School District, a very large district. As such he had purchasing responsibility for all support areas. In performing this function, he complied with statutory and regulatory bidding procedures. While Mr. Ashman as Department Director initially received the requisition forms, he *pro forma* assigned Mr. Effenberger those procurement needs within the support services area. Likewise, Director Ashman initialed all completed requisition forms prior to submitting same to his superiors. During this time period petitioner had the sole responsibility of negotiating and coordinating out-of-district transportation and jointure agreements servicing handicapped students. The fact that an employee has a supervisor and is assigned work does not make him a clerical employee within the meaning of the statute. Likewise, I **FIND** that most jobs, including that of the undersigned, contain some functions which could be classified as clerical. Performing nominal clerical duties does not make one a clerical employee within the meaning of the statute.

2. Between the period of 1986 through 1987, when petitioner was employed in the Purchasing Department under the direction of Charles J. Breslow performing the duties outlined above with the additional "Buyer" of Heike Graef and Richard W. Herbert, I **FIND** for the reasons articulated in paragraph one above, that petitioner was not a clerical employee within the meaning of the statute.

3. During the period of August 1987 until September 1988, wherein Mr. Effenberger was transferred first to the Department of Transportation and then to the Maintenance Department, I **FIND** that Mr. Effenberger was assigned very limited duties. I **FIND** that these duties which including answering the telephone, making copies, inputting data into a computer, and assisting in conducting student bus safety drills were primarily in the nature of clerical duties. As such, during the period August 1987 until September 1988, petitioner held a clerical position within the meaning of *N.J.S.A.* 18A:17-2(b).

4. For the period of September 1988 until the reduction in force of June 30, 1993, wherein petitioner was assigned to the Department of Transportation under Director Gus Kakavas, I **FIND** that petitioner was not a clerical employee within the meaning of the statute. During this time period, petitioner once again obtained responsibility for all out-of-district transportation contract and jointure agreements for special needs students. Moreover, while I **FIND** that petitioner was not a Supervisor defined by the Public Employees' Relations Act, *N.J.S.A.* 34:13A-5.3, I do **FIND** that in his position within the Department of Transportation, petitioner had the authority and discretion, which he utilized on a daily basis, to direct and control the work of bus drivers operating pursuant to the negotiated bargaining agreement, J-2. Moreover, I **FIND** that petitioner's responsibilities, in the absence of Joseph Placenti, for all aspects in the in-district special needs transportation evidenced duties encompassing great discretion and independence. Furthermore, during this time period, petitioner was provided assistance from individuals assigned to perform clerical duties for him, such as Constance Collina.

5. I **FIND** that the position of Administrative Assistant to the Payroll Supervisor performed as testified to by Patricia Smith and as outlined in the affidavit of publication, P-8, is not a clerical position within the meaning of *N.J.S.A.* 18A:17-2(b). Rather, Ms. Smith in her capacity, is responsible for supervising payroll clerks and is ultimately responsible to the entire district for all payroll checks and reports to the requisite governmental agencies.

6. I **FIND** that the reduction in force conducted by the Board during the 1992-93 school year was conducted as a result of the reasons articulated in its resolution P-3 and was a valid reduction for reasons of economy.

Accordingly, I **CONCLUDE** and **FIND** that petitioner, for only the period of August 1987 until September 1988, was employed in a clerical position within the meaning of *N.J.S.A.* 18A:17-2(b). As such, petitioner was not a clerical employee with the Board for the requisite period of time to obtain tenure. *Zimmerman v. Board of Education of Newark, Supra.* Consequently, while I am intrigued by petitioner's position that the respondent is liable for negligent failure to fully review the tenure rights of petitioner, finding that petitioner was not a tenured employee makes such a discussion futile. Accordingly, it is hereby **ORDERED** that the petition is **DISMISSED** and that the Board's conduct in not reemploying petitioner for the school year 1993-94 is **AFFIRMED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 20, 1994
DATE

Carol F Laskin
CAROL F. LASKIN, ALJ, t/a

Receipt Acknowledged:
Hope L Blackburn

7/22/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

slf

EXHIBITS

On behalf of the Petitioner:

P-1 Document entitled, Department Job Descriptions

P-2 Letter from Mr. Ritacco to Mr. Effenberger

P-3 Board of Education Resolution

P-4 Mr. Effenberger's college transcript

P-5 Letter from Mr. Kenney to Mr. Ritacco

P-6 School board Annual reappointment report

P-7 Extraction of personnel book

P-8 Affidavit of publication

P-9 Job description for business administrator

P-10 Job description for Assistant Superintendent

P-11 Job description for Superintendent of Schools

P-12 Table of organization

P-13 Nontenure secretaries list

P-14 1993 - 1994 Personnel Book

P-15 Job description book

P-16 1992 - 1993 Personnel Book

On behalf of the Respondent:

R-1 Letter application to Lakewood Board of Education

R-2 Job description document-Department of Transportation

Joint Exhibits:

J-1 1993 - 1994 Memorandum of Agreement

J-2 1991 - 1994 Agreement

WITNESSES

John Garrabrant

Gus Kakavas

Patricia Smith

Constance Collina

Heike Graef

Robert Effenberger

Robert Ciliento

Michael Ritacco

ROBERT L. EFFENBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4. In addition to the exceptions properly submitted by his attorney, petitioner on September 23, 1994 attempted to submit a motion on his own behalf, pursuant to N.J.A.C. 1:1-18.5, seeking to have additional factual information brought to the record. Such submission was apparently without the knowledge or consent of his attorney, nor was there any indication that it had been served on opposing counsel. By letter dated October 6, 1994, petitioner's submission was returned to him and he was advised by the Director of the Bureau of Controversies and Disputes that, pursuant to N.J.A.C. 1:1-5.1, a party to administrative proceedings may choose one of several options with respect to his representation and that, because petitioner elected throughout the course of the instant proceedings to be represented by counsel, absent notification to the Bureau of Controversies and Disputes that he is no longer represented by an attorney, petitioner is unable to make

submissions of any kind on his own behalf to the record of this matter.

Petitioner's exceptions argue, inter alia, that in reaching the determination that petitioner was not a "clerical employee" within the meaning of N.J.S.A. 18A:17-2, the Administrative Law Judge (ALJ) utilized an excessively narrow definition of this term. Petitioner asserts that the ALJ obviously interpreted "clerical employee" to denote an individual with minimal job duties and extremely limited responsibilities. He argues that such interpretation is contrary to applicable case law which requires that a tenure statute "should be liberally construed to achieve its beneficent ends." See Spiewak, supra, and Zimmerman, supra. (Petitioner's Exceptions, at p. 6) See Barnes, supra, which "rejected the use of a narrow definition of clerical and noted that the 'widest range should be given to the applicability of the law.' Barnes at 45." (Petitioner's Exceptions, at p. 8) Petitioner further excepts to the ALJ's factual determinations with respect to the responsibilities and discretionary authority connected with his job duties and, in this regard, contends that the ALJ erroneously gave significant weight to unapproved job descriptions rather than petitioner's credible testimony as to the work he actually performed.

In response, the Board proffers that petitioner's suggestion that the ALJ found the term "clerical" restricted to limited duties is based upon a strained interpretation of case law and petitioner's desire for a more favorable conclusion. It asserts that the ALJ applied the proper standard of review required by N.J.S.A. 18A:17-2 and subsequent case law in that she

> conducted a fact sensitive evaluation of the actual job duties performed by the Petitioner.

> Upon conclusion of this evaluation the A.L.J. applied these factual conclusions to the statutory protections of N.J.S.A. 18A:17-2(b), and the subsequent Court interpretations of same, and concluded Petitioner was not a "clerical employee." (Board's Exceptions, at p. 4)

The Board further asserts that in making her determinations with respect to credibility of witnesses and the weight of evidence, the ALJ had the opportunity to observe the witnesses and urges that the Commissioner should not overrule such determinations absent clear evidence to the contrary.

Upon careful and independent review of the record in this matter, which includes transcripts of the four days of hearings before the ALJ, the Commissioner concurs with the ALJ that petitioner was not a clerical employee for the requisite period of time to obtain tenure and, therefore, the Board's conduct in not reemploying him for the 1993-94 school year was not improper. Further, notwithstanding petitioner's exception arguments to the contrary, the Commissioner determines that the ALJ's factual findings and conclusions in this matter are amply supported by the record. The Commissioner is also satisfied that the ALJ carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit in reaching her findings of fact and he finds no cause to question such credibility assessments.

Accordingly, the recommended decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted as the final decision in this matter for the reasons clearly articulated therein.

OCTOBER 18, 1994

DATE OF MAILING - OCTOBER 18, 1994

COMMISSIONER OF EDUCATION

281-94

EDU #6095-93
C # 281-94
SB # 49-94

ROBERT L. EFFENBERGER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 18, 1994

For the Petitioner-Appellant, Francis P. Cullari, Esq.

For the Respondent-Respondent, Gilmore & Monahan (Thomas E. Monahan, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We also deny the petitioner's motion to supplement the record on appeal, pursuant to N.J.A.C. 6:2-1.9, with certain documents, including the written statements of several individuals. Notwithstanding petitioner's contention that his previous counsel failed to produce certain evidence, he has not demonstrated that the information he now seeks to offer was not available to him during the earlier proceedings. Cf. In the Matter of the Tenure Hearing of David Borrelli, decided by the State Board, July 6, 1994.

April 5, 1995

Date of mailing APR 07 1995

282-94

KEYPORT TEACHERS ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,

RESPONDENT.

AND

ATLANTIC CITY EDUCATION ASSOCIATION AND ATLANTIC CITY HEAD CUSTODIANS ASSOCIATION,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Associations on behalf of teachers and custodians alleged health insurance provided by respondent Boards to its employees through self-insurance program violated the provisions of Title 18A, in particular but not limited to N.J.S.A. 18A:16-13 et seq. (group life, hospitalization, health and accident insurance)

Citing Irvington Appellate Division decision, ALJ found that the Boards lacked the authority to provide health coverage on a self-insured basis as such coverage violated N.J.S.A. 18A:16-13. The ALJ also found that the Boards' contract of excess insurance coverage was authorized pursuant to N.J.S.A. 18A:16-13, but could not serve to legitimize the underlying self-insurance.

Commissioner affirmed initial decision with modification, finding Irvington controlling on the question of self-insurance but clarifying that excess insurance policies may not be construed as health insurance within the meaning of N.J.S.A. 18A:16-13.

OCTOBER 17, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6833-93

AGENCY DKT. NO. #195-6/93

KEYPORT TEACHERS ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,

Respondent.

and

ATLANTIC CITY EDUCATION ASSOCIATION AND ATLANTIC CITY HEAD CUSTODIANS ASSOCIATION,

OAL DKT. NO. EDU 8084-93

AGENCY REF. NO. #288-7/93

CONSOLIDATED

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

Richard A. Friedman, Esquire, for appellants Keyport Teachers Association, Atlantic City Education Association and Atlantic City Head Custodians Association (Zazzali, Zazzali, Fagella & Nowark, attorneys)

Salvatore Perillo, Esquire, for respondent Board of Education of the Borough of Keyport, Monmouth County (Perillo & Rosenberger, attorneys)

George G. Frino, Esquire, for respondent Board of Education of the City of Atlantic City, Atlantic County

Record Closed: June 7, 1994 Decided: June 30, 1994

BEFORE **JOSEPH E. KANE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Separate petitions were filed by petitioners Keyport Teachers Association, the Atlantic City Education Association and Atlantic City Head Custodians Association challenging the legality of action taken by the school boards of Atlantic City and Keyport in adopting the self-insured health benefits program. The Teachers Association petition was transmitted to the Office of Administrative Law (OAL) on July 21, 1993 and the Custodians Association petition was transmitted on August 26, 1993. By consent of the parties, the within matters were consolidated on May 9, 1994 for the purpose of filing summary judgment motions. Summary judgment motions and responses were filed by June 7, 1994, at which time the record was closed. A decision was rendered on June 30, 1994.

ISSUE

WHETHER A SCHOOL BOARD MAY PROVIDE A SELF-INSURED HEALTH BENEFITS PROGRAM TO ITS EMPLOYEES PURSUANT TO N.J.S.A. 18A:16-13.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the purpose of disposing of the within summary judgment motions, the **FACTS** in this matter are substantially not in dispute.

The petitioners are challenging the legality of a self-insured health benefits plan provided by the Keyport and Atlantic City School Boards (hereinafter referred to as the Boards). Petitioner's contend that the Boards lack the legal authority to institute a self-insured health benefits program under the provisions of N.J.S.A. 18A:16-13, and applicable case decisions.

The Boards contend that the new self-insured program provides adequate health benefits coverage and that such a program is within the inherent power of the Boards to adopt as compensation for their members.

The Boards have adopted an identically administered self-insured health benefits system. For the purposes of this motion, it is conceded that the benefits provided under the self-insurance program, are identical to those which were in effect prior to the implementation of the challenged program.

Group health benefits are provided to the Boards' employees through a dual program involving an excess insurance contract with Lamar Insurance Company (hereinafter referred to as Lamar) and by entering into an insurance consulting contract with Frank J. Siracusa & Son (hereinafter referred to as Siracusa). Lamar is an A+ (Superior) A. M. Best Company-rated insurer qualified to do business in New Jersey. Siracusa is not a licensed insurance company, but is a licensed insurance broker within the State of New Jersey.

The Boards argue that the self-insured Siracusa/Lamar programs have resulted in substantial cost savings over that previously paid to private insurance companies to

provide the same, or identical benefits. Petitioner's disagree with the Boards cost saving analysis. For the purposes of this motion, the expense of the program and whether or not cost savings have been realized is not a factor to be considered.

Siracusa administers the program by providing claims processing, claims investigation and adjustment, statistical reports and a variety of other management and administrative services.

Claims are paid to Board employees directly by the administrator from a fund maintained by the Boards. Each Board has purchased an excess policy from Lamar. The Lamar policy for the Atlantic City Board includes excess insurance coverage guaranteeing a maximum cost per insured of $30,000 per year and a maximum cost for all claims to the Board of about $5,243,000.

Lamar is also the excess carrier for the Keyport Board of Education providing that Board with a cap on its liability.

The pivotal statute upon which both parties rely is N.J.S.A. 18A:16-13 which provides in part:

> Any local board of education may enter into contracts of group life, accidental death and dismemberment, hospitalization, medical, surgical, major medical expense, or health and accident insurance with any insurance company or companies authorized to do business in this state. . . .

I **FIND** that the contract of excess insurance between Lamar and the Boards is a contract which is authorized pursuant to the dictates of N.J.S.A. 18A:16-13. Accordingly, the remaining question is whether the above cited statute provides the authority to the Boards to enter into the self-insured/self-administered portion of the program.

Petitioners' now move for summary judgment seeking an order declaring the health benefits program provided by the Boards to be illegal. Petitioners contend that

governmental entities, specifically boards of education, have no authority other than that which has been delegated to them by the legislature. Additionally, petitioners argue that boards of education are administrative agencies so that where there exists reasonable doubt as to a board's authority to act in a certain manner or area, power to act is denied. See In re: Jamesburg High School Closing, 83 N.J. 540, 549 (1980). As a result, petitioners claim that the only authority of the Boards to provide insurance coverage for its employees is rooted in N.J.S.A. 18A:16-13. The plain language of the statute requires coverage be provided in this instance through "contracts with a licensed insurance company" which on its face does not allow school boards to contract with intermediaries or to establish a self-insured program.

The Boards counter that N.J.S.A. 18A:16-13 is identical to the language contained in N.J.S.A. 40:10-17 which authorizes other divisions of local government, including municipalities and counties to enter into self-insurance programs. As such, the Boards argue that to find that the Boards do not have the authority to enter into a self-insured program, there would be a de facto determination that other governmental entities such as state, county and municipal self-insured programs are also without legal authority.

The pivotal case upon which petitioners rely is Irvington Education Association v. Board of Education of the Township of Irvington, 1982 S.L.D. 1009 aff'd State Bd. of Ed., 1983 S.L.D. 1571, aff'd App. Div. 1984.

The Boards disagree with the finding of the Irvington court. Specifically, they rely upon the holding in Teamsters Local 331 v. Atlantic City, 191 N.J. Super. 404 (Ch. Div. 1981) aff'd o.b. 191 N.J. Super. 394 (App. Div. 1983) for the proposition that non-statutorily authorized alternatives are available to local public entities to provide health benefits for employees. The Boards also reject the holding in Irvington, supra on the grounds that the affirmance of the Commissioner's decision is an unreported Appellate Division case and as such, cannot stand as precedent in this matter.

I hereby **REJECT** the Boards contention that the Irvington decision is to be given considerably less weight because it is an unreported decision of the Appellate Division and that the Teamsters decision should control. It must be noted that the Irvington decision has been relied upon by all parties to this matter. As such, it has been properly briefed and reported to this tribunal. See Falcon v. American Cyanamid, 221 N.J. Super 252 (App. Div. 1987).

The Irvington Appellate Court decision is an affirmance of a ruling of an administrative agency, which constitutes precedence before this tribunal. See Eherenstorfer v. Division of Public Welfare, Dept. of Human Services of State of N.J., 196 N.J. Super 405 (App. Div. 1984). There, the Division of Welfare was bound by an unpublished opinion of the Superior Court, Appellate Division which voided regulations pertaining to the Division of Welfare's administration of the Aide for Families with Dependent Children (AFDC) program.

I **FIND** that based upon the dictates set forth in Irvington, as well as the language of N.J.S.A. 18A:16-13, the Boards are without authority to adopt the Siracusa/Lamar health benefits program.

The scope of a school board's authority to provide health insurance was decided by the Commissioner of Education in Irvington, supra. The plan at issue here is remarkably similar to the program analyzed by the Irvington court. In Irvington, the plan provided for self-funding of claims payments. The Board paid all claims directly through an insurance administrator. It also provided an excess insurance policy, which acted as a cap on the Board's liability. The Commissioner held, and the State Board and Appellate Division affirmed that the provision of health benefits through that method was unlawful. In reaching its decision, the Appellate Division concluded that the lack of express authority, the availability of viable substitutes, the absence of a uniform scheme of statutory protection for such self-insurance funds, and the legislative history in analogous situations all required affirmance of the Commissioner's and State

Board's decisions; that school boards lack authority to provide health insurance coverage on a self-insured basis.

In addition, the Irvington court noted that the legislature authorized local school boards to participate in self-insurance pools pursuant to N.J.S.A. 18A:18B-1, but that self-insurance is only permissible in areas where boards have common law or statutorily imposed liability, such as motor vehicle liability, worker's compensation liability, and property loss, not in areas where there is a voluntary assumption of benefits, such as the area of health insurance benefits.

Finally, the Irvington court addressed the issue of excess insurance coverage. It concluded that the inclusion of such insurance had no bearing on the legality of the plan, and that the provision of direct benefits on a self-insured basis was unlawful, regardless of whether excess insurance was procured. Id. at p. 1943.

I herein **REJECT** the Boards' interpretation in the Teamsters case supra substantially for the grounds set forth in Irvington. The pivotal consideration in Irvington was that boards of education have no greater power than that granted to them via statute. The authorization to provide health benefits in the instance of a municipality, or county has been specifically provided for in Title 40. Additionally, the Teamsters decision did not deal exclusively with the self-insurance issue. There the court was confronted with a provision in a collective bargaining agreement pursuant to which the municipality had agreed to contribute payment to a union health and welfare fund as a method of providing health benefits for its employees.

The Boards correctly argue that in Teamsters, there was no specific statutory authorization for the municipality to fund the union's health benefits package. The court agreed with the City that despite the lack of statutory authorization, the program was within a municipality's power to enter into within the context of a collective bargaining agreement.

In reviewing Teamsters, the Irvington court commented upon the same argument which is made by the Boards herein that the general powers and compensation powers sections of the education act, imply the ability to enter into self-insurance programs.

I **FIND** that but for the fact that the Irvington court specifically dealt with this issue, such an argument could be compelling and even persuasive.

The Boards argue that the statute here at issue, N.J.S.A. 18A:16-13 is identical to the provisions of N.J.S.A. 40A:10-17 which deals with other units of local government including municipalities and counties. The Boards argue that to declare the within Siracusa/Lamar program illegal, is to also draw into question self-insurance programs which are in existence by virtue of the authority set forth in Title 40.

I **FIND** that the distinction to be drawn in this case is the argument set forth in Irvington wherein the court found that boards of education, have no greater power than that provided to them by the legislature. There the court essentially rejected the Board's argument that boards of education had the legal authority to provide health benefits through a self-insured program.

> While we are fully in accord with the Teamsters Local 331 opinions, that case is inapposite to the issue under discussion here. In the Teamsters case, in order to provide health benefits to its employees, the City of Atlantic City gave the employees a raise in an amount sufficient to pay the Union's charges for health insurance. The municipality was not a self-insurer. While the Teamsters Local 331 case does stand for the proposition that the statutory alternatives for providing health benefits are not exclusive, the case did not reach the point of whether the municipality there (or the board of education here) could be a self-insurer. Were the issue before us merely whether the school board, if it wished to provide health care benefits to its employees, would be limited to either a private insurance program under N.J.S.A. 18A:16-13 or to participate in the State program under N.J.S.A. 52:14-17.34, the Teamsters Local 331 decision would have set that question to rest. It is clear that a board of education may both provide health benefits and seek a method of doing so other than by the methods expressly

> authorized by the two cited statutes. The issue, however, is whether it may undertake self-insurance for these benefits without statutory authorization and appropriate regulation.

The Irvington court's discussion of permissible self-insurance for school boards in the area of worker's compensation and general liability solidifies the petitioner's argument that the school boards are creatures of statute with their powers specifically delineated thereunder. No such power has been delegated in the area of self-insurance and indeed the Irvington court makes it clear that until a legislative change occurs, such programs are impermissible. The fact that the Lamar program is a contract wherein the Boards are legally empowered to enter into pursuant to N.J.S.A. 18A:16-13 is not in and of itself sufficient to boot strap or save the self-insurance portion of the program.

The Boards' contention that self-insurance programs for municipalities and counties have been initiated in order to save taxpayer dollars is herein noted and applauded. Most notably the statutory authorization enabling the counties and municipalities to institute self-insurance programs is remarkably similar to the power vested in boards of education. As noted above, however, the distinction to be drawn between municipalities and boards of education is that the Boards have not been given specific authorization by the legislature, despite the Irvington courts invitation to the legislature to reconsider this issue. Accordingly, considering the dictates of Irvington supra, until an amendment to N.J.S.A. 18A:16-13 is herein effectuated, the Irvington decision stands as a bar to any effort on the part of boards of education to save tax dollars while in turn providing adequate health benefits to their membership.

Accordingly, I herein **HOLD** that the Siracusa/Lamar self-insurance health benefits program adopted by the Keyport and Atlantic City Boards of Education violate N.J.S.A. 18A:16-13.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 30, 1994
DATE

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

7/5/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 1994
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

psa

OAL DKT. NOS. EDU 6833-93 and EDU 8084-93 (CONSOLIDATED)

KEYPORT TEACHERS ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND		
ATLANTIC CITY EDUCATION ASSOCIATION AND ATLANTIC CITY HEAD CUSTODIANS ASSOCIATION, PETITIONERS, V. BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, RESPONDENT.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Separate exceptions were filed by each respondent Board of Education pursuant to the provisions of N.J.A.C. 1:1-18.4; a joint reply was filed by petitioners. Petitioners also filed primary exceptions on one point as noted below; no reply was filed by respondents.

In its exceptions, the Keyport Board of Education ("Keyport") argues that the ALJ erred in accepting the court's decision in Irvington, supra, as binding in this matter, as that

decision was unreported and is, therefore, of no precedential value for litigants who were not parties to the case. Moreover, the parties in the instant matter have advanced arguments not addressed in Irvington, so that the conclusions of that decision should be reconsidered in light of these, as well as in light of the subsequent (reported) court decision in Board of Education of Bloomfield v. Education Association of Bloomfield, 251 N.J. Super. 379 (App. Div. 1990), and the increasing, and increasingly recognized, need for boards of education to control spiraling costs through efficiencies in operation and management. Finally, the Board opines, the Irvington court misunderstood the holding of Teamsters, supra, and the Commissioner should re-examine Irvington's conclusions by (correctly) applying the Teamsters analysis to the facts herein.

Keyport next avers that the ALJ relied exclusively on N.J.S.A. 18A:16-13 and ignored the Board's arguments to the effect that the insurance program at issue is independently authorized by two other statutes. N.J.S.A. 18A:18A-5(a)(10), the Board contends, parallels a provision in the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) which has already been held by the Court, in Local 1081 v. Essex County, 255 N.J. Super. 671 (App. Div. 1992), to envision county and municipal self-funded insurance programs and consultant services to administer them; N.J.S.A. 18A:16-1, which confers on boards of education the power to "determine, and fix, and alter" the compensation of employees, must be read in light of Teamsters, supra, to include health benefits as part of such compensation and to permit modes of

providing compensation and benefits not specifically authorized in statute.

Finally, Keyport contends that N.J.S.A. 18A:18B-1 et seq. (joint self-insurance) does not act, as concluded by the ALJ, to prohibit single-district self-insurance, but rather serves to limit joint arrangements, as other statutes do for counties and municipalities in light of the potential for one entity's actions and liabilities to adversely impact another's.

In its own separate exceptions, the Atlantic City Board of Education ("Atlantic City") raises several of these same arguments. In addition, it argues that 1) the plan at issue is not self-insurance, but rather direct insurance with a large retention administered by a licensed and qualified insurance consultant, fully authorized by N.J.S.A. 18A:16-13 in that it is provided by direct contractual arrangement rather than a trust; 2) school districts are permitted to join the State Health Benefits Plan (SHBP), which is itself self-insurance, so that the effect of the initial decision is to acknowledge the validity of self-insurance as a means of providing health benefits, but then improperly compel districts to belong to a specific self-insurance plan; and 3) both Irvington, supra, and the initial decision, if adopted, constitute illegal rulemaking in violation of the Administrative Procedures Act (N.J.S.A. 52:14B-2(e)) and Metromedia, Inc. v. Director, 97 N.J. 313, 331-332 (1984).

Petitioners, in reply, reference their briefs before the ALJ and take issue with several of respondents' factual assertions. They also argue that respondents' position on the

validity of Irvington, supra, would lead to absurd results in that any Commissioner's decision reversed by the Appellate Division in an unpublished ruling could be relitigated on grounds that the court decision was not binding. Moreover, even denying, arguendo, the precedential value of the Appellate decision in Irvington, the State Board has also ruled in that matter and the Commissioner is bound by its ruling for purposes of the present proceeding.

Petitioners further argue that statute and case law addressing bidding issues cannot be read to independently authorize the self-insurance aspect of respondents' programs, and that respondents' excess policies cannot be construed, as they erroneously were by the ALJ, as health insurance within the meaning and contemplation of N.J.S.A. 18A:16-3 as they pay benefits to neither covered employees nor health care providers, instead serving only to hold harmless respondents' losses over and above a certain level. (This latter argument is also the subject of petitioners' primary exceptions, which in all other respects urge affirmance of the initial decision.) Neither can boards' general ability to enter into excess insurance contracts be read as concomitant authorization of the underlying insurance plan where that plan is not otherwise authorized in statute.

Petitioners also contend that respondents' argument to the effect that self-insurance is authorized by the general power of boards of education to fix employee compensation is thwarted by the fact that 1) this interpretation would render N.J.S.A. 18A:16-12 et seq. meaningless, as no statute addressing health insurance would otherwise be necessary; 2) boards of education,

unlike counties and municipalities, are administrative agencies, the powers of which must accordingly be construed narrowly rather than expansively; and 3) this proposition was already considered and rejected in Irvington, supra, and remains unaltered by subsequent decisions in Bloomfield, supra, and Local 1081, supra.

As to the State Health Benefits Plan, petitioners point out that it exists as a result of specific enabling statute, thus buttressing petitioners' position that self-insurance for health benefits must arise from express legislative enactment. Moreover, no analogy can be made between the SHBP and local board self-insurance in terms of the former serving as tacit authorization for the latter, in that the SHBP is protected by a huge risk-sharing pool and the full backing of State resources while local board plans must gamble on the loss experience and fiscal stability of a single, relatively small entity.

Finally, in response to the extensive rhetoric in respondents' filings regarding the need for school district cost savings and State support for local efficiencies, petitioners contend that the cost-reduction benefits of self-insurance are arguable and that a negative insurance experience could have a serious impact on a district's fiscal stability, thus undermining the very principles on which respondents purport to rely. Moreover, petitioners note, the issue before the Commissioner in this proceeding is a legal, not a political one, and respondents' efforts to obtain authority to self-insure for health benefits must, as was recognized in Irvington, supra, be directed to the Legislature rather than the Commissioner.

Upon review and consideration, the Commissioner concurs with the ALJ that the Irvington decision is controlling in this matter, and that the health benefits programs established by respondents herein are beyond the scope of statutory authority accorded to boards of education under current law.

Initially, the Commissioner rejects respondents' contention that Irvington is not binding because the decision was not reported. As noted by the ALJ, the Court's decision in Irvington is well known, widely referenced (including discussion by the Court in Bloomfield, supra, and publication in 1984 S.L.D. 1939) and has been fully briefed by the parties herein; moreover, the Commissioner is not at liberty to disregard holdings by the State Board of Education and the Court on issues and fact patterns of precisely the type raised by an earlier matter merely because the parties involved in a subsequent matter are different. Neither are the results of Irvington altered by more recent Court decisions in Bloomfield, supra, and Local 1081, supra. The former merely addresses the arbitrability of a health coverage dispute and, in reversing a lower court finding that the dispute at issue was not arbitrable, expressly gives no opinion on the Irvington ruling and leaves open, i.e., to the arbitrator, the question of Irvington's impact on petitioner's claim and remedy if successful; the latter is a bidding dispute where the validity of the underlying insurance program is not at issue and the Court's tacit acceptance of self-insurance by a county is of no import in the present matter in light of Irvington's analysis and conclusion that school districts require express authority to self-insure.

The Commissioner likewise determines that respondents' arguments based on statutes governing employee compensation and joint self-insurance were substantively addressed by Irvington, where these issues were expressly raised before and analyzed by the Court. Similarly, respondents' arguments based on the Public School Contracts Law fail in that they rely on an analogy between the school law and the Local Public Contracts Law as interpreted by Local 1081, supra, which analogy is inapposite in light of Irvington as discussed above.

Finally, the Commissioner finds no merit in respondents' contention that their plans do not constitute self-insurance, as it is undisputed that benefits are paid directly to employees from a fund maintained by the Board, with Siracusa providing administrative and claim processing services only and the Lamar policy serving merely to indemnify the Board against claims in excess of a certain level. Neither does the Commissioner find merit in respondents' arguments based on school district inclusion in SHBP, as that program, while fairly characterized as self-insurance, has separate legislative authorization, is highly regulated and is a State entity in which school districts are merely permitted to participate if they so desire. Nor does he view statutory interpretation consistent with prior Court holdings in the context of a dispute before him pursuant to N.J.S.A. 18A:6-9 to be illegal rulemaking within the contemplation and prohibitions of Metromedia, supra.

In one respect, however, the Commissioner would modify the initial decision. Notwithstanding that he later (correctly)

deems it insufficient to "bootstrap" the underlying prohibited insurance program, the ALJ finds at page 4 of the initial decision that the contract of excess insurance between Lamar and respondents is "authorized pursuant to the dictates of N.J.S.A. 18A:16-13." While there is no question about boards' general authority to obtain excess insurance, the Commissioner clarifies that excess insurance programs of the type at issue herein may not be considered health insurance within the meaning and contemplation of N.J.S.A. 18A:16-13, as such programs serve to indemnify boards rather than pay benefits to employees or health service providers.

Accordingly, as modified herein, the Commissioner affirms the initial decision of the Office of Administrative Law finding respondents' insurance programs to be in violation of existing statute and noting that school districts' inability to self-insure for health benefits under current law is a question properly addressed by the Legislature.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 17, 1994

DATE OF MAILING - OCTOBER 18, 1994

282-94

EDU #6833-93
C # 282-94
SB # 48-94

KEYPORT TEACHERS' ASSOCIATION, PETITIONER-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY, RESPONDENT-APPELLANT,	:	
AND	:	STATE BOARD OF EDUCATION
ATLANTIC CITY EDUCATION ASSOCIATION AND ATLANTIC CITY HEAD CUSTODIANS' ASSOCIATION, PETITIONERS-RESPONDENTS,	:	DECISION ON MOTION
V.	:	
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 17, 1994

Decision on motion by the Commissioner of Education, January 25, 1995

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

For the Respondent-Appellant Board of Education of the Borough of Keyport, Perillo & Rosenberger (Salvatore Perillo, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the City of Atlantic City, George G. Frino, Esq.

The State Board of Education denies the Atlantic City Board's motion for a stay of the Commissioner's decision of

APR. 5, 1995

October 17, 1994, substantially for the same reasons as expressed by the Commissioner on January 25, 1995, when he declined to stay that decision. In so doing, we concur with both the Commissioner's determination to permit the plan at issue to continue in effect through the end of the 1994-95 school year and his additional requirement that the Board

> ...explore, acquire and properly budget for a legally permissible plan to take effect at the beginning of the fiscal year (July 1, 1995) for which school budgets are now being prepared pursuant to law.

Commissioner's decision on motion, January 25, 1995, slip op. at 5. We stress that immediate compliance with this directive is essential to insure that the Board is prepared to provide alternate coverage if it proves necessary.

April 5, 1995

Date of mailing APR 05 1995

282-94

EDU #6833-93
C # 282-94
SB # 48-94

KEYPORT TEACHERS' ASSOCIATION,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,

RESPONDENT-APPELLANT,

AND

ATLANTIC CITY EDUCATION ASSOCIATION AND ATLANTIC CITY HEAD CUSTODIANS' ASSOCIATION,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education,
October 17, 1994

Decision on motion by the Commissioner of Education,
January 25, 1995

Decision on motion by the State Board of Education,
April 5, 1995

May 3, 1995

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

For the Respondent-Appellant Board of Education of the Borough of Keyport, Perillo & Rosenberger (Salvatore Perillo, Esq., of Counsel)

For the Respondent-Appellant Board of Education of the City of Atlantic City, George G. Frino, Esq.

For the reasons expressed by the Commissioner of Education, the State Board of Education affirms the Commissioner's decision that the self-insurance plan involved here violates N.J.S.A. 18A:16-13. In doing so, we note that there is no suggestion that the legitimacy of the specific plan here was affected by the enactment of P.L.1995, c. 74, providing express authorization for certain kinds of group insurance arrangements, which was signed into law on January 19, 1995.

May 3, 1995

Date of mailing MAY 05 1995

283-94

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

October 21, 1994

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

For the Board, Louis C. Rosen, Esq.

This matter having been opened before the Commissioner of Education on July 1, 1994 through certification of tenure charges of unbecoming conduct against respondent, a tenured custodian in the Board's employ; and

The Commissioner having directed respondent by printed notice on July 5, 1994 and August 16, 1994 and, again, by letter dated September 9, 1994, all sent via both regular and certified mail, to file a formal Answer to the Board's charges, which certified notification was returned by the Post Office; and

As of this date neither respondent nor any attorney on his behalf having so filed an Answer to the charges levied against him; and

Given that respondent has failed to properly respond to the tenure charges by way of an Answer, as directed, each count of the charges against him is deemed to be admitted; now therefore

IT IS ORDERED on this 21ST day of October 1994 that summary decision shall be granted to the Board and respondent shall be dismissed from his tenured position as a custodian in the Board's employ as of the date of this decision.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1994

DATE OF MAILING - OCTOBER 21, 1994

284-94

284-94E

T.M. AND C.M., on behalf of their child, A.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RUTHERFORD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

OCTOBER 25, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 8513-94
AGENCY DKT. NO. 358-9/94

T.M AND C.M., ON BEHALF OF THEIR MINOR CHILD, A.M.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF RUTHERFORD, ET. AL., BERGEN COUNTY,
Respondents.

Perry Burkett, Esq., attorney for petitioners

Rodney T. Hara, Esq., attorney for respondents (Fogarty & Hara, attorneys)

Record Closed: September 7, 1994 Decided: September 7, 1994

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

THIS MATTER having been opened to the Office of Administrative Law on petitioners' application for emergent relief pursuant to *N.J.A.C.* 1:1-12.6; and the Administrative Law Judge

having read and considered the moving papers and having heard the arguments of counsel and the parties; and for other good cause shown

IT IS on this 7th day of September 1994

ORDERED that petitioners' request for emergency relief be and hereby is **DENIED.**

This Order for Emergency Relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this Order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this Order within forty-five days, this recommended Order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

Sept. 7, 1994
DATE

MARIE P. SIMONELLI, A.L.J.

OAL DKT. NO. EDU 8513-94

T.M. AND C.M., on behalf of their child, A.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RUTHERFORD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The order denying petitioners' motion for emergent relief from the Office of Administrative Law and the audio tape of the hearing held on September 7, 1994 have been reviewed. No exceptions have been filed by the parties.

Upon careful and independent review, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by her on the record and directs transmittal of the matter to OAL for plenary hearing.

Accordingly, the motion for emergent relief is hereby denied.

IT IS SO ORDERED.

OCTOBER 25, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 25, 1994

285-94

285-94E

DAVID HERRON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

OCTOBER 24, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL ORDER DENYING APPLICATION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 7286-94
AGENCY DKT. NO. 85-4/94

DAVID HERRON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,
Respondent.

David Herron, petitioner, *pro se*

Brenda C. Liss, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: September 7, 1994 Decided: September 7, 1994

This is a transcript of the administrative law judge's oral order denying petitioner's application for emergent relief, rendered pursuant to *N.J.A.C.* 1:1-18.2.

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

Mr. Herron filed a petition with the Commissioner of the Department of Education challenging creation and effectuation of a pre-kindergarten school tuition plan/sliding income scale that would allow for children of parents whose incomes are under $50,000 to attend preschool programs without charge but children of those parents with incomes over $50,000 and up to $100,000 would be charged tuition based upon their adjusted gross incomes according to New Jersey income taxes for the previous year. The plan was challenged by Mr. Herron in a variety of ways as being contrary to statute, unconstitutional, discriminatory and likely to enhance and worsen the situation in the Montclair community involving minorities. The Board filed an answer in general denial of the allegations of illegality or unconstitutionality made by petitioner and raised certain affirmative defenses. One part of the petition of appeal in the *ad damnam* clause sought judgment of the Commissioner in immediately issuing an injunction against the Board to prevent implementation of the tuition-based pre-kindergarten program.

The matter proceeded to the Office of Administrative Law for hearing as a contested case. It was set down for hearing in the Office of Administrative Law today, September 7, 1994, but hearing today was confined not to plenary consideration of the issues in the case but only to the request for interposition of emergent relief by way of temporary restraint against effectuation of the plan until plenary hearing. I have listened to argument by Mr. Herron and by counsel for the Board and I'm satisfied that the application (interim relief) as made by Mr. Herron should be **DENIED**, and it is hereby. The reasons for denial in my view stem from consideration of the standards set forth by New Jersey in the case of *Crowe v. DeGioia*, 90 *N.J.* 126, a case in the Supreme Court in 1982. Largely as argued by the Board here, there has been no showing and indeed I do not think there could have been any showing of irreparability of harm should relief be denied. Obviously, if after plenary hearing petitioner were to prevail, that would necessarily imply invalidation of the tuition-based sliding income

scale and presumably that would require return of tuition, and that means that the question merely is one of money. There is no irreparability. If damage has been done or will be done hereafter, that damage will be reparable, not irreparable, because it can be repaired or can be cured or ameliorated by return of tuition money. That, however, will remain to be seen. In addition, *Crowe v. DeGioia* standards require the legal claim be clear or reasonably clear at this moment and my conclusion is in listening to the parties that Mr. Herron's claims as petitioner are not that clear. They may turn out to be. Today they are not. It's obvious also the facts and the conclusions to be drawn from material facts in this case will be disputed--no question about it. The opinions that will be advanced here I presume will be competing and they leave this case therefore in that respect in a state of flux. Under all the circumstances, it would be error for me to employ the extraordinary power of restraint or injunction at this moment. The motion is **DENIED**, Mr. Herron. I reserve the right to reduce my thoughts to writing. Should you object or take exception to the ruling, you will have your appropriate relief either upon review by the Commissioner or at the end of the case.

This order on application for emergent relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forth-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10 and *N.J.A.C.* 1:1-12.6(i, j).

END OF TRANSCRIPT

I, Angela M. Robinson, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Ospenson's oral order rendered in the above matter on September 7, 1994.

September 8, 1994
DATE

Angela M. Robinson
Angela M. Robinson

amr

OAL DKT. NO. EDU 7286-94

DAVID HERRON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The oral order denying petitioner's application for emergent relief from the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent consideration of the transcript of the oral order denying the application for emergent relief and the tape of the proceedings, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge for the reasons clearly articulated by him in the initial order.

Accordingly, the motion for emergent relief is hereby denied and the matter is directed to be transmitted to OAL for plenary hearing.

IT IS SO ORDERED.

OCTOBER 24, 1994

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 25, 1994

286-94

YOGESH SAXENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reimbursement of tuition paid to Board, contending that its policy with respect to future residents was unconstitutional. Said policy permits parents who reside outside the district, but who will move into the district within 90 days, to enroll their children in the district free of charge; however, if they do not move into the district in the allotted time, tuition is charged.

Board's motion to dismiss was granted. ALJ found the petition was filed more than 90 days after the alleged harm accrued. Moreover, the ALJ found no constitutional infirmity in the policy. ALJ ordered copy of the decision to be forwarded to the County Prosecutor since petitioner made a claim upon a political subdivision of the State for monies to which he is not entitled. (The contractor had indemnified petitioner against any tuition charge under the Board's policy if construction of the home was not timely completed.)

Commissioner concurred with findings and conclusions of ALJ that there was no constitutional infirmity in the Board's policy and that the petition was untimely filed pursuant to N.J.A.C. 6:24-1.2(c). Commissioner remanded matter to the Office of Administrative Law solely for findings and recommendations on the issue of sanctions.

OCTOBER 24, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4179-94

AGENCY DKT. NO. 48-3/94

YOGESH SAXENA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS,

Respondent.

Yogesh Saxena, petitioner, *pro se*

Lisa A. Sanders, Esq., for respondent (Martin R. Pachman, attorney)

Record Closed: July 21, 1994 Decided: September 6, 1994

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

Yogesh Saxena filed a petition of appeal challenging the constitutionality of Bernards Township Board of Education Policy No. 3240 and seeking reimbursement of tuition, plus interest, paid pursuant to the policy.

The Board filed an answer denying the allegations and setting forth affirmative defenses of (1) failure to state a claim on which relief may be granted, (2) failure to file timely under *N.J.A.C.* 6:24-1.2(c) and (3) fraud.

The Board also moved to dismiss the action for lack of timeliness, failure to state a claim on which relief may be granted, and because the petitioner's allegation that he suffered money damages is false.

The petitioner responded to the motion and the Commissioner of Education transmitted the matter to the Office of Administrative Law for proceedings with respect to the petition and motion. *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

Oral argument was heard on the motion on Thursday, July 21, 1994 at the Office of Administrative Law facility in Mercerville (Trenton). For the reasons that follow, the Board's motion is GRANTED.

From the pleadings and the argument on motion, I FIND:

1. The petitioner and his family moved in February 1992 to New Jersey, but did not reside in the Bernards Township school district.

2. The petitioner had a building contract and a house under construction in Bernards Township at the time.

3. The petitioner's children attended the district schools February-June 1992 under Board policy No. 3240.

4. The petitioner paid tuition per policy provisions.

5. The petitioner's children attended district schools, also under Board policy No. 3240 from September 1992 through February 1993 when home construction was sufficiently complete to allow occupancy.

6. On March 15, 1994, the petitioner filed the present appeal.

A copy of the policy is appended to this decision.

The petitioner generally argues that the policy creates two classes of future residents. One who can move into their homes in Bernards Township in 90 days and the other who are unable to occupy in 90 days. The first group attends the schools free, while the second group pays tuition.

Petitioner also asserts the policy is deceptive because one can be led to believe by a home builder that a new home can be completed in 90 days. Should the builder not deliver the home in time, the future resident pays tuition from the first day any family member attends district schools. The policy, therefore, treats the two groups unequally. Petitioner asserts it would be perfectly lawful to charge tuition from day one to every future resident or waive the same as long as one eventually moves into Bernards Township. The Bernards Township Board of Education policy is unlawful, discriminatory and enforceable under *N.J.S.A.* 18A:38-3.

The Board argues that the petitioner, on February 7, 1992, based on a contract for the purchase of a home within the district, applied to enroll his children in the public schools for the 1993-94 school year. On August 10, 1992, the Board requested a tuition deposit from the petitioner pursuant to the policy and *N.J.S.A.* 18A:38-3, in the amount of $5,899.26.

The policy permits parents who reside outside the district, but who will move into the district within 90 days to enroll their children in the district free of charge. Upon enrollment, the parents are charged a tuition deposit equaling an amount of tuition for the 90-day period. If the parents move into the district within 90 days, the deposit is

the 90-day period. If the parents move into the district within 90 days, the deposit is refunded. If the parents do not, the Board exercises its option to charge tuition to nonresident parents if they, in fact, do not move into the district within 19 days of initial enrollment.

After the ninety-day period in the petitioner's case expired, the petitioner did not move into the district. As a result, the Board credited the amount of the 90-day deposit to the petitioner's tuition account. The Board continued to charge tuition until the petitioner became a resident of the district in February 1993. The petitioner claims that he suffered monetary damages in the amount of $6,000 which represents the tuition paid for two children for the ninety-day period. The Board asserts that the actual amount charged to the petitioner was $5,899.25. Moreover, the petitioner suffered no monetary damages because his contract to purchase his home within the district contained a clause requiring the developer to pay all tuition costs if the closing did not occur within 90 days of enrollment of the petitioner's children in the district's schools.

DETERMINATION

The petitioner has alleged that the subject policy is unconstitutional in that it violates the equal protection clause of the federal Constitution. By signing his petition of appeal, he assured the Commissioner of Education that he was bringing a timely school law controversy. The petitioner also demands reimbursement of the tuition amounts paid. For the following reasons, each of these assertions is incorrect.

First, Board policy No. 3243 is not unconstitutional on its face or as applied. *N.J.S.A.* 18A:38-3 provides:

> 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.

The making of a rule must be authorized by a statute. Here, the Legislature has clearly bestowed to local boards of education the right to admit pupils, not resident in the district, with or without payment of tuition, *as the board may prescribe*. When a tribunal interprets a rule, questions of validity must be resolved first. The making of the rule must be authorized by a statute. The content of the rule must not conflict with any statutory provision, nor may the rule go beyond what has fairly been authorized by the Legislature. In this case, the Board made provision for nonresident attendance accompanied by a tuition charge. The policy, in pertinent part states:

> 2. Future Residents
>
> Families who reside outside the District but who intend to move into the District within 90 days shall be allowed to enroll their children without a charge for tuition. The family must submit proof of intent to move within the District to the Superintendent. This proof shall be a copy of a signed purchase or lease contract for residential housing. If the contract or lease is terminated for any reason, the Superintendent must be notified and the student must make formal application to remain as a tuition paying non-resident student. If the family move into the District is delayed beyond the 90 calendar day limit, the student may remain in school on a tuition paying basis until residency is achieved.
>
> Parents of non-resident pupils who anticipate becoming residents within 90 days of enrollment shall be charged with a deposit equal to a tuition payment for 90 days at the time of enrollment. This deposit shall be guaranteed by promissory note. The deposit shall be refunded if residency occurs during the 90 day period. Otherwise, this deposit shall be credited against any tuition charges.

The policy is clearly and rationally related to the Legislative grant of authority. There is nothing in the policy that exceeds the grant of authority. There is nothing in the policy that exceeds the grant of authority.

The petitioner contends that the policy makes two classes of citizens. That statement overreaches the facts. As political subdivisions of the State, boards of education have the power to draw certain lines. For example, *N.J.S.A.* 18A:38-1

provides for attendance at school free of charge to certain persons over five and under twenty years of age. Yet, *N.J.S.A.* 18A:38-5 provides:

> No child under the age of five years shall be admitted to any public school, except such as may be provided pursuant to law for children of his age.
>
> No board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year, but the board may in its discretion admit any such pupil if he or she meets such entrance requirements as may established by rules or regulations of the board.

In Village of Belle Terre v. Borrass, 416 U.S. 1, 8 (1974), the United States Supreme Court said, "But every line drawn by a legislature leaves out what might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."

In addition, the petition was filed more than 90 days after the alleged harm accrued. *N.J.A.C.* 6:24-1.2(c) requires filing within 90 days of the act complained of. This rule of repose has been strictly construed. *Riely v. Hunterdon Central High School Board of Education*, 173 *N.J. Super.* 109 (App. Div. 1980). And finally, the petitioner has suffered no loss. He has offered nothing to show that his builder did not reimburse him for tuition paid because the petitioner could not sooner occupy his home.

Having reviewed the papers and the parties' arguments, I **FIND** and **CONCLUDE** that the Bernards Township Board of Education exercised a Legislatively invested grant of authority when it adopted policy no. 3240. I further **FIND** and **CONCLUDE** that there is no constitutional infirmity in the policy, the petition is untimely and the petition is specious.

Accordingly, the Board's motion to dismiss must be **GRANTED**. It is so **ORDERED**.

One matter remains to be addressed. The petitioner sought money from the Board in his petition. The Commissioner can order monies paid only when restitution is appropriate. Restitution cannot be appropriate, however, when a petitioner has suffered no loss of money. It is asserted and not denied that the petitioner's builder, as part of the construction contract, indemnified the petitioner against any tuition charge under policy No. 3240 if construction were not timely completed. The petitioner cannot have it both ways. The Commissioner cannot be party to an unjust enrichment.

The petitioner chose to represent himself. He has that right. Upon representing himself, the petitioner assumes all the responsibilities as well as the rights of a legal representative. Inasmuch as Yogesh Saxena has made a claim upon a political subdivision of the State for monies to which he is not entitled, a copy of this decision and the final decision shall be forwarded to the Prosecutor of Somerset County.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6 SEPTEMBER 1994
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9/7/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 13 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

YOGESH SAXENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

In his exceptions, petitioner asserts that his claim should not be considered untimely pursuant to N.J.A.C. 6:24-1.2(c). Petitioner supports this position by reference to earlier correspondence to the Commissioner arguing that, "[s]ince the [Board's] policy is still in place and I am challenging the lawfulness and constitutionality of the said policy, the 90 days limit to contest does not apply." (Petitioner's Exceptions, Attachment 1)

Further, petitioner reasserts his position, as argued before the ALJ, that the Board's policy concerning future residents is discriminatory and unlawful. Petitioner maintains the policy is "punitive and not equitable" (Petitioner's Exceptions, at p. 1) as it refunds the requisite tuition deposit only to those parents who

gain residency status within the 90-day time frame established by the Board. If the parents do not become residents within the 90-day period, the Board exercises its option to charge tuition, and credits the deposit against any such tuition charges.

In response, the Board submits that assessing tuition against nonresidents is a matter of public policy inasmuch as the taxpayers of Bernards Township should not be required to fund the education of nonresident students. The Board contends that petitioner was "not being punished" and "remained free at all times to enroll his children in his district of residence free of charge for the 6-month period that it took to complete his home, but voluntarily elected to enroll his children in the Bernards Township schools instead." (Board's Reply Exceptions, at p. 2)

Lastly, petitioner excepts to the ALJ's conclusion that petitioner sought monies to which he was not entitled. Petitioner contends that, although his construction contract provided that the builder indemnify him for tuition charges should his home not be completed on time, that provision cost petitioner the ability to negotiate a free bathroom and other upgrades. Thus, petitioner argues, he paid $10,000 out-of-pocket for those options which "could have been for tuition***." (Petitioner's Exceptions, at p. 2)

That the tuition indemnification was in any way connected to the negotiation of other contract particulars is, the Board argues, "speculation." Additionally, the Board contends that

> Petitioner has intentionally attempted to hide relevant facts from this tribunal since the inception of this matter. The petition filed in this matter fails to divulge the existence of the contracted provision which required the builder's payment of tuition costs and seeks monetary

> damages for damages that Petitioner sustained in paying the tuition costs.*** (Board's Reply Exceptions, at p. 2)

The Board further argues that petitioner admitted he did not pay those tuition costs only when he was forced to so admit. In this regard, the Board seeks the imposition of sanctions upon petitioner as a pro se litigant in violation of the Rules of Professional Conduct.* (Id.)

Upon careful and independent review of the record in this matter, the Commissioner finds petitioner's exceptions unpersuasive and concurs with the findings and conclusions of the ALJ that there is no constitutional infirmity in the Board's policy. Furthermore, the Commissioner agrees that the petition was untimely filed pursuant to N.J.A.C. 6:24-1.2(c) and finds no compelling reason to relax this rule under N.J.A.C. 6:24-1.15.

The remaining issue is the necessity for sanctions against petitioner, in accordance with N.J.A.C. 1:1-14.14, which was not addressed in the initial decision, notwithstanding that the Board raised it before the ALJ. Therefore, the Commissioner is remanding this matter to OAL solely for findings and recommendations on the issue of sanctions.

Accordingly, the instant matter is hereby remanded to OAL. Further, as the Commissioner recognizes he is not the agency head for purposes of review of sanctions under N.J.A.C. 1:1-14.14 (Laufgas v. Barnegat Twp. Board of Education, 1988 S.L.D. 1905),

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*The Board cites N.J.A.C. 1:1-5.5(g), which mandates that pro se litigants be held to the standards contained in the Rules of Professional Conduct. Specifically, RPC 3.3 is invoked. (Board's Reply Exceptions, at p. 2)

such findings and recommendations by the ALJ will be forwarded to the Director of OAL, in accordance with N.J.A.C. 1:1-3.2(c)4, following a final decision on remand by the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 24, 1994

DATE OF MAILING - OCTOBER 25, 1994

287-94

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
A. MC G. AND L.M., RESPONDENTS.	:	DECISION

SYNOPSIS

Petitioning Board alleged that respondents' two children were not entitled to enrollment in the Cranford school district from September 1988 through November 1993 because they were not domiciled in the district. Board sought tuition reimbursment of $47,300.

Having considered testimony of witnesses and the record, the ALJ found that prior to December 1993 the petitioning mother proved that she was domiciled in Cranford. However, after her marriage in December 1993, she was thereafter domiciled in Newark. The grandmother's claim to custody of the children was not enough to establish eligibility to obtain a free public education under N.J.S.A. 18A:38-1(b), documentation of support or nonsupport of the children was not presented. ALJ concluded respondents were responsible for tuition from December 1993 through the end of the 1993-94 school year and ordered them to pay the tuition owed.

Commissioner adopted findings and determination in initial decision and directed Board to calculate the amount of tuition owed from December 1993 through the period that the children remained in the school district and ordered respondents to pay such amount owed.

OCTOBER 26, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. EDU 12071-93

AGENCY DKT NO. 395-11/93

BOARD OF EDUCATION OF THE

TOWNSHIP OF CRANFORD, UNION COUNTY,

Petitioner,

v.

A. McG. AND L. M.,

Respondents.

Anthony P. Sciarrillo, Esq., for petitioner

A. McG. and L. M., *pro se*

Record Closed: July 27, 1994 Decided: September 9, 1994

BEFORE **MUMTAZ BARI-BROWN** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Board of Education of the Township of Cranford ("Board"), alleges that respondents' two children are not entitled to enrollment in the Cranford School District from September 1988, through November 1993, because they are not domiciled in the district. The Board seeks tuition

reimbursement for each nonresident student of $5,500.00 per year or a total of $47,300.00.

Respondents contend that L. M. (mother) and her children A. M. and D. M. legally reside in Cranford. Further, respondents allege that the Board violated their civil rights by attempting to improperly place D. M. in an "educationally slow learner" class for the purpose of securing funds for the school. Respondents allege that the Board's discriminatory conduct was based on race.

The matter was transferred to the Office of Administrative Law on December 21, 1993, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. A hearing was held on June 21, 1994. Petitioner presented three witnesses and respondents presented two witnesses. After the hearing, the parties filed post hearing briefs and the record closed on July 27, 1994.

ISSUE

The issue is whether respondents' children were domiciled in Cranford from September 1988 through November 1993. *N.J.S.A.* 18A:38-1(b) provides that if the Board of Education denies a free education to a student based on domicile, the parent or guardian is entitled to a hearing and "shall have the burden of proving by a preponderance of the evidence before the commissioner that the child is eligible for a free education under the criteria listed in this subsection." Accordingly, respondents have the burden of proof that their children were domiciled in Cranford from September 1988 to November 1993.

SUMMARY OF EVIDENCE

The Board alleges that since 1988 respondents' children, A. M., eleven years old, and D. M., eight years old, have been domiciled at 40 Longfellow Avenue, Newark, and not at 3 McClellan Drive, Cranford. Therefore, the Board seeks payment of tuition for the previous years.

In June 1993, Patricia Planer, D. M.'s first grade teacher, reported that D.M. stated that he had moved back to Newark with his mom, dad, and sister "about three months ago." (P-1) Planer also testified that in May, D. M. stated that he was late for school because his mother had car trouble.

On June 8, 1993, William E. Cashman, acting superintendent, mailed L. M. a letter informing her that *N.J.S.A.* 18:38-1 requires children to attend school in the town in which they are domiciled with their parents and that tuition can be charged to out-of-town students. However, he also stated that "[the Cranford Board of Education] will allow your children, [D. M. and A. M.] to complete the remainder of the school year in Cranford." (P-2)

Evelyn McGill Abdulai, L. M.'s mother, testified that her grandchildren, A. M. and D. M., have lived in her home with their mother at 3 McClellan Drive in Cranford since the children's birth. On June 21, 1993, L. M. and Abdulai signed a Statement of Responsibility/Residency affidavit that the children resided in Abdulai's Cranford home. Also, after speaking with Board personnel about students' residence requirements, Abdulai filed papers to obtain legal custody of A.M. and D.M. On November 5, 1993, Judge John F. Malone, Superior Court - Family Part, awarded temporary custody of D.M. and A.M. to Mrs. Abdulai. (R-2) Abdulai stated that L. M. did move to Newark after she married A. McG. in

December 1993, but the children remained with her. Moreover, she maintained that neither A. McG. nor L. M. give her money for the children's support.

On September 13, 1993, Michele Schultz, confidential secretary to the Cranford Superintendent of Schools, received an anonymous phone call informing her that L. M. and her children had moved to East Orange. The caller also stated that L. M. dropped the children off at her mother's house in Cranford before school at 6:00 a.m. and then picked them up after work and took them back to East Orange. Schultz recorded the message on tape, (P-5a), then typed the content of the discussion that she had with the caller (P-5) Based on the anonymous tip, the school began a residency investigation.

The Board's residency investigators, Mr. William Mello and Mr. McFall, observed two residences, 3 McClellan Street in Cranford and 40 Longfellow Avenue in Newark, for 14 days between September 13 and December 20, 1993. (P-6) During that period, they watched A.M. and D.M. enter either the Cranford home or the Hillside School a total of two or three times. The investigators also saw L. M. pick up the children at the Cranford home two times and they then followed her car. However, the investigators lost her in traffic, and they were never able to determine where L. M. took the children. The investigation report discloses that on at least six occasions the investigators did not see any car deliver the children before school or pick them up after school. In addition, the report did not show that the respondents' children were transported to Cranford everyday. The anonymous caller clearly stated that everyday L. M. dropped off the children at their grandmother's house at approximately 6:00 a.m. then the grandmother drove them to school. (P-6) However, the record reflects that the investigators' surveillance usually began at approximately 7:00 a.m. and never before 6:20 a.m. Consequently, I **FIND** that the investigators' report is inconclusive.

L. M. testified that she has lived in Cranford with her mother and received all business and personal correspondence at the Cranford address until December 1993. She married respondent, A. McG. on December 4, 1993. Their children continue to live in Cranford with their grandmother but visit their parents' home on weekends and one day during the week. Prior to the marriage, L. M. also stayed at A. McG.'s. residence at Longfellow Avenue in Newark. However, L. M. candidly pointed out that the home on Longfellow Avenue was the marital home of A. McG. and his former wife. Thus, L. M. continued to maintain her permanent home in Cranford until after A. McG. was divorced. L. M. then married A. McG. and changed her mailing address to Longfellow Avenue in Newark. She and A. McG. decided that until they are able to establish a secure home, the children should remain with the grandmother and visit their parents. Also, after speaking with the Board's representative about the children's residence, L. M. allowed her mother to obtain custody of the children.

DISCUSSION AND CONCLUSIONS

The Board claims that Cranford was not A.M.'s domicile between 1988-1993 and also that Cranford was not D.M.'s domicile from 1991 to 1993. Therefore, they were not eligible to attend the district's schools. The Board's assertion is based on the anonymous telephone call from a neighbor who stated that the children did not live in Cranford but in East Orange, the comments of D.M. to his teachers that he lived in Newark, the results of the residency investigators' report, and respondents' failure to provide independent indicia of the children's domicile in Cranford. The tuition rate for nonresident students is $5,500.00 per school year. The Board seeks $47,300.00 in back tuition from the respondents or the grandmother Evelyn Abdulai.

Respondents contend that the children are legal residents of Cranford because they lived with their mother in Cranford. Alternatively, they claim residency status based on the temporary custody order obtained by the grandmother. Further, respondents allege in their answer to the complaint that petitioner has engaged in a systematic violation of D.M.'s civil rights by trying to place him in an "[e]ducationally slow learner class for the purpose of securing certain funds for the school."

Domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he intends to return. *Mercadante v. City of Paterson*, 111 *N. J. Super.* 35, 39 (Ch. Div. 1970), aff'd, 58 *N.J.* 112 (1971). A person may have multiple residences, but may have only one true domicile at a time. Therefore, the residence may coincide with domicile, but does not alone determine domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955). If there are several residences, domicile is that place which the person regards as his or her true and permanent home. *In re Jaffe*, 74 *N.J.* 86, 90-91 (1977). A domicile, once established, continues until it is superseded by a new one. *In re Estate of_Gillmore*, 101 *N.J. Super.* 77, 87 (App. Div. 1968), certif. denied, 52 *N.J.* 175 (1968). The question of domicile is one of fact and must be determined on a case by case basis. *Lea v. Lea*, 18 *N.J.* 1, 7 (1955). Some of the more important factors in determining the domicile of a person who has more than one residence are:

> the physical characteristics of each [residence], the time spent and the things done in each place, the other persons found there, the person's mental attitude toward each place, and whether there is or is not an intention, when absent, to return.

Mercadante, *supra*, *111 N.J. Super.* at 39-40.

In the *Matter of Unanue,* 255 *N. J. Super.* 362 (Law Div. 1991), the court stated that it is "clear. . . that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." *Id.* at 376. Persuasive evidence of actual domicile may include:

> recitals as to domicile in a will, trust, tax return or other formal document, as well as statements to others as to domicile, are evidential of the actual domicile. But they are not all conclusive. They are of value evidentially to the extent that they are not intended to deceive and other proofs support such domicile. I*d.* at 377.

Intent is the decisive factor in establishing domicile. It is the manifestation of a person's intent that converts a residence from a mere place in which a person lives to a domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955). In the event a person divides her time between two places where she lives, it is her intention that makes one or the other her domicile. *Ibid.* A person's true intent is determined by the acts, statements, and conduct of the individual as viewed in light of all the circumstances. *Collins v. Yancey*, 55 *N.J. Super.* 514 (Law Div. 1959).

In their brief, respondents allege an intent to return to the Cranford home after the warrant of removal is served on the home at 40 Longfellow Avenue in Newark. Respondents' statement is unsupported in the record and therefore rejected.

Regarding respondents' contention that L. M. resided in Cranford and continues to do so, case law still holds that a married woman may obtain a separate domicile from her husband if he consents. *See Zieper v. Zieper*, 14 *N.J.* 551, 554 (1954); *Floyd v. Floyd*, 95 *N. J. Eq.* 661 (E. & A.1924). Domicile of wife is merged into that of the husband and continues unless the wife acquires a

separate domicile by her husband's consent. Thus, if L. M. can prove that she has acquired, or maintained, a separate domicile in Cranford, or that the grandmother has legal custody for legitimate reasons in accordance with *N.J.S.A.* 18A:38-1(b) the children may continue to attend the Cranford schools. If not, they must be registered for school in their new domicile.

I have considered petitioner's evidence of the teacher's report about D.M.'s statement, the anonymous phone tip of a neighbor, and the investigators' inconclusive report. Assuming, *arguendo*, that the children were domiciled in Newark at the time of the June 8, 1993 letter from the acting superintendent, the letter bars recovery of any tuition money through the 1992-1993 school year. *N.J.S.A.* 18A:38-3 states that:

> [a]ny person not resident in a school district, if eligible except for residency, 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.

Thus, I **CONCLUDE** that when the Board allowed the children to finish the school year without requiring tuition, it waived any claim to tuition.

On the other hand, the record also reflects and I **FIND** that prior to December 1993, L. M. was domiciled in Cranford. She has presented numerous items showing that she was living at 3 McClellan Avenue including her driver's license, an insurance application from work, her car insurance card, and her marriage certificate dated November 1993. (R-4, R-5, R-6, R-7, R-8, R-9, R-10). I **FIND** that L. M. changed her address after her marriage to A. McG. in December 1993. Accordingly, she was thereafter domiciled in Newark.

I reject respondents' claim that the custody order issued to the grandmother gives the children the right to obtain a free public education in

Cranford. Custody alone is not enough to establish eligibility under the statute. *N.J.S.A.* 18A:38-1(b) states that a child living with a person domiciled within the school district is entitled to a free education upon the filing by the child's parent or guardian with the secretary of the board of education a "sworn statement that he is not supporting the child," due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement must be substantiated by documentation pertaining only to the support or nonsupport of the child. Respondents failed to provide documentation or convincing testimony regarding their inability to support the children. Moreover, the evidence shows that the grandmother misconstrued her discussion with Board personnel; she obtained custody of the children because she believed it would satisfy school residency requirements.

I also reject respondents' claim that D.M.'s civil rights were violated. The record reflects that the Board's Office of Special Services evaluated D.M. for eligibility for special education because he showed "low acquisition of letter and number knowledge." (R-12). The child study team concluded that he was eligible to receive special education services with the classification of perceptually impaired. *Ibid.* However, respondents failed to demonstrate that the recommendations made by the school were based on discriminatory motives. *See, N.J.S.A.* 10:5-1 to -42.

Based on the evidence, I **CONCLUDE** that respondents have met their burden of proof that the children were domiciled in Cranford prior to December 1993. However, I further **CONCLUDE** that respondents have not met the burden of proof that the children were domiciled in Cranford after their parents' December 1993 marriage; they were domiciled in Newark. Therefore, respondents are responsible for tuition from December 1993, through the end of the 1993-94 school year.

I, therefore, direct the Board to calculate the amount of tuition owed from December 1993, through the period that the children remained in the school district. The grandmother has not been named in the Board's complaint for tuition nor has the Board moved to amend its complaint to include the grandmother as a party to this proceeding. Indeed, under the Board's claim the grandmother is an indispensable party who has an interest in the matter. Therefore, I **CONCLUDE** that a disposition cannot justly be made in her absence. Accordingly, the order in this proceeding shall be directed at the respondents, A. McG. and L. M. .

ORDER

It is, therefore, **ORDERED** that respondents pay the amount of tuition owed for the children's attendance in the Cranford school district as directed

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 9, 1994
DATE:

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

9/13/94
DATE:

Hope R. Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 26 1994
DATE:

ASTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE

APPENDIX

Witnesses

For Petitioner:

Patricia Planer
Michelle Schultz
William Mello

For Respondents:

Evelyn McGill Abdulai
A. McG.
L. M.

Exhibits

J-1	Kindergarden Enrollment - D. M., dated September 12, 1991
J-2	Kindergarden Enrollment - A. M., dated September 1, 1988
P-1	Memo by Patricia Planer, dated June 1993
P-2	Letter dated June 8, 1993 to L. M.
P-4	Statement of Responsibility
P-5	Transcript of phone call on September 13, 1993
P-5a	Original Tape Recording dated September 13, 1993
P-6	Investigative Report
R-1	Judgment of Divorce dated July 16, 1993
R-2	Court Order - Temporary Custody
R-3	Name Change of D. M.
R-4	Automobile Insurance policy dated June 1989 to June 1990
R-5	Dental Form for A. M.

R-6 Bradlees charge bill dated November 19, 1993

R-7 Personal card dated August 5, 1991

R-8 Ownership of cat from Union County S.P.C.A. dated November 26, 1988

R-9 Dental form document dated October 26, 1992

R-10 Marriage Certificate dated November 1993

R-12 Re-evaluation for D. M. - Special Education dated July 27, 1992

R-13 Social Worker's report dated July 9, 1992

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
A. MC G. AND L.M., RESPONDENTS.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions submitted by respondents were untimely pursuant to N.J.A.C. 1:1-18.4, having been filed on October 17, 1994, in response to an initial decision mailed on September 26, 1994, and are, therefore, not herein considered.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge that the respondents have met their burden of proof that the children herein were domiciled in Cranford prior to December 1993. He further concurs with the ALJ that respondents have not met such burden of proof with respect to the children being domiciled in Cranford after their parents' marriage in December 1993 and, as such, they are responsible for tuition for the childrens' school attendance in this district from that time.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in the matter

for the reasons articulated therein. The Board is directed to calculate the amount of tuition owed from December 1993 through the period that the children remained in the school district and respondents are hereby ordered to pay such amount owed for the children's attendance in the Cranford school district.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 26, 1994

DATE OF MAILING - OCTOBER 26, 1994

287-94

EDU # 12071-93
C # 287-94
APP. DIV. #A-3175-94T3
SB # 103-95

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

PETITIONER-RESPONDENT,

V.

ANDRE L. MC GUIRE AND LISA C. MC GUIRE,

RESPONDENTS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 26, 1994

Remanded by the Appellate Division, September 19, 1995

For the Petitioner-Respondent, Anthony P. Sciarrillo, Esq., of Counsel

For the Respondents-Appellants, Andre L. and Lisa C. McGuire, pro se

On October 26, 1994, the Commissioner issued his decision in this matter, holding that appellants' children were not domiciled in the School District of the Township of Cranford as of December 1993 and directing appellants to pay tuition to the Board.

By notice filed on February 21, 1995, appellants appealed the Commissioner's decision to the Appellate Division of the Superior Court of New Jersey.

DEC. 6, 1995

A Deputy Attorney General acting on behalf of the Commissioner of Education then filed a motion with the Appellate Division seeking dismissal of the appeal on the grounds that appellants had failed to exhaust their administrative remedies.

On September 18, 1995, the Appellate Division granted the motion. However, the Court determined that the appeal should not be dismissed, but transferred to the State Board for consideration as if the appeal had originally been filed with the State Board.

Accordingly, we have reviewed the record in this matter. As follows, we dismiss this appeal for failure to file within the statutory time limit established by N.J.S.A. 18A:6-28 for appeals to the State Board of Education.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-12; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1, slip op. at 5 (App. Div. 1990); Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989).

In this case, the Commissioner's decision was rendered on October 26, 1994, and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appeal from was deemed filed on October 29. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the appellants were required to file their notice of appeal to the State Board on or before November 28, 1994. However, the appellants' notice of appeal to the Appellate Division, which was dated February 16, 1995, was not filed until February 21. Even if N.J.S.A. 18A:6-28 could be construed to provide us with the authority to enlarge the time limit for filing an appeal, and considering this appeal as if it had been filed with the State Board rather than with the Appellate Division, we find nothing in the record in this case to excuse appellants from not filing an appeal until four months after the Commissioner's decision.[1]

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit for appeals to the State Board of Education as computed under the applicable regulations.

December 6, 1995

Date of mailing DEC 08 1995

[1] We note that the time for filing an appeal with the Appellate Division is 45 days from the date of service of the decision. R. 2:4-1(b).

287-94

EDU # 12071-93
C # 287-94
APP. DIV. #A-3175-94T3
SB # 103-95
APP. DIV. #A-4742-95T3

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

PETITIONER-RESPONDENT,

V.

ANDRE L. MC GUIRE AND LISA C. MC GUIRE,

RESPONDENTS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 26, 1994

Remanded by the Appellate Division, September 19, 1995

Decision on remand by the State Board of Education, December 6, 1995

Remanded by the Appellate Division, February 10, 1998

For the Petitioner-Respondent, Anthony P. Sciarrillo, Esq.

For the Respondents-Appellants, Andre L. and Lisa C. McGuire, pro se

This matter is before us pursuant to a remand by the Appellate Division. The appeal at issue was an appeal to the State Board from a decision of the Commissioner of Education dated October 26, 1994 regarding the entitlement of appellants' two children to a free public education in the Cranford school district. Adopting the initial decision of the Administrative Law Judge (ALJ), the Commissioner held that appellants

May 6, 1998

had not met their burden under N.J.S.A. 18A:38-1(b)(2) of proving that the two children involved in this matter were domiciled in Cranford after December 1993, at which time their mother had married and moved to Newark to live with her new husband. Consequently, the Commissioner concluded that appellants were responsible for tuition from December 1993. Pursuant to the Commissioner's determination, appellants were directed to pay tuition for the relevant period as calculated by the Board.

By notice dated February 21, 1995, appellants filed an appeal from the Commissioner's decision. However, they made their appeal to the Appellate Division rather than to the State Board.

On September 18, 1995, the Appellate Division, acting on a motion to dismiss filed on behalf of the Commissioner, transferred the appeal to the State Board.

By decision of December 6, 1995, the State Board dismissed the appeal, stressing that even if it had been filed with the State Board rather than the Appellate Division, the appeal had not been filed within the 30-day statutory time limit imposed by N.J.S.A. 18A:6-28. The State Board also found that even if it had the authority to enlarge the statutory time limit, there was nothing in the record to excuse appellants' late notice of appeal, which had not been filed until four months after the Commissioner's decision was rendered.

On appeal from our determination, the Appellate Division agreed with the State Board that the 30-day statutory time limit set forth in N.J.S.A. 18A:6-28 was jurisdictional. Hence, the Court concurred that, if that time limit was applicable, the State Board could not expand it. The Court, however, questioned whether the 30-day time limit was applicable in this case inasmuch as the appeal appeared to be

interlocutory since appellants could not pay tuition to the Board until the Board calculated the amount due.

Stressing that interpretation of a statute is a judicial rather than an administrative function, the Court concluded that the "State Board erred as a matter of law in...dismissing the appeal without determining whether the decision appealed from was final." Appellate Division's Decision, slip op. at 11. However, the Court further concluded that the State Board must have the opportunity to interpret its own regulations and, therefore, remanded the matter to the State Board for reconsideration.

In addition, the Court offered comments on the record "in the event that they may be helpful in any further proceedings at the agency level." Id. First, the Court was concerned about whether the Commissioner had included any notice to the parties with respect to the appeal procedure when he rendered his decision. Secondly, the Court questioned the Commissioner's adoption of the Administrative Law Judge's finding that appellants had not proven that the children were domiciled in Cranford after their parent's marriage in December 1993. Thirdly, the Court questioned the application of the burden imposed by N.J.S.A. 18A:38-1(b) under the circumstances presented by this case.

Our first task pursuant to the Court's decision is to determine whether the Commissioner's decision in this case was a final decision within the meaning of N.J.A.C. 6:2-1.1(a). That regulation provides that final decisions for purposes of appeal to the State Board include:

> Any determination of the Commissioner, including, as to those separable issues upon which the Commissioner has rendered a final decision, a decision remanding all or part of a controverted case....

There has never been any question that, in general, a decision of the Commissioner under N.J.S.A. 18A:38-1 as to whether a child is entitled to a free public education in a given school district is a final decision for purposes of appeal to the State Board. In such cases, where a parent has contested a district board's determination as to domicile and the Commissioner has made a judgment under N.J.S.A. 18A:38-1(b)(2) that the evidence does not support the parent's claim, the statute mandates that:

> The Commissioner shall assess the parent...tuition for the student prorated to the time of the student's ineligible attendance....Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

In cases of this kind, the annual per pupil cost to the school district is established during the initial proceedings before the Administrative Law Judge. See, e.g., M.T., on behalf of minor children, L.T. and H.T. v Board of Education of the Lower Camden County Regional High School District, 97 N.J.A.R.2d (EDU) 374; Zadran v. Board of Education of the Township of Belleville, 97 N.J.A.R.2d (EDU) 334 (subsequent history omitted). Once that amount is established, the statute controls the calculation. Hence, once the period of ineligible attendance is determined, the computation is ministerial and the time for appeal to the State Board is not automatically tolled.

We reaffirm that decisions of this kind are final decisions within the meaning of our regulation. Accordingly, they are appealable to the State Board at that point and subject to the thirty-day statutory time limit.

Nonetheless, the Court found the circumstances presented by the record in this particular case to be such that the appeal at issue may not have been time-barred. Close examination of the ALJ's initial decision indicates that there may be merit to the Court's view. Compare with Ahmed v. Board of Education of the City of Paramus, 97 N.J.A.R.2d (EDU) 243 (finding of fact by the ALJ as to amount of tuition). However, we find that a definitive conclusion as to the character of the Commissioner's decision cannot be made without reconsidering the question in the context of a complete examination of the record upon which the decision was based. We therefore remand this matter to the Commissioner for determination of whether the amount of annual per pupil cost to the district that was applicable for the years in question had been adequately established in the record before the Commissioner rendered his decision and for such proceedings as may be required in light of the concerns expressed by the Court.

We retain jurisdiction.

May 6, 1998

Date of mailing MAY 08 1998

JERRY BARSHATKY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

AND

IN THE MATTER OF THE TENURE HEARING OF JERRY BARSHATKY, SCHOOL DISTRICT OF FREEHOLD REGIONAL HIGH SCHOOL, MONMOUTH COUNTY,

AND

JERRY BARSHATKY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 26, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSOLIDATED CASES

JERRY BARSHATKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent,

and

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Petitioner,
v.
JERRY BARSHATKY,
Respondent,

and

JERRY BARSHATKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

OAL DKT. NO. EDU 6008-92
AGENCY DKT. NO. 304-7/92

OAL DKT. NO. EDU 7807-92
AGENCY DKT. NO. 397-8/92

OAL DKT. NO. EDU 12017-93
AGENCY DKT. NO. 362-10/93

Stephen B. Hunter, Esq., for Jerry Barshatky (Klausner, Hunter, Cige & Seid, attorneys)

Malachi J. Kenney, Esq., for Board of Education of the Freehold Regional High School District (Kenney, Gross & McDonough, attorneys)

Record Closed: July 25, 1994 Decided: August 23, 1994

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

This matter involves tenure charges filed against Jerry Barshatky, a tenured teaching staff member employed by the Board of Education of the Freehold Regional High School District, and also two separate petitions filed by Jerry Barshatky seeking determinations that the Board of Education of the Freehold Regional High School District had wrongfully withheld his salary increments for the 1992-93 school year and 1993-94 school year, respectively. Hereinafter the Board of Education of the Freehold Regional High School District shall be referred to as "petitioner" and Jerry Barshatky shall be referred to as "respondent" although, as a technical matter, Mr. Barshatky is actually the petitioner in the increment withholding cases.

The first increment withholding case was transmitted to the Office of Administrative Law for determination as a contested case on August 4, 1992 and was assigned docket number EDU 6008-92. EDU 7807-92 was commenced on August 18, 1992, when petitioner in accordance with the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to 25, certified to the Commissioner three charges of inefficiency and incompetency. Specifically, the charges alleged that respondent was inefficient and incompetent by reason of his persistent use of improper and ineffective teaching techniques, including failure to prepare proper lesson plans, failure to motivate students, failure to understand the nature of learning, failure to utilize class periods efficiently, failure to gear lesson plans to the learning abilities of all students and failure to develop interpersonal skills. The charges also alleged that respondent was an incompetent and inefficient teacher by reason of his repeated failure to implement suggestions and criticisms offered by his supervisors and finally, that he was an incompetent and inefficient teacher by reason of his continuing inability to maintain proper order and decorum in his classrooms. An Answer was filed on behalf of respondent on September 25, 1992 and the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 7, 1992. A prehearing conference was conducted on November 4, 1992 and the matters were

consolidated for hearing on a series of dates in February and March 1993. Some of the dates were adjourned because of the illness of petitioner's counsel; others were adjourned because of respondent's illness or because of attorneys' conflicts. The hearing commenced on March 10, 1993 and continued on various dates in March, April, June, September, October, November and concluded on December 17, 1993. The second increment withholding case was transmitted to the Office of Administrative Law on December 16, 1993 and was assigned docket number EDU 12017-93. With the consent of the parties, it was consolidated with the other two pending cases for determination by order entered December 17, 1993.

Following the close of the hearing the record remained open for the receipt of written submissions. Respondent's initial post-hearing written submission was received February 10, 1994. Petitioner's initial post-hearing written submission was received March 1, 1994. A reply was filed on behalf of petitioner on March 31, 1994 and respondent's reply was filed April 6, 1994, whereupon the record closed. The record was reopened on May 18, 1994, when respondent's counsel advised that respondent had submitted his resignation from his teaching position, effective June 30, 1994, and had filed retirement papers with the Teachers' Pension and Annuity Fund which retirement was to be effective July 1, 1994. Respondent requested that the tenure charges be dismissed on the grounds of mootness, that his 1992-93 increment withholding petition (EDU 6008-92) be marked "withdrawn" and that an initial decision be issued with respect to the 1993-94 increment withholding case only (EDU 12017-93). The undersigned then offered both parties the opportunity to submit legal memoranda concerning the mootness issue. Respondent's letter memorandum in support of his motion to dismiss the tenure charges was received on June 3, 1994. Petitioner's brief in opposition to dismissing the charges was received on June 6, 1994. Each side filed a reply on June 13, 1994. Respondent's papers included his affidavit. Finally, by letter received July 25, 1994, respondent's attorney forwarded a copy of the notice sent to respondent by the Division of Pensions and Benefits advising him that the Board of Trustees of the Teachers' Pension and Annuity Fund had approved his

application for veteran's retirement, effective July 1, 1994, whereupon the record closed.

EDU 6008-92

By written notice dated May 18, 1994, respondent notified the undersigned and his adversary that he wished to withdraw his Petition of Appeal concerning the increment withholding for the 1992-93 school year. Petitioner has voiced no objection to respondent's request and accordingly, pursuant to N.J.A.C. 1:1-19.2 I **CONCLUDE** that this case is **WITHDRAWN** and the Clerk of the Office of Administrative Law shall return the matter to the Commissioner of Education for appropriate disposition.

EDU 7807-94

Respondent, Jerry Barshatky, has resigned from his teaching position with the Freehold Regional High School District, effective June 30, 1994 and has retired from teaching, his application for retirement having been approved by the Board of Trustees of the Teachers' Pension and Annuity Fund, effective July 1, 1994. Respondent's affidavit of June 10, 1994, establishes that respondent reached his 62nd birthday on December 9, 1993 and assures the undersigned and the Commissioner that he has no intention whatsoever of resuming any type of teaching career at the elementary or secondary level. It is respondent's contention that the tenure charges seeking to remove him from his tenured teaching position are therefore moot and should be dismissed.

An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, the conflict between the parties has become merely hypothetical. See Black's Law Dictionary 409 (5th ed. 1979), and In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983). Our courts, and the Commissioner as well, ordinarily will refuse to review

questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative resources. In re Conroy, supra., Carolyn Henry v. Board of Education of the City Wildwood, 1975 S.L.D. 1. Unquestionably, the relief sought by petitioner in the tenure inefficiency charges filed with the Commissioner, i.e., the removal of respondent from his tenured teaching position, can no longer be granted. Petitioner argues that although the case is moot, the issues presented are of such great public importance that a resolution is warranted nevertheless. While recognizing that the Commissioner has on many occasions approved settlements in tenure cases involving only inefficiency charges as consistent with the public policies articulated in Cardonick v. Board of Education of the Borough of Brooklawn, EDU 7093-81, 7094-81 and 100-82, petitioner argues that the within matter warrants a different conclusion because a lengthy hearing on the merits has already been conducted and because petitioner does not consent to the dismissal.

Although it is true that substantial resources of both parties and the administrative law judge have already been committed to this matter, a dismissal of the moot case at this point will still conserve judicial and administrative resources by obviating the necessity for the preparation of a written opinion by the administrative law judge and by the Commissioner and perhaps by appellate forums thereafter. Furthermore, none of the individual charges presents any novel issue such that a decision on the merits would further clarify the body of law concerning inefficiency charges and what constitutes inefficiency. The tenure charges contain no allegations of wrongdoing or misconduct which might nevertheless require determination by the Commissioner of Education for the imposition of a sanction or reprimand.

Petitioner also expresses concern that "dismissal of the tenure charges at this juncture would encourage tenure teachers to contest tenure charges, even where the facts are clear . . ., continue to draw salary without working for an extended period of time, accrue additional pension credit and then simply 'bail out' into the safe haven of

retirement at the last possible moment, with no resolution of the pending charges." It is not the dismissal of moot cases, however, which encourages the scenario recited by petitioner, but rather the existence of other statutory and regulatory provisions which ensure the payment of salary and the accrual of additional pension credit, regardless of the outcome on the merits. It is, of course, true that pursuant to the provisions of N.J.S.A. 18A:6-14 respondent (and all other respondents in tenure proceedings) received his full salary following the passage of 120 calendar days after certification of the charges. Any determination on the merits in this matter, however, would be totally irrelevant to the payment of those monies, since no provision exists for repayment upon a determination adverse to the teacher. Likewise, N.J.A.C. 17:3-4.1(f), a regulation adopted by the Board of Trustees of the Teachers' Pension and Annuity Fund, provides:

> A member under 62 years of age will receive service credit for that base salary received during the period of his suspension in which he is awaiting a determination by the Commissioner of Education as provided under N.J.S.A. 18A-6.14. (sic) Service credit will not be granted for such salary after the first of the month following his attainment of age 62 when that salary will no longer be covered by Social Security.

Accordingly, regardless of any determination on the merits, respondent is entitled to receive service credit in the Teachers' Pension and Annuity Fund for the monies paid pursuant to N.J.S.A. 18A:6-14 up until his 62nd birthday (which was December 9, 1993) and not thereafter. A decision on the merits would have no impact on either salary payments or pension credit, therefore, and consequently, neither of those factors provides any reason for determining a moot case.

Furthermore, inefficiency charges, standing alone without accusations of wrongdoing or conduct unbecoming are not generally something which concerns the State Board of Examiners. This is apparent from the provisions of N.J.A.C. 6:11-3.5, a

regulation governing teacher certification, which reads:

> In cases in which teaching staff members accused of misdemeanors, crimes or conduct unbecoming which might warrant revocation or suspension, resign or retire from their positions, either before tenure proceedings have been brought or prior to the conclusion of such proceedings, it shall be the responsibility of the chief school administrator of that district to notify the State Board of Examiners of the alleged conduct pursuant to N.J.A.C. 6:11-3.6(a)2. Should the Board of Examiners issue an Order to Show Cause, it shall be the responsibility of the district which reported the conduct to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying such allegations.

Accordingly, in cases such as the present where the only charges are inefficiency, petitioner has no obligation to notify the Board of Examiners of respondent's resignation and retirement. The likelihood of respondent, who will be 63 years old this year, obtaining employment in some other district and thereby potentially subjecting other students to inefficient teaching, is so remote as to be almost nonexistent, and in any event, respondent, in a sworn statement, has expressed his intention not to teach in any school under the Commissioner's jurisdiction subsequent to his retirement, effective July 1, 1994. Our courts have routinely dismissed moot cases even after extensive litigation at the trial and appellate levels and even when it is contrary to the wishes of one or both parties when there is no compelling reason to issue a decision. See, e.g., Oxfeld v. New Jersey State Board of Examiners of Education, 68 N.J. 301 (1975), Degnan v. Curcio, 87 N.J. 372 (1981).

None of the exceptions to the mootness doctrine which would warrant the issuance of a decision on the merits despite mootness exists in this matter, and accordingly, respondent's motion to dismiss the charges as moot is hereby **GRANTED**.

EDU 12017-93

The only way for a board of education to withhold an increment pursuant to N.J.S.A. 18A:29-14* is by a recorded roll call majority vote of the full membership at a meeting conducted in accordance with the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-1 to 21. It is undisputed that there was no such vote with respect to respondent's 1993-94 increment. Petitioner argues that respondent was not entitled to an increment by the terms of the Negotiated Agreement which require the completion of 94 working days in the prior school year to establish eligibility for an increment. Since respondent was suspended for the entire 1992-93 school year as a result of the pending tenure charges, the petitioner argued that he failed to satisfy the threshold requirement for receiving an increment. While the circumstances recited by petitioner obviously constitute "other good cause" within the statute for withholding respondent's 1993-94 increment, petitioner, for whatever reason, - probably through inadvertence - failed to take the necessary actions required by law to accomplish the increment withholding. Accordingly, I **CONCLUDE** that respondent's 1993-94 increment must be paid.

For all of the foregoing reasons, it is **ORDERED** that EDU 6008-92 is hereby **WITHDRAWN**, EDU 7807-92 is hereby **DISMISSED WITH PREJUDICE**, and EDU

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* That statute provides in pertinent part:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. . . .

12017-93 is resolved in accordance with the foregoing opinion and petitioner is hereby **ORDERED** to pay respondent's 1993-94 increment.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

August 23, 1994
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/25/94
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 31 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 Statement of charges and statement of evidence (12 pages)

J-2 Answer to tenure charges (2 pages)

J-3 Petition of Appeal (EDU 6008-92) (5 pages)

J-4 Answer to Petition of Appeal (EDU 6008-92) (5 pages)

For Freehold Regional High School District:

F-1 Statement of charges and statement of evidence (EDU 7807-92) (11 pages)

F-2 Professional Improvement Plan and bibliography of references provided to Mr. Barshatky February 24, 1992 (13 pages)

F-3 Final Teacher Evaluation, dated March 1, 1989 (3 pages)

F-4 Classroom Observation Report, October 21, 1988 (2 pages)

F-5 Classroom Observation Report, January 31, 1989 (2 pages)

F-6 Final Teacher Evaluation, dated March 5, 1990 (7 pages)

F-7 Classroom Observation Report, September 21, 1989 (2 pages)

F-8 Response by Mr. Barshatky to F-7 (6 pages)

F-9 Classroom Observation Report, October 20, 1989 (2 pages)

F-10 Supervisory Report, November 16, 1989 (2 pages)

F-11 Classroom Observation Report, November 28, 1989 (2 pages)

F-12 Supervisory Report, January 24, 1990, with response attached (2 pages)

F-13 Classroom Observation Report, February 8, 1990 (2 pages)

F-14 Mr. Barshatky's response to F-13 (3 pages)

F-15 Final Teacher Evaluation, March 1, 1991 (3 pages)

F-16 Mr. Barshatky's response to F-15 (2 pages)

F-17 Classroom Observation Report, October 17, 1990 (2 pages)

F-18 Classroom Observation Report, November 14, 1990 (2 pages)

F-19 Mr. Barshatky's response to F-18 (2 pages)

F-20 Classroom Observation Report, January 7, 1991, and response from Mr. Barshatky (3 pages)

F-21 Classroom Observation Report, January 18, 1991, and response from Mr. Barshatky attached (4 pages)

F-22 Classroom Observation Report, March 27, 1991 (2 pages)

F-23 Letter from Walter J. Zuber, Assistant Superintendent to Mr. Barshatky, dated April 16, 1991

F-24 Classroom Observation Report, May 28, 1991 (2 pages)

F-25 Mr. Barshatky's response to F-24 (6 pages)

F-26 Memorandum from Dr. Matthew Herman to Mr. Barshatky, dated September 26, 1991 (3 pages)

F-27 Supervisory Report, September 27, 1991 (2 pages)

F-28 Classroom Observation Report, October 7, 1991 and Mr. Barshatky's response attached (14 pages)

F-29 Letter from Mr. & Mrs. Gentilcore to Dr. Herman, dated October 14, 1991 (2 pages)

F-30 Classroom Observation Report, October 16, 1991

F-31 Mr. Barshatky's response to F-30 (7 pages)

F-32 Classroom Observation Report, October 31, 1991 (2 pages)

F-33 Mr. Barshatky's response to F-32 (19 pages)

F-34 Memorandum from Dr. Herman to Mr. Barshatky, dated November 15, 1991 (3 pages)

F-35 Memorandum from Dr. Herman to Mr. Barshatky, dated November 15, 1991

F-36 Memorandum from Dr. Herman to Mr. Barshatky, dated November 19, 1991 (3 pages)

F-37 Memorandum from Dr. Herman to Mr. Barshatky, dated November 19, 1991

F-38 Classroom Observation Report, November 21, 1991 (2 pages)

F-39 Mr. Barshatky's response to F-38 (2 pages)

F-40 Memorandum from Dr. Herman to Mr. Barshatky, dated January 6, 1992 (3 pages)

F-41 Memorandum from Dr. Herman to Mr. Barshatky, dated January 15, 1992 (3 pages)

F-42 Classroom Observation Report, January 27, 1992, with Mr. Barshatky's response attached (23 pages)

F-43 Memorandum from Dr. Herman to Mr. Barshatky, dated January 28, 1992 (2 pages)

F-44 Memorandum from Dr. Herman to Mr. Barshatky, dated January 29, 1992

F-45 Memorandum from Dr. Herman to Mr. Barshatky, dated January 30, 1992

F-46 Memorandum from Mr. Evans to Mr. Barshatky, dated January 30, 1992 with Mr. Barshatky's response attached (2 pages)

F-47 Memorandum from Dr. Herman to Mr. Barshatky, dated February 4, 1992

F-48 Memorandum from Mr. Evans to Mr. Barshatky, dated February 21, 1992

F-49 Handwritten letter from Ms. Fitzgerald, "To whom it may concern," dated February 24, 1992

F-50 Classroom Observation Report, March 2, 1992 (2 pages)

F-51 Memorandum from Mr. Evans to Mr. Barshatky, dated March 2, 1992

F-52 Memorandum from Mr. Evans to Mr. Barshatky, dated March 3, 1992

F-53 Memorandum from Mr. Evans to Dr. Herman, dated March 3, 1992 (2 pages)

F-54 Memorandum from Mr. Evans to Mr. Barshatky, dated March 4, 1992 (2 pages)

F-55 Memorandum from Mr. Evans to Dr. Herman, dated March 5, 1992

F-56 Memorandum from Mr. Evans to Mr. Barshatky, dated March 6, 1992

F-57 Memorandum from Dr. Herman to Mr. Barshatky, dated March 6, 1992

F-58 Classroom Observation Report, March 11, 1992, with Mr. Barshatky's response attached (7 pages)

F-59 Memorandum from Dr. Herman to Mr. Barshatky, dated March 12, 1992

F-60 Memorandum from Dr. Herman to Mr. Barshatky, dated March 16, 1992

F-61 Memorandum from Dr. Herman to Mr. Barshatky, dated March 16, 1992, with Mr. Barshatky's response attached (3 pages)

F-62 Memorandum from Dr. Herman to Mr. Barshatky, dated March 18, 1992

F-63 Memorandum from Dr. Herman to Mr. Barshatky, dated March 19, 1992

F-64 Memorandum from Mr. Evans to Mr. Barshatky, dated March 20, 1992

F-65 Memorandum from Mr. Evans to Mr. Barshatky, dated March 23, 1992, with Mr. Barshatky's response attached (3 pages)

F-66 Memorandum from Dr. Chase to Mr. Evans, dated March 24, 1992

F-67 Memorandum from Mr. Evans to Mr. Barshatky, dated March 24, 1992

F-68 Memorandum from Mr. Evans to Mr. Barshatky, dated March 25, 1992

F-69 Memorandum from Mr. Evans to Mr. Barshatky, dated March 25, 1992 (2 pages)

F-70 Classroom Observation Report, March 27, 1992 (2 pages)

F-71 Handwritten letter from Mrs. Sotelo to Dr. Herman, dated April 8, 1992 (2 pages)

F-72 Classroom Observation Report, April 9, 1992, with Mr. Barshatky's response attached (12 pages)

F-73 Memorandum from Mr. Evans to Dr. Herman, dated April 10, 1992 (5 pages)

F-74 Memorandum from Dr. Herman to Mr. Barshatky, dated April 13, 1992

F-75 Classroom Observation Report, April 16, 1992, with Mr. Barshatky's response attached (6 pages)

F-76 Memorandum from Mr. Evans to Mr. Barshatky, dated May 1, 1992 (Re: Cancelled meeting)

F-77 Memorandum from Mr. Evans to Mr. Barshatky, dated May 1, 1992 (Re: Computers)

F-78 Classroom Observation Report, May 6, 1992, with Mr. Barshatky's response attached (4 pages)

F-79 Classroom Observation Report, May 26, 1992, with Mr. Barshatky's response attached (7 pages)

F-80 Memorandum from Dr. Herman to Mr. Barshatky, dated June 3, 1992 (3 pages)

F-81 Memorandum from Mr. Evans to Mr. Barshatky, dated June 11, 1992

F-82 Memorandum from Dr. Herman to Mr. Barshatky, dated June 12, 1992 (Re: Parental complaint)

F-83 Memorandum from Dr. Herman to Mr. Barshatky, dated June 12, 1992 (Re: Textbooks)

F-84 Memorandum from Dr. Herman to Mr. Barshatky, dated June 15, 1992

F-85 Letter from Donna S. Jani to Dr. Daniel J. McGuire, dated June 15, 1992, with Mr. Barshatky's response attached (7 pages)

F-86 Final evaluation, June 23, 1992 (10 pages)

F-87 Final Teacher Evaluation, March 11, 1992 (2 pages)

F-88 Faculty Manual 1991-92, Howell High School

F-89 Collective bargaining agreement between Freehold Regional High School District Board of Education and Freehold Regional High School Education Association, July 1, 1991 through June 30, 1994

F-90 Memorandum from Dr. Herman to Mr. Barshatky, dated May 12, 1992 (2 pages)

F-93 Master schedules for teachers at Howell High School 1983 through 1992 (21 pages)

F-94 Work order number 29036 stamped received March 3, 1992

F-95 Letter from Division on Civil Rights to Freehold Regional High School District, dated October 16, 1991, with attachments (11 pages)

F-96 Letter from Division on Civil Rights to Superintendent Freehold Regional Board of Education, dated September 19, 1980, with attachments (9 pages)

F-97 Lesson plan, dated 4/29/92 (2 pages)

F-98 Lesson plan, dated 4/28/92

F-99 Memorandum from Ms. T. Shaw to Mr. Barshatky, dated June 24, 1992 (2 pages)

Exhibits for Mr. Barshatky:

B-1 Final Teacher Evaluation, March 3, 1988

B-2 Classroom Observation Report, December 2, 1987

B-3 Classroom Observation Report, November 6, 1987

B-4 Memorandum from Dr. Herman to staff, dated November 15, 1989 with school report card attached

B-5 Memorandum from Mr. Barshatky to Dr. Herman, dated June 5, 1992 (8 pages)

B-6 Memorandum from Mr. Barshatky to Dr. Herman, dated February 14, 1992 (2 pages)

B-7 Memorandum from Mr. Barshatky to Dr. Herman, dated February 21, 1992 (4 pages)

B-8 Memorandum from Mr. Barshatky to Dr. Herman, dated March 9, 1992 (2 pages)

B-9 "Rebut to the Rebut of Mr. Evans Observations, 3-11-92" (4 pages)

B-10 Memorandum from Mr. Barshatky to Dr. Herman updated April 16, 1992 (5 pages)

B-11 Memorandum from Mr. Barshatky to Mr. Evans and Dr. Chase, dated March 28, 1992 (2 pages)

B-12 Memorandum from Joseph Kruczek to Science Department Staff, dated March 24, 1992

B-14 Employee Attendance Calendar for Mr. Barshatky, July 1991 through June 1992

B-15 Memorandum from Mr. Barshatky to Mr. Evans, dated March 26, 1992 (3 pages)

B-17 Memorandum from Dr. Herman to Mr. Barshatky, dated April 16, 1992 (5 pages)

B-19 Second page of rebuttal memorandum, May 19, 1992

B-22 Science Curriculum Guide, September 1986

B-25 Memorandum from Mr. Evans to Mr. Barshatky, dated February 12, 1992

B-26 Memorandum from Mr. Barshatky to Mr. Evans with lesson plan, dated 3/20/92, attached

B-27 Memorandum from Mr. Barshatky to Mr. Evans, dated 6/12/92 (4 pages)

B-28 Memorandum from Rose Traficante to Mr. Barshatky, dated April 1, 1992

B-30 New Jersey Department of Health Hazardous Substance Fact Sheet on Ethyl Alcohol (3 pages)

B-31 Memorandum from Chakela Butler Insurance Analyst to Mr. Zuber, dated January 7, 1992

B-32 Classroom Observation Report, March 26, 1985 (2 pages)

B-33 Classroom Observation Report, September 25, 1972 (2 pages)

B-34 Classroom Observation Report, September 27, 1972 (2 pages)

B-35 Classroom Observation Report, October 25, 1972 (2 pages)

B-36 Classroom Observation Report, December 13, 1972 (2 pages)

B-37 Classroom Observation Report, January 5, 1973 (3 pages)

B-38 Classroom Observation Report, January 22, 1973 (2 pages)

B-39 Classroom Observation Report, January 31, 1973 (2 pages)

B-40 Classroom Observation Report, September 19, 1973 (2 pages)

B-41 Classroom Observation Report, September 24, 1973 (2 pages)

B-42 Classroom Observation Report, October 1, 1973 (2 pages)

B-43 Classroom Observation Report, October 24, 1973 (2 pages)

B-44 Classroom Observation Report, November 28, 1973 (2 pages)

B-45 Classroom Observation Report, October 25, 1974 (2 pages)

B-46 Classroom Observation Report, November 15, 1974 (one page-second page appears to be missing)

B-47 Classroom Observation Report, December 6, 1974 (2 pages)

B-48 Classroom Observation Report, January 17, 1975 (2 pages)

B-49 Classroom Observation Report, February 21, 1975 (2 pages)

B-50 Classroom Observation Report, January 31, 1977 (2 pages)

B-51 Classroom Observation Report, October 14, 1977 (2 pages)

B-52 Classroom Observation Report, November 28, 1977 (2 pages)

B-53 Classroom Observation Report, January 19, 1978 (2 pages)

B-54 Classroom Observation Report, January 23, 1978 (2 pages)

B-55 Classroom Observation Report, February 21, 1978 (2 pages)

B-56 Final Teacher Evaluation, March 20, 1978 (2 pages)

B-57 Classroom Observation Report, September 19, 1978 (3 pages)

B-58 Classroom Observation Report, November 16, 1978 (2 pages)

B-59 Classroom Observation Report, February 5, 1979 (2 pages)

B-60 Final Teacher Evaluation, March 14, 1979 (2 pages)

B-61 Classroom Observation Report, September 24, 1979 (2 pages)

B-62 Classroom Observation Report, December 19, 1979 (2 pages)

B-63 Classroom Observation Report, February 28, 1980 (2 pages)

B-64 Final Teacher Evaluation, March 18, 1980 (2 pages)

B-65 Classroom Observation Report, May 21, 1980 (2 pages)

B-66 Classroom Observation Report, September 8, 1980 and Mr. Barshatky's response (5 pages)

B-67 Classroom Observation Report, October 1, 1980 (one page, second page appears to be missing)

B-68 Classroom Observation Report, December 4, 1980 and Mr. Barshatky's response (6 pages)

B-69 Final Teacher Evaluation, March 20, 1981 (2 pages)

B-70 Classroom Observation Report, November 23, 1981 (2 pages)

B-71 Classroom Observation Report, February 26, 1982 (2 pages)

B-72 Final Teacher Evaluation, March 8, 1982 (3 pages)

B-73 Classroom Observation Report, September 22, 1983 (2 pages)

B-74 Classroom Observation Report, January 19, 1983 (2 pages)

B-75 Classroom Observation Report, September 30, 1983 (2 pages)

B-76 Supervisory Report, dated January 23, 1984 (2 pages)

B-77 Final Teacher Evaluation, March 5, 1984 (3 pages)

B-78 Classroom Observation Report, November 5, 1984 (2 pages)

B-79 Supervisory Report, dated December 6, 1984 (2 pages)

B-80 Final Teacher Evaluation, March 8, 1985 (3 pages)

B-81 Supervisory Report, dated May 28, 1985 (2 pages)

B-82 Classroom Observation Report, September 23, 1985 (2 pages)

B-83 Classroom Observation Report, September 23, 1985 (one page - second page appears to be missing)

B-84 Classroom Observation Report, September 26, 1985 (2 pages)

B-85 Classroom Observation Report, January 7, 1986 (2 pages)

B-86 Final Teacher Evaluation, March 1986 (2 pages)

B-87 Individual professional Improvement Plan, dated March 10, 1986

B-88 Classroom Observation Report, October 16, 1986 (2 pages)

B-89 Classroom Observation Report, October 27, 1986 and Mr. Barshatky's response (7 pages)

B-90 Classroom Observation Report, November 18, 1986 (2 pages)

B-91 Classroom Observation Report, December 4, 1986 (2 pages)

B-92 Classroom Observation Report, January 16, 1987 (2 pages)

B-93 Final Teacher Evaluation, February 24, 1987 (2 pages)

B-94 Individual Professional Improvement Plan, dated March 1987

B-95 Classroom Observation Report, May 23, 1988 and Mr. Barshatky's response (6 pages)

B-97 Chart showing hydrogen ion concentration and relationship to Ph

B-104 Flame test worksheet (2 pages)

B-105 Memorandum from Mr. Barshatky to Mr. Evans, dated March 19, 1992 (5 pages)

Exhibits for Court:

C-1 Copies of Bibliography materials supplied to Mr. Barshatky

C-2 Rules and safety precautions, dated March 1, 1992

C-3 Handwritten plans entitled "Experiment"

C-4 Lesson plans re: safety precautions

EXHIBITS FOR IDENTIFICATION ONLY

F-91 Report of classroom observation, February 6, 1992

F-92 Memorandum from Mr. Evans to Mr. Barshatky, dated October 5, 1989

B-13 Board of Education's Answers to Interrogatories

B-16 Eight disciplinary referrals, April 1, 1992

B-18 Memorandum re: loan of science equipment, March 28, 1990

B-20 Ethyl alcohol diagram

B-21 Ball and stick models

B-23 Introductory Physical Science text, fifth edition (1987)

B-24 Introductory Physical Science, third edition (same as B-100 for identification)

B-29 Part of F-32 and F-33 class list

B-96 Modern Physical Science text, teachers edition (1983)

B-98 Physical Science text, Prentice Hall teachers edition, third edition (1986)

B-99 Introductory Physical Science Haber Schaim fourth edition (1982)

B-100 Introductory Physical Science Haber Schaim third edition 1977 (same as B-24 for identification)

B-101 Concepts and Challenges in Science Book One, second edition, Winkler (1984)

B-102 Ditto on phase changes

B-103 Packet of materials re: phases of matter (13 pages)

WITNESSES

For Freehold Regional High School District:

Matthew C. Herman

John Evans

Joseph F. Kruczek

Rosanne Traficante

Herbert Bachmann

Diana Chase

Theresa Ann Shaw

For Mr. Barshatky:

Jerry Barshatky

Nancy Grbelja

Samuel Wyckoff

JERRY BARSHATKY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF JERRY BARSHATKY, SCHOOL DISTRICT OF FREEHOLD REGIONAL HIGH SCHOOL, MONMOUTH COUNTY,	:	COMMISSIONER OF EDUCATION DECISION
AND	:	
JERRY BARSHATKY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record and initial decision of the Office of Administrative Law have been reviewed. By extension, exceptions of the Board and replies thereto of Respondent Barshatky were timely filed in accordance with the applicable provisions of N.J.A.C. 1:1-18.4.

The Board's exceptions essentially recast and reiterate arguments presented in post-hearing submissions which the

Commissioner determines were fully and fairly considered and addressed by the Administrative Law Judge in her initial decision. Additionally, the Board advances that a determination of mootness in this matter is precluded by the grievance filed against the Board seeking payment for unused sick leave for respondent. It urges that resolution of such grievance requires a decision on the merits of the tenure charges herein.

In reply, respondent asserts that that there is no relationship between the pending grievance proceeding, which will culminate in binding arbitration, and the issue of whether the within tenure charges should be declared moot. He states that the grievance is purely contractual in nature and the claims would be the same whether or not respondent retired and regardless of the outcome of the tenure charges at issue. (Respondent's Exceptions, at p. 10)

Upon a careful and independent review of the record in this matter, the Commissioner determines the Board's exceptions to be without merit and concurs with the findings and conclusion of the ALJ that, under the circumstances existing in this matter, the within tenure charges of inefficiency, seeking the removal of respondent from his position, are rendered moot by respondent's retirement effective July 1, 1994. The Commissioner finds the discussion of the ALJ in this regard comprehensive and cogent. (See Initial Decision, at pp. 4-7.)

Further, the Commissioner agrees with the ALJ's determination that because the Board did not comply with the mandates of N.J.S.A. 18A:29-14 in the withholding of respondent's 1993-94 increment, such increment must be paid him.

Accordingly, the recommended decision of the Office of Administrative Law is adopted as the final decision in this matter. The within tenure charges (EDU 7807-92) are dismissed, with prejudice, as moot and the Board is hereby ordered to pay respondent's 1993-94 increment.

COMMISSIONER OF EDUCATION

OCTOBER 26, 1994

DATE OF MAILING - OCTOBER 26, 1994

288-94

EDU #6008-92, #7807-92 and #2017-93 (consolidated)
C # 288-94
SB # 51-94

IN THE MATTER OF THE TENURE HEARING OF JERRY BARSHATKY, SCHOOL DISTRICT OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

AND

JERRY BARSHATKY,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 26, 1994

For the Petitioner/Respondent-Appellant, Kenney, Gross & McDonough (Malachi J. Kenney, Esq., of Counsel)

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

On August 17, 1992, the Board of Education of the Freehold Regional High School District (hereinafter "Board") certified tenure charges alleging inefficiency and incompetency against Jerry Barshatky (hereinafter "respondent"), a tenured teaching staff member. That case was subsequently consolidated with petitions filed by

5/1/96

respondent challenging the Board's action in withholding his salary increments for the 1992-93 and 1993-94 school years.[1] Hearings were conducted in the Office of Administrative Law between March and December 1993. On May 18, 1994, however, after submission of post-hearing briefs and a month-and-a-half after the record had closed, respondent notified the Administrative Law Judge ("ALJ") that he had submitted his resignation from his tenured position, effective June 30, 1994, and had filed retirement papers with the Teachers' Pension and Annuity Fund.[2] As a result, respondent filed a motion to dismiss the tenure charges against him as moot.

On August 23, 1994, an Administrative Law Judge ("ALJ") recommended granting respondent's motion. The ALJ found that "a decision on the merits would have no impact on either salary payments or pension credit, therefore, and consequently, neither of those factors provides any reason for determining a moot case." Initial Decision, slip op. at 6. The ALJ asserted that "inefficiency charges, standing alone without accusations of wrongdoing or conduct unbecoming are not generally something which concerns the State Board of Examiners." Id. She found that "[t]he likelihood of respondent, who will be 63 years old this year, obtaining employment in some other district and thereby potentially subjecting other students to inefficient teaching, is so remote as to be almost nonexistent, and in any event, respondent, in a sworn statement, has expressed his intention not to teach in any school under the

[1] Respondent subsequently withdrew his petition challenging his salary withholding for 1992-93.

[2] We note that respondent's application was subsequently approved by the Board of Trustees of the Teachers' Pension and Annuity Fund, effective July 1, 1994.

Commissioner's jurisdiction subsequent to his retirement, effective July 1, 1994." Id. at 7.

The ALJ also recommended directing the Board to pay respondent his salary increments for the 1993-94 school year, finding that the Board had failed to take action to withhold respondent's increments by a recorded roll call majority vote of the Board in open meeting as required by N.J.S.A. 18A:29-14.[3]

On October 26, 1994, the Commissioner adopted the findings and conclusions of the ALJ, dismissing the tenure charges as moot and directing the Board to pay respondent's 1993-94 increments.

The Board filed the instant appeal to the State Board, contending, inter alia, that the public interest requires a determination on the merits of the tenure charges, that a grievance filed on behalf of respondent seeking accumulated sick leave pay is dependent upon a determination of those charges, and that the State Board of Examiners will require findings of fact and conclusions of law in determining whether to take action against respondent's teaching certificates.

After a thorough review of the record, we reverse the decision of the Commissioner both as to the tenure charges and salary increments, and remand for a determination on the merits of those tenure charges.

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[3] N.J.S.A. 18A:29-14 provides, in pertinent part:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education.

Initially, we reject the Commissioner's determination that the withholding of respondent's salary increments for the 1993-94 school year could not be sustained since the Board had failed to follow mandated procedures. We stress that respondent had no entitlement to receive a salary amount that included an award of increments during his suspension following the Board's certification of tenure charges in August 1992. In the Matter of the Tenure Hearing of Anthony Castaldo, decided by the State Board, 1986 S.L.D. 3026. In requiring resumption of an employee's full salary 120 days after certification of tenure charges, N.J.S.A. 18A:6-14 does not provide for automatic raises from year to year while the litigation is in progress. "In that increments are intended to reward only those who have contributed to the educational process, Bd. of Education of Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 321 (1979), the mandate of N.J.S.A. 18A:6-14 can not be construed as conferring an entitlement to automatic raises during suspension." In the Matter of the Tenure Hearing of John Eberly, decided by the State Board, 1988 S.L.D. 2441, 2445. Consequently, we reverse the Commissioner's determination directing the Board to pay respondent his salary increments for the 1993-94 school year.

We also reject the Commissioner's determination to dismiss the instant tenure charges as moot. Proposed settlements or withdrawals of tenure charges are required to be submitted to the Commissioner for his prior scrutiny and approval. In the Matter of the Tenure Hearing of Frank Cardonick, decided by the State Board, April 6, 1983. Approval may not be granted by the Commissioner unless such action is found to be consistent with the public interest. Id. While the instant matter does not involve the

settlement or withdrawal of tenure charges, respondent's motion to dismiss the instant charges was predicated on his unilateral action in retiring from his tenured position following the completion of hearings and the submission of post-hearing briefs in the Office of Administrative Law. The Board, which certified and litigated the tenure charges, opposes dismissal of the charges, and we find no justification for subjecting respondent's motion to any less scrutiny than a proposed settlement or withdrawal of tenure charges.

After reviewing the particular circumstances presented herein, we conclude that determination of the instant charges is required in the public interest. Notwithstanding respondent's age and his sworn statement indicating his intention not to teach in any school under the Commissioner's jurisdiction, he retains his teaching certificates, which qualify him for employment in the state as a teacher. Nor can we countenance the ALJ's presumption that inefficiency charges standing alone do not concern the State Board of Examiners, which determines whether there is cause to revoke or suspend a certificate holder's certificates pursuant to N.J.S.A. 18A:6-38, as implemented by N.J.A.C. 6:11-3.4, on the basis of the particular facts in the record of each individual case. See N.J.A.C. 6:11-3.6. Cf. In the Matter of the Revocation of the Teaching Certificates of Frances Dullea, decided by the State Board of Examiners, March 20, 1986, aff'd by the State Board of Education, September 3, 1986.

While the State Board of Examiners could conduct its own hearings in determining whether any action against respondent's certificates is appropriate, judicial economy dictates that the instant charges proceed to final disposition. The ALJ

conducted extensive hearings in this matter over the course of ten months, and the record had closed following submission of post-hearing briefs. Under these circumstances, requiring additional hearings on issues which have already been fully litigated would be a misuse of resources.

Moreover, there is still an outstanding claim which may be dependent upon the determination of those charges. The parties indicate that the Freehold Regional High School Education Association filed a grievance with the Board on behalf of respondent seeking pay for his accumulated unused sick leave under the terms of the district's collective negotiations agreement. The Board contends that resolution of the grievance is fully dependent upon a determination of the tenure charges since the collective negotiations agreement provides such benefits only to employees with 25 years of teaching experience and at least 75 days of accumulated unused sick leave. The Board maintains that since respondent had fewer than 75 days accumulated sick leave prior to his suspension, his entitlement to that contractual benefit turns on resolution of the tenure charges and his resultant statutory entitlement to accrue sick leave during the period of his suspension. Respondent counters that the grievance proceeding has no bearing on the mootness issue.

We disagree. While respondent's statutory entitlement to accrue sick leave during the period of his suspension following certification of the tenure charges is not before us in these proceedings, it is evident that his right to contractual sick leave benefits in this instance is dependent upon whether N.J.S.A. 18A:6-14, in requiring resumption of an employee's "full salary" 120 days after certification of tenure charges,

includes the accrual of sick leave during that period in the event the tenure charges are ultimately sustained.

Consequently, for the reasons expressed herein, we reverse the Commissioner's decision directing the Board to pay respondent his salary increments for the 1993-94 school year and dismissing the instant tenure charges as moot, and remand this matter to the Commissioner for a determination on the merits of those charges. We stress in so doing that in the event respondent ultimately prevails on the merits of the tenure charges, he would be afforded such relief as is necessary to make him whole, including retroactive restoration of his salary increments and accumulated sick leave. See Eberly, supra, at 2446.

We deny the Board's request for oral argument as not necessary for a fair determination of this matter. N.J.A.C. 6:2-3.2.

Attorney exceptions are noted.

May 1, 1996

Date of mailing MAY 03 1996

288-94

12-98 R
(288-94)

IN THE MATTER OF THE TENURE	:	
HEARING OF JERRY BARSHATKY,	:	
FREEHOLD REGIONAL HIGH SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT, MONMOUTH COUNTY.	:	DECISION ON REMAND
	:	

JANUARY 14, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4337-96

(EDU 7807-92 on Remand)

AGENCY DKT. NO. 362-10/93

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Petitioner,

v.

JERRY BARSHATKY,

Respondent.

James E. Collins, Esq., for petitioner (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

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

Record Closed: November 25, 1997 Decided: December 1, 1997

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

On May 1, 1996, the State Board of Education issued a decision remanding this matter to the Commissioner of Education for a determination on the merits of tenure inefficiency charges.

The State Board of Education opinion expressed two reasons for rejecting the Commissioner's determination that respondent's retirement made the tenure charges moot: 1) The New Jersey State Board of Examiners might wish to institute proceedings against respondent's teaching certificate, and 2) petitioner objected to dismissal of the action as moot because, according to petitioner, resolution of a grievance filed by respondent seeking compensation for his accumulated unused sick leave under the terms of the district's collective bargaining agreement was dependent upon a determination of the tenure charges. On May 16, 1996, the Commissioner of Education retransmitted the matter to the Office of Administrative Law for further proceedings consistent with the State Board of Education decision. By order entered August 21, 1996, the matter was placed upon the inactive list for a period not to exceed six months, pending resolution of respondent's appeal in the Appellate Division of the Superior Court. In September 1996, respondent withdrew his appeal in the Appellate Division, and counsel for both parties advised the undersigned that they were actively involved in settlement negotiations which, if successful, would resolve both concerns expressed by the State Board of Education.

By letter dated May 2, 1997, counsel for petitioner advised that the parties had reached agreement in principle on settlement of both the tenure charges and the issue concerning compensation for unused sick leave. On August 6, 1997, counsel for respondent forwarded to the undersigned a copy of correspondence sent to James E. Collins, Esquire, newly retained counsel for petitioner. That correspondence included draft settlement agreements executed by respondent concerning both issues as well as an affidavit signed by respondent on July 3, 1997. That affidavit is annexed hereto and made a part hereof as if set forth herein at length. By letter dated November 21, 1997 and received on November 25, 1997, counsel for petitioner transmitted to the undersigned the fully executed agreement concerning respondent's voluntary surrender of his instructional certificate. The November 21, 1997 letter bearing counsel's signature and the fully executed agreement are also attached hereto and made a part hereof as if set forth herein at length. A copy of the settlement agreement resolving the unused accumulated sick leave issue, which I received with counsel's August 6, 1997 letter and therefore is signed only by respondent, is also attached hereto for informational purposes only. That agreement resolves a dispute which had been the subject of an arbitration award issued on July 15, 1996. (Apparently the arbitrator

did not feel that a resolution of the tenure inefficiency charges on the merits was necessary to a determination of the issue). Since petitioner has forwarded the signed agreement resolving EDU 7807-92 and since it was petitioner's contention to the State Board of Education that resolution of the grievance was fully dependent upon a determination of the tenure charges, I **CONCLUDE** that the subject matter of the grievance has been amicably resolved between the parties as well and, accordingly, the within settlement agreement between the parties satisfactorily resolves both concerns expressed by the State Board of Education.

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

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

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

I **CONCLUDE** that there is currently no existing public policy reason for issuing a decision on the merits of the inefficiency charges. The within settlement agreement satisfactorily addresses any issues which might otherwise have been of concern pursuant to In the Matter of the Tenure Hearing of Frank Cardonick, decided by the State Board April 6, 1983. I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

December 1, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

12/3/97
DATE

DNA
~~MERIT SYSTEM BOARD~~

Mailed to Parties:

DEC 4 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

IN THE MATTER OF THE TEACHING LICENSE(C) OF, JERRY BARSHATKY,	: BEFORE THE NEW JERSEY STATE BOARD OF EXAMINERS : OAL DOCKET NO. EDU-7807-92 CIVIL ACTION AFFIDAVIT

Jerry Barshatky, being duly sworn upon his oath deposes and says:

1. Jerry Barshatky agrees to voluntarily surrender his teaching license and consents to the revocation thereof, consistent with the prescriptions of the attached Settlement Agreement.

2. In so consenting, Jerry Barshatky agrees to waive any and all hearings pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6:11-3.6.

3. The voluntary surrender of Jerry Barshatky's teaching license will have the same force and effect as a revocation.

4. This agreement shall not take effect until the State Board of Examiners has voted to accept its terms.

Jerry Barshatky

Sworn to and subscribed before me
this 30 day of July, 1997.

Stephen B. Hunter, Attorney-at-Law
State of New Jersey

LAW OFFICES
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NEW YORK, NEW YORK 10036
(212) 302-6868

November 21, 1997

Honorable M. Kathleen Duncan, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

RE: Jerry Barshatky
OAL DKT. NO. EDU 4337-96

Dear Judge Duncan:

I am in receipt of your November 18, 1997 correspondence regarding the above-captioned matter. Just two days prior to your letter, I did, in fact, receive the signed Agreement from the Freehold Regional High School District. As such, I enclose herewith the original and three copies of the fully executed Agreement for filing. I would ask that you please return "filed" copies to my office in the envelope provided.

Thanking you, I remain,

Very truly yours,

JAMES E. COLLINS

JEC/aw
Enclosures
cc: Mr. James Wasser, Assistant Superintendent
Stephen B. Hunter, Esquire (w/enclosure)

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

IN THE MATTER OF THE TENURE HEARING OF JERRY BARSHATKY, SCHOOL DISTRICT OF FREEHOLD REGIONAL HIGH SCHOOL, MONMOUTH COUNTY,	OAL DKT. NO. EDU 7807-92 .

A G R E E M E N T

WHEREAS Jerry Barshatky ("Barshatky"), a tenured teacher formerly employed by the Board of Education of the Freehold Regional High School District (the "Board"), is currently the subject of tenure proceedings pending before the Commissioner of Education, and bearing the docket number EDU-7807-92; and

WHEREAS the Board and Barshatky now desire to resolve the aforesaid matter in dispute between them amicably and without the need for further litigation.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT and JERRY BARSHATKY agree as follows:

1. Bartshatky shall irrevocably surrender his instructional certificate.

2. Upon receiving proof that Barshatky has irrevocably surrendered his instructional certificate, the

Board shall formally withdraw the tenure charge proceedings as a contested case.

3. The Board and Barshatky shall submit a copy of this Settlement Agreement to the administrative law judge for her approval.

4. Upon approval of this Settlement Agreement by the Commissioner of Education, this matter shall be closed.

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

JERRY BARSHATKY

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between **FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,** -and- **FREEHOLD REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION,** Grievant: Jerry Barshatky	Case No. 18 390 00405 94L SETTLEMENT AGREEMENT

WHEREAS on July 15, 1996 Arbitrator Scott E. Buchheit rendered an Opinion and Award in American Arbitration Association Case No. 18 390 00405 94L; and

WHEREAS insofar as here relevant, Arbitrator Buchheit ordered the Board of Education of the Freehold Regional High School District (the "Board") to pay to Jerry Barshatky ("Barshatky") certain sums for unused accumulated sick leave upon Barshatky's retirement; and

WHEREAS the Board has indicated its intention to seek to vacate the aforesaid Opinion and Award, pursuant to N.J.S.A. 2A:24-8; and

WHEREAS the Board, the Freehold Regional High School Education Association (the "Association") and Barshatky now desire to resolve the aforesaid matter in dispute between them amicably and without the need for further litigation.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, the FREEHOLD REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION and JERRY BARSHATKY agree as follows:

1. The Board shall pay to Barshatky the sum of One Thousand Sixty-Five and 63/100 ($1,065.63) Dollars, representing one-half of the amount awarded to Barshatky in American Arbitration Association Case No. 18 390 00405 94L; and

2. Barshatky agrees to accept the foregoing sum in full and complete satisfaction of the Board's obligations to him under the arbitrator's Opinion and Award in American Arbitration Association Case No. 18 390 00405 94L; and

3. The Board agrees that it will not seek to vacate the arbitrator's Opinion and Award in American Arbitration Association Case No. 18 390 00405 94L.

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

_____

FREEHOLD REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION

_____

JERRY BARSHATKY

Jerry Barshatky

OAL DKT. NOS. EDU 4337-96 and EDU 7807-92 (ON REMAND)
AGENCY DKT. NO. 362-10/93

IN THE MATTER OF THE TENURE	:	
HEARING OF JERRY BARSHATKY,	:	
FREEHOLD REGIONAL HIGH SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT, MONMOUTH COUNTY.	:	DECISION ON REMAND
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and satisfy the State Board's directives on remand. He, therefore, adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JANUARY 14, 1998
DATE OF MAILING JANUARY 14, 1998

289-94

289-94

RONALD R. GRAHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board member contended that Board's action of renegotiating a five-year term for superintendent after he served only one year of his initial three-year contract violated N.J.S.A. 18A:17-15. Petitioner contended that Board lacked the authority to alter the superintendent's term of appointment until the end of his initial term.

Initial decision found that the initial agreement did not comply with N.J.S.A. 18A:17-15. The Board had appointed the superintendent for a three-year term but did not reduce the agreement to writing. Thus, no enforceable contract existed that could be rescinded and, consequently, the ALJ concluded that the Board could by majority vote appoint the superintendent by written contract for a term of five years under N.J.S.A. 18A:17-15. Moreover, the ALJ concluded that N.J.S.A. 25:1-5(e) is applicable to contracts between boards of education and superintendents of schools entered into pursuant to N.J.S.A. 18A:17-15.

In light of the insufficient present record, the Commissioner remanded matter to OAL for further findings related to superintendent's contracts in question.

OCTOBER 27, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10557-93

AGENCY DKT. NO. 338-9/93

RONALD R. GRAHAM,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

Respondent.

Gregory G. Johnson, Esq., for petitioner

Frederick R. Dunne, Jr., Esq., for respondent (Dunne & Thompson, attorneys)

Melissa Vance Kirsch, Esq., participant for the New Jersey Association of School Administrators, appearing pursuant to *N.J.A.C.*1:1-16.6

Record Closed: June 6, 1994 Decided: July 25, 1994

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Ronald R. Graham, a board member of the Board of Education of the Township of Kearny (Board), alleges that the Board acted illegally when it negotiated a five-year term contract in August 1993 for the superintendent of schools who had completed only one year of his initial three-year contract. Petitioner asserts that under *N.J.S.A.* 18A:17-15, the Board lacks authority to alter the superintendent's term of appointment until the end of his initial term.

The Board asserts that the Superintendent's three-year contract, effective July 1992, was mutually rescinded in August 1993. Then, in September 1993, after the verbal contract between the superintendent and the Board was canceled by mutual consent, the Board awarded a new five year term contract to the superintendent. Thus, the Board submits that its action did not violate *N.J.S.A.* 18A:17-15.

The matter was transmitted to the Office of Administrative Law (OAL) on November 3, 1993, as a contested case pursuant to *N.J.S.A.* 52 :14B-1 to-15 and *N.J.S.A.* 52:14F-1 to -13. On January 18, 1994, Gregory G. Johnson, Esq., filed a notice of appearance on behalf of petitioner. On March 7, 1994, I granted participant status to the New Jersey Association of School Administrators (NJASA). Hearings were held on February 24, March 16, 17, and April 18, 1994. The parties and the participant submitted posthearing briefs and the record closed on June 6, 1994.

ISSUES

1. Whether an oral contract appointing a superintendent of schools to a three-year term pursuant to *N.J.S.A.* 18A:17-15 is enforceable; and if so;

2. Did the Board lack authority under *N.J.S.A.* 18A:17-15 to rescind the three-year verbal contract and thereafter execute a five-year written contract.

UNDISPUTED FACTS

The following relevant undisputed facts are adopted as **FACT**:

1. On May 19, 1992, the past Board appointed John J. McGeehan as the new Superintendent of Schools, effective July 1, 1992.

2. The Board appointed McGeehan to a three-year term from July 1, 1992 to June 30, 1995, pursuant to *N.J.S.A.* 18A:17-15. McGeehan's starting salary was $96,000.

3. As of August 1993, McGeehan had completed fourteen months of the three-year appointment.

4. During the period July 1, 1992 to August 17, 1993, no written contract was executed between the Board and McGeehan; Frederick R. Dunne, Jr. was the Board attorney.

5. On April 20, 1993, Ronald R. Graham, David Stevenson and William Campbell were elected to the Board for three-year terms.

6. The Board reorganized in April 1993 and presently consists of the following persons: Howard Zimmerman, president; Mary S. Torres, vice president; Judith A. Hyde; Richard Weber; Sebastian J. Viscuso; and Stephen A. Stewart.[1]

7. In June/July 1993, Board attorney Dunne requested the Board members to provide suggestions, if any, for inclusion in the superintendent's employment contract.

8. By memorandum dated July 6, 1993, Board member Graham submitted job performance goals for the Superintendent's contract.

9. The published agenda for the August 17, 1993 Board meeting did not specifically state formal action was contemplated on a proposal to grant Superintendent McGeehan a five-year contract.

10. Dunne and McGeehan had numerous meetings from July to August 1993 to discuss the terms and conditions for inclusion in the superintendent's contract.

[1]The names of the Board members are listed in Exhibit J-1, Stipulation of Facts, dated February 24, 1994.

11. At the August 17, 1993 Board meeting, Dunne stated that the superintendent's contract was nearly complete except for the starting date and term.

12. At the August 17, 1993 Board meeting, McGeehan stated that he and Dunne had been negotiating the terms of the contract for approximately two months.

13. During the August 17, 1993 Board meeting, Board member Campbell requested that Dunne first provide a written contract including all pertinent terms before the Board voted to rescind McGeehan's existing three-year appointment. In response to a motion to rescind the balance of McGeehan's three-year term, Campbell stated, "It just doesn't make sense to me to be voting on a term of service when we haven't really seen the make-up of what the contract says. You know, I don't know" (J-1).

14. No written legal opinion was rendered by Board attorney Dunne concerning the legal basis under *N.J.S.A.* 18A:17-15 for the Board to rescind the Superintendent's uncompleted three-year term and granting a five-year appointment.

15. On August 17, 1993, the majority of the Board voted to rescind McGeehan's three-year appointment. There was a vote concerning a five-year term.

16. On September 20, 1993, the Board by majority vote approved the Superintendent's contract, containing a five-year term from July 1, 1993 to June 30, 1998, and set a salary of $103,733 for the 1993-94 school year.

ARGUMENT

Petitioner contends that the Board and superintendent had an enforceable three-year contract. The Board appointed McGeehan to a three-year term by resolution. The agreement included an annual salary at $96,00.00, sick leave, vacation, health

coverage, and other benefits. Thereafter, on September 20, 1993, the Board voted to approve a written contract containing all the terms and conditions of employment within one document. Thus, it is submitted that the essential elements of McGeehan's contract were committed to writing.

The Board concedes that on May 19, 1992, it appointed McGeehan as the Superintendent of Schools, effective July 1, 1992, but "[f]or a variety of reasons, none of which seem significant, the appointment of Mr. McGeehan was never reduced to a written agreement" (Respondents brief at 1). Thereafter, in May or June 1993, the Board attorney was directed to meet with McGeehan "and work out or negotiate the terms of the contract" for Board approval. *Ibid.* Also, the Board attorney was asked whether the superintendent's contract could be lengthened.

The Board argues that it and the superintendent of schools have a right to modify or enter into a new employment contract. The Board relies on basic contract principles; the parties to a contract may, upon sufficient new consideration, by agreement, rescind, modify or supplement the existing agreement. Here, there was new consideration given by the Board and the Superintendent. Thus, the Board submits that the second or modified contract is valid.

Participant NJASA maintains in its brief that the typical situation involves a superintendent who has a written multiple-year contract but is then given a new contract for a term of three to five years before the initial contract term has expired. Although the statute expressly requires a written contract between the board and the superintendent, the NJASA asserts that a Board cannot avoid the dictates of the statute by failing to enter into a written contract. For example, a board may not attempt to terminate a superintendent who has never been given a written contract. Consequently, a determination that oral contracts are not enforceable would allow boards to circumvent the requirements of the tenure law by failing to set forth the terms and conditions in a written contract. Thus, it is submitted that a superintendent's contract, whether oral or written, may be mutually rescinded, modified or amended.

DISCUSSION AND CONCLUSIONS

A superintendent of schools shall be appointed by contract for a term of not less than three years nor more than five years. *N.J.S.A.* 18A:17-15 states in part:

> The board of education of a Type I district and any Type II district, now having or hereafter authorized to have a superintendent of schools, may by contract appoint, for a term of not less then three nor more than five years and expiring July 1, a superintendent of schools by the recorded roll call majority vote of the full membership of the board.

Thus, the Legislature has empowered local boards of education to appoint superintendents, granted specific contractual power to the local boards to effectuate the appointment of superintendents, and prescribed the minimum period of three years for the superintendent's term of employment.

N.J.S.A. 25:1-5(e) provides that no action shall be brought on an agreement that is not to be performed within one year from the making thereof, unless such agreement shall be in writing. Moreover, a letter or memorandum does not suffice under the statute unless the writing itself contains the essential terms of the agreement, including the salary. *Olympic Junior, Inc. v Davis Crystal, Inc.*, 463 *F. 2d.* 1141, 43-44 (3d Cir. 1972), (the court held that a five-year employment contract which was not reduced to writing did not satisfy the requirement of the statute of frauds); *Kooba v. Jacobitti*, 59 *N.J. Super.* 496 (App. Div. 1960) (two-year oral employment agreement unenforceable under the statute of frauds).

When enacting law, the Legislature is presumed to be aware of its prior enactments and judicial construction placed on them. *Mahwah Tp. v. Bergen County Bd. of Taxation*, 98 *N.J.* 268 (1985); *County of Essex v. Comm'r, N.J. Dep't of Human Services*, 252 *N.J. Super.* 1 (App. Div. 1991); *Guzman v. City of Perth Amboy*, 214 *N.J. Super.* 167 (App. Div. 1986). Thus, the application of this principle to *N.J.S.A.* 18A:17-15 warrants a finding that the Legislature is aware of the operation of *N.J.S.A.* 25:1-5(e).

In enacting *N.J.S.A.* 25:1-5(e), the Legislature intended that certain contracts be memorialized. The formality of a writing assists the parties to the contract and the tribunal in adjudicating issues surrounding the parties agreement. Also, inherent in all persons is the tendency of memory to fail and go stale with the passage of time. Thus, Section (e), the one-year provision, separates contracts of long duration from contracts of short duration; the former requires a writing, the latter does not.

In enacting *N.J.S.A.* 18A:17-15, the Legislature inserted in the text the term "contract" and set the minimum amount of time that a superintendent's contract is to run at "three years." The Legislature's usage of the term "contract" and the minimum term of "three years" are not excess verbiage. Legislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless. Thus, when the Legislature choose to assign a minimum allowable term and included the term contract, it meant to shroud the agreement between the board and the superintendent with all the benefits and burdens concomitant with a lawful and enforceable contractual relationship.

Consequently, I **CONCLUDE** that *N.J.S.A.* 25:1-5(e) is applicable to contracts between boards of education and superintendents of schools entered into pursuant to *N.J.S.A.* 18A:17-15.

Here, the Board appointed the superintendent for a three-year term but did not reduce the agreement to writing. Although the Board does not specifically address whether the three-year agreement is enforceable, it argues that it was empowered to rescind the existing contract and enter into a new contract. Petitioner, however, avers that an enforceable three-year contract existed between the Board and the superintendent. Indeed, on May 19, 1992, the Board, by resolution, appointed McGeehan "to a three-year contract" but did not vote to approve a written contract containing all the terms and conditions of employment within one document until September 20, 1993. Thus, it is submitted that the essential elements of the contract were committed to writing.

I reject the parties' argument because the written contract between the Board and McGeehan contained at least two essential changes from the prior oral agreement--an expanded term of employment from three to five years and an increased salary from $96,000 to $103,733 annually. Thus, the Board and superintendent would first have to rescind the initial agreement and then enter into a new agreement. Implicit in the concept of mutual recession is the existence of a lawful contract. Here, the initial agreement did not comply with *N.J.S.A.* 18A:17-15 and, therefore, it was not an enforceable contract. The Legislature intended that agreements executed pursuant *N.J.S.A.* 18A:17-15 be lawful and enforceable. I also reject petitioner's assertion that the Board had no authority under *N.J.S.A.* 18A:17-15 to rescind the three-year contract. No enforceable contract existed that could be rescinded.

Consequently, I **CONCLUDE** that on September 20, 1993, the Board could by majority vote appoint, by written contract for a term of five years, McGeehan as superintendent of schools under *N.J.S.A.* 18A:17-15.

Based on the foregoing conclusions, the remaining issue of whether the Board could rescind an enforceable three-year contract and thereafter execute a five-year contract under *N.J.S.A.* 18A:17-15 need not be addressed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 25, 1994
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

7/27/94
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

Witnesses

For Petitioner:

Ronald R. Graham
William M. Campbell
David Stevenson

For Respondent:

Frederick R. Dunn, Jr., Esq.
Mary Torres
Sabastian J. Biscuso
Howard Zimmerman
Judith Hyde
Richard Weber

Exhibits

J-1 Stipulation of Facts, February 24, 1994
J-2 Minutes of Board Meeting on September 20, 1993 (closed session)

P-1 Written Evaluation of McGeehan

R-1 Transcript of Closed Board meeting April 26, 1993
R-2 Motion, April 26, 1993
R-3 Motion, Recorded on Evaluation, April 26, 1992
R-4 Sample Policy
R-5 Certified Copy of Board Meeting, June 21, 1992
R-6 Certified Copy of Board Meeting, July 20,1 993
R-7 Letter, January 25, 1994

RONALD R. GRAHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions of petitioner, respondent and participant New Jersey Association of School Administrators (NJASA) were timely filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner excepts to the ALJ's conclusions that 1) the "Board had no authority under N.J.S.A. 18A:17-15 to rescind the three-year contract [since] [n]o enforceable contract existed that could be rescinded;" and 2) the Board by majority vote on September 20, 1993, could appoint the superintendent to a five-year term by written contract. (Petitioner's Exceptions, citing the Initial Decision at p. 8) Additionally, petitioner finds exception with the initial decision in that the ALJ did not address petitioner's allegations of bad faith conduct on the part of the respondent Board.

Petitioner first argues that, since the former board voted by resolution to appoint the superintendent to a three-year contract, the parties' conduct and the operation of the statute

(N.J.S.A. 18A:17-15) created an enforceable contract. In the alternative, petitioner submits that the Board's failure to enter into a written contract should not render the three-year appointment void. Citing Houman v. Mayor & Coun. Bor. Pompton Lakes, 155 N.J. Super. 129, 169 (Law Div. 1977), petitioner contends that the doctrine of substantial compliance should be applied herein; that is, substantial compliance with the objectives and essential elements of a statute should be sufficient to find that the first agreement satisfied N.J.S.A. 18A:17-15 and was, therefore, enforceable. (Petitioner's Exceptions, at p. 4)

Both petitioner and NJASA warn that the initial decision can be construed to permit circumvention of the five-year limit on terms of appointment established by N.J.S.A. 18A:17-15 by adopting an employment agreement which is not reduced to writing. Petitioner argues

> Moreover, the taxpayers are left unprotected by a ruling that the three year appointment was unenforceable. Unquestionably, the intent of the law is to replace permanent tenure, relieving taxpayers of costly buyouts, by providing fixed term appointments. The ALJ's ruling creates uncertainty and instability***.
> (Petitioner's Exceptions, at p. 4)

NJASA asserts that, in spite of the above implications of the initial decision, "***a board may not avoid the statutory protection afforded superintendents *** by refusing to provide a written contact." (Participant's Exceptions, at p. 2) Superintendents employed since the enactment of N.J.S.A. 18A:17-15, -20, -20.1 and -20.2 are granted the protection of tenure for a period of from three to five years and, once appointed, can only be removed "***for inefficiency, incapacity, or conduct unbecoming a superintendent or other just cause***." (N.J.S.A. 18A:17-20.2) Such tenure, NJASA

submits, "does not depend on the existence of a contract, written or otherwise." (Participant's Exceptions, at p. 2)

While the Board agrees with the ALJ's finding, it notes that the conclusion would not have been different even if the ALJ had not determined that the Statute of Frauds rendered the initial agreement unenforceable. That is, the Kearny Board of Education and the superintendent mutually agreed to rescind the initial three-year contract and, by majority vote, to award the superintendent with the new five-year contract. The Board posits that, even if the first contract was determined valid, by mutually rescinding that contract, the Board was in a position to validly offer the superintendent a new contract with a five-year term.

Finally, petitioner maintains that the Board's actions with respect to the adoption of a new contract for the superintendent were arbitrary and contrary to public policy, in accordance with Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327 (App. Div. 1965). Petitioner urges that the resolution to adopt a new contract was a split vote without the presence of the full Board of Education. Petitioner reinforces that the parties stipulated there was no advance notice that action was contemplated at the August 17, 1993 Board meeting regarding the superintendent's contract. Consequently, petitioner was absent from the meeting where the Board voted to rescind the three-year appointment and approve a five-year term. Additionally, petitioner argues

> Based upon the responses by Board members Stevenson and Campbell at the August 17, 1993 meeting, no meaningful discussion took place because the majority members refused to disclose critical information.
>
> (Petitioner's Exceptions, at p. 6)

Upon review and consideration, the Commissioner finds that the issues raised by the parties herein, both before the ALJ and on exception, cannot be adequately addressed by a Statute of Frauds analysis. Left unresolved by such an analysis are the central questions underlying petitioner's claim: 1) May a board of education, under N.J.S.A. 18A:17-15 et seq., appoint a superintendent for a three-year term and then, one year into the appointment, act to appoint the superintendent to a five-year term? 2) What effect, if any, does the absence of a written initial contract have under the circumstances of this matter in light of N.J.S.A. 18A:17-15 et seq. and other applicable school law, such as N.J.S.A. 18A:27-5? and 3) If mutual rescissions followed by new contracts are permissible in general, was the Board's action in this instance taken in bad faith and is it voidable on those grounds? Moreover, on the present record, the Commissioner has an insufficient factual and legal basis to make these determinations on his own.

Accordingly, this matter is remanded to the Office of Administrative Law for further argument and fact-finding as necessary, consistent with the Commissioner's discussion above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

OCTOBER 27, 1994

DATE OF MAILING - OCTOBER 27, 1994

290-94

290-94

DR. PETER J. ROMANOLI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, superintendent dismissed on tenure charges, alleged Board improperly denied payment for accrued vacation time.

ALJ concluded that petitioner had failed to comply with the timeliness requirement of N.J.A.C 6:24-1.2(c) and that the petition must be dismissed. Petitioner had relied on date of State Board's decision, claiming this decision constituted final agency action, while ALJ determined petitioner's cause of action to have been the Commissioner's decision on tenure dismissal.

Commissioner concurred with ALJ that the appeal was untimely filed, but modified the ALJ's analysis to clarify that petitioner's cause of action was the date of his awareness that he would not receive the expected payment, not the date of his actual termination. Petitioner's reliance on the date of the State Board's decision on tenure appeal was misplaced. As termination benefits were not at issue in the Commissioner's decision or on appeal, petitioner had no reasonable basis on which to expect the State Board's decision to effectuate any alteration in his status regarding pay for unused vacation days. Petition was dismissed.

OCTOBER 31, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2824-93

AGENCY DKT. NO. 40-3/93

DR. PETER J. ROMANOLI,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

Respondent.

Margaret C. Murphy, Esq., for petitioner

Lisa H. James, Esq., for respondent (Hill Wallack, attorneys)

Record Closed: August 1, 1994 Decided: September 15, 1994

BEFORE **JOSEPH F. FIDLER**, ALJ:

STATEMENT OF THE CASE

By petition filed with the Commissioner of Education on March 3, 1993, Dr. Peter J. Romanoli alleges that he was improperly denied payment for accrued vacation time at the time of his dismissal on tenure charges, and that he is entitled to this payment pursuant to *N.J.S.A.* 18A:28-5. The respondent's answer was filed with the

Commissioner on March 23, 1993. The respondent admits that the petitioner was not paid for unused vacation days, but denies that the petitioner is entitled to relief.[1] Among other arguments, the respondent asserts that the petitioner's Petition of Appeal was untimely filed pursuant to *N.J.A.C.* 6:24-1.2(c), and should be dismissed.

PROCEDURAL HISTORY

On March 29, 1993, this matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13. A telephone prehearing conference was conducted on November 8, 1993, and the matter was set down for hearing. On January 6, 1994, the petitioner filed an amended petition. The hearing was then held as scheduled in Mercerville, New Jersey on May 2, 1994. On that day, the respondent filed its Motion to Dismiss, which argues in part that the petitioner's Petition of Appeal was not timely filed. The record remained open following the hearing to permit the parties to submit post-hearing briefs. The last of these was received on August 1, 1994, and the record closed on that date.

FINDINGS OF FACT

Many of the material facts in this matter are undisputed, and the parties have stipulated to the following, which I **FIND AS FACT.**

1. Petitioner, Dr. Peter J. Romanoli, was employed as superintendent by the respondent board from April 1, 1971, to July 29, 1992.

2. The only contract of employment received by Dr. Romanoli is dated March 15, 1971(Exhibit J-1).[2]

[1] In his petition, Dr. Romanoli also alleged that he was improperly denied payment for accrued sick days. He withdrew this claim for payment on the day of hearing.

[2] The contract is silent on the subject of vacation days.

3. If the Court determines that Dr. Romanoli could accrue unused vacation leave from year to year, the unused vacation days would total 253.5 as of July 30, 1989 (See Exhibits P-2 and P-3).

4. Board payroll records show that Dr. Romanoli used no vacation:

during the year ending July 22, 1990;
during the year ending July 12, 1991;[3] and
during the year ending July 30, 1992

5. Dr. Romanoli earned and had not used 1.9 days vacation for the period from July 1 to 29. 1992.

6. Board records show that Dr. Romanoli had accrued and had not used 115.5 "in district" and 38.5 "out of district" sick days as of June 30, 1992.

7. Dr. Romanoli's final salary was $99,600.00 *per annum*.

It was also stipulated at the hearing that the respondent's Business Administrator, Wayne Thomas, would have testified if called as a witness that board policy no. 4152, concerning vacations for members of the administrative staff, did apply to the Superintendent. Policy no. 4152 was admitted into evidence as part of Exhibit P-1, constituting an amendment to the respondent's answers to interrogatories. These answers had indicated the respondent's assertion that the petitioner had admitted in his answers to interrogatories that "Board policy was silent with respect to the Superintendent's vacation and with respect to payment for sick leave upon separation." In addition, the respondent had asserted in its answers that "the absence of a policy mandating such payment and the absence of a negotiated agreement mandating such payment supports the Board's refusal."

Policy no. 4152, revised July 27, 1981, provides:

[3] For the purposes of this stipulation, petitioner agrees that he did not earn vacation time from February 20 to June 20, 1991.

All members of the professional staff not part of a negotiating unit, who hold twelve-month contracts are entitled to a month's vacation.

In addition, they shall observe all legal holidays as set forth in the school calendar and any other day designated by law or approved by the Superintendent of Schools.

Absence incurred during the summer to attend school or any other professional activity must be charged to vacation allowance. This does not include time spent at conferences attended with the permission or at the request of the Superintendent of Schools.

Vacations are earned during the year preceding the time when the vacation period is operative. This means that vacation earned during the school year cannot be taken until after June 30th, except by permission of the Superintendent of Schools. Also, vacation days are not cumulative but must be taken during the year following that in which they are earned.

A twelve-month employee who separates from the system before June 30th without completing a full current year of service will be entitled to two days of vacation for each month or major part of a month that he/she was employed. No severance pay will be granted for unused vacation time. However, the days earned may be taken prior to the date of separation, provided the person has been employed by the Board of Education at least six months in that contract year.

A twelve-month employee who terminates his/her employment as of June 30th shall receive his/her vacation prior to June 30th of the contract year.

TESTIMONIAL EVIDENCE

Dr. Romanoli testified on his own behalf. He stated that policy no. 4152 did not apply to him. He said that he did not even have the impression he was administrative staff, since he was the chief executive officer of the school district. As such, he existed in a category all by himself. Dr. Romanoli noted that the policy required administrative staff members to obtain his approval for vacations taken before June 30th of the year they are earned.

It was the testimony of Dr. Romanoli that he did not take a lot of vacation because it was not possible to, for various reasons. One reason was that the board wanted administrative staff to take vacations during the Summer months. Someone

had to be present to run the school district offices, so he would cover for employees on vacation. Dr. Romanoli acknowledged that there was nothing in his job description which required him to fill in for employees who were on Summer vacation. However, he said that he felt personal pressure to do that. According to Dr. Romanoli, board members often came into school offices during the Summer to see who was working there. The one time he did take a vacation during the Summer, he was roundly criticized by board members.

The other reason Dr. Romanoli gave for not taking vacation was that he had taken a two weeks vacation to Italy in May 1984, and had been criticized for taking a vacation during the school year. He was criticized for taking a vacation in October 1987, and a vacation he began in January 1990 became part of the tenure charges against him which led to his dismissal.[4] According to Dr. Romanoli, the procedure he followed was to notify the board president when he planned to be out of town, and if there was no objection, he would leave. He said that he never requested vacation permission from the board and thus, the board never denied permission. However, he felt constant pressure from the board to not take a vacation.

Also testifying on behalf of the petitioner was Gerard Whittle, who was a member of the respondent board of education from April 1987 until March 1990. Mr. Whittle stated that the Board wanted Dr. Romanoli to be present no matter what was going on, so that he could answer their questions. The few times he did go away, he was roundly criticized. Mr. Whittle felt the board members generated the crisis themselves by

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[4] The board's tenure charges were filed with the Commissioner of Education on February 22, 1991, and the Administrative Law Judge's Initial Decision upholding the tenure charges was issued on June 15, 1992. By a Decision issued and effective on July 29, 1992, the Commissioner of Education affirmed the dismissal of Dr. Romanoli from his tenured employment as Superintendent of the Willingboro School District.

In affirming the Commissioner of Education's determination that Dr. Romanoli engaged in unbecoming conduct warranting dismissal from his tenured position, the State Board of Education stated:

> we stress, as did the Commissioner, the seriousness of Respondent's conduct in absenting himself from the district for vacation during the period in which the Board was preparing its 1990-91 budget. This breech [*sic*] of professionalism is of such consequence that, in our view, it alone justifies Respondent's dismissal.

The Final Decision of the State Board of Education, issued December 4, 1992, was affirmed by the Appellate Division of the Superior Court on April 13, 1994.

demanding answers to their questions, and the worst example of this was the incident which was used in the tenure charges against Dr. Romanoli.

Mr. Whittle also testified that the board had no set policy concerning the superintendent's vacations. He felt the superintendent's status is a unique situation and he opined that the board would have to approve payment of accrued vacation time unless payment were ordered. It was his testimony that he could not remember anyone losing his or her vacation time while he was on the school board; everyone was able to take vacation except the superintendent. According to Mr. Whittle, Dr. Romanoli made sure everyone else had vacation, but the board did not want him to take his.

The foregoing is the substance of the evidential record. The respondent rested without calling witnesses, relying instead upon those matters stipulated above, and upon its legal arguments.

ARGUMENTS OF THE PARTIES

The parties presented several competing arguments as to the import of the above evidence. However, I address only the argument that the petitioner's petition was not timely filed and should be dismissed, as this threshold issue is dispositive of this matter. The respondent contends that the Administrative Code is clear that a petition must be filed with the Commissioner of Education within 90 days of receipt of notice by the petitioner of the order, ruling or action for which the hearing is requested, pursuant to *N.J.A.C.* 6:24-1.2(c). The respondent further argues that there should be no relaxation of the 90 day rule where good cause to do so is not shown.

The respondent contends that on the issue of timeliness, the question which must be answered first is when did the petitioner become aware that he could be due payment for unused vacation leave. According to the respondent, the latest this could have occurred was upon issuance of the Commissioner's Decision upholding Dr. Romanoli's dismissal from his tenured position, on July 29, 1992. The petitioner's

OAL DKT. NO. EDU 2824-93

DR. PETER J. ROMANOLI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by the respondent Board of Education.

In his exceptions, petitioner objects to the initial decision's dismissal of his appeal on grounds of untimeliness. Petitioner argues that his termination by the Commissioner on tenure charges is a separate action from the Board's refusal to pay him for earned vacation time, so that there is no rational basis for establishing the date of the Commissioner's tenure decision as the date from which petitioner's ninety days are to run pursuant to N.J.A.C. 6:24-1.2(c). Petitioner further argues that the Board failed to meet its burden of proof in claiming untimeliness, as, in addition to its motion to dismiss being itself untimely made, the Board admitted that it took no specific action with respect to payment to petitioner and such action is a necessary prerequisite to running of the ninety-day limitation

period. Finally, in the alternative, petitioner reiterates his contention that the State Board's decision affirming the Commissioner's tenure dismissal constitutes petitioner's cause of action herein, as it represents the final agency action on petitioner's employment.

In reply, the Board argues that the Commissioner's tenure decision is the proper date from which to reckon petitioner's cause of action, as a determination to dismiss a tenured employee constitutes termination of entitlement to any form of compensation on the part of the employee. Moreover, absent a stay, which was not obtained in this case, the Commissioner's determination is the mechanism by which the relationship between the parties is terminated, not the State Board's decision on appeal. The Board further characterizes petitioner's argument as absurd in that, petitioner having never asked the Board for payment of unused vacation time, there being no operative policy in effect and there being nothing the Board could have taken "final action" upon, the argument's logical conclusion is that the ninety-day rule would never expire, a result clearly not intended by regulation or even espoused by petitioner. Finally, the Board urges that petitioner's objection to the timing of its motion to dismiss be found meritless for the reasons stated by the ALJ.

Upon review and consideration, the Commissioner concurs with the ALJ that the within appeal was untimely filed. However, the Commissioner would modify the ALJ's analysis to the following extent.

Initially, the Commissioner concurs with petitioner that termination of employment and a board's nonpayment of anticipated benefits upon termination may in fact constitute separate actions, and that the date of a Commissioner's decision terminating employment cannot automatically be reckoned as the date of a petitioner's cause of action in a matter arising from a dispute over termination benefits. Rather, notwithstanding that a Commissioner's decision may be the impetus for termination, the cause of action in such a dispute is more likely to be a petitioner's receipt of final notice of the board's determination not to pay benefits, or, in the event that a specific determination is lacking or that no specific request has been made to the board, petitioner's recognition that he or she is not receiving benefits as expected. Thus, in the Commissioner's view, the inquiry to be made in the present matter is whether petitioner's cause of action arose upon the date of his termination, and if not, precisely when it did arise. Although the initial decision did not frame the inquiry in this manner, the Commissioner is satisfied that the record already developed permits him to make a full and fair determination without resort to further proceedings.

In the present instance, the Commissioner's tenure decision is silent on the question of benefits, if any, due petitioner upon termination of his employment; therefore, in the absence of evidence to the contrary, petitioner cannot reasonably be found to have immediately recognized that he would not be paid

for unused vacation time as anticipated and his cause of action cannot fairly be reckoned as the date of the Commissioner's decision. Neither can the Commissioner look to any "final action" on the part of the Board, as the record is devoid of any indication that petitioner ever made any request to the Board upon which it could have taken such action. Thus, the question becomes one of pinpointing the date of petitioner's recognition that he would not be receiving the expected benefit, a question not definitively answered in the initial decision's fact-finding or apparent in the record.

However, petitioner's employment was terminated by a Commissioner's decision dated July 29, 1992, and it would be unreasonable to conclude that by December 3, 1992, the outside date on which the cause of action could occur for a petition timely filed on March 3, 1993, petitioner did not know, or should not have known, that the Board did not intend to pay him for his unused vacation time. Certainly, petitioner's reliance on the date of the State Board's decision on tenure appeal is misplaced, as termination benefits were not at issue in the Commissioner's decision or on appeal, so that petitioner had no reasonable basis on which to expect the State Board's decision to effectuate any alteration in his status regarding pay for unused vacation days.

Finally, the Commissioner rejects petitioner's contention that his appeal cannot be dismissed as untimely due to the Board's failure to raise the ninety-day rule as an issue in its answer or at prehearing conference, as the record is clear

that petitioner had ample opportunity to address this question during the course of proceedings before the ALJ and was in no demonstrable way prejudiced by the Board's actions.

Accordingly, the recommendation of the Office of Administrative Law that the Petition of Appeal be dismissed is affirmed for the reasons expressed therein as modified above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 31, 1994

DATE OF MAILING - NOVEMBER 1, 1994

292-94

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD UJHELY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF LINDEN,	:	DECISION
UNION COUNTY.	:	
	:	

NOVEMBER 2, 1994

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. EDU 08941-93

AGENCY DKT NO. 312-8/93

IN THE MATTER OF THE TENURE HEARING OF DONALD UJHELY, BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY

Howard Schwartz, Esq., for petitioner, Linden Board of Education
(Schwartz & Barkin, attorneys)

Sanford R. Oxfeld, Esq., for respondent, Donald Ujhey
(Balk, Oxfeld, Mandell & Cohen attorneys)

Record Closed: August 15, 1994 Decided: September 15, 1994

BEFORE: **MUMTAZ BARI-BROWN** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Linden Board of Education ("Board") certified tenure charges of conduct unbecoming a teacher and fraud against respondent Donald Ujhely under *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6:24-5.1. The specific charges are as follows:

under *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6:24-5.1. The specific charges are as follows:

1. Ujhely on numerous occasions made false reports requesting payment for home instruction services.

2. Ujhely knowingly received compensation from the Linden Board of Education based on statements that he rendered services when he did not do so.

3. Ujhely applied for compensation for home instruction on days which he was out of work due to illness or disability. However, the Board relied upon his application and Ujhely received payment.

4. Ujhely falsely stated that he rendered services when he was physically unable to render such services.

5. Ujhely received compensation from his public employer when he did not render the services for which he claimed payment and for which he actually received payment.

The Board submits that the above acts constitute conduct unbecoming a teacher, misconduct and fraud.

Ujhely is a tenured teacher employed by the Board. By resolution adopted on August 16, 1993, the Board found probable cause to certify tenure charges of unbecoming conduct and other just causes which, if true, were sufficient to warrant Ujhely's dismissal.

On August 26, 1993, the Board filed its written tenure charges with the Commissioner of Education ("Commissioner"). Also, on September 10, 1993, Ujhely filed an answer to the charges. The Commissioner transmitted the matter to the Office of Administrative law ("OAL") on September 21, 1993, for a determination as contested case pursuant to *N.J.S.A.* 52:14B-1 to - 15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on February 1, 1994, and the matter was scheduled for hearing on May 31, 1994.

The parties have agreed to a proposed settlement, subject to the approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights, and that the agreement is consistent with the public interest. (*Id.* at 850-51).

On May 31, 1994, the OAL held a public hearing on whether the proposed settlement should be accepted. Council for both parties set forth on the record the reasons why settlement would be in the public interest. On August 15, 1994, the parties submitted a written stipulation setting forth the terms of the agreement.

Based on my review of the record and the testimonial evidence, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Ujhely has been employed by the Board for twenty years.

2. Ujhely has admitted to poor record keeping but his competence as a teacher has never been challenged by his colleagues, his students or their parents.

3. As a result of the alleged indiscretions, Ujhely must pay a substantial penalty and has agreed to submit to a medical and psychiatric examination that he is able to resume his teaching duties.

Before entering into the agreement, Ujhely had full opportunity to consult with legal counsel to explain the meaning of the settlement to him. Ujhely is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the Board of Examiners for any action which they may deem appropriate. Further, both on and off the record, I informed Ujhely and counsel that notwithstanding the parties' agreement to settle this matter, the Commissioner must approve the agreement. Thus, any execution of a settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of the settlement are in the public interest.

ORDER

It is, **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

for twenty-four (24) school days for 1994, pro-rated four (4) days per month for the period January through June 1994.

2. The Board agrees to add twelve (12) days of sick leave to Mr. Ujhely's unused sick-day bank.

3. Mr. Ujhely will be re-employed as of September 1, 1994 as a tenured teaching staff member with his salary to what it would have been for the academic year 1993-94. (He will not receive any increment or raise for the 1994-95 academic year).

4. Mr. Ujhely will not receive credit for seniority for the time not worked, except for four (4) months in the academic year 1993-94, when he was on worker's compensation and receiving such benefits.

5. Mr. Ujhely will be permitted to return to work for the academic year commencing September, 1994 upon acceptance by the Board of acceptable medical and psychiatric report that he is able to perform his usual teaching duties.

6. Mr. Ujhely agrees to pay back to the Board the sum of $1332.00 without interest, at the rate of $100.00 per month until the said sum is fully paid starting September 1, 1994 and he agrees that the Board may deduct such sum from his payroll checks if he is employed at that time.

7. The Board believes that this settlement is in the public interest in that Mr. Ujhely has been employed by the Board of Education for approximately twenty (20) years, he is suffering a substantial penalty for the alleged indiscretions in the within matter, the certainty of result in this matter, the avoidance of credibility issues, his admission of poor record keeping and the

fact that the Board is being made whole as a result of this settlement.

8. The employee, Mr. Ujhely, was advised of his right to have a hearing on the charges and he expressly waived same, such waiver having been on the record together with other rights having been given to him and he having acknowledged same.

This Settlement Agreement is entered into by the Board of Education of the City of Linden, and the Respondent teacher, and submitted to the Administrative Law Judge for inclusion in an initial decision to be submitted to the Commissioner in the within matter.

BOARD OF EDUCATION OF THE
CITY OF LINDEN

DATE: By: _____
ALVIN COPLAN
President

DATE: 8/15/94 _____
DONALD UJHELY

fact that the Board is being made whole as a result of this settlement.

8. The employee, Mr. Ujhely, was advised of his right to have a hearing on the charges and he expressly waived same, such waiver having been on the record together with other rights having been given to him and he having acknowledged same.

This Settlement Agreement is entered into by the Board of Education of the City of Linden, and the Respondent teacher, and submitted to the Administrative Law Judge for inclusion in an initial decision to be submitted to the Commissioner in the within matter.

BOARD OF EDUCATION OF THE CITY OF LINDEN

DATE: 8/15/94 By: _____
ALVIN COPLAN
President

DATE: _____
DONALD UJHELY

OAL DKT. NO. EDU 8941-93

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD UJHELY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF LINDEN,	:	DECISION
UNION COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846) To the extent the parties may have acted upon the terms herein prior to this approval, they have done so at their own peril.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 2, 1994

DATE OF MAILING - NOVEMBER 2, 1994

355-94

E.R. AND F.R., as guardians ad litem OF C.R., AND C.R., individually,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 27, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2715-94

AGENCY DKT. NO. 31-2/94

E.R. AND F.R., AS GUARDIANS AD LITEM OF C.R. AND C.R., INDIVIDUALLY,

Petitioners,

v.

RED BANK REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent,

Peter P. Kalac, Esq., for petitioners (Kalac, Newman, Lavender & Campbell, attorneys)

James P. Granello, Esq., for respondent

Record Closed: October 28, 1994 Decided: November 7, 1994

BEFORE **JOHN R. TASSINI, ALJ:**

STATEMENT OF THE CASE

The petitioners claimed that C.R., a student in the respondent's school system, was wrongfully denied admission to the National Honor Society affiliated with the respondent's school. The respondent denied any wrongful conduct. As shown in the attached "Stipulation of Settlement," the case has been settled.

PROCEDURAL HISTORY

On February 23, 1994, the petition of appeal was filed with the New Jersey Commissioner of Education and, on March 7, 1994, the respondent's answer and defenses were so filed. N.J.S.A. 18A:6-9. The matter was transmitted to the Office of Administrative Law where, on March 22, 1994, it was received and filed as a contested case. N.J.S.A. 52:14B-2(b). The case was assigned to me and, on August 15, 1994, it was the subject of a conference and was adjourned to allow the parties time for settlement. On October 28, 1994, the stipulation was filed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. The parties have intelligently and voluntarily agreed to the settlement.
2. The settlement fully disposes of all issues in controversy and is consistent with the law. N.J.A.C. 1:1-19.1.

ORDER

I approve the settlement and **ORDER** that the parties comply with it and that this case is concluded.

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

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

Nov. 7, 1994
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

November 8, 1994
DATE

Hope R Blackwell
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 16 1994
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ml

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934 Highway 35, P.O. Box 4040
Middletown, New Jersey 07748
(908) 671-6100
Attorneys for Petitioners

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. EDU 02715-94
Docket No. 31-2/94

E.R. and F.R., as guardians ad litem of C.R., and C.R., individually,

Petitioners,

-vs-

BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

STIPULATION OF SETTLEMENT

The matter in difference in the above entitled action having been amicably adjusted by respondent agreeing to admit C.R. to the National Honor Society, it is hereby stipulated and agreed that the same be and is hereby dismissed, with prejudice.

James P. Granello
Attorney for Respondent

Peter P. Kalac
Attorney for Petitioner

Date: October 10th, 1994

OAL DKT. NO. EDU 2715-94

E.R. AND F.R., as guardians ad litem OF C.R., AND C.R., individually,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

DECEMBER 27, 1994

DATE OF MAILING DECEMBER 28, 1994

356-94

MARY ANN SMITH,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRCT, MORRIS COUNTY,	:	
RESPONDENT.	:	

DECEMBER 23, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. EDU 7710-93

AGENCY DKT NO #266-7/93

MARY ANN SMITH,

Petitioner,

v.

BOARD OF EDUCATION OF

MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,

MORRIS COUNTY

Respondent.

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

Allan P. Dzwilewski, Esq.,
(Green & Dzwilewski, attorneys for respondent)

Record Closed: June 29, 1994 Decided: August 12, 1994

BEFORE **MUMTAZ BARI-BROWN,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Mary Ann Smith, a math and comprehensive science teacher, was employed by respondent, Board of Education of Morris County Vocational

School District, Morris County (Board) for school years 1988-89 through 1992-93. Petitioner alleges that the Board violated her tenure and seniority rights when it abolished her position effective June 30, 1993. Further, petitioner alleges that teachers who are nontenured, have less seniority, and /or are not properly certified have been assigned to teach courses which she is entitled to teach. Thus, petitioner requests reinstatement and assignment to a teaching position in accord with her tenure, seniority and certification rights.

Respondent's Morris County Vocational-Technical School (Vo-Tech) offers vocational education programs[1] to high school students and post graduates persons. (J-3) Students spend one-half of the day, morning or afternoon at the vocational school. The other one-half of the day is spent at their local high school where they complete academic programs and participate in social and athletic programs. *Ibid.*. However, Vo-Tech also offers academic credit in mathematics or science through an academic infusion program. *Ibid.*

The academic infusion program is a pilot project which incorporates academic proficiencies[2] within the scope of the vocational program. Under the infusion program, high school students may earn five mathematics or science credits in additional to 15 vocational credits per year toward their high school diplomas.

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[1] Vocational education is organized educational programs directly related to preparing individuals for employment in areas such as agriculture, technical, trade, and industrial occupations or for additional preparation for a career in fields and occupations requiring less than a baccalaureate or advanced degree. "Vocational education programs include competency-based applied learning which contributes to a pupil's academic knowledge, higher order reasoning and problem-solving skills, work attitudes, general employability skills, and the occupationally-specific skills necessary for economic independence as a productive and contributing member of society". *N.J.A.C.* 6:43-1.2.

[2] "'Proficiency' means an explicitly stated and demonstrable knowledge and/or skill used to define a desired learning outcome." *N.J.A.C.* 6:30-4.2.

Respondent argues that petitioner was terminated pursuant to a valid, legitimate reduction in force (RIF) as part of a planned, approved change in its infusion program. Respondent further argues that petitioner's claims are barred by laches and or equitable estoppel.

The matter was transmitted to the Office of Administrative Law (OAL) on August 13, 1993, as a contested case pursuant to *NJSA* 52 :14B-1 to-15 and *NJSA* 52:14F-1 to -13. A prehearing was held on November 17, 1993, and a hearing was held on April 19, 1994. After the conclusion of the hearing, the parties submitted post hearing briefs and the record closed on June 29, 1994.

The issues are whether petitioner is entitled to reinstatement and assignment to teaching positions in accord with her tenure, seniority and certifications, and back pay.

FINDINGS OF FACT

Background

Based on the documentary evidence, I **FIND** the following as **FACT:**

In 1987, the State Board of Education (State Board) adopted regulations increasing high school graduation requirements. The revised standards raised concern over the vocational students' ability to meet the new requirements in mathematics and science. (J-6) Thus, in a memo dated February 28, 1990, to the superintendents of secondary school districts, Richard A. DiPatri, Assistant Commissioner of the New Jersey Department of Education (Department) stated that the regulations[3] also provided an alternate program completion option. *Ibid.* Through the two other methods, pupils could fulfill the State Board high school graduation course and credit requirements. The first alternative method is that students demonstrate a mastery of determined proficiencies, *i.e.*, passing a test.

[3] *N.J.A.C.* 6:8-7.1(c)1.ii

The second method is a course substitution. DiPatri also advised the superintendents that under the alternative program completion option, pupils "particularly vocational pupils in shared-time schools, may satisfy . . .[high school graduation requirements] *N.J.A.C.*6:8-7.1(c) 1.i through these methods in lieu of taking the required course[s]." *Id.* at 2.

In a memorandum dated May 22, 1990, to chief administrators of districts with secondary schools, Assistant Commissioner DiPatri answered questions about course credits and sending-receiving relationships under the Alternate Program Completion Options.

> 2. Q: For a course that meets 160+ minutes a day (the equivalent of twenty credits), may the vocational school district assign fifteen (15) vocational credits and five (5) mathematics or science credits?
>
> A: *The vocational school district may assign five (5) mathematics or science credits in addition to the fifteen (15) vocational credits when the instructor certifying the mathematics/science proficiencies associated with these five (5) credits is appropriately certified.* In addition, the vocational school district in conjunction with the sending school districts must satisfy criterion #2 in Dr. Richard A. DePatri's memorandum of February 28, 1990 concerning the "course substitution" alternative program completion option:
>
> 3. Q: May a sending district redesignate five (5) of twenty (20) vocational credits as mathematics or science credits even though the vocational district could not do so because its teacher did not possess the appropriate mathematics or science certification?
>
> A: No. N.J.A.C. 6:8-7.1(d)1.ii(4) states that "group programs based on specified instructional objectives shall be approved in the same manner as either approved course." Therefore, *when a "Plan B" course substitution is authorized for a group of students (i.e., shared time vocational) the elective course teacher must possess appropriate certification to teach both the vocational course and the mathematics or science component.*
>
> [J-7 (emphasis addded)]

Thereafter, Assistant Commissioner DiPatri notified Department officials of respondent's request that the Department "consider a variation on the options authorized in the May 22, 1990 question and answer document about alternate program completion options." (J-8). The memorandum dated July 16, 1990, to Joel Bloom, Leo Klagholz, and Lloyd Newbaker states in part that:

> At present, Morris County Vocational employs a teacher certified in both math and science to provide nonvocational courses which satisfy state high school graduation requirements. This math/science teacher has worked with the vocational teachers to identify the math/science proficiencies which are taught in vocational courses. Mr. DeWorken has five school districts that are interested in participating in a pilot program. Their proposal is for students to take a ...vocational course taught by a traditionally certified vocational teacher to receive fifteen vocational credits and five math or science credits. The May 22 question and answer document (Q-3) states that the Plan B Course Substitution Option for groups of students requires that the elective course teacher must possess an appropriate certificate to teach both a vocational course and the math or science component. . . .
>
> *Mr. DeWorken has requested a meeting with senior department personnel to explore the feasibility of receiving a formal wavier to conduct a pilot project which enables youngsters to receive math or science credits in a course taught by a teacher with vocational certification only. He proposes to use his math/science certified person to insure that the proficiencies are included in the curriculum. . . .*
>
> It may be the right time for the department to provide greater regulatory flexibility by authorizing this pilot. However, at this juncture I have only agreed to host a meeting to explore in more detail Mr. DeWorken's request.
>
> [*Ibid.*]

A meeting between respondent and Department officials was held in July 1990. Superintendent James DeWorken testified that during the meeting there was no discussion that the infusion program's approval was conditioned on employing a certified math/science teacher. However, at the end of the meeting, DeWorken peripherally and casually mentioned that a math and science teacher would be on board as a resource person.

On August 30, 1990, DeWorken submitted a plan to the Department showing how it would award credit for math and science. (J-9). On September 10, 1990, the Department approved respondent's proposed implementation plan for two years. (J-10).

Mary Ann Regan is the acting principal of Vo-Tech, and she has held the following positions with respondent: supervisor of curriculum and instruction, supervisor of special services, and learning disabilities teacher consultant. Regan testified about the objectives of the infusion program. She stated that after the State Board increased high school graduation requirements, Vo-Tech's enrollment has declined. Regan attributed the student attrition to students failing academic courses and thereby becoming credit deficient. Also, students lack the time to attend both the academic and vocational schools. Moreover, students must successfully complete all courses and pass the HSPT before they apply to the shared time vocational program.

Regan agreed with many studies performed in the past five years that "students frequently do not possess basic skills in communications and computation necessary to be successful in a given career field." (J-5). She also believed that "increased linkages are needed between basic skills and trade skills." *Ibid.* Regan opined that it was feasible for Vo-Tech to offer its students academic training. She noted, however, that the memo from DiParti regarding alternative program completion options raised the issue of teacher certification. Respondent's specific concern was the requirement that "to award academic credit for participation in vocational programs, the instructor must be duly certified in both vocational educational and in the academic area that credit is to be awarded". *Id.* at 4. Thus, prior to implementing the infusion program, respondent requested a meeting with the State Board to discuss the instructors' certification requirements. (*Ibid.*).

At that meeting, respondent and Department officials discussed whether teachers who were certified to teach vocational courses, but not certified in math or science, could award credit to students who participated in courses in which math or science proficiencies were presented by the vocational instructors. Regan also informed Department officials that the current separate pull out program [4]would cease, but that the math/science teacher would continue on staff and would be used primarily as a resource to the vocational instructors to implement the math and science academic infusion program.

Respondent implemented its math and science infusion program in 1991-92. school year. (J-13). Regan developed the math/science teacher's job description. (J-11). Although she stated that the math/science teacher was responsible "for providing services to administration, staff and students related to the infusion of mathematics and science in each vocational program" J-11, Regan testified that petitioner was hired as a resource instructor to vocational instructors during the infusion program. She maintained that the infusion program was designed to allow the math/science teacher to assist the vocational teachers for two years; it was not designed to instruct the students. Moreover, the vocational teachers taught the academic concepts "in their own way." Consequently, after the 1993-94 school year, it was unnecessary for the math/science teacher to remain on staff. However, she conceded that that students who fail courses and do poorly no longer receive remedial assistance from petitioner. Instead, the guidance counselors refer the students to their district schools for help. Further, the vocational instructors do not receive formal or outside training in teaching academic math or science content in the vocational class. Since petitioner's termination, Regan has been the resource person to vocational instructors. She answers their questions about teaching math and science in the shop course. Regan also testified that if a certified

[4] In the pull out program, students are taken from the vocational shop and placed into a specific math or science program.

math and science teacher is required by law then she would recommend dropping the infusion program.

Other conflicting testimonial and documentary evidence describing the role of the math/science teacher in the infusion program is disclosed in memorandums. For example, in a memorandum dated April 10, 1991, Regan also stated that each year 50% to 70% of the students were "high risk" or "special needs learners" in academic areas. Thus, the academic teacher must work with each instructor on modification of the curriculum to meet their special needs. Further, she estimated that 50 to 100 students would require direct services in remedial instruction to be successful. Regan stated that, "It will serve no purpose to offer the possibility of credit if students are unable, due to learning disabilities, to take advantage of it." J-13. Therefore, she recommended that the math/science infusion program for the 1991-92 school year include a full time resource person, continuation of inservice program, staff and material developments, remediation activities, evaluation and assessment, liaison to resident districts and other area vocational-technical schools, and related academic infusion activities. (*Ibid*).

Additionally, Regan stated that:

> A key to delivery would be "demonstration" teaching or "reciprocal" teaching.
>
> The resource teacher and vocational teacher would work in tandem sharing academic and vocational expertise to present students with a cohesive infusion approach. ***The resource teacher would present actual lessons in academics in vocational classes to demonstrate academic instructional methodologies.***
>
> [J-13)]

Regan also developed the math/science teacher's job duties. This states in part that math/science teacher shall:

- act as a consultant to each classroom instructor;

- provide two periods daily of reciprocal teaching in vocational classrooms in tandem with the vocational instructor;
- assist in the administration of the pre and post-testing in math and science;
- conduct in-service activities for vocational staff as per annual in-service activity schedule in math and science;
- assist in the identification of remedial learners and provide direct remediation to identified students;
- assist the vocational instructor in the ongoing modification of curriculum delivery for the high risk and special needs learner; serve as a liaison to resident districts in the ongoing articulation for the academic program.

Also, the math/ science teacher reported to the supervisor of special services. (J-11).

Dennis Nick, the former principal of Vo-Tech, sent the math/science teacher's job descriptions to DeWorken in a memorandum dated August 31, 1991. (J-11). In stark contrast to DeWorken's and Regan's testimonies that the major role of the math/science teacher was that of a resource person to the vocational instructors, Nick viewed reciprocal teaching in the vocational classrooms (the math/science teacher and the vocational instructor) as the key to petitioner's involvement with the staff. Thus, the math/science infusion program was a team approach to teaching and petitioner was "the key player in this project." J-11. Also, "to assure the success and effectiveness of the academic infusion program," Nick directed that "[n]o, [vocational] teacher will be permitted to leave the shop or the classroom while Mrs. Smith is teaching or observing " *Ibid.* Further, in a memorandum dated August 30, 1991, Nick told his staff that "[t]o ensure that this project is implemented in a competent and accountable manner, Mrs. Mary Ann Smith has been hired as our math and science instructor " J-13. She will participate in reciprocal teaching and assist the instructional staff "attain the mastery to infuse math and science into, as it relates to, their vocational program." *Ibid.* Additionally, he stated that:

> Mrs. Smith will work with the instructional staff for a minimum of two periods per day throughout the school year. She will not be a substitute, nor there to provide coverage of our vocational

> staff. When Mrs. Smith is working within a vocational teaching period, both the vocational instructor and Mrs. Smith will be required to be in the room, either teaching or observing.
>
> [*Ibid.*].

Regan's mid year report on the infusion program, dated February 3, 1992, stated that petitioner had met the requirements outlined in her job description. Students were excited about the science experiments they performed and also began using the computer laboratory. (J-15). Petitioner's other activities and accomplishments during the 1991-92 school year included

> *A resource library of material, texts, video tapes, filmstrips and slides has been established for each program. . . .
>
> *The establishment of a criterion-referenced test bank. . . .
>
> *The computer laboratory was not utilized by the day school at all during the course of 1990-91 school year. During 1991-92 Mrs. Smith has provided training both for instructors and students. . . .
>
> *Of particular note are the inclusion of Cosmetology and the Auto Service Tech 2 program within the computer lab. . . .
>
> *She has participated to a large extent, on her own time, on the executive council of both the mathematics alliance and science alliance for the county. She organized a dinner that was held at the Voc-Tech in the fall and presented the infusion program as part of the general inservice activities for math teachers in the county. She is continuing her activities in both these areas for the 1992-93 school year. This provides direct liaison activities with each resident district and provides further validation of the infusion program at Morris County Vocational School.
>
> [J-16].

Regan proposed that petitioner continue the reciprocal teaching for the 1992-93 school year. (*Ibid*). Petitioner's time would be divided as follows: 40% reciprocal teaching, 40% providing direct remediation to students, and 20% additional training activities. (J-16)

Mary Ann Smith began teaching academic math and science under the "pull-out" program in 1988. Petitioner helped develop the infusion program and

was assigned as the program's math/science instructor in 1991. (J-13). In addition to the job duties listed in J-11 and J-12, she continued teaching math and science. However, instead of teaching the subjects in a separate classroom, petitioner taught math or science concepts to the students during the vocational class; in tandem the vocational teacher applied to concept to the trade. For example, in the plumbing and pipefitting class petitioner taught the students the freezing point for water. She also administered quizzes on the subject matter taught and then gave the students' grades to the vocational teacher.

Petitioner prepared a portion of the Middle States Evaluation Committee document for respondent. (J-19). The report stated that "[w]hen program approval was received, at issue was teachers' certification. . . . When it was explained that a math/science certified instructor would be on staff to work with the vocational instructors, [the Department] granted program approval prior to the discontinuance of the math/science position". *Id. at 3.* The report further indicated that a major weakness cited in the math/science infusion program was the elimination of the math/science position for the 1993-94 school year. Consequently, reciprocal teaching will also be eliminated. Further, "[i]nstructors who have exhibited weaknesses in these areas [formal academic skills] because of a lack of basic skills on their own will no longer receive necessary assistance in house on a daily basis." (J-19).

Argument

Petitioner contends the termination of her employment and the assignment of the math and science instruction for academic credit to teachers with vocational certification violates certification standards and her tenure and seniority rights. Petitioner asserts tenure in the positions of math and science. Thus, when her position was abolished, she was entitled to be retained over nontenured or less senior teachers. Further, petitioner asserts that her tenure

and seniority rights included all math and science content courses. Therefore, the assignment of courses to teachers not certified to teach math and science content courses and who have no tenure or seniority rights in those subject matters is a violation of her tenure and seniority rights.

Petitioner avers that no law exists which extends the scope of vocational certification or which authorizes teachers who are certified to teach vocational courses to teach academic subjects. Indeed, the designation of appropriate certification and the scope of an endorsement must be established through regulations promulgated by the State Board of Education. Further, any change in the scope of an endorsement must be made through administrative regulation.

Petitioner also contends that respondent sought a waiver of the certification requirement from the State Board because (1) teachers with endorsements in production, personnel, and service occupations cannot teach math or science; (2) teachers with endorsements in technical occupations cannot teach math or science; and (3) teachers with endorsements in vocational technical related subjects can teach technical related math and science subjects, including related areas. But, these endorsements do not confer authority to teach academic math or science for graduation credit. Therefore, respondent's assignment of math and science instruction for academic credit to vocational teachers is unlawful and a violation of petitioner's tenure and seniority rights.

Additionally, respondent's practice is contrary to common sense and good policy. Granting students academic credit for instruction given by teachers who are not certified in math and science and have no formal training in these subjects is an unacceptable lowering of academic standards. Indeed, respondent's practice does not benefit those students it purports to help because vocational students are in most need of remediation and extra help in academic skills. Moreover, there is no guarantee that vocational students will

ultimately be employed in vocational settings. Thus, respondent's practice deprives these students of necessary academic instruction.

Moreover, since her termination Voc-Tech has no teacher who is knowledgeable in math or science to assist the students, "despite their dire need for remediation and extra help." Petitioner's brief at 15. Nor is there a certified math and science teacher to help certified vocational teachers who need assistance in these areas. Petitioner submits that this constitutes bad law and bad policy.

Respondent's wavier and estoppel defenses lack merit legally and factually. As a matter of law a teacher cannot waive her tenure or seniority rights. Moreover, petitioner's knowledge that her position might be abolished at some time does not constitute a wavier.

Further, petitioner argues she is not estopped from asserting her rights. She did not misrepresent or conceal facts known to her. Nor did respondent rely upon any actions of petitioner to its detriment.

Thus, petitioner submits that the termination of her employment and allowing teachers who are not certified in math or science to teach math and science for academic credit violated her tenure and seniority rights.

Respondent argues petitioner's major responsibility was to teach the vocational instructors how to better present material that had always been taught by them within their shops. Further, petitioner did not teach "any type of curriculum that could be considered actual math or science instruction requiring math/science certification" such as algebra, geometry, biology or "any other recognized math/science course offering.". Respondent's brief at 3.

Additionally, respondent argues that before the infusion program began the math/science proficiencies were already in the vocational, technical courses. "These proficiencies were always taught by the vocational technical instructors pursuant to their certification " .*Id.* at 6. Thus, respondent submits that teaching math and science in a trade course does not require the teacher to be certified in math or science.

Respondent also asserts that if a certified math and science teacher is required, then the infusion program would likely be abandoned or reduced from a full time program to part-time. Further, it will destroy state wide initiatives and programs.

Further, respondent argues that the Department's approval of the infusion program renders petitioner's claim frivolous. Moreover, the approval was not conditioned on having a math/science certified teacher on staff. "This was purely information and played no role in the presentation or approval of the program." *Id.* at 9.

Additionally, respondent asserts that petitioner is estopped from pursuing this action because at least one year prior to her termination she was informed that her position would be abolished. Further, when petitioner raised the issue of certification, "Regan gave her copies of relevant correspondence and material indicating that such certification was not required." *Ibid.* Thus, petitioner was obligated to make her claim known to respondent before she accepted the position and before she was terminated.

DISCUSSION AND CONCLUSIONS

I

The approval of the infusion program

Respondent's infusion program is currently operating without a teacher holding math and science endorsements. Petitioner alleges that this practice violates the regulations governing professional standards for school teachers and her tenure and seniority rights. However, before addressing petitioner's tenure and seniority rights, I will first discuss the issue of whether teachers who are not certified in math and science can provide instruction in these proficiencies to vocational students within the vocational class setting.

Second, if the Commissioner approved respondent's academic infusion program, thereby waiving regulatory requirements without engaging in rulemaking, what then was the scope of the Commissioner's waiver and approval? To determine the issue of whether teachers who are not certified in math and science can provide instruction in these proficiencies to vocational students within the vocational class setting, requires the analysis of several sub-issues.

First, do the statutes and regulations governing public schools permit students to receive academic credit when taught by an instructor without an endorsement for that subject? Second, if the statutes and regulations do not permit such an arrangement, can the Commissioner waive the applicable requirements? Third, if the Commissioner waived the requirements, what were the elements or conditions of that waiver?

N.J.A.C. 6:11-6.1(a) provides that "[e]ach teaching endorsement is required for the corresponding teaching assignment." *N.J.A.C.* 6:11-6.2(a)14 establishes that a mathematics endorsement "authorizes the holder to teach mathematics in all public schools." *N.J.A.C.* 6:11-6.2(a)20 establishes separate endorsements for biological science, earth science, and physical science and specifies the subdisciplines that teachers holding such endorsements are qualified to teach. Thus, to teach mathematics or science in New Jersey's public

schools, one must have an instructional certificate and a mathematics or science endorsement.

A teacher holding the production, personal or service occupations endorsement, the skilled trade endorsement or the technical occupations endorsement is qualified to teach "in the area of his or her State-approved occupational experience." *N.J.A.C.* 6:11-6.2 (a) 26, 27 and 28. A holder of the vocational-technical related subjects endorsement is qualified to teach "those subjects utilized in skill[ed] and technical trades such as math, science [and] related theory." *N.J.A.C.* 6:11-6.2(a)29.

Respondent asserts that all instructors at Vo-Tech "are appropriately certified as teachers of productions, personal or service occupations, teacher of skilled trades or teacher of technical occupations." Respondent's brief at 6. However, it has not been shown that any of respondent's vocational teachers hold the vocational-technical related subjects endorsement.

The existence of the vocational-technical related subjects endorsement pursuant to *N.J.A.C.* 6:11-6.2(a)29 supports a conclusion that holders of the other vocational endorsements are not qualified to teach the math and science utilized in the vocational curriculum. *See also, e.g., Miller v. N.J. State Board of Examiners*, 92 *N.J.A.R.* 2d (Vol. 4A) 599, 600 (Dept. of Ed.). "A student personnel services endorsement is required of any person assigned in a New Jersey public school to perform services such as study and assessment of individual pupils with respect to their status, abilities, interests "[citation omitted] aff'd, Comm'r 92 *N.J.A.R.* 2d (Vol.) 4A) 601; *Gerdes v. Spotswood Boro Board of Education*, 92 *N.J.A.R.* 2d (Vol. 4) 168, 170 (Dept. of Ed.). "A teaching staff member holding an educational services certificate is qualified to serve in any assignment under that certificate for which he or she holds the requisite endorsement." [emphasis added], aff'd State Bd., 92 *N.J.A.R.* 2d (Vol. 4) 427;

Morano v. Bd. of Ed. of Verona, 1990 *S.L.D.* 1192, 1196 "Statutes and regulations prohibit a teacher being employed except to teach a subject for which he holds an appropriate endorsement and authorization and this is in keeping with the students' right to a thorough and efficient education.", aff'd, Comm'r of Ed., 1990 *S.L.D.* 1201; *Old Bridge Educ. Assn. v. Old Bridge Twp. Bd. of Ed.*, 1986 *S.L.D.* 1917, 1924 An endorsement to teach French authorizes the holder to teach French. Such endorsement does not authorize the holder to teach anything but French; *Savarese v. Board of Ed. of Bernardsville*, 1989 *S.L.D.* 2130, rev'd by Comm'r of Ed.,1989 *S.L.D.* 2144, aff'd. State Bd. 1990 *S.L.D.* 1808 Teachers holding any of ten endorsements are authorized to teach family life. The State Board denied a requested exemption that would have allowed a teacher holding a secondary school social science endorsement to teach family life, despite the fact that the individual involved was primarily responsible for development of the district's family life course and had taught it for twelve years.

In this matter, the State Board's policy regarding regarding respondent's proposed infusion program is consistent with the regulation:

> *N.J.A.C.* 6:8-7.1(d)1.ii(4) states that "[g]roup programs based on specified instructional objectives shall be approved in the same manner as either approved course." Therefore, *when a "Plan B" course substitution is authorized for a group of students (i.e., shared time vocational) the elective course teacher must possess appropriate certification to teach both the vocational course and the mathematics or science component.*
>
> [J-7]

Old Bridge Ed. Assoc., supra, 1986 *S.L.D.* involved facts similar to those presented here and provides some guidance.. Certified teachers with endorsements in social studies, science and English taught, in addition to traditional classes within their respective subject areas, "social studies reading, science reading and literary reading." Each of these specialized reading classes had its own curriculum which concentrated on the relevant subject matter, but

also included reading skills such as phonics, pronunciation, prefixes and suffixes. Through a team teaching approach, the board sought to offer the students an interdisciplinary approach to the subject matter while strengthening reading study skills. The administrative law judge (ALJ) and the Commissioner concluded that these teachers of reading required an endorsement to teach reading. Therefore, I **CONCLUDE** that the regulation requires a teacher of math and science to hold those endorsements. Further, I **CONCLUDE** that a holder of a teacher of production, personal or services occupations endorsement, a teacher of skilled trades endorsement, and a teacher of technical occupations endorsement does not have the necessary credentials to teach math or science.

I am further persuaded by the evidence that the vocational curriculum under the infusion program is substantively different from the previous vocational curriculum under the pull out program. Thus, I also reject respondent's argument that the math and science proficiencies have always been a part of the vocational curriculum. In contrast, the record reflects that respondent requested approval to participate in a pilot project "which enables youngsters to receive math or science credits in a course taught by a teacher with vocational certification only . . . [and] proposes to use his [her] math/science certified person to insure that the proficiencies are included in the curriculum." J-8. Thus, respondent's request is inconsistent with its later assertion that "[t]eaching these math/science proficiencies has always been intrinsically intertwined with the trade, skill, etc,. and does not render the course, in whole or part, a math or science course requiring such [endorsement]." Respondent's brief at 6.

Also, I reject respondent's assertions that petitioner did not give grades nor have any role in the grading process. Petitioner testified that at times she would give the students a quiz that was based on the material that she presented and then she would grade the test. Although she did not use the

scores to create grades, she did give those grades to the teacher who would use them.

Petitioner's testimony was credible and straightforward. Further, the testimony is supported by the documentary evidence. In a memorandum dated February 3, 1991, Regan stated that petitioner "assisted in both the administration and the scoring of the pretest in math and science." (J-15) Further, the attachment to the document provides that:

> ...if you have questions about record keeping, I find the instructors doing it several ways:
>
> 1. Segregating your math and/or science questions and placing them at the end of tests/quizzes or
>
> 2. Coding the math/science related questions in the context of the test. . .Another suggestion is if you're giving a test that's strictly math--say on equivalent measures in culinary or engine capacity in auto service, just enter the grades in your book as usual and put a red "M" over the column to cue you when you do your grades...
>
> [*Ibid,*]

See also Old Bridge Ed. Assoc., supra, 1986 *S.L.D.* 1917 where the ALJ and the Commissioner found determinative the fact that the teachers taught and graded the reading class separately from the instructional time devoted to the subject matter. Thus, I **CONCLUDE** that the students in Vo-Tech's academic infusion program did receive a separate grade for the math or science credits earned.

Further, I **CONCLUDE** that teachers who are not certified in math and science but provide instruction in these proficiencies to vocational students within the vocational class setting violate regulations governing professional standards for school. Thus, the next question is whether the Commissioner is authorized to waive these regulatory requirements?

The breadth of an agency's power to waive regulatory requirements has been addressed in several cases. *SMB. Assocs. V. NJDEPE*, 264 *N.J. Super.*

38, 50 (App. Div. 1993) The government agencies in question have no "authority to grant such a waiver [from regulatory standards] in the absence of a regulation, adopted pursuant to the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to -15 authorizing waivers and establishing standards for the exercise of waiver authority.", *aff'd,* __ *N.J.* __ (1994), (slip op. at 4). "We need not resolve in this case the breadth of an agency's power to waive regulatory requirements or whether a rule authorizing waiver is always necessary. We are satisfied that the Legislature did not contemplate that [the agency] would be authorized to waive substantive requirements of [the law]." The Court noted that the *SMB. Assocs.* case was exceptional because the primary regulator, DEPE, was at odds with the final review body, the Coastal Area Review Board, comprised of the Commissioners of DEPE, Commerce and Community Affairs. *Cf. Dougherty v. Human Services Dept.*, 91 *N.J.* 1 (1982) We "conclude that the Commissioner must make the determination as to whether, in the circumstances of this case, waiver of the regulation serves the purposes of the [statute]." *Id.* at 12

Generally, administrative agencies are bound by the rules they promulgate. *SMB Assocs. v. DEPE, supra*, 264 *N. J. Super.* at 50-51; *Iuppo v. Burke*, 162 *N.J. Super.* 538 (App. Div. 1978); Crema v. DEP, 94 *N.J.* 286 (1983); *In re Waterfront Dev. Permit*, 244 *N.J. Super.* 426, 434 (App. Div. 1990), certif. denied, 126 *N.J.* 320 (1991). *Iuppo v. Burke, supra*, involved a regulation which required the Commissioner of Education to annually classify schools as approved, conditionally approved, or unapproved. The Commissioner decided not to classify the schools in the first year that the regulation was in effect because the unavoidable delay in translating the statutes and regulations into working procedures for local school districts resulted in incomplete data being available to the Commissioner. The Court rejected the Commissioner's argument that the regulations did not establish a start-up date, and that the department was therefore merely interpreting and applying the rules in light of the prevailing circumstances. The Court concluded that the decision to exclude

the first year was an amendment to the rule, and therefore, invalid for failure to comply with notice and comment rulemaking. The Court stated that, "It is not necessary that we judge the wisdom of the course chosen by the Commissioner and the State Board. They are bound by duly promulgated rules and regulations." *Iuppo v. Burke, supra*, 162 *N.J. Super.* at 549.

In *Crema v. DEP, supra*, the Court stated that, "[T]he permit granted by DEP in this case ... was not authorized by either the express provisions of [the statute] or any standards found in current departmental regulations implementing [the statute] ... therefore the approval cannot be sustained." *Id.* at 298. *In re Waterfront Dev. Permit, supra*, 244 *N.J. Super.* at 435, the court reasoned that: "To allow the Commissioner to depart from this carefully thought out program whenever he wishes would simply diminish the integrity of his agency's standards without any corresponding benefit."

Although administrative agencies have wide discretion in selecting the means to fulfill the duties the Legislature has delegated to them, *e.g., Emmer v. Merin*, 233 *N.J. Super.* 567 (App. Div. 1989) certif.. denied, 118 *N.J.* 181 (1989); *Dougherty v. Human Services Dept.*, 91 *N.J.* 1, 6 (1982); *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 333 (1984); *Texter v. Human Services Dept.*, 88 *N.J.* 376, 383 (1984), "this flexibility does not allow an agency to ignore the dictates of the APA." *Board of Ed. of City of Plainfield v. Cooperman*, 209 *N. J. Super.* 174, 207 (App. Div. 1986). The need for prompt action "does not absolve the Commissioner from adhering to the mandates of the APA. *Ibid.*

The issue in *Cooperman, supra*, was the Department's promulgation "policy guidelines" governing admission to local public schools of children diagnosed with AIDS or AIDS Related Complex. The State argued that the guidelines were not promulgated to establish new policy but were issued "to insist that local school districts comply with the existing regulations and statutes

regarding admission of children to school and the communicability of disease." *Id.* at 205. The Court stated that, "The label given to administrative action should not be determinative if the substance of such action falls within the ambit of rule-making requiring compliance with *N.J.S.A.* 52:14B-2(e).", *Id.* at 206. The Court concluded that rulemaking was required due to the widespread, continuing and prospective effect of the policy. *Id.* at 205. *See also Shapiro v. Albanese*, 194 *N. J. Super.* 418 (App. Div. 1984) Court rejected the contention that the agency "circular letter" was not subject to APA because it was an intra-agency or inter-agency statement; the agency called it an interpretation of the rules, and the Court called it "ad-hoc legislation" and a "re-writing" of the regulation. *Id.* at 429.

The regulations and case law make clear that math and science endorsements are a prerequisite to teaching those subjects in the public schools. Further, the regulations governing the certificates and endorsements necessary to be employed as a teacher in New Jersey schools contain no provision allowing the Commissioner to waive the requirements. Although agencies may have the inherent power to waive de minimus violations of objective standards, *SMB Assocs. v. DEP*, *supra*, 264 *N. J. Super.* at 59, the waiver here involved regulations which enforce fundamental policy determinations that school teachers have certain minimal credentials to teach in the public schools.

Indeed, the New Jersey Supreme Court "has recognized the need and efficacy of rulemaking for establishing administrative law." *Crema v. DEP, supra*, 94 N.J. at 299. *N.J.S.A.* 52:14B-2(e) defines a rule as:

> [E]ach agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include:

The waiver granted by the Commissioner to respondent is not of general applicability and continuing effect, but a rule governing waiver requests for infusion programs is necessary to avoid arbitrary action by the Commissioner. The criteria set forth in *Metromedia, supra*, provided a "test of when rulemaking procedures are necessary in order to validate agency actions or determinations." *Woodland Private Study Group v. DEP*, 109 *N.J.* 62, 68. (1987).

> [A]n agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow or select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [*Metromedia, supra*, 97 *N.J.* at 331-332]

The approval of respondent's infusion program does not encompass a large segment of the regulated or general public, but is limited to respondent. However, the parties agree and the evidence shows that this matter contains questions of statewide import , *i.e.*, (1) whether instructors in an academic math and science infusion programs at vocational-technical schools are required to hold endorsements in those proficiencies; and (2) what is the role of the math/science teacher, if one is required.

Indeed, six vocational school districts are offering academic credit for mathematics through an infusion program. The ratio of teachers with a math endorsement to the students earning math credit ranges from 1:12.5 to 1:506. (R-1). Thus, it can be presumed that if one school district is permitted to offer credit for math and science without having a math or science endorsed teacher on staff, other districts will seek to similarly economize.

In this instance the Commissioner waived the regulatory requirements that a teacher of math and science be certified in math and science. (J-7, J-8, J-10). However, it is speculative to determine what aspects of the approval of respondent's program would be generally and uniformly applied to the other districts. Notwithstanding whether the approval was predicated upon a properly endorsed teacher remaining on staff, the Commissioner's approval of the infusion program establishes a standard not obviously inferable from the statutes or regulations. *Metromedia, supra.* Similarly, the approval constitutes a material and significant change from the prior agency position. *Ibid.* The Commissioner's approval of respondent's program, together with the apparent approval of other districts' programs, indicates that a general policy has been established to allow such programs. Therefore, I **CONCLUDE** rulemaking is the appropriate method for establishing the standards to govern infusion programs if it is to operate prospectively. *Metromedia, supra.*

The remaining issue involves the Department's scope of the approval granted to respondent's pilot project. Petitioner maintains that the project approved by the Department presumes that a teacher with the necessary math and science endorsements will remain on staff as an integral part of the program. Respondent argues that the Department's approval does not require the continued employment of a math and science teacher.

Petitioner relies upon J-8, the July 16, 1990 memorandum from Assistant Commissioner DiPatri to Department officials. The document contains Morris County's request for a waiver of the regulatory requirements and its proposal to "conduct a pilot project which enables youngsters to receive math or science credits in a course taught by a teacher with vocational certification only", and "to use [the] math/science certified person to insure that the proficiencies are included in the curriculum."

Respondent relies upon J-9 and J-10. J-9 is DeWorken's August 30, 1990 correspondence sent to DiPatri after their meeting about the infusion program. It contains Morris County's plan to reach its "eventual goal of Morris County Vocational School awarding the credit for math and science." J-10 is the September 10, 1990 response from DiPatri. The purpose of that letter was "to grant approval of [Morris County's] proposed implementation plan over the next two years." However, neither J-9 nor J-10 mention how the infusion program will address the regulatory requirement that teachers have the proper endorsements to teach math and science.

Both respondent and the Commissioner, however, acknowledged that the teachers' credentials were an issue. (J-5). Although neither the written proposal nor the written approval addresses that issue, respondent testified that at the meeting held to discuss the infusion program "the issue of the district having an academically certified math and/or science person on staff. . .was discussed as an aside." Transcript at 118. Moreover, "at the time we also told them [Department officials] that the math/science teacher that we had would continue on staff and would be utilized in a different forum in terms of acting primarily as a resource to the vocational instructors in implementing the math and science academic infusion program." Transcript at 121.

Additionally, DiPatri specifically sought input from Department officials on "what authorizations and assurances the department might require if we approve this pilot program." J-8. Yet, nothing in the written proposal or approval mentions any required "authorizations and assurances." Consequently, it is not known what elements of respondent's program were considered desirable or necessary.

Finally, neither J-8 nor J-10 include a standard to evaluate the project or criteria for its continuation or termination. "Administrative officers should articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *Crema v. DEP, supra*, 94 *N.J.* at 301. "These standards should be determined by agency rulemaking in order that the criteria that underlie their formulation and application can be properly developed and expounded with the maximum involvement of the general public." *Id.* at 303.

Based on the documentary evidence and the reasons discussed, I **CONCLUDE** that the Commissioner's approval of respondent's infusion program was predicated upon the understanding that a teacher with endorsements in math and science was an integral part of the program. This conclusion also renders the Commissioner's approval consistent with state regulations.

I further **CONCLUDE** that the waiver sought by respondent was based on Morris County Vo-Tech's maintaining a teacher with math and science endorsements on its staff. This would insure that the vocational curriculum warrants the academic credit and that assistance would be available to vocational instructors. But, the actual student instruction would be handled by reciprocal teaching from the math/science teacher and the vocational instructor. Thus, I further **CONCLUDE** that the Commissioner never authorized respondent to dispense with the services of its certified math and science teacher. This conclusion is consistent with the regulatory requirements and the breadth of

Commissioner's authority to relax regulatory requirements without a formal rule amendment. Further, it is supported by parties' joint exhibits.

II

b. Tenure

Petitioner argues that she has "tenure and seniority rights in the academic components of Math and Science [and that her] seniority rights include all Math and Science content." Petitioner's Brief at 11.

Tenure is a legislative status, not acquired in any specific assignment, but in the positions which require one to hold appropriate certificates issued by the Board of Examiners. *N.J.S.A.* 18A:28-5. Further, teachers who have Acquired tenure "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." *Ibid.* However, a board of education can reduce the number of teachers it employs "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 a change in the administrative or supervisory organization of the district or for other good cause." *N.J.S.A.* 18A:28-9. Dismissals resulting from any such reduction in force must be made on the basis of seniority within categories of service. *N.J.S.A.* 18A:28-10 and 13.

Moreover, in a reduction in force (RIF) situation, a tenured teacher is entitled to any existing position within her category of employment that is held by a nontenured employee or a tenured employee with less seniority. *See*, *N.J.A.C.* 6:3-5.1(i). If no such position exists, the tenured teacher is entitled to placement on a preferred eligibility list for re-employment in order of seniority whenever a

vacancy occurs for which she is qualified. *Gainer v. Wayne Twp. Bd. of Ed.*, 94 *N.J.A.R.* 2d (Vol. 4B) 222, 223 (State Board); *Capodilupo v. West Orange Bd. of Ed.*, 218 *N.J. Super.* 510, 515 (App. Div. 1987) certif denied, 109 N.J. 514 (1987).

Petitioner has been employed by respondent as a math and science teacher from 1988 to 1993, and she has acquired tenure in that position. *N.J.S.A.* 18A:28-5 However, the evidence show that petitioner's job duties are significantly different than the duties of the various vocational-technical teachers. Thus, I **CONCLUDE** that the positions of the math/science infusion teacher and the vocational instructor are not equivalent for tenure and seniority purposes. "A mere overlap in duties, ... does not mean that two positions are equivalent for tenure purposes." *Dennery v. Passaic Cty. Reg. Bd. Of Ed.*, 131 N.J. 626, 640 (1993). Indeed, petitioner lacks the necessary endorsements to teach the vocational curriculum. A teacher's "tenure rights do not compel the district to fragment an established multi-disciplinary position for which petitioner is only partially certified." *Eftychiou v. Board of Ed. of Bergenfield*, 1990 *S.L.D.* 1068, 1070) The Commissioner held that a tenured teacher with English endorsement is not entitled to one-third of a basic skills course over a nontenured teacher with elementary endorsement which qualifies her to teach the entire basic skills curriculum: reading, math and language arts.

Therefore, if respondent is authorized to offer math and science credits to its vocational students through the infusion program without having a teacher holding math and science endorsements on staff, then petitioner's tenure and seniority rights will be limited to placement on a preferred eligibility list for re-employment whenever a vacancy occurs for which she is qualified. However, I have concluded that the Commissioner s approval of the project was predicated upon the understanding that a teacher with endorsements in math and science was an integral part of the program. Therefore, I **CONCLUDE** that respondent

violated petitioner's tenure rights when it terminated her employment and then assigned math and science instruction for academic credit to teachers with vocational certification only. Thus, for as long as respondent continues to operate the infusion program, a certified instructor with math and science endorsements must be on staff.. Further, I **CONCLUDE** that petitioner is entitled to reinstatement to the position. Moreover, if respondent decides to terminate its math and science infusion program and revert to providing math and science instruction to its students through a pull-out program, I **CONCLUDE** that petitioner is likewise entitled to reinstatement to the position of the math and science teacher for the "pull-out" program.

III

Affirmative Defenses

I reject respondent's affirmative defenses that petitioner waived her tenure and seniority rights and that she is estopped from asserting her claim. As a matter of law, a teacher cannot waive tenure or seniority rights. *State v State Supervisory Employees' Assn.* 78 *NJ* 54 (1978); *In re West Morris Reg. Sch. Dist.* 1981 *S.L.D.* 723, Comm'r. 1981 *S.L.D.* 732. I also reject respondent's estoppel claim because the doctrine of estoppel is founded on justice and good conscience. It requires that one may not repudiate an act done or position assumed where that course would work injustice to another who, having right to do so, had relied thereon. *Mattia v. Northern Ins. Co. of N.Y.* 35 *N.J. Super.* 503,510 (App. Div. 1955). "The essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." *O'Malley v. Dept of Energy*, 109 *N.J.* 309, 317 (1987). Estoppel also requires

lack of awareness of the true facts by the party seeking estoppel. *Horsemen's Benev. & Prot. V. Atlantic City Racing Ass'n*, 98 *N.J.* 445, 456 (1985); Accord, *Carlsen, v. Masters Mates & Pilots Pension Fund*, 80 *N.J.* 334, 339 (1979). Respondent has not shown that petitioner misrepresented or concealed facts known to her but not known to respondent. Further, there is no evidence that respondent has relied on any alleged misrepresentation or concealment to its prejudice. See R. 4:5-4. Therefore, I **CONCLUDE** that respondent has not demonstrated the elements of equitable estoppel.

ORDER

It is therefore **ORDERED** that the Morris County Vocational School District promptly reinstate Mary Ann Smith to her position as the math/science teacher together with back pay and other lost benefits from September 1, 1993, less mitigation.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 12, 1994
DATE

MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

8/17/94
DATE:

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 22 1994
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Mary Ann Smith

For Respondent:

Maryann Regan
James De Worken

Exhibits

J-1	Smith - Certificate of Mathematics
J-2	Smith - Certificate of Science and Biological Science
J-3	Board of Education Policy #508
J-4	Course Catalog for Applicants - Morris County Vocational - Technical School
J-5	Report Re: Background and Description of Infusion Program by M. Regan, June, 1990
J-6	Letter to Superintendents of Secondary School Districts from R. DiPatri, February 28, 1990
J-7	Letter to Chief School Administrators from R. . DiPatri, May 22, 1990
J-8	Letter to Bloom Klagholz and Newbaker, from R. DiPatric, July 16, 1990
J-9	Letter to R. DiPatri from J. DeWorken, August 30, 1990
J-10	Letter to J. DeWorken from DiPatri, September 10, 1990
J-11	Memo to DeWorken from D. Nick, August 23, 1991
J-12	Job Description of the Math/Science Teacher, September

	17, 1991
J-13	Memo to DeWorken from M. Regan, April 10, 1991
J-14	Memo to DeWorken from M. Regan, May 16, 1991
J-15	Memo to D. Nick from M. Regan, February 3, 1992
J-16	Memo to DeWorken from M. Regan, March 31, 1992
J-17	Teacher List - 1993-94 Academic Infusion
J-18	Cover letter to Friedman, Esq. re: Math/Science Infusion Program April 13, 1994
J-18a	Mathematics Proficiencies
J-18b	Science Academic Skills
J-18c	Lesson Plan - Culinary Arts I, October 25-29, 1993
J-18d	Lesson Plan - Animal Tech I, October 25, 1993
J-18e	MATRIX of Computation Skills
J-18f	MATRIX of Communication Skills
J-18g	Science - Biology Program
J-18h	Science - Anatomy/Physiology Program
J-18i	Science - Chemistry Program
J-18j	Science - Physics Program
J-18k	Science - Environmental Program
J-19	Auxiliary Programs - Math/Science Infusion Program
R-1	Memo to County Vocational School Superintendents, April 20, 1993
R-2	Letter to Klagholz from B. McAndrew, May 5, 1993 (Not in Evidence)
R-3a	Certifications and Endorsements on Vocational Teacher, page 128
R-3b	Certifications and Endorsements on Vocational Teacher, page 129

OAL DKT. NO. EDU 7710-93

MARY ANN SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent sought and received an extension of time, until September 9, 1994, within which to file exceptions to the decision. Such exceptions were not filed until September 13, 1994 and, consequently, are untimely. As such, these and petitioner's reply thereto will not be herein considered.

Given that at the time the circumstances underlying this case arose the Commissioner was Director of the Division of Teacher Preparation and Certification and, in that capacity, present at meetings wherein the Board sought approval of its pilot infusion program project, the Commissioner has recused himself from deciding this matter to obviate any possible appearance of impropriety and designated Assistant Commissioner Peter B. Contini to act in his stead in the deciding of this case.

Upon careful, independent review of the record in this matter, which includes transcripts of the hearing at the Office of Administrative Law, the Assistant Commissioner agrees that the

Administrative Law Judge (ALJ) correctly determined that the Department of Education's approval of the Morris County Vocational School District's infusion program was predicated upon the understanding that a teacher with endorsements in math and science was an integral part of such program and that such an individual would be maintained on the school district's staff.

The Assistant Commissioner determines that the Department's approval of the infusion plan submitted by the district herein envisioned the granting of credit for the infused math/science instruction as a curricular activity pursuant to N.J.A.C. 6:8-7.1(d)i(4B). Additionally, the plan as presented was cast in terms of student selection and crediting for the infusion program being effectuated on an "individual" rather than a "group" basis (see Exhibit J-9). It must be herein noted that the Department has historically interpreted individualized programs pursuant to N.J.A.C. 6:8-7.1(d)i(4B) and 7.1(d)ii(4) to permit credit for learning experiences without imposing certification requirements on the student's mentor or instructor (see Exhibit J-8). Consequently, the infusion program in this matter, structured on an individualized basis, which contemplated delivery of math/science instruction for academic credit by vocationally certified teachers was consistent with these applicable regulatory provisions. It is clear, however, that since the vocational/technical school, rather than the sending district, was to be the credit granting entity under the district's proposal, program approval was, of necessity, predicated on the presence of a properly certificated staff person to provide the required oversight of program content and delivery, and of student proficiency assessment. As such, so long as the district continues

to operate the infusion program proposed to and approved by the Department, it is not free to abolish petitioner's position. Therefore, the Assistant Commissioner concurs with the ALJ's conclusion that respondent violated petitioner's tenure rights when it terminated her employment.

In that the ALJ found, and the Assistant Commissioner concurs, that there was no waiver of regulations involved in this case, he passes no judgment on the ALJ's rulemaking discussion in the initial decision as such is not necessary for a determination in the instant matter.

Accordingly, the initial decision of the Office of Administrative Law is adopted, as modified herein, as the final decision in this matter. The Morris County Vocational School District is hereby ordered to restore petitioner to her position as the math/science teacher with salary and all emoluments, less mitigation, from the date of her wrongful termination.

Peter B Contino

DECEMBER 23, 1994 ASSISTANT COMMISSIONER OF EDUCATION

DATE OF MAILING - DECEMBER 23, 1994

356-94

EDU #7710-93
C # 356-94
SB # 8-95

MARY ANN SMITH, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY, : DECISION

RESPONDENT-APPELLANT. :

Decided by the Assistant Commissioner of Education, December 23, 1994

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

For the Respondent-Appellant, Green & Dzwilewski (Allen P. Dzwilewski, Esq., of Counsel)

The decision of the Assistant Commissioner of Education is affirmed substantially for the reasons expressed therein. We emphasize that instruction for credit in science and mathematics may be provided only by individuals possessing instructional certification in those specific subject fields.

June 7, 1995

Date of mailing JUN 09 1995

357-94

IN THE MATTER OF THE CAP WAIVER :

APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION

OF THE TOWNSHIP OF LAKEWOOD, : DECISION

OCEAN COUNTY. :

:

SYNOPSIS

Board appealed General Fund cap waiver in the amount of $1,235,504 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $1,235,504 in cap waiver monies for a total General Fund tax levy of $42,819,495 for 1994-95 school year.

DECEMBER 23, 1994

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF LAKEWOOD, : DECISION
OCEAN COUNTY. :
:

For Petitioner, Richard Sacks, Esq.

This matter was opened before the Commissioner of Education on June 20, 1994, by way of a Petition of Appeal filed by the Board of Education of the Township of Lakewood (Board) seeking inclusion within the 1994-95 General Fund Tax Levy a cap waiver defeated on April 19, 1994, by the voters of the district in the amount of $1,235,504. In addition to the defeat of the cap waiver, the voters also defeated the base budget.

The aforesaid requested cap waiver amount was submitted to the voters pursuant to the provisions of N.J.S.A. 18A:7D-28(f) which provides as follows:

> Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C.18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts

> required to be approved for each school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L 1971 (C.18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes for type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C.18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review or appeal.

The Commissioner notes that the Acting County Superintendent of Ocean County approved the N.J.S.A. 18A:7D-28(f) cap waiver request as being necessary for the provision of a thorough and efficient education after reviewing the entire school budget to determine whether reallocations within the base budget could be accomplished. As a result of the aforesaid review, the Acting County Superintendent, after discussion and consultation with a Department of Education panel of coordinating county superintendents and representatives of the Division of Finance, directed reallocation of $436,171 within the base budget thus reducing the cap waiver amount to the $1,235,504 presented to the voters of the district. After the Board revised its cap waiver request to reflect the reallocations for the base budget directed by the Acting County Superintendent, the Acting County Superintendent conditionally approved the base budget for submission to the voters with the provision that should the cap waiver be rejected the district would be required to file an appeal with the Commissioner. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

The accounts and the amounts which were approved for submission to the voters as a cap waiver are set forth below:

1. LE1 Alternate School ($174,481) - This program currently serves forty (40) disaffected youth, offering curricular counseling and community service components for these potential dropouts. The program has been identified by the Ocean County Prosecutor for expansion through a grant from the state which will be administered by the prosecutor's office. The school district must be able to maintain its level of funding for this program, or the grant and the expanded program may be jeopardized.

2. Security Services ($242,900) - Provided at four sites including the middle and high schools. Utilized as a preventive measure to hold down incidents of violence and vandalism.

3. Nurses ($195,000) - Six out of the district's seven nursing positions fall into this appeal. Their services are utilized to provide essential instructional, health and developmental support to the transient multiethnic population of Lakewood's schools. This necessitates school nurses providing a liaison between the home and the school. Many families are in desperate need of health care, and knowledge of where and how to receive it. The nurses work closely with Kimball Medical Center to ensure student/parent compliance with state health mandates.

4. Guidance Counselors ($288,619) - Two-thirds of the district's counselors are included in this appeal request. The psychological, social and academic support provided by these personnel to the population of Lakewood's schools is essential. These counselors service all the elementary schools, the middle school and the high school. Elementary counseling would no longer be provided should this waiver not be granted, while levels of service at the secondary level will be reduced. It should be noted that the Lakewood schools do not employ social workers for regular instructional students. Elementary school level counselors are necessary to provide the services normally provided by social workers.

5. Assistant Principals ($130,000) - These elementary assistants directly oversee programs designed to meet the needs of the at-risk population within Lakewood's elementary schools. Responsibility includes curricular development and articulation, and an instructional delivery system used to implement it. Lakewood's elementary schools consist of four buildings, two having a population of over 850, and two somewhat smaller. The diverse population dictates a need for the assistant principal to deal with the daily discipline, parent contact, social agency contact, and maintain a safe and violence-free environment. An administrative reorganization in 1992

consolidated 38 administrative positions into 32 positions. This year, three administrative positions have been eliminated.

6. Special Education, Bilingual and Elementary Equipment ($22,154) - This request is representative of the equipment to service both the Special Education and Bilingual students within the district, and is inclusive of computerized technologies. At the elementary level, it represents replacement of out-dated computers (10-12 years old). The district is finding it difficult to maintain information services that it makes available to elementary students.

7. Capital Projects ($137,000) - Maintenance of health, safety and sanitary conditions of the district facilities is where these funds will be spent. Some examples are:

   (a) minor roof repairs at four facilities
   (b) repair of the high school track - severe cracking of the surface is causing accidents, and must be repaired
   (c) replacement of exterior doors in four buildings, and installation of bathroom partitions in a number of facilities. Exterior doors are old, and warp when the weather is damp, causing water damage within the buildings. In addition, these doors cannot be secured for safety purposes, allowing outsiders to enter without appropriate identification.

8. Summer School and Evening High School ($45,350) - These programs are implemented to provide Lakewood's at-risk population with multiple opportunities to be successful. The summer programs in the past focused heavily on acquisition of the skills necessary to be successful, with appropriate emphasis on successful test-taking techniques for the students involved.

Pursuant to N.J.S.A. 18A:22-37 the Board and the Township Committee of the Township of Lakewood (Township) met May 12, 1994, after the defeat of the base budget and the cap waiver. As a result of the said meeting, the Board and the Township agreed to a reduction of the base budget in the amount of $887,712.

Upon defeat of the budget and cap waiver and the subsequent reduction of the General Fund Tax Levy agreed upon between the Board and the Township, the Acting County Superintendent of Ocean County reviewed the reductions and determined that they could be sustained

without impacting upon the ability to provide a thorough and efficient system of education in the Lakewood Public Schools provided that the items in the cap waiver were also funded.

The reductions which the Acting County Superintendent agreed to were based upon the following changed circumstances as contained with her Affidavit dated August 3, 1994:

> 1. Account #11-120-100-101, 11-130-100-101, 11-140-100-101, 11-230-100-106, 11-000-221-102, 11-000-290-290 - Salaries, in the amount of $277,712.
>
> This reduction could be sustained due to not replacing two elementary teachers, two secondary teachers and two supervisors. This figure also includes benefits.
>
> 2. Account #11-190-100-610, 11-000-240-600, 11-000-290-500 - Supplies, in the amount of $45,000.
>
> This reduction could be sustained because of a lower bid that was made for copier supplies, general and administrative supplies.
>
> 3. Account #11-000-221-104 - In-Service, in the amount of $25,000.
>
> This account could be reduced and replaced by three grants that were received during the last few weeks.
>
> 4. Account #11-000-260-610 - Plant and Custodial Supplies in the amount of $25,000.
>
> This reduction is possible by eliminating the retrofitting of the heating and lighting systems in the districts and also by curtailing the purchasing of the cleaning supplies.
>
> 5. Account #11-000-270-512 - Field Trips in the amount of $65,000.
>
> These trips have been eliminated and only instructional trips will be possible through grants and private donations.
>
> 6. Account #11-000-290-250 - Unemployment trust fund in the amount of $50,000.

This reduction could be sustained since privatization costs have now been covered and there will be sufficient funds to cover incidental unemployment costs. ($50,000 is currently in the budget.)

7. Account #12-000-400-390 to 12-000-400-610 - Capital Oulay projects in the amount of $200,000.

This cut could be sustained through postponing several projects to another time and only addressing those items directly related to the instructional program and student's safety.

8. Account #12-000-400-390, 12-000-400-450 - Budgeted fund balance in the amount of $200,000.

Although this additional appropriation is being made, the Fund Balance will still be approximately 2% of the total budget.

Board's Position

The Board argues that a comparison of its 1993-94 Budget and its 1994-95 budget reveals that almost every line item has been reduced or held to no increase and therefore supports its contention that a thorough and efficient system of education cannot be accomplished without a cap waiver as requested. The Board asserts that it already has taken the following steps to reduce its operating costs:

1. Reduced its free balance to 2%.

2. Reduced its administrative staff by 25%.

3. Privatized transportation serving 30% over its current transportation system.

4. Privatized plant operation.

5. Brought special education students back to the district so that twice as many children are being served for the same dollar amount.

6. Stabilized insurance costs through rebidding.

7. Held collective bargaining increases to the 4-5% range.

8. Reduced capital projects to emergency items and to support instructional programs.

(See Board's Position Statement dated July 1, 1994)

The Board contends that its current fiscal problems in fact derive from its earlier prudent steps in which it was below cap in each year since 1991-92 (See, chart in Board's Position Paper p. 5).

The Board points out that the cap waiver items involve thorough and efficient essential items in the following areas:

1. Provision of services for its alternative school.

2. Provision of security services in an urban environment.

3. Providing nursing services in its seven schools.

4. Provision of guidance counselors at both the elementary and secondary level.

5. Assistant principals for elementary schools in order to meet the needs of at-risk students.

(See, August 31, 1994 letter to Commissioner for detailed description of services.)

Commissioner's Decision

The Commissioner has reviewed the papers submitted by the Board as well as the Affidavit of the Acting Ocean County Superintendent submitted as part of the record in this matter. In addition, the Commissioner has reviewed the entire budget beyond the reduction made by the Township. Based upon said review and the detailed documentation and budget comparisons provided by the Board, the Commissioner concludes that the base budget of $41,583,991 and the cap waiver amount of $1,235,504 are the minimal amount necessary for the provision of a thorough and efficient system of education in the Township of Lakewood. (See, Board of Education of the Borough

of Rutherford v. Mayor and Council of the Borough of Rutherford, decided by the State Board of Education July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board of Education July 6, 1994).

Accordingly, the Ocean County Board of Taxation is directed to adjust the General Fund Tax Levy of the Lakewood Township Board of Education for the 1994-95 school year to reflect an increase of $1,235,504 for a total of $42,819,495 consistent with the Commissioner's findings above.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 23, 1994

DATE OF MAILING - DECEMBER 23, 1994

[1]After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In this review for the purpose of determining potential revenue to be appropriated in lieu of increasing the tax levy, the Commissioner concluded that the undesignated surplus did not materially exceed the budgeted amount.

358-94

IN THE MATTER OF THE CAP WAIVER :

APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION

OF THE BOROUGH OF WESTVILLE, : DECISION

GLOUCESTER COUNTY. :

:

SYNOPSIS

Board appealed General Fund cap waiver in the amount of $74,756 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $74,756 in cap waiver monies for a total General Fund tax levy of $879,861 for 1994-95 school year.

DECEMBER 23, 1994

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF WESTVILLE, : DECISION
GLOUCESTER COUNTY. :
:

Russell E. Paul, Esq., for the Petitioner.

This matter was opened before the Commissioner on June 10, 1994, through the filing of a Petition of Appeal by the Board of Education of the Borough of Westville (Board) wherein the Board sought to have included in the General Fund tax levy for the 1994-95 school year a cap waiver amount defeated by the voters at the annual school election based upon the following facts which are uncontested:

1. The Board adopted a resolution asking the voters of the Borough of Westville to approve a thorough and efficient (T&E) cap waiver in the amount of $74,756. The cap waiver request was for the following programs:

Pre-School Program 4 year old students (Pre-K)

Salaries	$16,425
Art Music, G&T/Computer Education	3,035
Total	$19,460
Restoration of Full-Time Program of Art, Music G&T Computer Education for Grades 1-5 Salaries	30,330
Restoration of Full-Time Program for Art, Music G&T Computer Education for Grade 6	9,099

Restoration of Classroom Aide for Pre-K Program	3,250
Purchase of Math Textbooks, workbooks, and Support Materials for Students in Grades 3-6	7,000
Restoration of Outdoor Educational Program for 6th Grade Students	617
Restoration of Transportation Expenses for Class Trips at Each Grade Level and Transportation Expenses for the Sixth Grade Outdoor Educational Program	5,000
Total Cap Waiver Request	$74,756

2. The Board submitted to the voters of the District on April 19, 1994, its proposed General Fund Budget for the 1994-95 School Year. Less than a majority of those voting voted to approve the Cap Waiver Request.

3. The Board submitted to the voters of the District on April 19, 1994 a proposed Cap Waiver Request in the amount of $74,756 for the 1994-95 school year. Less than a majority of those voting voted to approve the Cap Waiver Request.

4. The Board delivered the completed proposed General Fund Budget and the Cap Waiver Request for the 1994-95 school year to the Mayor and Council of the Board of Westville (Borough) on April 21, 1994.

5. Pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2 the Board and the Borough met for the purpose of consulting as to the amount of funds required to be raised by the general purpose tax levy, in order to provide a thorough and efficient education in the Borough of Westville. Consultation was in the time permitted by law.

6. At an open public meeting of the Borough Council of the Borough on May 10, 1994, the Borough adopted a resolution supporting the Board's request for a $805,105 in tax levy to be certified by the Borough to the Gloucester County Board of

Taxation. The Borough made no reduction in the General Fund budget for the 1994-95 school year.

7. The Borough Council of the Borough adopted a resolution at an open public meeting held on May 10, 1994, supporting the Board's appeal of the cap waiver denial to the Commissioner and supported the inclusion of $74,756 in the 1994-95 school budget.

8. The Board at a special meeting held at the Parkview Elementary School on May 11, 1994, pursuant to the Open Public Meetings Act, adopted a resolution concurring with the Borough in the certification to the Gloucester County Board of Taxation the 1994-95 school budget of $2,399,884. The Resolution, in addition to requesting that the amount to be raised by local tax levies remain at $805,105, also requested that the Commissioner certify to the County Board of Taxation the additional sum of $74,756 to be raised through local taxes for the cap waiver defeated by the voters at the school election.

Standard of Review

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of

Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). In order to meet this duty, the Commissioner is charged with the responsibility to review defeated budgets which had been approved by the county superintendent subject to voter approval to exceed the statutory budget limitation (cap waiver). See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991) Upon review, the Commissioner may order an increase in those limited instances where it is necessary to meet the constitutional mandate. Districts must demonstrate both that particular amounts above the cap are necessary to provide a thorough and efficient education and that reallocation within the permissible budget amount cannot be accomplished. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994; see AAA 91-0036, supra.

Mindful then of the balance to be applied in this standard of review with respect to the various line items contained in the cap waiver request, the Commissioner makes the following determination with respect to the cap waiver appeal before him.

Budget Line Item Analysis

School Program (Pre K) Acct. 11-110-100-101 $ 19,460

The Board asserts that the program serves approximately 60 at-risk children and focuses upon children both in need of readiness/social skills prior to kindergarten as well as shy young children and those in need of extra language and speech services. It is also offered as an option instead of evaluation and classification as pre-school handicapped. The funds are for the teacher and aide positions. A reduction in a program previously offered would reduce the effectiveness of the school program. The Commissioner adopts as his own those reasons advanced by the Board. Consequently, the Baord request for $19,560 is approved.

Full Time Program of Art, Music G&T/Computer Education

The Board's position is that the art program is essential for preparing children for all aspects of life and contributes to improve test scores and achievement. As to the music program, the Board asserts that a full-time music program has been provided by the district for 25 years. It prepares students to continue to participate in similar programs at the junior and senior high school levels. Finally, as to the Gifted and Talented/Technology Program and its coordinator the Board asserts that the program identifies students identified as needing a differentiated program to challenge and enhance their talents and has been in existence in the district since 1979. The Commissioner determines that the Board request for $42,679 is approved.

The accounts and amounts which were requested by the Board:

Grades 1-5	Acct. 11-120-100-101	$30,330
Grade 6	Acct. 11-130-100-101	9,099
Pre-K Program	Acct. 11-190-100-106	3,250
		$42,679

Purchase Math Textbooks, Workbooks, and Support Materials

Grades 3-6 Acct. 11-190-100-640 7,000

The Board asserts that the math curriculum was revised during the 1992-93 school year to emphasizing higher-order thinking and problem solving skills. The current textbooks are over 10 years old and are inappropriate for the skills recommended by the Standards of the National Council of Teachers of Mathematics and the standards for the N.J. Early Warning and High School Proficiency Tests. Board request for $7,000 is approved.

Outdoor Educational Program Acct. 11-401-100-100 $ 617

The Board asserts that these funds are to permit students to participate in a four-day science and environmental program under the direction of Montclair State College. Board request for $617 is approved.

Transportation Expenses - Class Trips and Sixth Grade Outdoor Educational Program Acct. 11-000-270-512 $ 5,000

Board request for $5,000 is approved.

TOTAL APPROVED CAP WAIVER LINE ITEMS $ 74,756

The foregoing approvals are based on the impact the reduction or elimination of the services, programs and materials would have on the district's ability to provide a thorough and efficient system of education. In reviewing the Board's reasoning, in total, the Commissioner is convinced that the original approval of the foregoing programs in the cap waiver request was consistent with the constitutional mandate to provide a thorough and efficient education.

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that the $74,756

in cap waiver monies, sought by the Board are essential to provide a thorough and efficient educational system and that a reallocation of funds within the districts maximum permissible budget is not possible.

Accordingly, the Gloucester County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $879,861 to be raised in tax levy for the General Fund of the Westville Board of Education for the 1994-95 school year.[1]

Tax Levy Summary	General Fund
Tax Levy Certified by Council	$ 805,105
Cap Waiver ordered by Commissioner	74,756
Total	$ 879,861

Budget Summary	
Original General Fund Budget Total	$2,054,845
Approved Cap Waiver	74,756
Total General Fund Budget	$2,129,601
Special Revenue Funds	70,876
Debt Service	274,163
Total Budget	$2,474,640

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

[1]After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In this review for the purpose of determining potential revenue to be appropriated in lieu of increasing the tax levy, the Commissioner concluded that the undesignated surplus did not materially exceed the budgeted amount.

359-94

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

RESPONDEDNT.

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOROUGH OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY.

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $330,193 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $268,250.

Board also appealed General Fund cap waiver in the amount of $178,641 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $174,372 in cap waiver monies for a total General Fund tax levy of $7,400,243 for 1994-95 school year.

DECEMBER 23, 1994

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO,	:	
PETITIONER,	:	
V.	:	
MAYOR AND COUNCIL OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
AND	:	
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY.	:	

For Petitioner, Ramiro M. Carbonell, Esq. (Montgomery, McCracken, Walker & Rhoads)

For Respondent, Timothy D. Scaffidi, Esq.

This consolidated matter was opened before the Commissioner of Education on June 15, 1994, through the filing of a Petition of Appeal pursuant to the authority vested in the Commissioner by N.J.S.A. 18A:6-9 to hear and determine controversies under the school laws of this State and in accordance with Attorney General Opinion No. 91-0036 (1991) by reason of the following facts:

1. Petitioner is the Board of Education of the Borough of Glassboro in the County of Gloucester, New Jersey (Board) and is required both by the Constitution and Statutes of New Jersey to provide a thorough and efficient (T&E) education to its students.

2. On March 24, 1994, the Board submitted its proposed budget for the 1994-95 school year to the Gloucester County Superintendent of Schools along with a cap waiver request. The proposed General Fund budget totaled $16,926,906. Contained in the budget was a proposed General Fund tax levy of $7,287,814.

3. The Board requested a cap waiver of $389,398 for enrollment increases and $195,938 for special education cost increases. The Board also requested a voter T&E cap waiver in the amount of $275,260 pursuant to N.J.S.A. 18A:7D-28(f).

4. On March 28, 1994, the Commissioner approved the full amount of the cap waiver request of $585,336 for increased enrollment and special education cost increases raising the maximum permitted total net budget for 1994-95 to $16,525,626.

5. On March 31, 1994, the County Superintendent notified the Board that following review and a reallocation analysis made pursuant to N.J.S.A. 18A:7D-27 the 1994-95 school year budget could be advertised to include a cap waiver proposal in the amount of $275,260 of which $178,641 was necessary for the provision of a thorough and efficient education. The remaining $96,619 was authorized to be submitted to the voters as part of the cap waiver request, but was not deemed essential to the provision of a thorough and efficient education.

6. On April 19, 1994, at the annual election, the Board submitted a General Fund Budget in the amount of $7,287,814 to the voters of the School District pursuant to N.J.S.A. 18A:22-23 and a cap waiver in the amount of $275,260.

The voters rejected the General Fund tax levy as well as the cap waiver.

7. On April 25, 1994, the Board delivered its proposed school budget to the Borough Council of Glassboro Borough.

8. On, May 17, 1994, the Borough, after consultation with the Board, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), passed a resolution that a $6,957,621 General Fund tax levy was, in the judgment of the Borough necessary to provide a thorough and efficient system of education in the district. The net effect of the resolution and subsequent certification of taxes was $330,193 less than the amount originally proposed by the Board. This decreased the total proposed budget from $18,768,878 to $18,438,685.

9. On May 18, 1994, the Board adopted a resolution authorizing an appeal of the $330,193 tax reduction to the Commissioner of Education on the grounds that the amount certified by the Borough would not be sufficient to provide a thorough and efficient system of education.

10. On May 25, 1994, the Board notified the Borough and the Commissioner of its intent to appeal both the General Fund tax reduction by the Borough and the voter rejection of the cap waiver in the amount of $178,641.

Consequently, the General Fund tax levy funds in contention between the parties in this consolidated matter are as follows:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Governing Body	
General Fund	$7,287,814	General Fund	$6,957,621
Cap Waiver	$ 178,641	Cap Waiver	N/A

Amount of Reduction by Governing Body		Amount of Reduction in Dispute	
General Fund	$330,193	General Fund	$330,193
Cap Waiver	N/A	Cap Waiver	$178,641

The Borough in its answer to the Petition of Appeal of its General Fund reductions states that it relies upon the "resolution adopted and determinations made in support of its position that the funding reductions are appropriate and will not affect the provision of the adequate services for a thorough and efficient education." It further took no position on the cap waiver appeal. Consequently, the Borough submitted no additional documentation in these consolidated matters.

In addition, on December 16, 1994, the parties were notified that the Commissioner of Education intended to take official notice of the 1993-94 year-end district audit as it relates to the amount of anticipated undesignated surplus.

The Borough reduced the accounts in the amounts specified for the rationales stated, below:

Account	Title	Amount
	Surplus	$200,000

Rationale: As to the Board's estimated $470,962 surplus, Council proposes to use $200,000. (The Borough does this with the understanding that in the event of a general major mechanical failure, a cooperative funding program will be developed to finance the repair.)

Account	Title	Amount
11-110-100-101	Preschool/Kindergarten - Salaries of Teachers	$2,500

Rationale: Through prudent planning and closer monitoring of needs for substitutes the proposed amount was reduced.

Account	Title	Amount
11-120-100-101	Grades 1-5 - Salaries of Teachers	$7,000

Rationale: Through prudent planning and closer monitoring of needs for substitutes the proposed amount was reduced.

Account	Title	Amount
11-130-100-101	Grades 6-8 - Salaries of Teachers	$2,000

Rationale: Through prudent planning and closer monitoring of needs for substitutes the proposed amount was reduced.

Account	Title	Amount
11-140-100-101	Grades 9-12 - Salaries of Teachers	$4,500

Rationale: Through prudent planning and closer monitoring of needs for substitutes the proposed amount was reduced.

Account	Title	Amount
11-190-100-610	General Supplies	$2,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-205-100-610	General Supplies	$5,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-213-100-610	General Supplies	$1,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-217-100-320	Purchased Professional - Education Serv.	$4,000

Rationale: Line items reduced from estimated figures to reflect a general tightening of expenses.

Account	Title	Amount
11-218-100-100	Salaries of Teachers	$5,000

Rationale: Line items reduced from estimated figures to reflect a general tightening of expenses.

Account	Title	Amount
11-219-100-101	Salaries of Teachers	$4,000

Rationale: Line items reduced from estimated figures to reflect a general tightening of expenses.

Account	Title	Amount
11-219-100-320	Purchased Professional Educational Serv.	$3,000

Rationale: Line items reduced from estimated figures to reflect a general tightening of expenses.

Account	Title	Amount
11-220-100-320	Purchased Professional Educational Serv.	$5,000

Rationale: Line items reduced from estimated figures to reflect a general tightening of expenses.

Account	Title	Amount
11-230-100-610	General Supplies	$1,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-230-100-800	Other Objects	$1,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-402-100-600	Supplies and Materials	$2,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-000-218-600	Supplies and Materials	$1,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-000-219-600	Supplies and Materials	$1,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-000-221-105	Salaries of Secretarial and Clerical Assistants	$5,000

Rationale: With the shifting of funds from Title programs to cover some secretaries and clerical salaries, some economical saving actions can be implemented.

Account	Title	Amount
11-000-222-600	Supplies and Materials	$2,500

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-000-230-600	Miscellaneous Expenditures	$2,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-000-260-100	Salaries	$45,000

Rationale: Position of supervisor of building and grounds has been vacant for almost two (2) years and through the realignment of responsibilities and duties of present personnel, the Board could adequately handle the supervisory role and responsibilities.

Account	Title	Amount
11-000-260-610	General Supplies	$2,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-000-270-511	Contract Service (between Home and School) - Vendors	$5,750

Rationale: Original calculation was based on $675 per pupil. Actual cost $625 per pupil.

Account	Title	Amount
11-000-290-220	Social Security Contributions	$3,443

Rationale: Reflects savings in costs for not hiring Supervisor of building and grounds.

Account	Title	Amount
11-000-290-290	Other Employee Benefits	$6,500

Rationale: Reflects savings in costs for not hiring Supervisor of building and grounds.

Account	Title	Amount
11-000-290-600	Supplies and Materials	$2,000

Rationale: Reduce line item to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

Account	Title	Amount
11-000-310-930	Transfers to Cover Deficit	$5,000

Rationale: Costs could be saved through general review of expenditures of cafeteria operation and tighter fiscal controls.

	TOTAL	$330,193

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has

authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). In order to meet this duty, the Commissioner is charged with the responsibility to review defeated budgets which had been "conditionally certified" by the county superintendent subject to voter approval to exceed the statutory budget limitation (cap waiver). See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991). Upon review, the Commissioner may order an increase in those limited instances where it is necessary to meet the constitutional mandate. Districts must demonstrate both that particular amounts above the cap are necessary to provide a thorough and efficient education and that reallocation within the permissible budget amount cannot be accomplished. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the

Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994; see AAA 91-0036, supra.

Before reviewing the instant matter line item by line item, the Commissioner must point out that the New Jersey Supreme Court in East Brunswick, supra, has addressed the proper standard of review by a governing body after defeat of a budget by the voters. It reads in pertinent part:

> 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. (at 105-106)

At the same time the Court has also reiterated that the Commissioner must be sensitive to the taxpayers in making his determinations. In Deptford, supra, the Court provided:

> ...the Commissioner cannot ignore completely the municipality's political concerns and indeed may not override them without some necessity strictly related to the constitutional mandate to provide for a thorough and efficient school system. (at 314)

Mindful then of the balance to be applied in this standard of review with respect to the various line items the Commissioner makes the following determination with respect to the consolidated petition of appeal before him.

DEFEATED BUDGET

The budget accounts and amounts under appeal and as determined by the Commissioner in this matter are as follows:

Account		Amount
11-110-100-101	Salaries of Teachers (Substitutes)	$2,500
11-120-100-101		$7,000
11-130-100-101		$2,000
11-140-100-101		$4,500

The Board asserts that these items comprise only regular instruction teacher costs and regular instruction substitute teacher costs. The Board asserts that its prior actions eliminating out-of-district in-service and scheduling in-district in-service after school hours has reduced the funding for this line to the minimum amount necessary to assure that students will not be denied adequate instructional services in the event of the absence of regular teaching staff. Moreover, the Board has stated that substitute teachers are only utilized when teachers are absent due to illness, death or other circumstances beyond their control.

Borough opinion that prudent planning and closer monitoring of substitute needs was not accompanied by any evidence or information to indicate that prudent planning or close monitoring is not occurring. Blanket reductions with broad reasons based on perceptions is not adequate when determining whether funding is needed to assure a thorough and efficient system of education. While the Commissioner agrees that prudent planning and close monitoring of substitute needs is essential the Board has demonstrated the need for these amounts for the provision of a thorough and efficient system of education. Consequently, the total $16,000 reduction is restored.

Account	Amount
11-190-100-610 - General Supplies Regular Programs	$2,000

The Board position is that the amount budgeted for supplies has only increased 3% over a two year period while student

enrollment has increased by 4.79% and 5.76% respectively. The Board has presented a detailed listing of supplies to be purchased and the amounts allocated (See Board Position Statement Appendix).

The Borough's argument indicating that the reduction will promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility or to reflect a general tightening of expenses is extremely broad and does not address the constitutional requirement to provide a thorough and efficient system of education. In consideration of the assertions of the parties the Commissioner finds that adequate supplies are essential to the provision of a thorough and efficient education. Consequently, the Commissioner orders restoration of the $2,000.

Account	Amount
11-205-100-610 - Special Education Inst. Perceptually Impaired General Supplies	$5,000

The Borough's position is that this line item was reduced to promote prudent spending and purchasing to reflect present economy and overall fiscal responsibility.

The Board asserts that reducing the Board's budgeted amount will result in students working with out-of-date materials in math, reading and science. It has submitted information that this account provides materials for the 126 perceptually impaired students in the district. An additional eighteen students were anticipated for 1994-95. The cost of workbooks, supplies and classroom materials average $135 per student. Based upon the Commissioner's analysis the Board has demonstrated the necessity for these funds to provide a thorough and efficient system of education to its students. Therefore, the $5,000 reduction is restored.

Account	Amount
11-213-100-610 - Resource Room - General Supplies	$1,000

The Borough again reduced this line item to promote prudent spending and purchasing to reflect the present economy and overall fiscal responsibility. The Board contends that the supply request was already reduced below 1993-94 levels in order to accommodate the need for fiscal restraint. It had budgeted a total of $5,100 or $69 per resource room pupil for the 1994-95 school year. The Commissioner finds that the Board has demonstrated the need for the amounts provided and, therefore, orders restoration of the $1,000.

Account	Amount
11-217-100-320 - Supplementary Instruction	$4,000
11-218-100-101 - Salaries - Speech Instruction	$5,000
11-219-100-101 - Home Instruction	$4,000
11-219-100-320 - Purchased Prof. Educ. Services	$3,000
11-220-100-320 - Extraordinary Services	$5,000

The Borough provided only that this reduction was made to reflect a general tightening of expenses. No evidence has been presented to establish that educational considerations were taken into account when making those reductions.

The Board asserts that the budgeted amount is the minimum amount necessary in order to provide for supplemental instruction, speech instruction, home instruction and physical and occupational therapy based upon Individualized Educational Plans of special education students. (See 20 U.S.C.A. 1412; N.J.S.A. 18A:46-1 et seq.) The Board further asserts that the rates of payment are contractually established and may not be unilaterally reduced.

The Commissioner finds that the Board has established that these amounts are essential for the provision of a thorough and

efficient education to its special education students. Consequently, the Commissioner orders the reductions of $4,000, $5,000, $4,000, $3,000 and $5,000, respectively, to be restored.

Account	Amount
11-230-100-610 - Basic Skills/Remedial Instruction - General Supplies	$1,000

The Board asserts that funding for basic skills supplies was reduced from 1992-93 to 1993-94 and then further reduced by transfers during the 1993-94 school year. It asserts that the amount budgeted for workbooks and software for the elementary level reading and math center is the minimum amount necessary to implement the program. The Board did not provide information or documentation to support the need for the amounts requested. Therefore, the reduction is sustained.

Account	Amount
11-230-100-800 - Other	$1,000

Again the Borough reasoning was to promote prudent spending. The Board asserts that these are fixed costs for current copier leases prorated for usage in the Basic Skills program. The Commissioner directs that the $1,000 be restored.

Account	Amount
11-402-100-600 - School Sponsored Athletics - Supplies and Materials	$2,000

The Borough asserts that this cut was to promote prudent spending and to reflect present economy and overall fiscal responsibility. The Commissioner finds the argument of the Borough to be without any supporting basis; however, the Board offers no evidence which satisfies the criteria for restoration. Moreover, the Board in its position statement provided only information

regarding the budgeted expenditure of $2,253, an amount in excess of the Borough reduction. Therefore, the reduction is sustained.

Account		Amount
11-000-218-600	Undis. Exp. Oth. Sup. Serv. Stu.- Regular - Supplies and Materials	$1,000
11-000-219-600	Undis. Exp. Oth. Sup. Serv. Stu.- Special - Supplies and Materials	$1,000

The Borough provided the same generic reasons for reducing these accounts as provided, above.

The Board has provided evidence establishing that these amounts are necessary for student testing and the materials to produce Individualized Educational Plans in accordance with law. Consequently, the Commissioner orders restoration of these amounts.

Account		Amount
11-000-221-105	Undis. Exp. Improvement Inst. Serv. - Sal. Sec. and Cler. Assist.	$5,000

The Borough's reasoning that funds be shifted from Title I does not appear feasible since there has been a shortfall in revenue with further reductions anticipated. To shift additional funds from educational lines to clerical would be counterproductive and may not be consistent with grant requirements. The Board has established the need for this position to service the assistant superintendent, transportation coordinator, Chapter I coordinator and Genesis Grant coordinator. Consequently, the reduction is restored.

Account		Amount
11-000-222-600	Undis. Exp. Educational Media - Supplies and Materials	$2,500

The Board asserts that these amounts are necessary in order to provide materials for the new Dorothy L. Bullock School. In light of the increased enrollment the Commissioner orders these amounts restored.

Account	Amount
11-000-230-890 - Undis. Exp.-Supp. Serv. Gen. Adm. - Miscellaneous Expenses	$2,000

The reduction is sustained. The Board has failed to establish the need for the amounts asserted. While certain costs for Board member dues are legally required certain cost such as sports and honors recognition activities, and generally stated travel expenses for board members to attend conferences, are not necessarily required. The Board has not submitted documentation to support the need for these amounts.

Account	Amount
11-000-260-100 - Salaries	$45,000
11-000-260-610 - General Supplies	$ 2,000

The Borough asserts that the position of supervisor of buildings and grounds has been vacant for almost two years. It further asserts that through realignment of responsibilities and duties of present personnel, the Board could adequately handle the supervisory role and responsibilities.

The Board asserts that the position is necessary in order to appropriately operate its facilities and asserts that the amount is reasonable and comparable to that paid by other districts. It points out that the actual amount budgeted for this account was $40,000 not the $45,000 asserted by the Borough.

The Board further asserts that the $2,000 reduction in general maintenance supplies is necessary and included the cost of seeding, fertilizers, shrubbery, machinery rental, fence repairs, gravel, top soil, weed killers and other costs of maintenance.

Upon independent review the Commissioner finds that the Board has failed to establish that these accounts and amounts are

necessary for the provision of a thorough and efficient education and sustains the reductions of $40,000 and $2,000, respectively. The reduction of $5,000 is ordered restored to reflect the actual amount budgeted of $40,000.

Account	Amount
11-000-270-511 - Undis. Exp.-Student Transportation Cont. Serv. Between Home and School	$5,750

The request of the Board is approved, based on the correct calculations for the provision of transportation reimbursement for parents having children in private schools. The reduction of $5,750 is restored.

Account	Amount
11-000-290-220 - Undis. Exp.-Business & Other Supp. Soc. Sec. Contr.	$3,443
11-000-290-290 - Cont. Serv. Between Home and School Other Empl. Benefits	$6,500

The reduction of the Borough is sustained, since funding for the restoration of position was disapproved, above.

Account	Amount
11-000-290-600 - Supplies and Materials	$2,000

The Board asserts that it has experienced increased costs for payroll and bookkeeping related items, computer supplies, checks, and newsletters to residents. It additionally asserts that a direct deposit program further increased costs. The Board, however, has not provided any specific information related to the need for these amounts to provide a thorough and efficient education. Consequently, the reduction is sustained.

Account	Amount
11-000-310-930 - Undis. Exp.-Food Serv. Trans. to Cover Deficit (Enterprise Fund)	$5,000

The request of the Board is denied. The Board provided no information documenting the amounts by which the asserted costs of the food service program exceed income or the specific need for the amount of the reduction.

Revenue Revision $200,000

The Board has asserted that it has of necessity deferred maintenance on its physical plant for two years. Moreover, it asserts the additional need for the amount in light of the fact that the reduction would reduce the surplus to 1.6%. While the Commissioner encourages the Borough's proposal for joint funding of major mechanical failures, there is no assurance that such joint funding would indeed occur. Moreover, no mechanism was proffered to address other emergency educational problems which may arise. Consequently, in light of the overall size of the budget and assertions of potential physical plant concerns, the Commissioner orders restoration of $200,000 .

Account Title	Account Number	Amount Not Restored	Amount Restored
Gen. Current Expenses			
Regular Program			
Salaries - Teachers			
Pre-Sch/Kinder	11-110-100-101		$2,500
Grades 1-5	11-120-100-101		7,000
Grades 6-8	11-130-100-101		2,000
Grades 9-12	11-140-100-101		4,500
General Supplies	11-190-100-610		2,000
Special Education Inst.			
Perceptually Impaired			
General Supplies	11-205-100-610		5,000
Res. Room			
General Supplies	11-213-100-610		1,000
Supplementary Inst. Salaries	11-217-100-320		4,000

Account Title	Account Number	Amount Not Restored	Amount Restored
Speech Instruction	11-218-100-101		5,000
Home Instruction	11-219-100-101		4,000
Purchased Prof. Ed. Serv.	11-219-100-320		3,000
Extraordinary Services	11-220-100-320		5,000
Basic Skills/Remed. Inst.			
General Supplies	11-230-100-610	$1,000	
Other	11-230-100-800		1,000
Sch.Sponsored Athletics			
Supplies and Mat.	11-402-100-600	2,000	
Undis. Exp.-Other Supp. Ser. Stu.-Regular			
Supplies and Mat.	11-000-218-600		1,000
Undis. Exp.-Other Supp. Ser. Stu.-Regular			
Supplies and Mat.	11-000-219-600		1,000
Undis. Exp.-Improvement Instruction Services			
Sal. Sec. & Cler. Asst.	11-000-221-105		5,000
Undis. Exp.-Edu'l Media			
Supplies & Materials	11-000-222-600		2,500
Undis. Exp.-Supp. Serv.			
General Adm. Misc. Exp.	11-000-230-890	2,000	
Undis. Exp.-Oper. & Maint.			
Salaries	11-000-260-100	40,000	5,000
General Supplies	11-000-260-610	2,000	2,000
Undis. Exp.-Student Transp. Cont. Serv.			
Between Home & School	11-000-270-511		5,750
Undis. Exp.-Business and Other Supp.			
Soc. Sec. Contr.	11-000-290-220		
Other Empl. Benefits	11-000-290-290		
Supplies & Materials	11-000-290-600	2,000	
Undis. Exp.-Food Serv. Trans. to Cover Deficit (Enterprise Fund)	11-000-310-930	5,000	
Sub Total		$59,943	$68,250
Revenue Revision			200,000
Total Revisions		$61,943	$268,250

DEFEATED CAP WAIVER

The cap waiver amounts under appeal and as determined by the Commissioner in this matter are as follows:

Account	Amount
11-120-100-101 - Regular Programs - Instruction Grades 1-5 Salaries	$52,549

The Board request is approved. This amount provides for a music teacher and for one half-time computer teacher and is consistent with the provision of a thorough and efficient system of education.

Account	Amount
11-190-100-320 - Purchase Prof. Ed. Services	$2,570

The Board request is approved. This amount is required to support the cost for the Satellite Education Resource Consortium (SERC) satellite educational program.

Account	Amount
11-190-100-500 - Other Purchases	$3,650

The Board request is approved. This amount supports the program providing students with civic and community responsibility.

Account	Amount
11-190-100-610 - General Supplies Regular Programs	$11,220

The Board request is approved. The program provides calculators for the math program and desks and chairs necessary because of the increased enrollment and is consistent with the provision of a thorough and efficient education.

Account	Amount
11-190-100-640 - Textbooks	$12,335

The Board request is approved. The program request is consistent with the provision of a thorough and efficient education by providing textbook replacement at the high school and intermediate school levels.

Account	Amount
11-230-100-610 - Basic Skills General Supplies	$2,103

The Board request is approved. The amount requested maintains the program necessary for the provision of a thorough and efficient system of education.

Account	Amount
11-401-100-100 - Co-Curricular Activities	$29,839

The Board request is approved. The amount requested maintains the program by providing for salaries for structured, school-sponsored programs consistent with the provision of a thorough and efficient system of education.

Account	Amount
11-401-100-500 - Co-Curricular Purchase Services	$2,246

The Board request is denied. The Board has failed to document that the amount is essential to the provision of a thorough and efficient system of education.

Account	Amount
11-401-100-600 - Co-Curricular Supplies/Materials	$372

The Board request is denied. The Board has failed to document that the amount is essential for the provision of a thorough and efficient system of education.

Account	Amount
11-401-100-800 - Co-Curricular - Other Objects	$10,914

The Board request is approved. The amount supports a "close up" program which permits students to meet with their congressional representatives and to learn how government works in Washington, DC.

Account	Amount
11-402-100-100 - Sponsored Athletics - Instruction	$2,500

The Board request is approved. The program request permits the maintenance of a program which is consistent with the provision of a thorough and efficient system of education

Account	Amount
11-402-100-500 - Other Support - Students Regular	$2,500

The Board request is approved. The funds maintain current programs consistent with the provision of a thorough and efficient system of education.

Account	Amount
11-000-218-104 - Salaries/Professional	$12,500

This amount is approved as essential to the provision of a thorough and efficient system of education for emotionally disturbed students.

Account	Amount
11-000-218-600 - Supplies/Materials	$1,943

The Board request is approved. These funds are necessary for the provision of district-wide testing.

Account	Amount
11-000-219-600 - Other Support - Students Spec. Supplies	$ 33
11-000-219-800 - Other Objects	$289

The Board request for a waiver is denied. The Board has not documented the necessity for these amounts.

Account	Amount
11-000-221-104 - Undistributed Salaries - Other Professional Staff	$8,184

The Board request is approved. These funds address the program addressing student achievement, core curriculum proficiencies and monitoring preparation.

Account	- Other Support Services	Amount
11-000-221-320	- Purchased Prof. Ed.	$102
11-000-221-600	- Supplies/Materials	$180
11-000-221-800	- Other Objects	$ 41

The Board request is denied. The Board has not documented the needs for these specific items.

Account		Amount
11-000-222-600	- Educational Media General/Miscellaneous	$4,444

The Board request is approved. These amounts support materials to provide current library materials to the students.

Account		Amount
11-000-230-890	- Support Services General/Miscellaneous	$3,157

The Board request is approved. This item provides for fixed mandated costs supporting the Board of Education and, also, provides for education of Board members pursuant to N.J.S.A. 18A:12-33.

Account		Amount
11-000-290-100	- Business - Other Support Salaries	$493

The Board request for a waiver is denied. The Board did not document that this amount was essential to the provision of a thorough and efficient system of education.

Account		Amount
11-000-290-290	- Business - Other Support Other Employee Services	$13,000

The Board request for a waiver is approved based on the approval of the positions.

Account		Amount
11-000-290-500	- Business - Other Support Other Purchased Services	$964

The Board request for a waiver is approved. This amount provides for a fixed cost for insurance for school buses.

Account		Amount
11-000-290-890	Miscellaneous	$513

The Board request for a waiver is denied. The Board did not present documentation to establish that this amount was essential to the provision of a thorough and efficient system of education.

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that $268,250 of the revisions recommended by Council is essential to provide a thorough and efficient educational system and $174,372 of the original cap waiver request are also essential and that a further reallocation of funds within the districts maximum permissible budget is not possible (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by the State Board of Education, July 7, 1993.)

Accordingly, the Gloucester County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $7,400,243 to be raised in tax levy for General Fund purposes for the 1994-95 school year as per the following calculations.

	General Fund
Tax Levy Certified by Council	$6,957,621
Ordered by Commissioner:	
Restoration of Council Reductions	268,250
Cap Waiver Approval	174,372
Total Taxes to Be Raised for 1994-95 School Year	$7,400,243

IT IS SO ORDERED.

DECEMBER 23, 1994

DATE OF MAILING - DECEMBER 23, 1994

COMMISSIONER OF EDUCATION

C #359-94
SB #. 9-95

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO,

PETITIONER-RESPONDENT,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

RESPONDENT-APPELLANT,

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO,GLOUCESTER COUNTY.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 23, 1994

For the Petitioner-Respondent, Montgomery, McCracken, Walker & Rhoads (Ramiro M. Carbonell, Esq., of Counsel)

For the Respondent-Appellant, Timothy D. Scaffidi, Esq.

This is an appeal by the Mayor and Council of the Borough of Glassboro (hereinafter "Council") from a decision of the Commissioner of Education which: 1) directed the restoration of certain line item reductions made by the municipal governing body pursuant to N.J.S.A. 18A:22-37 after the voters had defeated the education budget that had been proposed by the Board of Education of the Borough of Glassboro (hereinafter "Board") for 1994-95, and 2) directed an additional increase in the District's general fund budget for a portion of the amount included in a cap waiver

3/6/96

proposal which had been placed before the voters and defeated pursuant to N.J.S.A. 18A:7D-28(f).

As follows, we find that the Commissioner's decision in this case does not conform to the standards we enunciated in our decision in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board, July 6, 1994. Consequently, we remand this case to the Commissioner for consideration under the appropriate standards.

I.

Before submitting its proposed budget to the voters in the annual school election in April 1994, the Board submitted it to the Gloucester County Superintendent for approval as required by N.J.S.A. 18A:7D-27. The Board's proposal included a request for a cap waiver from the Commissioner pursuant to N.J.S.A. 18A:7D-28(e) on the basis of increasing enrollment and special education costs. In addition, it requested approval to seek voter approval to exceed its maximum permissible budget by another $275,260 on the basis that these additional funds were necessary to provide a thorough and efficient education.

The Commissioner approved the Board's request for a cap waiver pursuant to N.J.S.A. 18A:7D-28(e), and the County Superintendent instructed the Board to advertise a maximum permissible budget totaling $16,525,626.

In addition, the County Superintendent instructed the Board to submit its proposal to exceed its maximum permissible budget to the voters pursuant to N.J.S.A. 18A:7D-28(f). The Board was instructed to present this proposal with two components:

One for $178,641 representing amounts for items the County Superintendent had designated as necessary for the provision of a thorough and efficient education and another for the remaining $96,619.

On April 19, 1994, the voters rejected the Board's general fund budget proposal, which, pursuant to N.J.S.A. 18A:7D-28(e), had included the amount of the cap waiver granted by the Commissioner. They also rejected both components of the cap waiver proposal which had been submitted to them pursuant to N.J.S.A. 18A:7D-28(f).

Then, as provided by N.J.S.A. 18A:22-37, the Borough's governing body reviewed the general fund budget and determined the amount it judged necessary in order for the school district to provide a thorough and efficient education, thereby reducing the base budget proposed by the Board. Because the items that were to be funded by the voter requested cap waiver were not before it, the Council made no evaluation as to the need for those items or amounts.

By separate petitions to the Commissioner of Education, the Board appealed both the reductions made by the Council to the general fund budget and the voter rejection of $178,641 of the cap waiver proposal submitted pursuant to N.J.S.A. 18A:7D-28(f). This amount represented the component of the proposal which had included the items the County Superintendent had designated as necessary to a thorough and efficient education.

The matters were consolidated.

On December 16, 1994, the Commissioner notified the parties that he was taking notice of the 1993-94 year end district audit.

Based upon the documentation submitted to him, the Commissioner found that $268,250 of the reductions that had been made by the Council pursuant to N.J.S.A. 18A:22-37 were necessary to the provision of a thorough and efficient education. He also found that $174,372 for items that initially were intended to be funded by the voter cap waiver proposal was also necessary for a thorough and efficient education.

The Council appealed both of the Commissioner's determinations to the State Board of Education.

It is the Council's position that the Commissioner failed to apply the correct standard of review when he evaluated the reductions that the municipality made to the base budget. The Council argues that under the proper standard, the Board was obligated to demonstrate to the Commissioner that it needed the amounts reduced in order to provide a minimally adequate education in constitutional terms before the Commissioner could direct restoration of those amounts. It asserts that because the Board in this case did not do so, the Commissioner was required to sustain the reductions.

The Council is also challenging the Commissioner's determination to award the Board $174,372 of the amount which had been proposed to and defeated by the voters pursuant to N.J.S.A. 18A:7D-28(f). The Council contends that the clear language of this statute precluded the Commissioner from even considering these funds and that, in any event, there is no evidence in the Commissioner's decision that the District could not provide a thorough and efficient education without these amounts.

In response, the Board argues that the Commissioner applied the correct standard by reviewing each line item reduced and balancing the needs of the students with the political concerns of the taxpayers. It maintains that the Commissioner's decision must be affirmed because the Board "...neither found, nor argued during the appeal to the Commissioner, that the Board's proposed budget exceeds the minimum necessary to provide a thorough and efficient system of public schools..." Board's answer brief, at 5.

The Board argues in general terms that the budget certified by the Council is insufficient to provide a thorough and efficient education. It also asserts that the Commissioner had the power to review the defeated amounts presented to the voters pursuant to N.J.S.A. 18A:7D-28(f) and to include those funds in setting a budget sufficient to provide a thorough and efficient education.

In reply, the Council contends that the Commissioner never stated which educational mandates would be violated if its reductions were upheld and that none of the items involved here are required to provide a thorough and efficient system of schools in Glassboro.

II.

In the introductory remarks to his decision, the Commissioner acknowledged that before he can direct restoration of amounts reduced by a governing body pursuant to N.J.S.A. 18A:22-37, "the Commissioner must determine whether a district board has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient

system of education." Commissioner's decision, slip op. at 9. He also recognized that he could properly order an increase in a budget beyond a district's maximum permissible budget only in those instances where it was necessary to meet the constitutional mandate, and that, as articulated in the State Board's decision in Edgewater, the school district had to demonstrate both that the particular amounts above the cap were necessary to provide a thorough and efficient education and that reallocation within the permissible budget amount could not be accomplished before such increase could be directed. Id., citing Edgewater, supra.

However, while the Commissioner set forth the correct standards in his introductory remarks for assessing the reductions to the base budget proposed by the Board and for judging the necessity for directing an increase beyond that amount, he did not apply those standards in deciding the case before him. Rather, in deciding this case, the Commissioner placed the burden on the Council to demonstrate that the reductions made pursuant to N.J.S.A. 18A:22-37 should be sustained instead of requiring the Board to show that it needed the items and the amounts with which it proposed to fund those items in order to be able to provide a thorough and efficient education. Similarly, when the Commissioner directed that the District's budget be increased to include most of the items originally proposed as part of the cap waiver presented to the voters pursuant to N.J.S.A. 18A:7D-28(f), he did not ascertain whether either of these amounts were necessary in order to meet the constitutional mandate or whether reallocation within the base budget was possible beyond those items reduced by the Council.

The Commissioner's treatment of the Council's reductions of amounts budgeted for salaries for substitute teachers (lines 11-110-100-101, 11-120-100-101, 11-130-100-101, and 11-140-100-101) provides one example of his failure to require the Board to show it needed the amounts reduced from the Board's base budget pursuant to N.J.S.A. 18A:22-37 in order to meet the constitutional mandate before he directed restoration of these amounts. The amounts which the Board had budgeted for substitute teachers were reduced by the Council by a total of $16,000, because, as stated in its resolution effecting the reductions, the Council believed that the cost for substitutes could be cut by closer monitoring and planning of substitute needs. The Commissioner restored these reductions in total, stating that:

> Borough opinion that prudent planning and closer monitoring of substitute needs was not accompanied by any evidence or information to indicate that prudent planning or close monitoring is not occurring. Blanket reductions with broad reasons based on perceptions is not adequate when determining whether funding is needed to assure a thorough and efficient system of education. While the Commissioner agrees that prudent planning and close monitoring of substitute needs is essential the Board has demonstrated the need for these amounts for the provision of a thorough and efficient system of education. Consequently, the total $16,000 reduction is restored.

Commissioner's decision, slip op. at 11.

The Board's submissions to the Commissioner do not, however, establish a record that is sufficient to support this conclusion. The Board's argument for restoration of these amounts is set forth in its position paper filed in support of its appeal to the Commissioner. In that document, the Board states that its actual expenditures for substitutes in 1992-93 totaled $144,982, but that the costs for substitutes was projected

to drop to $99,500 during 1993-94. Pointing to the fact that the total amount budgeted for substitutes for 1994-95 was $96,075, the Board asserts that:

> [the Council's] proposed sum will not provide sufficient funds to pay for substitute teachers and will cause classrooms of students to be without teachers when regular teachers are absent. Clearly, teachers are necessary to a thorough and efficient system of education.

Board's Position Statement, at 4-5.

Even assuming that the Board's figures are accurate, there is nothing to indicate that the amount sought by the Board is the minimal amount required to fund necessary expenditures for substitutes or that without that amount the dire consequences claimed by the Board would automatically follow. Most significantly, the Board did not submit any evidence relating to planning and monitoring of costs in this category or demonstrate that the amount which the Council had determined to be sufficient was inadequate.

Similarly, in seeking $2,000 by which the Council had reduced the amount it had budgeted for general supplies (line 11-110-100-610), the Board argued that it needed the full amount it had budgeted because this amount ($163,815) represented only a 3% increase over a two year period and enrollment had increased 4.7% and 5.76%. Again, assuming the accuracy of the Board's figures, this alone is not a sufficient basis to conclude that the "proposed sum is simply insufficient." Board's Position Statement, at 5. Nor does examination of that portion of the Board's Appendix to which it points to support its position reveal evidence sufficient to support the Commissioner's determination that the Board needed the $2,000 reduced by the Council in this category

in order to provide a thorough and efficient education. See Appendix, at 3 (listing budget allocation for supplies for 1993-94 by program).

We stress that the fact that the items the Board is seeking to fund by this appeal may be educationally appropriate is not determinative of the Board's entitlement to the sums at issue. Nor does the fact that the amounts which the Board budgeted to support those items may be reasonable entitle it to those amounts once the voters defeated the budget and the Council acted to reduce it pursuant to N.J.S.A. 18A:22-37. Rather, in proceedings to challenge the Council's reductions, the Board had the burden to establish that it needed both the items it proposed and the amounts it budgeted in order to provide a constitutionally adequate education. Edgewater, supra.

Quite simply, the record developed before the Commissioner was far too sparse to support the restorations he directed. Moreover, given the specificity of the Council's reductions and the size of those reductions in relation to the school district's total budget, it is impossible for us to determine with any certainty on this record that the Board needed these amounts to provide an adequate education to its students. We therefore remand this matter to the Commissioner for such proceedings as necessary to reevaluate these items under the proper standard.

III.

In addition to seeking restoration to its base budget of the amounts reduced by the Council pursuant to N.J.S.A. 18A:22-37, the Board in this case also sought from the Commissioner a directive to increase its budget above its maximum permissible budget so as to include some of the amounts that were proposed to and defeated by the

voters under N.J.S.A. 18A:7D-28(f). While we reject the Council's contentions that the Commissioner could not consider these amounts, we stress that they are not before us pursuant to N.J.S.A. 18A:22-37.

This is not the first time we have reviewed a Commissioner's determination which directed an increase in an education budget under these circumstances. In our decision in Edgewater, supra, we recognized that the limitations of N.J.S.A. 18A:7D-28(f) in no way altered the constitutional obligation of either the Commissioner or the State Board of Education to insure that the budget of a local school district is sufficient to provide a thorough and efficient education.

However, as we emphasized,

> ...the power to direct such increase may properly be exercised only where an increase is necessary to enable the district to provide a thorough and efficient education. [In re Upper Freehold Reg'l School Dist., 86 N.J. 265 (1981).] Further, any increase must be limited to those amounts the district needs in order to provide a thorough and efficient education. Id. ...

Edgewater, supra, slip op. at 15, quoting Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, decided by the State Board, July 7, 1993, slip op. at 5-6.

In Edgewater, we made it abundantly clear that the circumstances that would warrant directing an increase in a district's education budget beyond its statutory limitation where the voters have defeated a proposal to do so are extremely limited. In doing so, we pointed to Upper Freehold, supra, which presented an analogous situation. It is evident from an examination of Upper Freehold that the kind of circumstances that

must be present to justify exercising the Commissioner's power by compelling a district's taxpayers to raise additional monies are rarely presented.

The Commissioner's decision in this case directs an increase in the District's budget to include most of the items originally proposed as part of the cap waiver proposal defeated by the voters and does so in the amounts which the Board had proposed to the voters. In some instances the Commissioner "approved" the Board's "request" with only a conclusary statement that the amount was necessary for the provision of a thorough and efficient education. See, for example, Commissioner's decision, at 20 (line 11-120-100-101 - Regular Programs-Grades 1-5 Salaries). In many cases, the Commissioner "approved" the "request" on the grounds that the proposed item was "consistent with the provision of a thorough and efficient education." See, e.g., id. (line 11-190-100-610 - General Supplies). In some cases, the Commissioner "approved" the amount with no reference to educational or constitutional standards. E.g., Id. (lines 11-190-100-320 - Purchase Prof. Ed. Services and 11-190-100-500 - Other Purchases).

Nor did the Commissioner examine whether further reallocation within the District's base budget was possible before directing these increases. While the record reflects that the County Superintendent's review prior to advertisement included attention to the possibility of reallocation, the conclusions drawn by the County Superintendent in that context did not insulate those amounts from the Commissioner's review and were not dispositive in the proceedings. However, despite this, the Commissioner did not extend his review of the Board's proposed budget beyond those items reduced by the

Council so as to ascertain whether additional reallocation within the Board's base budget was possible.

In short, in directing that the Distirct's budget be increased to include amounts proposed to and defeated by the voters under N.J.S.A. 18A:7D-28(f), the Commissioner made no determination either of whether it was possible to make reallocations within the Board's base budget or whether the voter requested cap waiver amounts were needed in their entirety in order for the District to provide a thorough and efficient education. To permit this result given the defeat of the proposal made to the voters pursuant to N.J.S.A. 18A:7D-28(f) would contravene the express terms of that statutory provision without the assurance that the Commissioner needed to do so in order to fulfill his constitutional obligations.

The record is not sufficiently developed to permit us to determine whether or to what extent, the specific items which the Board sought to fund with the voter requested cap waiver amounts are in fact essential in order to enable the Board to meet its constitutional obligations. Nor is it sufficient to allow us to determine whether reallocation within the District's permissible budget is possible so as to provide support for those programs which the District originally proposed to fund by the voter requested cap waiver monies. Consequently, we have no recourse but to remand this matter for such determinations.

Attorney exceptions are noted.

March 6, 1996

Date of mailing MAR 0 8 1996

360-94

360-94

BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF HAMPTON, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $40,000 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to sustain the reduction for a total General Fund tax levy of $936,670 for 1994-95 school purposes.

DECEMBER 23, 1994

BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF HAMPTON, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Wesley L. Lance, Esq.

For Respondent, Richard P. Cushing, Esq. (Gebhardt & Kiefer, P.C.)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on June 10, 1994, and amended on June 14, 1994, by the Board of Education of the Borough of Hampton (Board) appealing the reduction in the 1994-95 General Fund Tax Levy imposed by the governing body of the Borough of Hampton (Borough) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid reduction consisted of $40,000 in the area of teacher's salaries. As a result of the reduction the amount in dispute before the Commissioner is summarized below:

Proposed Tax Levy Adopted by Board of Education	Amount of Tax Levy Certified by Governing Body
General Fund $976,670	General Fund $936,670
Amount of Reduction by Governing Body	**Amount of Reduction in Dispute before Commissioner**
General Fund $40,000	General Fund $40,000

On June 23, 1994, the Borough filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On June 16, 1994, the Board filed its written submission in support of the Petition of Appeal and then filed what it entitled supplements to some on June 30 and July 27 respectively. The Borough filed its written submission on July 19, 1994. A response to the Board's "Second Supplement" to its Position Statement was filed on August 12, 1994, by the Borough. A further affidavit was filed by the Hunterdon County Superintendent detailing the circumstances and review under the circumstances and review undertaken in the granting of cap waivers to the Board pursuant to N.J.S.A. 18A:7D-28(e) which is not part of the matter controverted herein.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See, also, Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994.

In the instant matter, the Borough upon defeat of the 1994-95 budget by the voters of the district, did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes. The aforesaid tax levy was established by imposing a single line item reduction in the following account:

Account		Reduction
11-120-100-101	Salaries of Teachers	$40,000

The rationale provided at such time of the reduction (See Resolution 21-94 dated May 16, 1994, as attached to Board Petition) was due to anticipated staff reduction due to retirement.

Commissioner's Determination

The dispute in this matter involves the retirement of two senior staff members from the district producing an initial savings

in teacher salaries of $113,777. The Board points out that its replacement costs in terms of salary and benefits amount to $44,000 reducing the savings to the district to $69,777. However, the Board further notes that its contractual obligations to reimburse retirees for unused sick leave at the time of retirement obligates it to pay an additional $32,977 leaving the remaining $7,023 to be made up from appropriations out of free balance if the $40,000 reduction imposed by the Board is not restored. (See, Second Supplement to Board's Position Statement)

It is the Board's position that its anticipated June 30, 1994, free balance of $37,131 being less than 3% of its general fund budget is inadequate to ensure the district's ability to meet contingencies and, thus be prepared to provide a thorough and efficient system of education (See, Exhibit 4C as part of Petition of Appeal) The Board further points to the provisions of an amendment to 18A:7D-27.1 signed by the Governor on June 29, 1994, which permits a district with small general fund opportunities to maintain free balances of up to $75,000 or 7.5% whichever is larger before it is required to appropriate said free balance into its current year's budget. (See Board's Position Paper)

The Borough's essential position is that the Board's basic argument is that the reduction imposed reduces the Board's General Fund Free Balance to an unacceptable level. The Borough contends that the Board has failed to demonstrate specific proof that the absence of the approximately $7,000 in surplus required to be appropriated if Board's contentions are correct will produce a direct impact on the program.

The Borough contends that it is clear that using the Board's own figures that the retirements almost equal the reduction imposed by the Borough. Thus, the Borough contends that its reduction is an appropriate amount consistent with its constitutional obligations pursuant to Board of Education of East Brunswick v. Township Council of East Brunswick 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

The Borough further contends that if the Commissioner is to override its decision he must make a finding that the Board cannot provide a thorough and efficient system of education if the cuts are carried out. In the present matter, the Borough contends the Board has not made such a case.

In its response to the Board's position, the Borough initially takes issue with the Board's filing of a second supplement to its position contending it to be both untimely and impermissible. Further, the Borough contends that the Board misapplies the recent amendment to N.J.S.A. 18A:7D-27.1 since it is not meant to apply retroactively.

The Commissioner has carefully considered all the arguments of the parties including the argument raised by the Board relative to the amendment N.J.S.A. 18A:7D-27.1. In so doing, he finds the Board's argument in that regard to be irrelevant since the bill does not require a general fund free balance of 7.5% or $75,000 whichever is larger but merely requires amounts in excess thereof to be appropriated for the purpose of preparing its budget under conditions articulated therein.

Finally, the Commissioner agrees that the Board, despite its efforts to point out the general reasons for which the maintenance of an adequate free balance is necessary, has failed to point to any obligations which it presently faces which would endanger its ability to provide a thorough and efficient system of education.

For the reasons elaborated above the Commissioner sustains the $40,000 reduction in the General Fund tax levy imposed by the Borough of Hampton. The Petition of Appeal is dismissed.[1]

COMMISSIONER OF EDUCATION

DECEMBER 23, 1994

DATE OF MAILING - DECEMBER 23, 1994

[1]After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In this review the Commissioner concluded that the undesignated surplus did not materially exceed the budgeted amount.

361-94

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	
OF THE EASTERN CAMDEN COUNTY	:	COMMISSIONER OF EDUCATION
REGIONAL DISTRICT, CAMDEN	:	DECISION
COUNTY	:	
	:	

SYNOPSIS

Board appealed General Fund cap waiver in the amount of $462,317 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $462,317 in cap waiver monies for a total General Fund tax levy of $8,441,979 for 1994-95 school year.

DECEMBER 23, 1994

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	
OF THE EASTERN CAMDEN COUNTY	:	COMMISSIONER OF EDUCATION
REGIONAL DISTRICT, CAMDEN	:	DECISION
COUNTY	:	
	:	

For Petitioner, Ronald W. Sahli, Esq. (Sahli & Padovani)

This matter was opened before the Commissioner of Education on May 24, 1994, by way of a Petition of Appeal filed by the Eastern Camden County Regional District Board of Education (Board) seeking inclusion within the 1994-95 General Fund Tax Levy a cap waiver in the amount of $462,317 which was defeated on April 19, 1994, by the voters of the district. The voters of the regional district at the aforesaid school election approved the basic General Fund Tax Levy of $7,979,662.

The aforesaid requested cap waiver amount was submitted to the voters of the district pursuant to the provisions of N.J.S.A. 18A:70-28(f) which provides as follows:

> Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22

> and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C.18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L 1971 (C.18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes for type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C.18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review or appeal.

The Commissioner notes that the Camden County Superintendent of Schools approved the N.J.S.A. 18A:7D-28(f) cap waiver request as being necessary for the provision of a thorough and efficient system of education after reviewing the entire school budget to determine whether the amounts in the cap waiver could be accommodated by way of reallocation within the base budget. Having determined that such reallocation could not be so accomplished, he conditionally approved the budget for submission to the voters with the provisions that should the cap waiver amounts which were deemed necessary for the provision of a thorough and efficient system of education be defeated, the district must file an appeal with the Commissioner of Education, See Administrative Agency Advice (AAA) 9-0036 (July 8, 1991)

The accounts and the amounts which were approved for submission to the voters are set forth below:

Account Title	Account Number	Dollar Amount
Regular Programs	11-110-100-101	$136,040.00
General Supplies	11-190-100-610	9,000.00

Textbooks	11-190-100-640	10,000.00
Salaries of Professional Staff	11-000-218-104	85,611.00
Salary of Sec. & Clerks	11-000-240-105	24,625.00
Other Employee Benefits	11-000-290-290	27,108.00
Energy (Heat & Electric)	11-000-260-620	169,933.00
	TOTAL	$462,317.00

By way of letters from each of the governing bodies of the constituent districts of the Eastern Camden County Regional School District (Gibbsboro, Voorhees and Berlin) informed the Commissioner that they supported the Board's appeal for inclusion of the $462,317 cap waiver in the 1994-95 General Fund Tax Levy. (See, Exhibits F & G of Petition of Appeal and Letter from Gibbsboro Mayor.)

Board's Position

The Board asserts that the increasing enrollment in both 1993-94 and 1994-95 necessitate the request for the cap waiver amount in the instructional accounts in order to maintain existing staff and to provide funds to compensate staff for an additional instructional period negotiated with its collective bargaining unit. Additionally, the Board's waiver requests includes funds for compensation of two substance abuse persons as well as for part time support personnel in each of the districts two schools. Benefits for these individuals are likewise included.

The Board further seeks approval for an increase of $169,933 in its Energy (Heat and Electric) account to compensate for miscalculation of the actual cost of heating its new intermediate school which opened in the 1993-94 school year.

Finally, the Board argues that its current fiscal problems stem from having appropriated $854,284 and $688,480 from its Free Balance in 1992-93 and 1993-94 to fund operations, thus depleting

its balance below 3% to $62,058.95 according to the 1993 Audit Report, as well as causing the inability to use the balance appropriated in previous years to impact on its net budget calculations.

Commissioner's Decision

The Commissioner has reviewed the arguments presented by the Board as well as the affidavit submitted by the Camden County Superintendent attesting to his pre-election and post-election review of the General Fund Budget for purposes of possible reallocation. In addition the Commissioner has independently reviewed the budget for possible reallocations. Based upon his review and the review of the County Superintendent as well as the arguments presented by the Board, the Commissioner concludes that the cap waiver in the amount of $462,317 is necessary for the provision of a thorough and efficient system of education. (See Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, decided by the State Board of Education July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board of Education, July 6, 1994.

Accordingly, the Camden County Board of Taxation is directed to adjust the General Fund Tax Levy of the Eastern Camden County Regional School District for the 1994-95 school year to

reflect an increase of $462,317 for a total of $8,441,979 consistent with the findings above.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 23. 1994

DATE OF MAILING - DECEMBER 23, 1994

[1]After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In this review for the purpose of determining potential revenue to be appropriated in lieu of increasing the tax levy, the Commissioner concluded that the undesignated surplus did not materially exceed the budgeted amount.

362-94

IN THE MATTER OF THE CAP WAIVER :

APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION

OF THE TOWNSHIP OF HARRISON, : DECISION

GLOUCESTER COUNTY. :

:

SYNOPSIS

Board appealed General Fund cap waiver in the amount of $310,319 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $310,319 in cap waiver monies for a total General Fund tax levy of $2,235,816 for 1994-95 school year.

DECEMBER 23, 1994

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF HARRISON, : DECISION
GLOUCESTER COUNTY. :
:

For Petitioner, Russell E. Paul, Esq.

This matter was opened before the Commissioner of Education on June 13, 1994, by way of the filing of a Petition of Appeal by the Board of Education of the Township of Harrison (Board) seeking inclusion within the 1994-95 General Fund Tax Levy a cap waiver defeated on April 19, 1994, by the voters of the district in the amount of $310,319. In addition to the defeat of the cap waiver, the voters also defeated the base budget.

The aforesaid requested cap waiver amount was submitted to the voters of the district pursuant to the provisions of N.J.S.A. 18A:7D-28(f) which provides as follows:

> Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C.18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each school district

> in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L 1971 (C.18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes for type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C.18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review or appeal.

In addition to the afore cited defeated cap waiver submitted under N.J.S.A. 18A:7D-28(f) the Commissioner approved a cap waiver in the amount of $218,833 pursuant to N.J.S.A. 18A:7D-28(e) which was included within the base budget as prescribed by the above cited statute.[1] The amount so approved by the Commissioner was based upon $167,701 due to enrollment increases and $51,132 for increased special education costs.

The Commissioner notes that the Gloucester County Superintendent of Schools approved the N.J.S.A. 18A:7D-28(f) cap

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[1] A board of education of a school district which: (1) for the two years prior to the prebudget year, has had an annual average increase in the district's resident enrollment which is greater than two percent; or (2) between the prebudget year and the year prior to the prebudget year, has had an increase in the district's local cost for special education pupils which is greater than five percent; or (3) during the 1990-91 school year but prior to April 1, 1991, has entered into a lease purchase agreement, may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section. A board of education of a school district that sends pupils and pays tuition to a special needs district may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section. Any waiver granted by the commissioner pursuant to this subsection shall not be included in the question on excess expenditures which is to be submitted to the voters of the district pursuant to subsection f. of this section.

waiver request on March 31, 1994 as being necessary for the provision of a thorough and efficient (T&E) education after reviewing the entire school budget to determine whether reallocation within the base budget could be accomplished. Having determined that such reallocation was not possible he conditionally approved the budget for submission to the voters with the provision that should the cap waiver be rejected the district must file an appeal with the Commissioner of Education. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

The accounts and the amounts which were approved for submission to the voters are set forth below:

Account Title	Account Number	Dollar Amount
School Library Salaries	11-000-222-160	$ 63,050
K. Art, Music, Phys. Ed., Computer	11-110-100-101	14,700
1-5 Art, Music, Phys. Ed., Computer	11-120-100-101	155,943
Gr. 6 Art, Music, Phys. Ed., Computer	11-130-100-101	41,456
Health Benefits	11-000-290-290	35,170
Total Amount:		$310,319

Pursuant to N.J.S.A. 18:22-37 the Board and the Township Committee of the Township of Harrison (Township) met on May 16, 1994, after the defeat of the budget and the cap waiver. As a result of the meeting the Board agreed to a reduction of its base budget in the amount of $73,100 reducing the General Fund Tax Levy from the requested $1,998,597 to $1,925,497. By way of a resolution adopted on June 6, 1994, the Township supported the cap waiver request of the Board and indicated its determination not to participate in this appeal (See, Exhibit 6 of the Board's Petition of Appeal).

Upon defeat of the budget and waiver, and the subsequent reduction of the General Fund Tax Levy agreed upon between the Board and Township, the Acting County Superintendent of Gloucester County reviewed the reductions and determined that they could be sustained without impacting upon the ability to provide a thorough and efficient system of education in Harrison Township provided that cap waiver items were also funded as follows:

($1,000) Library Stipend

This amount was budgeted to pay the librarian to move books into the new library. Volunteers and custodians will accomplish this task.

($500) Sunshine Fund

This amount was included in a miscellaneous line item and its purpose will be satisfied through faculty donations outside the budget.

($5,000) Electricity

The original energy costs were based on the architect's estimates. The board agreed to raise temperatures in the warmer weather to reduce air conditioning costs.

($4,000) Bus Repair

Minor repairs will be accomplished by school maintenance staff rather than contracting out.

($5,000) Gasoline

Out-of-district placements will be reduced in the 1994-95 budget thereby reducing gasoline costs.

($3,600) Equipment

The board deferred the purchase of a lawnmower/ snow plow for the new building. Existing hand mowers will be used to accomplish the job.

($54,000) School Buses

The board was required to replace two buses because of the age of the vehicles. The board will lease purchase the vehicles over five years and amortize the costs.

Board's Position

In support of its appeal, the Board points out that Harrison Township has experienced explosive growth in recent years requiring the construction of a K-2 addition to its current facilities which would open for the 1994-95 school year. It argues that the increased cost to open the new building and to staff it with additional professionals required the district to exceed its permissible cap by the $310,319 which is at issue in this appeal. Unless the cap waiver is granted, the Board argues it will be required to eliminate its library program, its computer program, its physical education program, its art program and its music program at specified grade levels. (See Board's Petition of Appeal) Due to the increased enrollment the entire cap waiver request is to provide salaries and benefits for the maintenance of one full time teacher in each of the programs indicated above and the hiring of a part time person in each of these programs to accommodate the increased enrollment.

Commissioner's Decision

The Commissioner has viewed the papers submitted by the Board as well as the Affidavit of the Gloucester County Superintendent of Schools submitted as part of the record in this matter. In addition, the Commissioner has reviewed the entire budget beyond the reductions made by the Township. Based upon this review and consideration of the changed circumstances set forth in the county superintendent's affidavit, the Commissioner concludes that the base budget of $1,925,497 and the $310,319 cap waiver are the minimal amount necessary for the provision of a thorough and efficient system of education. (See Board of Education of the

Borough of Rutherford v. Mayor and Council of Rutherford, decided by the State Board July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board of Education, July 6, 1994)

Accordingly, the Gloucester County Board of Taxation is directed to adjust the General Fund Tax Levy of the Harrison Township Board of Education for the 1994-95 school year to reflect an increase of $310,319 consistent with the Commissioner's findings above for a total of $2,235,816.[1]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 23, 1994

DATE OF MAILING - DECEMBER 23, 1994

[1]After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In this review for the purpose of determining potential revenue to be appropriated in lieu of increasing the tax levy, the Commissioner concluded that the undesignated surplus did not materially exceed the budgeted amount.

363-94

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, PETITIONER, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WASHINGTON, WARREN COUNTY, RESPONDENT. AND IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, WARREN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $157,637 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $102,405.

Board also appealed General Fund cap waiver in the amount of $84,801 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $84,801 in cap waiver monies for a total General Fund tax levy of $4,658,670 for 1994-95 school year.

DECEMBER 23, 1994

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, PETITIONER, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WASHINGTON, WARREN COUNTY, RESPONDENT. AND IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, WARREN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioner, Boyd Harbourt, Esq.

For the Respondent, Michael J. Friedman, Esq.
(Weiner Lesniak)

This consolidated matter was opened before the Commissioner of Education on June 8, 1994, through the filing of a Petition of Appeal of a defeated school budget and a defeated cap waiver by the Board of Education of the Township of Washington (Board). An Answer to the Petition of Appeal was filed on June 23, 1994, by the Township Committee of the Township of Washington (Township).

The parties filed respective position statements relative to the reductions imposed by the Township in the base budget and the Township filed a response to the Board's position statement. The Township filed no response to the Board's request for restoration of

the cap waiver amount having indicated in its Answer that the $84,801 contained in said cap waiver request was no longer at issue between itself and the Board.

Further, as a result of State Board of Education decisions in Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, decided July 7, 1993, and Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided July 6, 1994, (wherein the State Board ruled that decisions in defeated voter cap waiver appeals must determine whether reallocations within the district's maximum permissible budget is possible and whether and to what extent the specific programs at issue are essential in order to enable the Board to meet its constitutional obligation to provide a thorough and efficient system of education), the County Superintendent was required to file a sworn affidavit setting forth an explanation and documentation of the review conducted prior to submission of the cap waiver request to the voters. The aforesaid affidavit included the bases for concluding that (1) reallocation within the district's maximum permissible budget for the 1994-95 school year was not possible and (2) the reasons why the specific programs at issue were essential for the Board to provide a through and efficient system of education to its students. The Warren County Superintendent's affidavit was filed on August 1, 1994, and the Township filed a response to the County Superintendent's affidavit on September 1, 1994, which, it is noted, does not specifically address the cap waiver amounts other than to note the defeat by the voters but calls the Commissioner's attention to the standard set forth in Edgewater.

On April 19, 1994, the voters of the Township of Washington defeated the Board's General Fund tax levy and a proposed cap waiver which had been approved by the Warren County Superintendent of Schools as being necessary for the provision of a thorough and efficient system of education.

The specific line item accounts for the T&E cap waiver were as follows:

Account		Amount
11-000-270-511	Contracted Services Reg.	$41,756
11-000-270-514	Contracted Services Spec. Ed.	43,045
	Total T&E Cap Waiver	$84,801

In addition to the T&E cap waiver approved by the County Superintendent for submission to the voters, the Commissioner also approved cap waivers for a total amount of $400,511 pursuant to the provisions of N.J.S.A. 18A:7D-28(e) which affords the Commissioner the authority to grant such waivers whenever district resident enrollment average increase for two years prior to the prebudget year is greater than 2% and whenever between the prebudget year and/or the year prior to the prebudget year, there has been an increase in the district's local cost for special education pupils which was greater than 5%. Waivers were granted in the amount above for both of these exigencies.

Subsequent to the defeat of the budget by the voters, the Board and the Township pursuant to the provisions of N.J.S.A. 18A:22-37 consulted on the defeated budget whereupon the Township reduced the basic budget by $157,637. The amount of the proposed General Fund tax levy, the reduction proposed by the Township and the amount in dispute are set forth below:

Proposed General Fund tax levy	$4,629,101
Amount Certified by Township	$4,471,464
Amount of Reduction in Dispute	$ 157,637

DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also, Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

The specific line item reductions and the reasons for such reductions as provided in the Township's Resolution R94-54 dated May 17, 1994, are set forth below:

Regular Programs Undistributed Instruction	Account Number	Amount
1. Other Salaries for Instruction	11-190-100-106	$ 11,232
2. General Supplies	11-190-100-610	5,000
3. Textbooks	11-190-100-640	5,000
Special Education Instruction Special Instruction		
4. Salaries of Teachers	11-218-100-101	16,790
Undistributed Expenditures Other Support Service Students - Regular		
5. Salaries of Professional Staff	11-000-218-104	26,039
Undistributed Expenditures Other Support Service Students - Special		
6. Salaries of Other Professional Staff	11-000-219-104	10,240
Undistributed Expenditures Support Service General Administration		
7. Salaries	11-000-230-100	21,980
8. Legal Services	11-000-230-331	1,000
9. Other Purchase Services	11-000-230-590	2,000
Undistributed Expenditures Support Service School Administration		
10. Supplies and Materials	11-000-240-600	5,000
Undistributed Expenditures Operations Maintenance of Plant Services		
11. Cleaning, Repair and Maintenance Services	11-000-260-420	10,000
12. Insurance	11-000-260-520	3,000
13. General Supplies	11-000-260-610	4,000
14. Energy	11-000-260-620	10,000

Undistributed Expenditures Business and Other Support Services	Account Number	Amount
15. Other Employee Benefits	11-000-290-290	16,556
16. Interest for Lease Purchase	11-000-290-830	5,000
Undistributed Expenditures Food Services		
17. Transfers to Cover Deficit	11-000-310-930	4,800
TOTAL		$157,637

RATIONALE:

1. Elimination of the Board's request for two (2) additional part-time classroom aides. This is not considered a priority.
2. Reduction in supplies based on 1993-94 history. Additional allocation not required.
3. Reduction in textbooks based on 1993-94 history. Entire appropriation not considered a priority.
4. Reduction to maintain level of speech instruction resources at the current level. This is not considered a priority.
5. Reduction to maintain the current level of guidance instruction provided.
6. Additional social workers' time is not considered a priority.
7. Reduction reflects the decision to not increase the secretaries' time by 25% and to maintain the superintendent's and principal's time allocations as currently in effect.
8. Reduction based on current year activity.
9. Reduction made to keep coverage as is.
10. Reduction made based on analysis of current year activity.
11. Reduction based on level of increase, current activity and lack of detail to support the increase.
12. Reduction based on lack of need to increase coverage without detail support.
13. Decrease based upon review of current year activity.
14. Reduction based upon current year activity and the expected increase.
15. Reduction made based on personnel requests which have been eliminated.

16. Reduction based on estimated timing of the transaction.

17. Reduction based on current year activity.

COMMISSIONER'S DETERMINATION

The Commissioner has carefully reviewed all the evidence and arguments submitted by the parties in support of their respective positions. The Commissioner's review of the arguments relative to line item reductions and his conclusions are set forth below:

Account		Reduction
11-190-100-106	Other Salaries for Instruction	$11,232

The Council argues that the addition of two part-time aides is not a necessity required to provide a thorough and efficient education.

The Board contends that the aides in question are necessary to provide support for larger kindergarten and second grade classes. The added support, the Board asserts, is required by continuation of its Whole Language, Real Math and Computer Literacy programs.

The Commissioner has considered the arguments presented above. Based upon the heightened standard enumerated by the State Board in Edgewater, supra, the Commissioner finds and determines that the Board has failed to demonstrate that the elimination of the two part-time aides would materially affect its ability to provide a thorough and efficient system of education. The reduction of $11,232 is sustained.

11-190-100-610	General Supplies	$5,000

The Township argues that an increase in this appropriation is not justified based upon 1993-94 expenditures. The Township

contends that the Board did not provide detailed support to justify its appropriation.

The Board contends that the Township based its decision on the March 31, 1994, Financial Statement. The Board asserts that orders for Whole Language and Math materials were held by the superintendent and subsequently spent after March 31 due to fear that transfers to special education accounts and teacher salaries would result in a shortfall in the 1993-94 budget.

The Commissioner finds that the Board offers a reasonable explanation for its seeming need for the supplies requested but provides no documentation to support its assertion that subsequent purchases were made in this account. In light of the Board's failure to so demonstrate, the Commissioner sustains the $5,000 reduction imposed by the Township.

Account		Reduction
11-190-100-640	Textbooks	$5,000

The Township argues that the 1993-94 level of expenditure indicates a large available balance in this account.

The Board again contends that the Township's position is based upon the March 31 Financial Statement which reflected a decision to hold expenditures in this account due to fear of a possible deficit.

The Commissioner once again is constrained to observe that although the Board provides reasonable explanation for the balance held as of March 31, 1994, it likewise in this account fails to document its contention that expenditures for textbooks were undertaken after that date. Consequently, the $5,000 reduction in this account is sustained.

Account		Reduction
11-218-100-101	Teacher's Salaries Speech	$16,790

The Township merely argues that it seeks to maintain the level of speech instruction at 1993-94 levels.

The Board argues that the impact of the reduction in the speech salary account would reduce projected speech time to .59 time from full time for one therapist. It is the Board's contention that speech requirements have grown 80% since December 1993. It contends that during the 1994-95 school year it will be required to provide speech therapy to three additional students plus providing speech once per week to students in a class for Perceptually Impaired and twice per week for a new class of Multiply Handicapped students. The Board sets forth the following table of growth in requirements for speech therapy:

1991	42 cases
1992	47 cases
1993	47 cases
1994	86 cases
1994-95	89 cases

In light of the documentation of its increased needs in the area of speech therapy, the Commissioner directs the restoration of $16,790 for a part-time speech therapist.

11-000-218-104	Salaries Professional Staff	$26,039

The Township argues that guidance services should remain at 1993-94 levels.

The Board contends that increased enrollment requires that its guidance services should be increased from its current level of .47 time to full time. In support of its position, the Board sets forth the increases by grade level in Attachment 1A to its Position Statement.

Upon review of the arguments of the parties and in light of the significant increase in student population, the Commissioner directs the restoration of $26,039 in the guidance teacher account.

Account		Reduction
11-000-219-104	Other Salaries Professional Staff	$10,240

The Township argues that increase in the social workers' time was not a priority.

The Board contends that it has only one part-time individual providing social work services. The Board contends that the increase in time for the social worker is necessitated by a 25% increase in the special education population as of April 1994. Between September 1992 and June 1994, special education population has increased from 85 students to a projected 126 students by September 1994.

The Commissioner, based upon the undisputed contention by the Board as to the growth in its special education population, finds and determines that the Board has borne its burden and directs a restoration of $10,240 in this account.

11-000-230-100	Salaries General Administration	$21,980

The Township argues that the amount of time spent by the superintendent and the principal in administrative activities should not change. Therefore, the Township asserts that the increase is not a priority.

The Board argues that the secretarial assistance provided to the superintendent and the principal of the Brass Castle School in this account is necessitated by the fact that both individuals serve only part time in their respective positions with the superintendent also serving as a part-time principal and the

principal of the Brass Castle School serving as Director of Special Services and Learning Disabilities Consultant.

Given the myriad functions required of both a superintendent and a principal as outlined by the Board in its Position Statement, the Commissioner finds more than adequate justification for providing additional administrative assistance through the hiring of an additional secretary to be shared by the two. This is particularly true given the multiple functions of the part-time building principal. The Commissioner therefore directs the restoration of $21,980 in this account.

Account		Reduction
11-000-230-331	Legal Services	$1,000

The Township argues that 60% of the funds allocated for legal services in 1993-94 were unused as of March 31, 1994.

The Board argues that the fact the 60% of legal services funds were unused as of March 31, 1994, should not serve as the basis for the reduction imposed for 1994-95. It points out that legal services costs fluctuate from year to year with its 1992-93 expenditures being $4,900 over budget. The Board points out that it is involved in a lease purchase building project which will require over expenditure in the amount of $11,500. Additionally, the Board contends it will be negotiating a new contract with the education association in 1994-95 which will add to its legal costs.

The Commissioner finds that the Board has demonstrated its need for the amount by which this account has been cut. Therefore, the Commissioner directs that the $1,000 in this account be restored.

11-000-230-590	Other Purchased Services	$2,000

The Township argues that the reduction is based upon insufficient justification for the increase in coverage sought.

The Board contends that it has received a strong recommendation to increase its liability coverage from $2 million to $5 million.

The Board argues that its increased student population produces increased potential for liability and that the increase in costs for the increased coverage is minimal.

The Commissioner has considered the arguments of the Board carefully but finds them unpersuasive in that there is no evidence presented to demonstrate that the relatively small increase in student population raises the level of anticipated liability. The $2,000 reduction in this account is sustained.

Account		Reduction
11-000-240-600	School Administration Supplies and Materials	$5,000

The Township argues that the district overbudgeted in this account in 1993-94 and failed to provide sufficient documentation for the appropriation represented.

The Board points out that the original amount budgeted in 1993-94 in this account was $22,000 but $10,458.20 was transferred to cover unanticipated expenditures in other accounts, thus, leaving a backlog of needs for professional books, student awards, copy supplies, etc.

The Commissioner, upon review, determines that the Board has failed to supply specific amounts which would be required to provide those supplies which it contends it needs and therefore he directs that the $5,000 reduction imposed be sustained.

11-000-260-420	Plant Repair and Maintenance	$10,000

The Township contends that the Board increased its appropriation from $40,000 in 1993-94 to $80,150 in 1994-95 without

sufficient detailed documentation to support the amount budgeted. The Township points out that it has permitted increased appropriations over 1993-94 but does not deem the entire amount justified.

The Board contends that its projected budget for 1993-94 was actually $58,000 but its actual expenditures were $104,184.69. In rebuttal to the Township's assertion of lack of documentation, the Board provides a list of projects in Attachment 2A of its Position Statement amounting to $57,000, as well as an additional amount of $23,150 in maintenance contracts.

Upon consideration of the documentation presented by the Board, the Commissioner notes that no attempt is made to indicate which projects are absolute priorities which impact upon the health and safety of its pupils other than to describe the total amount as a priority. In light of the Board's failure to provide such documentation, the Commissioner sustains the $10,000 reduction in this account.

Account		Reduction
11-000-260-520	Insurance	$3,000

The Township contends that the Board has provided insufficient justification for the increase in coverage sought.

The Board contends that it paid $20,048 for insurance in this account in 1993-94 and that the $23,000 budgeted in 1993-94 is based upon adjustment in values and a standard increase.

In considering the arguments of the parties, the Commissioner notes that the Board provides no documentation to substantiate the increase in insurance costs in this account. The Commissioner therefore sustains the reduction of $3,000 imposed by the Township.

Account		Reduction
11-000-260-610	Plant General Supplies	$4,000

The Township argues that the Board provides no detailed support to justify the increase requested in this account. It further contends that approximately 50% or $7,000 was available in this account as of the March 31, 1994, Financial Statement.

The Board asserts that purchases in this account were restricted and were transferred to salaries and plant repairs and maintenance for needed roof replacement at the Brass Castle School.

Since the restoration in spending in this account resulted in reduction in inventory of cleaning supplies, there will be a shortage in this account if it is reduced.

The Commissioner, upon review of the arguments and the record, finds that the Board has failed to document the transfers alleged in its Position Statement, nor sufficiently documented the shortages which would result from the reduction imposed by the Township. The reduction of $4,000 in this account is sustained.

11-000-260-620	Plant Energy	$10,000

The Township argues that a 15% increase in appropriations for 1994-95 was not justified. It contends that despite the severe winter of 1993-94, the Board's original appropriation of $80,000 was excessive.

The Board asserts that $73,383.69 was spent during 1993-94 and a $10,000 reduction in this account as imposed by the Township could produce a shortfall. It contends that the additional funds appropriated for 1994-95 are to pay for the addition of hot water to the lavatory facilities in its two schools and an increase in the rate for natural gas.

Once again, the Commissioner notes the failure of the Board to document its contention of a rate increase for natural gas and the approximate cost increase to result from the addition of the hot water to the lavatory facilities. The Commissioner, therefore, directs that the reduction of $10,000 be sustained.

Account		Reduction
11-000-290-290	Other Employee Benefits	$16,556

The Township justifies the reduction in this area due to its elimination of the additional positions requested by the Board.

The Board argues that the reduction in this account would result in a shortfall if the positions cut by the Township were restored.

The Commissioner directs the restoration of the $16,556 in this account in light of his restoration of all the positions requested by the Board except for those of the two part-time aides.

11-000-290-832	Interest for Lease Purchase	$5,000

The Township argues that the reduction is justified since the lease will not be effective July 1, 1994, and, thus, a full year's interest is unnecessary.

The Board contends that although a full year's interest may not be required, the interest rate has been increased from 5% to 6%. Further, it argues that the project costs were originally estimated at between $330,000 and $340,000 but the lowest bid was actually $396,000.

The Commissioner, based upon the Board's contention of increased interest rate and higher overall costs, concludes that the reduction in this account cannot be sustained and therefore directs the restoration of $5,000.

Account		Reduction
11-000-310-930	Transfer to Cover Deficit	$4,800

The Township argues that its reduction is based upon 1993-94 activity. It further argues that the reduction is an encouragement to eliminate the deficit.

The Board argues that a reduction in this account would make it impossible to cover a deficit which might occur in 1994-95. The Board argues that it is prudent to provide a reserve fund for such a purpose.

The Commissioner notes, based upon his own expertise, that deficits in Food Service areas are common and therefore concludes that budgeting for such an exigency is prudent. The Commissioner directs the restoration of the $4,800 in this account.

Recapitulation

Account		Reduction Sustained	Restoration
11-190-100-106	Other Salaries Inst.	$11,232	
11-190-100-610	General Supplies	5,000	
11-190-100-640	Textbooks	5,000	
11-218-100-101	Teachers Salaries Speech		$ 16,790
11-000-218-104	Salaries Prof. Staff		26,039
11-000-219-104	Other Salaries Prof. Staff		10,240
11-000-230-100	Salaries Gen. Admin.		21,980
11-000-230-331	Legal Services		1,000
11-000-230-590	Other Purchased Services	2,000	
11-000-240-600	Sch. Admin. Supplies	5,000	
11-000-260-420	Plant Repair and Maint.	10,000	
11-000-260-520	Insurance	3,000	
11-000-260-610	Plant General Supplies	4,000	
11-000-260-620	Plant Energy	10,000	
11-000-290-290	Other Employee Benefits		16,556
11-000-290-832	Interest for Lease Purchase		5,000
11-000-310-930	Transfer to Cover Deficit		4,800
	TOTALS	$55,232	$102,405

In summary, the Commissioner finds and determines that of the $157,637 General Fund tax levy reduction imposed by the Township, a sum of $55,232 has been sustained and determines the

remaining amount of $102,405 is essential to enable the Board to provide a thorough and efficient system of education.

It is therefore ordered that the Warren County Board of Taxation increase the local school tax levy for the 1993-94 school year in Washington Township by $102,405.

CAP WAIVER

In reviewing the cap waiver request in this matter, the Commissioner notes that the sole accounts for which the Board seeks to increase its expenditures are for additional transportation costs necessitated by increased overall student enrollment and increased special education enrollment. In rendering a determination in this matter, the Commissioner has carefully considered the affidavit of the Warren County Superintendent and the documents indicating the efforts of the County Superintendent and the Department of Education's Cap Waiver Review Committee to consider reallocation. The Commissioner has further weighed the impact of his own review of the reductions imposed by the Township Committee. Based upon the foregoing, the Commissioner concludes that further reallocation within the base budget cannot be carried out without impacting on the Board's ability to provide a thorough and efficient system of education. (See, Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board July 6, 1994.)

The Commissioner further notes that the Township in this matter does not seek to challenge the Board's contentions relative to its need for additional funds to meet its transportation requirements. (See, Answer of Township to Petition of Appeal, at p. 3.)

Therefore, in light of the documented and unchallenged need for additional funds to provide transportation for both regular and special education pupils, the Commissioner directs the Warren County Board of Taxation to further increase the 1994-95 General Fund tax levy of the Washington Township Board of Education by an additional $84,801 so that the total tax levy for school purposes shall be:[1]

Tax Levy Certified by Township	$4,471,464
Restored by Commissioner (Defeated Budget)	102,405
Cap Waiver Ordered by Commissioner	84,801
Total Tax Levy	$4,658,670

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 23, 1994

DATE OF MAILING - DECEMBER 23, 1994

[1]After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In this review for the purpose of determining potential revenue to be appropriated in lieu of increasing the tax levy, the Commissioner concluded that the undesignated surplus did not materially exceed the budgeted amount.

364-94

364-94

R.A., on behalf of her minor children, S.H. AND D.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent appealed Board's determination of nonresidency. Board contended petitioner and her children, D.A. and S.H., were not domicile in the district but in Trenton and, thus, were not entitled to a free public education in Ewing pursuant to N.J.S.A. 18A:38-1.

In light of evidence presented and testimony of the witnesses, the ALJ concluded petitioner proved that she and her children were domiciled in Ewing, although they did spend time at a Trenton apartment. Citing Matter of Unanue, Mercadante, and Fort Lee Board of Education v. Kintos, ALJ found petitioner's intent was determinative.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 5, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4177-94
AGENCY DKT. NO 65-4/94

R.A., ON BEHALF OF HER MINOR CHILDREN, S.H. AND D.A.,
Petitioners,
v.
BOARD OF EDUCATION OF EWING TOWNSHIP, MERCER COUNTY,
Respondent.

R.A., pro se, on behalf of the petitioners

Robert J. Merryman, Esq., for the respondent (Carroll and Weiss, attorneys)

Record Closed: July 12, 1994 Decided: August 25, 1994

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

R.A., on behalf of her minor children, S.H. and D.A., filed a petition with the Commissioner of Education (Commissioner) seeking to reverse the determination by the Board of Education of Ewing Township, Mercer County (Board), that her children, S.H. and D.A., be removed from the Ewing Township School System. In response, the Board contends that R.A. and her children, D.A. and S.H., are not domiciled within the Ewing Township School District.

The Commissioner on May 2, 1994, transferred the matter to the Office of Administrative Law to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing took place in the Office of Administrative

Law in Trenton, New Jersey, on July 8 and 12, 1994, and the record in the matter closed on July 12, 1994.

FACTUAL FINDINGS

The issue of the domicile of R.A. and her two children first arose in June 1993 when R.A. registered her youngest child, S.H., for kindergarten in the 1993-94 school year. At that time, R.A. listed her address as 22 Marquis Road in Ewing Township (Ewing house). The school nurse found that S.H.'s medical records were not complete and she called the listed physician to get S.H.'s immunization records. The physician's office indicated that S.H. lived at 90 Prospect Village in Trenton (Trenton apartment) (R-5). In September 1993, S.H. told her teacher that she did not live with her grandparents (Ewing house), but with her father (Trenton apartment), and that her father dropped her off daily at the Ewing house so that she could get the bus for school (R-4, R-5).

During the hearing, R.A. testified that she and her two children live in her parents' house (Ewing house), and that she has always lived in Ewing Township. In support of her position, R.A. presented the birth certificates of S.H. and D.A., which indicate that the children's mother resides at the Ewing house (P-1, P-2), and her driver's license (P-5) and vehicle registration (P-6), both of which indicate that R.A. resides at the Ewing house. R.A. stated that although her parents own the house, she helps with the expenses by paying both the water and telephone bills. R.A. presented a water bill which was addressed to her at the Ewing house (P-4), as well as a Bell Atlantic telephone bill addressed to her at the Ewing house (P-3). According to R.A., she does not pay any of the expenses at the Trenton apartment.

R.A. testified that she has never been married and that she has custody of both of her children. The oldest child, D.A., is eleven years old and is in the fifth grade at the Antheil School in Ewing Township. R.A. has not kept in touch with D.A.'s father, although she thinks he resides in Trenton. D.A. spends most of his time at her parents' house or with his friends in Ewing Township. R.A. stated that the father of her

youngest child, S.H., resides in Trenton, and that sometimes she and S.H. visit with him at the Trenton apartment. According to R.A., her daughter's doctor has the Trenton apartment address since her daughter is covered by her father's medical insurance.

R.A. is employed by the Capital Nursing Center and she used to work primarily the 3:00-p.m.-to-11:00-p.m. shift. When she worked this shift she would take S.H. to the Trenton apartment where the child would stay with her father and an older sister. According to R.A, her mother is disabled and cannot take care of R.A.'s young daughter. After working this shift, R.A. did not want to wake her daughter up, so R.A. and S.H. would stay at the Trenton apartment. In the morning, R.A. would drive her daughter back to the Ewing house. R.A. would fix breakfast for her daughter at the Ewing address and then the child would catch the bus for school. Sometimes R.A. would take both children to the Trenton apartment, and there were times that she and one or both children spent a weekend at the Trenton apartment.

R.A. stated that she now works primarily the 11:00-p.m.-to-7:00-a.m. shift; however, she also works other shifts and, at times, double shifts.

Mark Schon, the administrator of the Capital Nursing Center, was subpoenaed to testify on behalf of the Board and to bring with him R.A.'s work records from September 1993 through June 1994. Mr. Schon testified that R.A. is an employee of the Capital Nursing Center and that her time records (R-1, R-2, R-3) show when she worked and when she was off. According to these records, R.A. worked the 3:00-p.m.-to-11:00-p.m. shift for much of September through December 1993 (R-1).

R.A. stated that S.H.'s father never drove S.H. back to the Ewing house so that she could go to school, since he leaves for work at 5:30 a.m. Also, R.A. said that she sometimes lends her car to S.H.'s father.

Because of the information given by R.A.'s daughter and the doctor, David J. Mikalauskus, the residency and attendance officer for the Ewing School District, was assigned to investigate where R.A. and her two children lived. Mr. Mikalauskus and a

part-time residency officer, Victor Ptycia, conducted an investigation to determine the residence of R.A. and her children, and both officers submitted reports of their surveillances at both the Ewing house and the Trenton apartment (R-5, R-7).

The two officers conducted a total of seventy surveillances between October 6, 1993, and March 13, 1994. Twice, three surveillances were conducted on the same day, and eleven times, two surveilances were conducted on the same day. Only on one occasion did an officer see R.A. drive to the Ewing house early in the morning with both children in her car and only on three occasions did an officer see R.A. drive to the Ewing house early in the morning with one young child (presumably S.H.) in her car. On three occasions, the officer did not see R.A.'s car early in the morning at the Ewing address, and then later saw the car there. On twenty-eight occasions, at various times during the day or evening, the officers saw R.A.'s car parked near the Trenton apartment. The officers did not stay long enough to determine who was in the Trenton apartment. On all the other occasions they either saw R.A.'s car parked in front of the Ewing house or did not see R.A.'s car. In comparing the dates and times of these surveillances with R.A.'s employment records, it is clear that R.A.'s car was seen sometimes near the Trenton apartment on days she was not working the 3-p.m.-to-11 -p.m. shift and on days R.A. was not working at all (R-6).

Mr. Mikalauskus spoke to R.A.'s father, who said that R.A. lived at the Ewing house and that her clothes were there (R-5).

Based on the testimony of the witnesses, I **FIND** R.A. to be a credible witness and I **FIND** that she and her two children reside at the Ewing house. Except for the one occasion that an officer saw R.A.'s son, D.A., arriving early in the morning at the Ewing house, there is no evidence at all to suggest that D.A. lives anywhere but at the Ewing house. As to R.A. and her daughter, S.H., I **FIND** that both R.A. and her daughter spend some time at the Trenton apartment and that there are times when R.A. leaves her daughter with the daughter's father when R.A. is at work. Further, I **FIND** that the statement made by S.H. to her teacher is not proof of where she lives most of the time.

S.H. was in kindergarten when she made the statement and very young children's statements are often not reliable. For example, the facts show that contrary to her statement, S.H.'s father does not drive her back to the Ewing house.

CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:38-1, free public education shall be provided to any person over five and under twenty years of age who is domiciled within the school district. In general, domicile is the place of a person's abode where he or she has the present intent of remaining and to which, if absent, he or she intends to return, Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). The courts have recognized that a person may have multiple residences, but only one domicile, State v. Benny, 20 N.J. 238, 251 (1955); In re Jaffe, 74 N.J. 86, 90-91 (1977); Lea v. Lea, 18 N.J. 1, (1955). In the Mercadante cae, the court stated that the following factors are important in determining the domicile of a person:

> . . . the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return.
>
> [111 N.J. Super. at 39-40]

The court in In the Matter of Unanue, 255 N.J. Super. 362, 376 (Law Div. 1991), stated that "a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In general, the courts have recognized that intent is a decisive factor in establishing domicile, Benny, supra, 20 N.J. 238; Unanue, supra, 225 N.J. Super. 362; Collins v. Yancey, 55 N.J. Super. 514 (Law Div. 1959). In a recent case, the Commissioner has recognized that the determining factor in deciding a family domicile is a matter of intent, Fort Lee Board of Education v. Kintos, 92 N.J.A.R. 2d (Vol. 4) 96, 103 (Education).

The record in this matter shows that both children live with R.A. and that R.A. considers the Ewing house her residence. Although the Board has shown that R.A. and one or both of her children spent some time at the Trenton apartment, I **CONCLUDE** that this is insufficient to establish domicile there.

CONCLUSION

Therefore, I **CONCLUDE** that the petitioner has shown that she and her children are domiciled within the Ewing Township School District, and I **ORDER** that the decision of the Board be reversed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 25, 1994
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

Aug 29, 1994
DATE

Mailed to Parties:
ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

AUG 30 1994
DATE

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioners:

P-1 Birth Certificate for D.A.

P-2 Birth Certificate for S.A. (S.H.)

P-3 Bell Atlantic telephone bill sent to R.A.

P-4 Trenton Water Works bill sent to R.A.

P-5 New Jersey Motor Vehicle Services Operator License issued to R.A.

P-6 New Jersey Motor Vehicle Services Car Registration issued to R.A.

For the Respondent:

R-1 Work record of R.A. from the Capital Nursing Center for September through December 1993

R-2 Work record of R.A. from the Capital Nursing Center for January through March 1994

R-3 Work record of R.A. from the Capital Nursing Center for April through June 1994

R-4 Attendance/Residency Complaint regarding S.H., dated September 13, 1993

R-5 Report of David Mikalauskus

R-6 Copy of a calendar for the period October 1993 through March 1994 showing days of surveillances, days the school was closed and days on which R.A.'s car was seen near the Trenton apartment or driving to the Ewing home early in the morning

R-7 Report of Victor Ptycia

R-8 Transcript of a portion of the meeting of the Ewing Township Board of Education on March 14, 1994

WITNESSES:

For the Petitioners:

R.A.

For the Respondent:

David Mikalauskus
Mark Schon
Victor Ptycia

R.A., on behalf of her minor children, S.H. AND D.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent pursuant to the provisions of N.J.A.C. 1:1-18.4.

Respondent Board of Education of the Township of Ewing (Board) initially excepts to the ALJ's finding of Petitioner R.A. as a credible witness. The Board points to the contradictions in R.A.'s testimony regarding the relationship between the shifts she worked and time spent at the Trenton address.* The Board posits this conflicting testimony is evidence of R.A.'s attempt "to mislead both the Board and the Court***" with regard to the amount of time she stays in Trenton. (Board's Exceptions, at p. 2)

* The Board asserts that, although R.A. alleges she stays in Trenton only when she works the 3:00 p.m. to 11:00 p.m. shift, upon cross-examination, she admits that she and the children stay in Trenton on weekends when she is not working, and also when she works the 11:00 p.m. to 7:00 a.m. shift. Additionally, respondent's surveillance records indicate that R.A.'s car was parked at the Trenton address on days when she worked from 7:00 a.m. to 3:00 p.m., contrary to her testimony that she does not go to Trenton on those days. (Tr. 7/8/94, at pp. 10, 12, 13, 15, 16; (R-8), at pp. 18-19)

The Board further contends that R.A. failed to meet her burden, as established by N.J.S.A. 18A:38-1(b)(2), to prove by a preponderance of evidence that her children are eligible for a free public education in the Township of Ewing. The Board asserts that the documents which R.A. purports to evidence a Ewing domicile are insufficient. The children's birth certificates, the Board argues, merely show that R.A. lived in Ewing when her children were born in 1982 and 1988. The driver's license and registration do not necessarily reflect current domicile since a driver must take affirmative steps to update or change such records. The Board dismisses the weight of the phone and water bills in R.A.'s name.

Finally, the Board challenges the ALJ's emphasis on intent when determining domicile. This emphasis, the Board maintains, will present an unworkable standard for local boards of education to effectively respond to the problems of nonresidents attending their schools. The Board argues that the amended language in N.J.S.A. 18A:38-1 was an attempt by the Legislature to establish less rigorous procedures for local boards to follow when attempting to remove or deny admission to students who are not entitled to a free public education in the district.

Upon careful and independent review of this matter, which included a review of the transcripts of the hearings conducted on July 8 and 12, 1994, the Commissioner adopts the ALJ's conclusion that petitioner has shown that she and her children are domiciled in the Township of Ewing. In making this determination, the Commissioner finds that the inconsistencies with respect to petitioner's testimony on record are inconsequential; the Commissioner recognizes:

> Establishing a domicile involves an act of volition. "A person has the right to choose his own domicil, and his motive in doing so is immaterial." Lyon v. Glaser, 60 N.J. 259, 264, 288 A.2d 12 (1972). In accordance with this principle it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, business or employment.*** (Matter of Unanue, 255 N.J. Super. 362, 375 (1991))

The sole question considered by the Commissioner was whether petitioner's children are persons domiciled in the Township of Ewing and therefore entitled to a free public education in that district, in accordance with N.J.S.A. 18A:38-1. At the outset, the Commissioner notes that the terms "residence" and "domicile" are not synonymous; a person may have several residences or places of abode, but only one domicile at a time. See Collins v. Yancy, supra, at 520, 521; see also State v. Benny, supra, at 251.

> In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. (Matter of Unanue, supra, at 374, citing Kurilla v. Roth, 132 N.J.L. 213, 215, 38 A.2d 862 (Sup. Ct. 1944))

See also Mercadante v. The City of Paterson, supra, at 39, aff'd 58 N.J. 112 (1971).) Thus, the domicile is what one regards as a true and permanent home. In re Jaffe, supra, at 90, 91

The ALJ's decision turns on the element of intent in accordance with Fort Lee Board of Education v. Kintos, supra, aff'd State Board April 13, 1994. Yet, the concepts of home and domicile embody both a subjective and objective relationship to a physical residence. Matter of Unanue, supra, at 375. In the instant matter, the objective indicia of R.A.'s Ewing domicile include the children's birth certificates, the water and telephone bills in her

name, and her driver's license and registration. The objective indicia are also evidence of petitioner's intent. That R.A. has continued to accept and pay the telephone and water bills, and has not taken steps to change the address on her driver's documents, suggest that she regards Ewing as her permanent home.

> A change of domicile***is effected if a person actually moves to a new abode intending to remain there for an indefinite time and establishing it as a fixed present domicile, notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time.*** (emphasis supplied)
> (Matter of Unanue, supra, at 378)

R.A.'s testimony before the Board shows an unequivocal intent to remain in Ewing Township as long as her parents are living, irrespective of the time which she elects to spend in Trenton. (R-8, at pp. 22-23)

Accordingly, for the reasons expressed by the ALJ and herein, the initial decision of the Office of Administrative Law finding the children of R.A. entitled to a free public education in the Ewing Township School District pursuant to N.J.S.A. 18A:38-1 is affirmed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 5, 1994

DATE OF MAILING - OCTOBER 5, 1994

365-94

365-94

JOYCE A. SHERRILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner asserted that as a tenured secretary she had entitlement to a full-time 12-month position which became available at the time her half-time 12-month position was eliminated. Petitioner contended her tenure rights under N.J.S.A. 18A:17-2 were violated.

ALJ concluded that tenure does not accrue in a specific secretarial position but rather as a secretary in the school system. Thus, upon abolition of her 12-month half-time secretarial position, petitioner was entitled to be assigned to one of the vacant full-time 12-month secretarial positions. The Board was ordered to compensate petitioner for amount owed from July 1, 1993 (date new full-time 12-month secretarial position commenced) to December 31, 1993 (date of petitioner's resignation).

Commissioner adopted findings and determination in initial decision and ordered payment of compensation.

DECEMBER 29, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10107-93

AGENCY DKT. NO. 311-9/93

JOYCE A. SHERRILL,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Stephen J. Mushinski, Esq., for respondent

Record Closed: June 29, 1994 Decided: November 10, 1994*

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

This matter was commenced on September 28, 1993 with the filing of a petition of appeal wherein Joyce A. Sherrill (hereinafter petitioner) asserted that the Board of Education of the

---

* Extensions of time for issuing the Initial Decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

Township of Cinnaminson (hereinafter respondent) had violated her tenure rights under N.J.S.A. 18A:17-2 by assigning her to a half-time ten-month position rather than to a full-time twelve-month position when it abolished her half-time twelve-month secretarial position. Petitioner asserted that the reassignment constituted a reduction in compensation without proceedings under the Tenure Act. An answer on behalf of respondent was filed on October 18, 1993 wherein respondent denied that it had violated petitioner's tenure rights. On October 22, 1993 the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on January 19, 1994 wherein it was determined that cross-motions for summary decision would be filed. Respondent's motion and supporting papers were received on March 3, 1994. Petitioner's motion and supporting papers were received on March 25, 1994. Oral argument on the cross-motions took place on May 24, 1994, following which both parties submitted supplemental memoranda. Respondent's letter brief and attachments were received on June 9, 1994. Petitioner's supplemental letter memorandum was received June 29, 1994, whereupon the record closed.

FINDINGS OF FACT

The parties submitted the following joint stipulation of facts:

1. Petitioner Joyce A. Sherrill resides at 539 Zeisner Avenue, Cinnaminson, New Jersey 08077.

2. Respondent Board of Education of the Township of Cinnaminson, Burlington County, is a public school district with administrative offices located at Eleanor Rush School, P. O. Box 224, Cinnaminson, New Jersey.

3. Petitioner Joyce A. Sherrill commenced employment with respondent on or about September 1, 1985 as a teachers' aide.

4. Petitioner was assigned to the position of half-time secretary to the Curriculum Supervisors on or about September 22, 1988.

5. Petitioner held the position of half-time secretary until June 30, 1993.

6. Petitioner acquired tenure under N.J.S.A. 18A:17-2 in her respective employment position with the respondent.

7. Petitioner's position as a half-time secretary to the Curriculum Supervisors was a twelve-month position.

8. For the 1992-1993 school year, petitioner was paid an annual salary of $8,595.00.

9. On or about June 30, 1993 petitioner's position as a twelve-month half-time secretary was abolished.

10. Petitioner, by virtue of her tenure, was entitled to bump into a vacant position or one held by a non-tenured employee. Petitioner was assigned to the position of half-time secretary to the Child Study Team commencing September 1, 1993.

11. Petitioner's position as a half-time secretary to the Child Study Team was a ten-month position, for which petitioner was paid an annual salary of $7,518.00.

12. At or about the time that respondent abolished petitioner's twelve-month half-time secretarial position, it created a new twelve-month full-time secretarial position to the administrative assistant commencing July 1, 1993. Respondent assigned a non-tenured individual to that position.

13. At or about the time that respondent abolished petitioner's twelve-month half-time secretarial position, another twelve-month full-time position as secretary to the high school vice principal became vacant. Respondent assigned a non-tenured individual to that position.

14. Paragraph D(1)(c) of Article 26 of the Agreement between the Cinnaminson Education Association and the Board of Education of the Township of Cinnaminson, entitled "Reduction in Force and School Closing", provides that "Seniority is defined as the number of months worked in

> applicable positions in the District as a full-time employee. If an employee works one day in a calendar month, he shall be given credit for a full month."
>
> 15. Petitioner resigned from her position as a ten-month half-time secretary to the Child Study Team effective December 31, 1993.

In addition to the foregoing stipulations, the following additional uncontested facts appear from the motion papers, oral argument of counsel, and the copies of the negotiated agreement between the Cinnaminson Township Board of Education and the Cinnaminson Education Association, Inc. supplied by respondent.

Additional provisions of Article 26 of the Negotiated Agreement which were not quoted in the stipulations submitted by the attorneys provide for the preparation of seniority lists in three "groups" in the event of a reduction in force among tenured secretarial employees. "Group 1" and "Group 3" are not relevant to this matter; "Group 2" provides for four "sub-lists":

(1) 12 Month Secretary
(2) 10 Month Secretary
(3) 12 Month Clerk
(4) 10 Month Clerk

Additional subparagraphs of Article 26, Section D(1) provide:

> (f) A tenured secretarial employee whose position is eliminated or filled by another employee whose position has been eliminated has the right to claim the position filled by the lowest seniority employee on the same sub-list if he possesses greater seniority than that employee.
>
> (g) In the event that the affected employee is not senior to the lowest seniority employee on the same sub-list, he has the right to claim the position filled by the lowest seniority employee on the next lower sub-list within the Group if he possesses greater seniority than that employee.
>
> . . .

> (j) An employee who claims a position within his sub-list shall maintain his current salary. An employee who claims a position on another sub-list shall move laterally to the same step on the new salary column.

The salary columns referred to in Article 26, Section D(1)(j), which relate to this matter are entitled "twelve-month secretary" and "ten-month secretary." For the year 1992-93 petitioner was paid on step six of the twelve-month secretary column ($17,190 x .5= $8,595). For 1993-94 school year petitioner was paid on step seven of the ten-month secretary column ($15,035 x .5 = $7,518). Petitioner made timely application for each of the vacant twelve-month full-time secretarial positions; however, respondent reviewed all of the secretarial positions in the district and riffed the holder of the only other half-time secretarial position, which happened to be a ten-month position, and assigned petitioner to that ten-month half-time position. The within matter followed.

APPLICABLE LAW AND DISCUSSION

N.J.A.C. 1:1-12.5, the rule governing motions for summary decision, provides:

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The now classic statement of the standards for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), explains that the procedure is designed to provide a prompt, businesslike and inexpensive method of disposing of

any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. In the present matter the parties agree that there are no material facts in dispute, and accordingly, this matter is ripe for summary decision.

N.J.S.A. 18A:17-2, the statute pursuant to which petitioner holds her tenure as secretary with respondent provides in pertinent part:

. . .

> 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
>
> . . .
>
> 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 sub-article B of article 2 of chapter 6 of this title. (N.J.S.A. 18A:6-9 to 6-26)

Although some of petitioner's arguments are couched in language complaining about unlawful reduction in compensation, during oral argument petitioner's attorney acknowledged that if there had been no other secretarial positions available, i.e., no vacant positions or positions filled by non-tenured or less senior tenured secretaries, petitioner would have no basis for

complaint; her twelve-month half-time position was legally abolished and although the ten-month half-time position to which she was assigned in fact pays her less money on an annual basis, she was paid at a rate which was not a reduction in compensation. Petitioner acknowledged that she was not seriously arguing she should be paid a twelve-month salary for working ten months. The problem in the present matter, of course, is that other twelve-month positions were available; petitioner indicated her interest in those positions in a timely manner, and for whatever reason, respondent determined to assign her to a half-time ten-month position instead. For the following reasons, I CONCLUDE that respondent's actions in this regard violated not only petitioner's statutory tenure rights but also her seniority rights pursuant to the Negotiated Agreement.

Although the Commissioner has on a number of occasions indicated that rules and regulations concerning reassignment after a reduction in force pursuant to N.J.S.A. 18A:28-5, the tenure law for teaching staff members, do not apply following a reduction in force pursuant to N.J.S.A. 18A:17-2, the tenure law for secretaries, etc., none of those cases support respondent's actions in the within matter.

Ann Kigerl v. Board of Education of the Borough of South Plainfield, Middlesex County, 1981 S.L.D. 889, aff'd State Board 896, states ". . . when a person, whose position is lawfully abolished, is reassigned or is transferred to another position with a lower salary structure, a reduction in salary does not occur for purposes of N.J.S.A. 18A:17-2." The key word in this quotation is "position". It is quite clear from the statutory language that tenure, either under N.J.S.A. 18A:28-5 for professional staff or N.J.S.A. 18A:17-2, for secretaries and business staff, attaches to a "position". Barbara Ellicott v. Board of Education of the Township of Frankford, Sussex County, 1990 S.L.D. 1714, 1717-1718, State Board opinion, aff'd 251 N.J. Super. 342 (App. Div. 1991). Kigerl dealt with a variety of position titles, all of which were different from the title of Ms. Kigerl's abolished position. Tenure in a position, even if it is a secretarial position, requires the conclusion that when other assignments exist within the same position title, a riffed tenured employee who held that position title is entitled to claim that vacancy as opposed to a non-tenured applicant. The result in Kigerl was based upon two factors, neither of which is present in the within matter, i.e., Ms. Kigerl selected a different position title with a lower salary

guide, and the Board and the Association in Kigerl had not negotiated specific seniority rights for secretaries and/or clerks. In this case, petitioner, a tenured twelve-month secretary, did not select the lower paying ten-month position; in fact, she applied for both vacant twelve-month secretarial positions. Without regard to specific negotiated seniority and bumping rights, respondent's actions in assigning petitioner to a different position on a different salary scale when that result could easily have been avoided by assigning her to one of the vacancies within her own twelve-month position title violated her tenure rights. Furthermore, in this matter petitioner's seniority rights were specifically designated in the Negotiated Agreement quoted hereinabove and in the joint Stipulation of Facts which provides for all seniority to be calculated on a full-time basis* and which provides for four "sub-lists", each with a separate salary guide, i.e., twelve-month secretary, ten-month secretary, twelve-month clerk, and ten-month clerk. Pursuant to Article 26, D(1)(f), a tenured secretarial employee whose position is eliminated or filled by another employee whose position has been eliminated has the right to claim the position filled by the lowest seniority employee on the same sub-list if he possesses greater seniority than that employee. Petitioner's sub-list was twelve-month secretary and respondent employed two non-tenured people in two vacant positions on that sub-list, clearly a violation of petitioner's rights.

The fact that petitioner worked in her tenured position only part-time does not require a different result. Teaching staff members who work part-time achieve tenure as a teacher, not as a part-time teacher. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982); Lichtman v. Ridgewood Bd. of Ed., supra. There is no logical reason for concluding that a secretary who works part-time achieves tenure as a part-time secretary. Respondent's seniority rules in the Negotiated Agreement acknowledge that the position title is a twelve-month secretary and provide for calculation of seniority on a full-time basis. No mention is made in the agreement of part-time positions, and it appears that petitioner as a secretary who worked part-time was simply paid a pro rata share, i.e., 50%, of the salary column for her position title.

Mackey v. Bd. of Ed. of the Borough of Ridgefield, 1983 S.L.D. 96, cited by respondent, also provides no support for respondent's actions herein. Although the judge in Mackey used

* The logic of such a calculation is supported by Lichtman v. Rigdewood Bd. of Ed., 93 N.J. 362 (1983).

language that indicated the board could transfer secretaries from one position to another position without violating tenure rights, it is clear that what she really meant was that the board had discretion to transfer tenured employees from assignment to assignment within the same position title. This is evident from the statement at p. 103, "I **CONCLUDE** that tenure does not accrue in a specific position as secretary in a specific school, but rather as a secretary in a school system." In fact, tenure does accrue in a position; it does not accrue in a specific assignment within the position, which is what Mackey actually holds. See Williams v. Bd. of Ed. of the City of Plainfield, 176 N.J. Super. 154 (App. Div. 1980) and Howley and Bookholdt v. Ewing Twp. Bd. of Ed., 6 N.J.A.R. 509 (1982).

Accordingly, for all of the foregoing reasons, I **CONCLUDE** that upon the abolition of her twelve-month secretarial position (half-time) , petitioner was entitled to be assigned to one of the vacant twelve-month secretarial positions full time. Since she resigned from her employment with the district, effective December 31, 1993, she is entitled to damages in an amount equal to the difference between what she would have earned in the twelve month position from July 1, 1993 through December 31, 1993 and what she actually earned during that time period in the position to which she had been assigned by respondent. Respondent is hereby **ORDERED** to compensate petitioner in that amount, together with any benefits and emoluments to which she would otherwise have been entitled.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

November 10, 1994
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1994
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

JOYCE A. SHERRILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Repondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4. No reply exceptions were filed.

Respondent Board of Education excepts to the ALJ's reliance upon the collective bargaining agreement between the Board and the Cinnaminson Education Association to conclude that petitioner was entitled to a full-time 12-month secretarial position after her half-time 12-month position was abolished. Respondent asserts that Article 26, paragraph D(1)(c), of the agreement does not apply to petitioner as a part-time employee; she was not intended to be given seniority.

Respondent further contends that the ALJ erred in failing to recognize the Commissioner of Education's decision in Casey v. Board of Education of the Township of Cinnaminson, decided by the Commissioner December 17, 1993, 94 N.J.A.R. 2d (EDU) 187, and in improperly relying upon case law arising under the teachers' tenure statute.

Upon careful and independent review, the Commissioner concurs with the ALJ's conclusion that when petitioner's half-time, 12-month secretarial position was abolished, she was entitled to be assigned to one of the vacant full-time, 12-month secretarial positions which were, instead, filled by nontenured individuals.

There is no dispute that petitioner acquired tenure in her 12-month secretarial position with respondent. (Initial Decision, at p. 3) The ALJ properly utilizes the bargaining agreement as the vehicle which categorizes the clerical positions available in the district and thus confers upon petitioner the right, under the circumstances herein, to claim a position filled by a nontenured employee. Therefore, respondent's argument that the collective bargaining agreement "did not apply to the Petitioner since Petitioner was a part time employee" and "[p]art time staff was not to be given seniority" is misplaced. (Respondent's Exceptions, at p. 2) The issue herein concerns the benefits and emoluments of tenure, namely, entitlement to positions held by nontenured employees, which benefits cannot be circumvented by contractual seniority provisions, even assuming arguendo that they do not apply to petitioner.

Additionally, the Commissioner finds that Casey, supra, is not determinative in this matter. The result in Casey is based upon the fact that there were no available positions within petitioner's library clerk title; the only two library clerk positions in the district were held by tenured persons with more seniority than petitioner Casey.

Finally, the Commissioner finds that the ALJ's reliance upon cases other than those which interpret N.J.S.A. 18A:17-2 was not improper; the principles extracted from these cases are general

pronouncements on the nature of tenure, application of which need not be limited to the particular statute under which they arose.

Accordingly, for the reasons expressed in the initial decision, the Commissioner adopts as his own the findings and conclusions of the ALJ and orders compensation for the period set forth therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 29, 1994

DATE OF MAILING DECEMBER 29, 1994

365-94

EDU #10107-93
C # 365-94
SB # 10-95

JOYCE A. SHERRILL,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 29, 1994

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq. of Counsel)

For the Respondent-Appellant, Stephen J. Mushinski, Esq.

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

S. David Brandt opposed.

June 7, 1995

Date of mailing JUN 09 1995

366-94

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $1,209,850 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to sustain $493,679 of the reductions and restore $716,171 for a total General Fund tax levy of $18,850,163.

DECEMBER 29, 1994

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

James T. Hundley, Esq., (Hundley, Parry & Hopkins, P.C.) for Petitioner

Donald L. Beekman, Esq., (Beekman & Missett) for Respondent

This matter was opened before the Commissioner on May 23, 1994, through the filing of a Petition of Appeal by the Neptune Township Board of Education (Board) appealing the reduction in the current expense tax levy imposed by the Township Committee of the Township of Neptune (Township) following voter rejection on April 19, 1994, of the Board's proposed General Fund tax levy for 1994-95 school year, pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration on the grounds of necessity for a thorough and efficient education. Subsequent to the defeat, the Board and Township, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2, consulted on the defeated budget and the Township reduced the General Fund tax levy by $1,209,850. Consequently, the monies in contention in this matter are as set forth below:

Proposed Tax Levy Adopted By Board of Education	Amount of Tax Levy Certified By Governing Body
General Fund $19,343,842	General Fund $18,133,992

Amount of Reduction
By Governing Body

General Fund $1,209,850

Amount of Reduction In Dispute
Before the Commissioner

General Fund $1,209,850

It must be noted that the Petition of Appeal filed by the Board cited the amount of reduction in dispute to be $1,209,850. The Board's Position Statement, however, noted acceptance of a total of $195,711 reductions from three line items.

On May 31, 1994, the Township submitted its Answer to the Petition and on June 3, 1994, filed a Supplement to the Answer. A letter was sent to the Township attorney on June 1, 1994, by the Acting Director of the Bureau of Controversies and Disputes requesting the required submission of a copy of the full line item budget as proposed by the Board and a certification as to the date the Township reduction was given to the Board. These documents were submitted by the Township on June 8, 1994. A Position Statement was filed by the Board on July 5, 1994, with a corrected copy filed on July 8, 1994. On December 16, 1994, the Commissioner notified the parties that, pursuant to N.J.A.C. 1:1-15.2, he intended to take official notice of the 1993-94 year-end district audit as it relates to the amount of anticipated undesignated surplus.

The specific reductions in the General Fund tax levy are as follows:

Account #	Title	Rationale	Reduction
10-303	Fund Balance	Reduce surplus to 3%	$ 300,000
11-000-290-20-290-7	Employee Insurance	Reflect a reduction of 27 employees and stable insurance rate	372,000
11-000-230-20-331-1	Legal Fees	Reduce to prior year budgeted amount	12,000
11-000-230-20-339-1	Accountant Fees	Reduce to prior year budget amount	11,500
11-000-230-20-339-2	Engineer Services	Reduce to prior year budgeted amount	10,000
11-000-230-20-339-5	Architect Fees	Reduce to prior year budgeted amount	14,500
11-000-230-20-890-2	Bd. Members Expenses	Reduce to prior year budgeted amount	2,500
11-000-230-20-590-9	Election Expenses	Reduce to prior year budgeted amount	1,500
11-000-230-20-890-3	BOE Dues/ Travel/Mtg/ Conf.	Limit travel to in-state conventions	6,400
11-000-270-30-511-37	Payment in lieu of transportation	Budgeted for excessive number of students	30,000
11-000-290-20-100-2	Asst. Board Sec. Salary	Position eliminated by Board of Education	56,000
11-000-0315-218-33-104-8	Elementary Counselors' Salary	One counselor for each elementary school	60,000
11-120-100-3-101-76	Ridge 1-5 Substitutes	Reflect 5% increase over previous year	33,500
11-120-100-3-101-78	Green Grove 1-5 Substitutes	Reflect 5% increase over previous year	17,000
11-120-100-3-101-80	Summerfield 1-5 Substitutes	Reflect 5% increase over previous year	28,500
11-130-100-2-101-81	Middle School 6-8 Substitutes	Reflect 5% increase over previous year	41,000

Account #	Title	Rationale	Reduction
11-000-221-14-102-2	At-Risk Supervisor	Reduce to prior year budgeted amount and assign duties to existing supervisors	63,000
11-000-290-30-220	Social Security - Board Share	Reflect reduction of 27 employees	25,000
12-140-100-566-1	Special Ed. Summer	Allowing $70,000 increase for increased population over previous budget	110,450
12-140-100-100-1-730-15	High School Equipment	(No rationale given)	15,000
		TOTAL	$1,209,850

It should be noted that both parties incorrectly listed the Fund Balance account number as 11-303, whereas, it is 10-303. Also, the account numbers for other line items include district identification numbers as well as the standard budget account numbers.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford

Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989)). The Commissioner moreover, has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990).

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is specifically related to the provision of a thorough and efficient system of education and that the level of funding is the minimal level required to support each of those items. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994.

Mindful, then, of the standard of review to be applied, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Township.

10-303	Fund Balance	$300,000

The Township, in its resolution, stated that it intended to include a fund balance of 3%; however, it determined that the Board would have $550,000 in additional surplus available. The Commissioner accepts the Township's determination to reduce the fund balance to 3%. The proposed 1994-95 budget and the 1993-94 year-end audit for the district establishes that the projected total fund balance as of June 1994 was $2,841,759. The audit reveals that the

actual undesignated surplus was $1,130,399 or 3.02% of the General Fund Balance of $37,490,516. Consequently, in order to effectuate the stated intent of the Township to permit the Board to retain a surplus of 3%, the Commissioner orders the restoration of $300,000.

11-000-290-20-290-7 Employee Insurance $372,000

The Township states that this reduction is valid based on twenty-seven (27) fewer positions in the district for 1994-95 and a stable insurance rate. The Board submits a letter from its insurance carrier listing a 1994-95 plan year premium of $4,154,171 and recommending an additional budgeted amount of $346,181 for an ongoing liability for a one-month "premium lag" equal to one-twelfth. This "premium lag" results in an Alternate Funding Charge and permits premium payments to have a due date thirty days after the first of the month to which the premium applies. According to the agreement, the total premium due during the year July 1, 1993, through June 30, 1994, was to have equalled eleven-twelfths (11/12) of the total premium applicable to that year. According to the terms of the Premium Lag, supplement to the prospective rating agreement the Alternate Funding Charge is included. Based on the total of these figures presented by the carrier and the reduction of twenty-seven (27) staff positions, the Board asks for restoration of $311,739 and accepts the reduction of $60,261. A review of the budget presented in this matter, however, verifies that there is $4,151,493 in 1993-94 funds for employee insurance and that there should not be a one-month "premium lag" of $346,181. With sufficiently budgeted funds, moreover, there should not be any "premium lag" in 1994-95. It is determined, therefore, that a budgeted figure of $4,154,171 is required for the 1994-95

plan year premium, resulting in the Commissioner sustaining a reduction of $150,829 and ordering the restoration of $221,171.

11-000-230-20-331-1 Legal Fees $12,000

The Township reduced this line item to the prior year budgeted amount. The Board states that it spent $63,000 in legal fees in 1993-94 and the budget submitted does have an adjusted amount for 1993-94 legal fees of $63,000. The Board also states that they are currently involved as defendants in a civil rights action. Since boards are required to be represented by counsel in litigation, the Commissioner orders the restoration of $12,000.

11-000-230-20-339-1 Accountant Fees $11,500

The Township reduced this line item to the prior year's budgeted amount. The Board states that the accounting firm's fee for the 1993-94 school year audit is $17,500 and that it plans to use the auditor's services, billed at an hourly rate, for traditional assistance in preparing for litigation, preparing grant and loan applications and preparing required reports. Sufficient funds must be provided for the annual audit required by statute. The professional staff of the district, however, should have the skill to prepare grant and loan applications and required reports. There is also no evidence to support the need for technical assistance for litigation. The Commissioner, therefore, sustains the reduction of $11,000 and orders the restoration of $500.

11-000-230-339-3 Engineering Services $10,000

The Township again based this reduction on the prior year's budgeted amount. The Board states that the services of electrical

and mechanical engineers are required to correct lighting deficiencies identified during state monitoring. It also anticipates the need for environmental engineering services for asbestos abatement projects, air monitoring and water testing, and civil engineering services as part of land acquisition to increase and improve athletic, recreation and parking facilities at the Ridge Avenue School. The provision of a thorough and efficient education requires maintenance of buildings and property, compliance with laws on classroom lighting, asbestos abatement, air and water purity, and appropriate indoor and outdoor facilities for school programs; however, no information was provided to establish which costs are new as opposed to which costs carried over from the prior year. Nor was information provided on the items for which money was spent in the prior year. Consequently, the reduction of $10,000 is sustained.

11-000-230-20-339-5 Architect Fees $14,500

The Township reduced this line item to the prior year's budgeted amount. The Board states that the services of an architect will be required for roof replacement and repairs approved in a referendum and to be completed in the 1994-95 school year which was not a part of the prior year's budgeted amount. Based upon the above, the Commissioner orders the restoration of $14,500.

11-000-230-20-890-2 Board Members Expenses $2,500

The Township reduced this line item to the prior year's budgeted amount. The Board states that additional meetings with associated expenses will be required in 1994-95 because of ongoing negotiations. The Board does not specify the nature of the associated expenses. The Commissioner sustains the reduction of $2,500.

11-000-230-20-590-9 Election Expenses $1,500

The Township reduced this line item to the prior year's budgeted amount. The Board states that more than the budgeted amount was spent in 1993-94 because the regular election and a special bond referendum election were held. With only one election scheduled for 1994-95, the amount certified by the Township should be sufficient. The Board also states that it anticipates raising the hourly rate for election workers in 1994-95. The Board cannot independently raise the pay for election workers since the hourly rate is determined by the State. The Commissioner sustains the reduction of $1,500.

11-000-230-20-890-3 BOE Dues, Travel, Conferences $6,400

The Township based its reduction of this line item on the position that Board member travel would be limited to in-state conventions. The Board submits an invoice for dues to the New Jersey School Boards Association in the amount of $23,396 for 1994-95. The funds for those dues, however, are budgeted on a different line, 11-000-230-20-890-5, in the budget document submitted in this matter, and sufficient funds for the dues obligation are budgeted for 1994-95. The Commissioner determines that insufficient information was presented for the necessity of the out-of-state conventions for the provision of a thorough and efficient education and sustains the reduction of $6,400.

11-000-270-30-511-37 Payment In Lieu of Transportation $30,000

The Township reduced this line item based on its belief that the Board had budgeted for an excessive number of students. The Board submits a copy of the list of students applying for payments in lieu of transportation for 1994-95. The Board has seventy-six (76) applications and anticipates, based on past experience, that there will be a total of ninety (90) applications. The Board had proposed the same budgeted amount for 1994-95 as in 1993-94. The Township offers no explanation for its belief that the Board budgeted for an excessive number of students. Based on the data presented and the fact that transportation or aid in lieu of payments is required for students attending private schools, the Commissioner restores $30,000.

11-000-290-20-100-2 Asst. School Bd. Secretary $56,000

The Township based this reduction on its belief that this position had been eliminated by the Board. The Board states that, owing to personnel changes and illnesses, the position has not been filled since December 31, 1993, but is currently being advertised to be filled in the 1994-95 school year. It would appear that the district has managed its business operations without this position for half of the 1993-94 school year and part of the 1994-95 school year. It is not possible, therefore, to support the necessity for this position under the requirements of a thorough and efficient education. The Commissioner sustains the reduction of $56,000.

11-000-0315-218-104-8 Elementary Counselor's Salary $60,000

The Township's rationale for this reduction is "One counselor for each elementary school." This is confusing since the Board does have one counselor for each elementary school. The Board

states that it provided this staffing in 1992-93 in response to a recommendation of the External Review Team assigned by the Department of Education to evaluate the district. The Board submits the 1994-95 projected salaries for these five positions to be the proposed amount of $188,403. The provision of guidance services and counseling is an important element in a thorough and efficient education. The Commissioner orders the restoration of $60,000.

11-120-100-3-101-76	Ridge 1-5 Substitutes	$33,500
11-120-100-3-101-78	Green Grove 1-5 Substitutes	$17,500
11-120-100-3-101-80	Summerfield 1-5 Substitutes	$28,500
11-130-100-2-101-81	Middle School 6-8 Substitutes	$41,000

The Township states that the amounts it certified for substitutes at these four schools reflects a five percent (5%) increase over the previous year. The Board states that it expects to provide an increase in the daily rate from $50 to $75 to keep the district competitive, and that it had fifteen percent (15%) of the classes uncovered during 1993-94 owing to a shortage of substitute teachers. The Board also states that extended vacancies are filled by fully certified teachers at a proration of the appropriate level of the salary guide. The Board further anticipates the use of substitute coverage for staff development activities to be scheduled during the day in 1994-95.

A review of the budget document submitted in this matter shows that the Board had significantly overbudgeted these lines in 1993-94 and adjusted the numbers by a reduction of over forty-seven percent (47%). Documentation submitted by the Board also indicates that expenditures for 1993-94 for these substitute services will be

significantly less than the adjusted reduced figures. The five percent (5%) increase over the adjusted budgeted figures for 1993-94 as certified by the Township is apparently reasonable. The rate of uncovered classes is a concern but the Board has not verified that this is due to the daily pay rate and not to the general shortage of available substitutes. The Commissioner sustains the reductions of $33,500, $17,000, $28,500 and $41,000 -- total $120,000.

11-000-221-14-102-2 At-Risk Supervisor Salary $63,000

The Township reduced this line item to the prior year's budgeted amount, with duties assigned to the existing supervisor. The Board states that this is an existing position that was assigned an incorrect budget line account in 1993-94. The position is responsible for the district's remedial education, preschool, and ESL programs. Since this is an existing position responsible for the management of programs essential to a thorough and efficient education, the Commissioner orders the restoration of $63,000.

11-000-290-30-220 Social Security-Board Share $25,000

The Board accepts this reduction of $25,000. The Commissioner sustains the reduction.

11-000-100-10-566-1 Special Education Summer $110,450

The Board accepts this reduction of $110,450. The Commissioner sustains the reduction.

12-140-100-11-730-15 High School Equipment $15,000

The Township provided no rationale or details on this reduction, which was added and handwritten on the Township resolution on the reduction. The Board states that the funds are for the purchase of computers for the high school. The computers currently in the high school will be transferred to the elementary

schools. The Board states that this plan is in response to a recommendation by the External Review Team. It is unquestionably essential in this electronic age that schools provide training in the use of computers for a thorough and efficient education. The Commissioner orders the restoration of $15,000.

Thus, for the reasons set forth above, the Commissioner determines to restore $716,171 and sustain $493,679 of the reduction in the General Fund tax levy appealed herein, as summarized by the chart below:

Account #	Title	Reduction	Sustained	Restored
10-303	Fund Balance	$300,000		$300,000
11-000-290-20-290-7	Employee Insurance	372,000	$150,829	221,171
11-000-230-20-331-1	Legal Fees	12,000		12,000
11-000-230-339-1	Accountant Fees	11,500	11,000	500
11-000-230-339-3	Engineering Services	10,000	10,000	
11-000-230-339-5	Architect Fees	14,500		14,500
11-000-230-890-2	Board Member Expenses	2,500	2,500	
11-000-230-590-9	Election Expenses	1,500	1,500	
11-000-230-890-3	BOE Dues/Travel/ Conferences	6,400	6,400	
11-000-270-30-511-37	Payment In Lieu of Transportation	30,000		30,000
11-000-290-20-100-2	Asst. School Bd. Secretary	56,000	56,000	
11-000-0315-218-33-104-8	Elementary Counselor Salary	60,000		60,000
11-120-100-3-101-76	Ridge 1-5 Substitutes	33,500	33,500	
11-120-100-3-101-78	Green Grove 1-5 Substitutes	17,000	17,000	
11-120-100-3-101-80	Summerfield 1-5 Substitutes	28,500	28,500	
11-130-100-2-101-81	Middle School 6-8 Substitutes	41,000	41,000	
11-000-221-14-102-2	At-Risk Supervisors Salary	63,000		63,000
11-000-290-30-220	Social Security-Board Share	25,000	25,000	

Account #	Title	Reduction	Sustained	Restored
11-000-100-10-566-1	Special Ed. Summer	110,450	110,450	
12-140-100-11-730-15	High School Equipment	15,000		15,000
	Totals	$1,209,850	$493,679	$ 716,171

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $18,850,163 to be raised in tax levy for General Fund purposes by the Township of Neptune for the 1994-95 school year.

	General Fund
Tax Levy Certified by Township	$18,133,992
Restored by Commissioner	716,171
Total	$18,850,163

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 29, 1994

DATE OF MAILING DECEMBER 29, 1994

367-94

BOARD OF EDUCATION OF SALEM CITY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

COMMON COUNCIL OF THE CITY OF SALEM, SALEM COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $392,427 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions were necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to sustain $253,187 of the reductions and restore $139,240 for a total General Fund tax levy of $1,822,349.

JANUARY 3, 1995

BOARD OF EDUCATION OF SALEM CITY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
COMMON COUNCIL OF THE CITY OF SALEM, SALEM COUNTY, RESPONDENT.	:	DECISION

For Petitioner, John T. Barbour, Esq.

For Respondent, David J. Puma, Esq., (Waters, Sherman & Puma P.A.)

This matter was opened before the Commissioner on June 16, 1994, through the filing of a Petition of Appeal by the Board of Education of Salem City (Board) appealing the reduction in the current expense tax levy imposed by the Common Council of the Salem (Council) following voter rejection on April 19, 1994, of the Board's proposed General Fund tax levy for the 1994-95 school year, pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought partial restoration on the grounds of necessity for a thorough and efficient education. Subsequent to the defeat, the Board and Council, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), consulted on the defeated budget and the Council reduced the proposed General Fund tax levy of $2,197,405 by $514,296. The Council set the amount of the tax levy at $1,683,109. Consequently, the monies in contention in this matter are as set forth below.

Proposed Tax Levy Adopted by Board of Education		Amount of Tax Levy Certified by Governing Body	
General Fund	$2,197,405	General Fund	$1,683,109

Amount of Reduction by Governing Body	
General Fund	$514,296

Amount of Reduction in Dispute before Commissioner	
General Fund	$392,427

On June 27, 1994, the Council submitted its Answer to the Petition. Position Statements were filed by the Council on July 18, 1994, and by the Board on July 19, 1994. The Council filed a response to the Board's Position Statement on August 1, 1994. The Board's summation was filed on August 11, 1994, and the Council's Summation was received on August 22, 1994. On September 1, 1994, the Board submitted an objection to the Council's Summation and stated that the Summation should not be considered because it was not filed in a timely manner pursuant to N.J.A.C. 6:24-7.8. The Council replied to the objection with a letter received on September 9, 1994, which stated that the Board's Summation was not only filed late but also inappropriately raised issues for the first time. The letter stated that if the Board's Summation was to be considered, the Council's Summation should be considered. The Commissioner notes the accuracy of the citation in that letter, School Board of Deptford v. Township of Deptford, 116 N.J. 305, which held that any decision by the Commissioner of Education on a school budget proposal should not be based on procedural grounds alone, and thus all submitted documents are considered in this matter. The record of this matter was closed on September 9, 1994.

The specific reductions in the General Fund tax levy are as follows:

Account #	Title	Rationale	Reduction	Appealed By Board
General Current Expense Regular Program Instruction				
11-110-100-101	Preschool Kindergarten Salaries of Teachers	Reduce salary increase from 4.5% to 3%	$ 2,112	$ 2,112
11-120-100-101	Grades 1-5 Salaries of Teachers	Reduce salary increase from 4.5% to 3%	18,524	18,524
		and		
		Reduce summer salaries	3,000	3,000
11-130-100-101	Grades 6-8 Salaries of Teachers	Reduce salary increase from 4.5% to 3%	11,049	11,049
11-140-100-101	Grades 9-12 Salaries of Teachers	Reduce salary increase from 4.5% to 3%.	23,419	23,419
		and		
		Savings on retirement of Catherman	9,112	-0-
11-190-100-610	General Supplies	Unused 1993-94 app. at 4/30/94 $13,000	7,500	7,500
11-190-100-640	Textbooks	Unused 1993-94 app. at 4/30/94 $2,200	2,000	2,000
11-190-100-800	Other Objects	Unused 1993-94 app. at 4/30/94 $13,000, also 1994-95 budget included an unexplained $12,000 under the heading of a Miscellaneous Miscellaneous	12,000	12,000

Account #	Title	Rationale	Reduction	Appealed By Board
Special Education Instruction				
11-201-100-101	Mentally Retarded Salary of Teacher	Reduce salary increase from 5% to 3%	$ 785	$ 785
11-205-100-101	Perceptually Impaired Salaries of Teachers	Reduce salary increase from 5% to 3%	5,450	5,450
11-205-100-160	Other Salaries for Instruction	Reduce salary increase from 5% to 3%	937	937
11-213-100-101	Resource Room Salary of Teachers	Reduce salary increase from 5% to 3%	5,410	5,410
		and		
		Savings on retirement of Graner	21,677	1,000
11-218-100-101	Speech Instruction Salary of Teachers	Reduce salary increase from 5% to 3%	720	720
11-219-100-320	Home Instruction Purchase of Prof. Services	Unused 1993-94 app. at 4/30/94 $7,000	2,000	2,000
Basic Skills/Remedial Instruction				
11-230-100-101	Basic Skills Salaries of Teachers	Reduce salary increase from 5% to 3%	5,938	5,938
11-230-100-610	General Supplies	Unused 1993-94 app. at 4/30/94 $4,800	4,372	4,372
11-230-100-640	Textbooks	Unused 1993-94 app. at 4/30/94 $4,800	2,000	2,000
11-230-100-800	Other Objects	Unused 1993-94 app. at 4/30/94 $1,600	1,000	1,000

Account #	Title	Rationale	Reduction	Appealed By Board
Athletics				
11-402-100-100	Athletic Instruction Salaries	Stipend for Athletic Dir. appears to be in addition to his salary as Director	$ 3,608	$ 3,608
11-402-100-500	Purchased Services	Unused 1993-94 app. at 4/30/94 $12,000 and requesting $10,000 more in 1994-95 would appear to be excessive	12,000	7,000
11-402-100-600	Supplies & Materials	Unused 1993-94 app. at 4/30/94 $1,700 and requesting $10,000 more in 1994-95 would appear to be excessive	4,000	4,000
Health Services				
11-000-213-100	Health Services Salaries	Reduce salary increase from 5% to 3%	1,357	1,357
		and		
		Savings on retirement of Dague	25,912	5,912
11-000-213-300	Purchased Prof. Services	Unused 1993-94 app. at 4/30/94 $20,175	1,000	-0-
Other Support Services - Regular				
11-000-218-104	Salaries Other Prof. Services	Reduce salary increase from 5% to 3%	4,452	4,452

Account #	Title	Rationale	Reduction	Appealed By Board
Other Support Services - Special				
11-000-219-104	Salaries Other Prof. Staff	Reduce salary increase from 5% to 3%	2,219	2,219
11-000-219-390	Other Purchased Prof. Services	Explanation provided does not support $11,000 increase	5,000	3,000
11-000-219-600	Supplies & Materials	No explanation of what "Special Office Management" is.	2,000	2,000
11-000-219-800	Other Objects	Unused 1993-94 app. at 4/30/94 $7,600 - also no explanation for "Special Project $6,500"	6,500	-0-
Improvement of Instruction Services				
*11-000-221-104	Salaries Other Prof. Staff	Reduce salary increase from 5% to 3%	3,873	3,873
		and		
		Elimination of Carlson's position	57,000	57,000
11-000-221-600	Supplies & Materials	$5,000 for software appears excessive	3,000	1,500
Educational Media Services				
11-000-222-800	Other Objects	Explanation provided does not support an increase of $5,364	2,500	2,500

* Both parties in this matter used an incorrect account number for this item relating to Improvement of Instruction Services. The documents cite 11-000-219-104 as the account number but it should, as per the description and detail in the documents, 11-000-221-104.

Account #	Title	Rationale	Reduction	Appealed By Board
General Administration				
11-000-230-100	Salaries - General Administration	Reduce salary increase from 5% to 3%	4,727	4,727
11-000-230-331	Legal Services	Appears that legal cost for 1993-94 will approximate only $33,000	5,000	5,000
11-000-230-339	Other Purchased	Explanation given does not support increase of $7,300 over 1993-94	6,500	6,500
11-000-230-590	Other Purchased Services	Board Members training	3,000	5,200
		Board Members travel	2,200	
11-000-230-890	Miscellaneous	Expenses incurred in 1993-94 are not repetitive	6,800	6,800
School Administration				
11-000-240-103	Salaries Principal & Assistant	Reduce salary increase from 5% to 0%	18,452	18,452
11-000-240-600	Supplies & Material	Increase budget over 1993-94 is $37,000 which is excessive	10,500	10,500
11-000-240-800	Other Objects	Little supporting data was submitted - Fenwick School appears excessive	2,000	-0-

Account #	Title	Rationale	Reduction	Appealed By Board
Plant Operation and Maintenance				
11-000-260-800	Other Objects	App. for a misc. - misc. of $17,596 indicates that a reduction appears warranted.	9,000	9,000
Business Services				
11-000-290-100	Salaries	Reduce salary increase from 5% to 0%	2,922	2,922
		and		
		Eliminate Secretary Bell position	14,773	14,773
11-000-290-220	Social Security	Excessive budgeting acknowledged and willingness to reduce by $50,000 but need $32,000 for transfer which is improper	82,000	32,000
		and		
		Soc. Sec. applicable to secretary Bell	1,016	1,016
11-000-290-290	Other Employee Benefits	Cost savings on retired and RIF employee	7,900	7,900
11-000-290-831	Interest on Current Loans	Purchase of computers was through lease-purchase and that cost is charged elsewhere	10,000	10,000

Account #	Title	Rationale	Reduction	Appealed By Board
Food Services				
11-000-310-930	Transfer to Cover Deficit	This $63,347 is to pay for cafeteria employees medical expense - this should be paid by the Food Service which has adequate cash, not with taxes	50,000	50,000
Capital Outlay				
12-000-220-730	Capital Outlay	Computers replaced with the 160 purchased in 1993-94 could be used elsewhere	4,080	-0-
		TOTALS	$514,296	$392,427

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. Board of Education of the Borough of Edgewater v. In the Matter of the Cap Waiver Appeal of the Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994.

Mindful then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Council.

Account		Reduction
11-110-100-101	Preschool Kindergarten Salaries of Teachers	$ 2,112
11-120-100-101	Grades 1-5 Salaries of Teachers	18,524
11-130-100-101	Grades 6-8 Salaries of Teachers	11,049
11-140-100-101	Grades 9-12 Salaries of Teachers	23,419
11-201-100-101	Mentally Retarded - Salaries of Teachers	785
11-205-100-101	Perceptually Impaired - Salaries of Teachers	5,450
11-205-100-106	Other Salaries for Instruction - Special Education	937
11-213-100-101	Resource Room - Salaries of Teachers	5,410
11-218-100-101	Speech Instruction - Salaries of Teachers	720
11-230-100-101	Basic Skills - Salaries of Teachers	5,938
11-000-213-100	Health Services Salaries	1,357
11-000-218-104	Other Support Services - Salaries Special	4,452
11-000-219-104	Other Support Services - Salaries Special	2,219
11-000-221-104	Salaries - Other Prof. Staff - Improvement of Instructional Staff	3,873
	TOTAL	$86,245

The reduction in each of these accounts was certified by the Council on the basis of a reduction of salary increase to 3% from, in some accounts 4 1/2%, and in other accounts 5%. The Board agrees that the recently ratified contract for 1994-95 with the Salem Teachers Association provides for a 3% salary increase. The Board states that the 1.5% to 2% differential is required to offset a shortage in the insurance account caused by the negotiated agreement to provide more expensive health benefits than that included in the Board's proposed budget. The Council argues that the underfunding in the insurance account is because the Board changed health insurance carriers and accepted a plan that was less expensive but provided substantially less than the previous health insurance plan, and that this action was taken without consultation with or agreement by the Salem Teachers' Association. The Council also states that the current underappropriation in the insurance premium account should not be covered by the excess funds in the salary accounts.

Although Boards of Education may, and, in fact, often have to transfer funds between line accounts during the school year, the Commissioner cannot restore funds to lines for which those funds are not required just so the monies will be available for other lines which appear to be underbudgeted. The Commissioner, therefore, sustains the reductions noted above totalling $86,245.

Account		Reduction
11-120-100-101	Grades 1-5 Summer Salaries	$3,000

The Council cited a reduction of $3,000 from $4,750 to $1,750, for this item but did not present a reason for the reduction in its resolution. The Board stated that these funds are necessary to update curriculum alignment as well as summer work and specified

the need for the entire $4,750 as follows - Reading $1,250, Math/Science $2,500, and Curriculum Alignment $1,000. The Council's Response then noted that they believe that the curriculum alignment work should be done within the salary budgeted for the district curriculum coordinator. Curriculum development is a critical element in the provision of a thorough and efficient education. Council has not provided any satisfactory reason or support for the reduction in this account, and the Board has identified specific needs for the funds. The Commissioner orders the restoration of the $3,000 reduction.

Account		Reduction
11-190-100-610	General Supplies - Regular Education	$7,500

The Council based its reduction on the fact that $13,000 of the 1993-94 appropriation were unused as of April 30, 1994. The Board states that 98% of the funds were spent as of June 27, 1994, and that a balance as of April 30, 1994, is not a valid reason for a reduction of funds. The Board adds that, "Sound fiscal management warrants expenditures over the course of the budget year." The Council disagreed with that position but changed the reduction from $7,500 to $2,500 because it found that the April 30, 1994, balance was $3,900, not $13,000. The Board does not provide any specific reasons for the necessity for these funds, but notes only the general need for "sufficient funds." Based on this absence of specific reasons and also on the fact that the smaller reduction granted by Council provides an increase in this account of more than 5% over the 1993-94 budgeted amount, the Commissioner restores the $5,000 as amended by Council and sustains the reduction of $2,500.

Account		Reduction
11-190-100-640	Textbooks - Regular Education	$ 2,000

The Council again bases its reduction on the unused 1993-94 appropriation of $2,200 as of April 30, 1994. The Board again states that the fact that 98% of the funds were expended as of June 27, 1994, is not a valid reason for reduction in funds. A sufficient number of appropriate textbooks is unquestionably essential to the provision of a thorough and efficient education. Also critical to this item is the fact that the Board budgeted $817 less in 1994-95 than in 1993-94 for this item. Based on these facts, the Commissioner orders the restoration of the $2,000 reduction.

11-190-100-800	Other Objects - Regular Education	$12,000

The Council again cites unused 1993-94 appropriations of $13,000 as of April 30, 1994, as the basis for its reduction. The Board again states that 98% of the funds were expended as of June 27, 1994, and that a balance as of April 30, 1994, is not a valid reason for reduction in funds. It must be noted that the Board also budgeted less in 1994-95 than in 1993-94 for this item, but the lack of any specificity by the Board for the need for these funds is particularly relevant in an account as general as "Other Objects." The Board has not justified the need for these funds, and the Commissioner sustains the reduction of $12,000.

11-213-100-101	Resource Room Salaries of Teachers	$ 1,000

The Council determined that this reduction is possible because of the retirement of a teacher named Graner. The Board accepted a reduction of $20,677, which it states was originally

proposed by Council. They do not, however, specify any needs for the balance of $1,000. In the absence of this detail, the Commissioner sustains the reduction of $1,000.

Account		Reduction
11-219-100-320	Home Instruction - Purchased Prof. Ser.	$ 2,000

The Council bases its reduction on the unused 1993-94 appropriations of $7,000 as of April 30, 1994. The Board states that the proposed budget is a conservative estimate of the monies needed to provide mandated services. The Board adds that the amount needed is less in some years, but can double or triple in others. The Board cites two specific examples of cases in 1993-94 that caused a significant increase in the expenditures for this line item. There is no question that this is an area where there must be estimates of costs more than a year in advance of some actual expenditures. The services provided in this area are also essential for a thorough and efficient education. The Board's proposed budget for 1994-95 is the same amount as budgeted in 1993-94. The Commissioner orders the restoration of the $2,000 reduction.

11-230-100-610	General Supplies - Basic Skills	$ 4,372

The Council bases its reduction on the unused 1993-94 appropriations of $4,800 as of April 30, 1994. The Board again states that the reason is not valid. Council, in its response, states that the unused appropriations were $3,200, not $4,800, and therefore changes the reduction to $2,922. Although general supplies are obviously essential to a thorough and efficient education, the Board has not justified the need for these funds. Also the amount certified by the Council for this line item provides

a significant increase over the amount budgeted in 1993-94. The Commissioner restores the $1,450 as offered by Council and sustains the reduction of $2,922.

Account		Reduction
11-230-100-640	Textbooks - Basic Skills	$2,000

The Council again bases its reduction on the unused 1993-94 appropriations of $4,400 as of April 30, 1994. The Board again offers only the general statement that the reason is not valid and that the amounts proposed by the Board are legitimate needs to run a sound Basic Skills program. The Board also did not dispute the amount of unused 1993-94 appropriations as they did regarding textbooks for Regular Educational Programs. Based on these facts, the Commissioner determines that there is no documented need for these funds and sustains the reduction of $2,000.

11-230-100-800	Other Objects - Basic Skills	$1,000

The Council bases its reduction on the unused 1993-94 appropriations of $1,600 as of April 30, 1994. The Board again states that the reason is not valid and that the funds are legitimately needed for the Basic Skills program. As noted above, there is no specific documentation from the Board to verify the need for these funds. The Commissioner sustains the reduction of $1,000.

11-402-100-100	Athletic Instruction Salaries	$3,608

The Council states that the stipend for athletic director appears to be in addition to his salary as Director. The Board states that only 50% of the salary is for the duties of athletic director and the other 50% for duties as Supervisor of High School Instruction. The Board adds that the stipend covers after school, evenings, and weekend events in fulfillment of athletic director

duties. Although these services may be extremely beneficial to a school's athletic program the record does not establish that they are a contractual obligation or essential to the provision of a thorough and efficient education. The Commissioner sustains the reduction of $3,608.

Account		Reduction
11-402-100-500	Purchased Services - Athletics	$7,000

The Council based its reduction of $12,000 on the unused 1993-94 appropriations of $12,000 as of April 30, 1994, and states that the increase of $10,000 in the 1994-95 appropriations would appear to be excessive. The Board accepted a $5,000 reduction but stated the additional funds are needed for the services of an athletic trainer whose hours have been increased for the 1994-95 school year. Again, it must be noted that the skills of an athletic trainer can be beneficial to a district's athletic program but are not essential to a thorough and efficient education. The Commissioner sustains the reduction of $7,000.

11-402-100-600	Supplies & Materials - Athletics	$4,000

The Council again based its reduction on the unused 1993-94 appropriations of $1,700 as of April 30, 1994, and states that the increase of $10,000 in the 1994-95 appropriations would appear to be excessive. The Board states that the additional funds are needed as indicated by the 1993-94 expenditures and that athletics is "one of the main motivators of keeping students in school and out of trouble." Certainly programs that positively serve students are worthwhile, even if not specifically identified as a necessity to a thorough and efficient education. In this case, however, the funds certified by the Council still provide an increase of greater than

35% over the 1993-94 appropriations. The Commissioner sustains the reduction of $4,000.

Account		Reduction
11-000-213-100	Health Services - Salaries	$ 5,912

The Council bases its reduction on the savings $25,912 due to the retirement of a staff member (Dague). The Board accepts $20,000 of this reduction, but never disputes the balance of the savings or presents any information on the necessity of these funds. Based on the information presented, the Commissioner sustains the reduction of $5,912.

11-000-219-390	Other Purchased Prof. Services - Spe. Ed.	$ 3,000

The Council states that the explanation provided by the Board does not support an $11,000 increase in this account and therefore reduces it by $5,000. The Board accepts $2,000 of the reduction but states the additional funds may be necessary for specialized services dependent on the student clientele in any particular year. The Board never responds to the issue of an $11,000 increase in this account. While it is true that these services must be provided when necessary, the Board does not indicate any potential increase in enrollment or provide any specific reason for the significant increase. Based on these facts, the Commissioner sustains the reduction of $3,000.

11-000-219-600	Supplies & Materials - Special Education	$ 2,000

The Council states that this reduction is based on the lack of explanation by the Board as to what "Special Office Management" is. The Board states that these funds are needed for postage, envelopes, paper supplies, etc., to complete the high volume of paperwork and parent notification mandated by the State. Although

supplies and materials are obviously essential in the operation of any office, in this case the office for special education, the Board does not provide any justification for the need for increased funds in this account. The amount certified by Council does provide an increase over the 1993-94 appropriations of an amount greater than 35%. The Commissioner sustains the reduction of $2,000.

Account		Reduction
11-000-221-104	Salaries - Imp. of Inst. Services	$57,000

The Council determined that this reduction is possible with the elimination of the position of Director of Curriculum and Instruction (Carlson position). The Board states that this position is critical to the continued essential improvement of the district's educational program. The Board explains that this position was instituted in the district in April 1993, after the district was placed by State monitors in Level II because of curriculum deficiencies. The Board states that there are not certified subject area supervisors in the district other than one half-time high school position which deals mainly with math and science. The Council states in its Response that the problems noted by the Board have been addressed by the Director of Curriculum and can now be delegated to grade chairperson. The professional development and implementation of curriculum, including continuing review and modification, is an absolute essential of a thorough and efficient education. Since this is an area that has been identified as deficient in this district, the Council's action does seem arbitrary. The Commissioner orders the restoration of the $57,000 reduction.

Account		Reduction
11-000-221-100	Supplies & Materials	$ 1,500

The Council based a reduction of $3,000 in this account on its determination that $5,000 for software appears excessive. The Board accepts a reduction of $1,500 but states the additional funds are necessary to fully activate basic skills and Chapter I technology purchases. Since the amount certified by the Council still provides a significant increase of approximately 50% over the amount budgeted in 1993-94, it would appear that the Board should have sufficient funds for any necessary purchases. The Commissioner sustains the reduction of $1,500.

11-000-222-800	Other Objects - Ed. Media Services	$ 2,500

The Council bases the reduction on the position that the Board explanation does not support an increase in this account of $5,364. The Board states that the funds are needed for media services and the funding in the line item is a realignment from other line items according to GAAP (Generally Accepted Accounting Principles). The Board's very generalized statement does not provide any specific justification for these funds. It must also be noted that the GAAP system of accounting was initiated in school districts in 1993-94 and thus realignments should have been completed during that school year. The Commissioner sustains the reduction of $2,500.

11-000-230-100	Salaries - General Admin.	$ 4,727

There seemed to be confusion about this item in the initial documents submitted by both parties. The Council based its reduction, as it had for other salary items already reviewed, on the basis of lowering the salary increase to 3%, instead of, as in this

account, 5%. The Board, in its Position Statement, included this item with the other salary items covered by negotiations with the Salem Teachers Association. The Board, however, in that same Position Statement, notes in a separate entry that the amount budgeted is for contracted 1994-95 salary increase. The Council, in its Response to the Board's Position Statement, notes that this account relates to the salary of the school superintendent and not to teacher salaries as they had originally thought. Since contractual obligations must be met, the Commissioner orders the restoration of the $4,727 reduction.

Account		Reduction
11-000-230-331	Legal Services	$ 5,000

The Council bases its reduction on the belief that the legal costs in 1993-94 will approximate only $33,000 and that the $41,800 budgeted in 1994-95 is excessive. The Board states that past experience indicates that legal expenses can very easily be accumulated and that there is a need to have sufficient funding in this line item. The Board, however, does not refer to any specific legal issues pending or anticipated for 1994-95. Also, the amount certified by Council provides an increase of greater than 50% over the 1993-94 appropriations. The Commissioner sustains the reduction of $5,000.

11-000-230-339	Other Purchases Prof. Services	$ 6,500

The Council bases its reduction on the belief that the Board's explanation does not support an increase of $7,300 over 1993-94 for this account. The Board states that the district's physical needs necessitate funds for a variety of jobs, and lists some possible projects. The Council in its response states that the

projects should be included in the capital budget and not in the line item in question. This position is really irrelevant since the major issue in question is the General Fund tax levy which includes capital projects. The Board adds in its summation that the funds budgeted in this line item are for "contracted salaries," not "contractors." The Board does not, however, justify the additional funds. The legal obligations cited by the Board are not new for 1994-95, and the funds certified by Council provide an increase of more than 45% over the amount budgeted in 1993-94. The Commissioner sustains the reduction of $6,500.

Account		Reduction
11-000-230-590	Other Purchased Services	$ 5,200

The Council reduces the amount budgeted for Board members training by $3,000 and for Board members travel by $2,200. The board states that increased State requirements for Board members and their personal desire to improve their knowledge necessitate full funding of this line item. Appropriate training of Board members and the necessary travel to complete that training are essential for the skillful performance of Board members. The Board, however, has not identified any unique programs necessary for 1994-95, and the amount certified by the Council for this account provides an increase of more than 10% over the 1993-94 appropriations. The Commissioner sustains the reduction of $5,200.

11-000-230-890	Miscellaneous	$ 6,800

The Council states that the reduction is based on the fact that expenses incurred in 1993-94 are not repetitive. The Board states that this account includes election positions, dues and fees, and general administrative and staff membership in professional

organizations and adds that many of these obligations are either mandated by law or contractual by nature. The Board, in its Summation, states that this item includes election expenses as well as "a variety of staff support items and other miscellaneous items." Although legal obligations certainly must be met by a Board, the generalized response in a "Miscellaneous" category does not support the necessity of all the funds for a thorough and efficient education. The Commissioner, therefore, sustains the reduction of $6,800.

Account	Reduction
11-000-240-103 Salaries - Principal and Assistant	$18,452

The Council bases its reduction in this account on a reduction of salary increase from 5% to 0%. The Board states that it is currently in negotiations with the administrator group and needs to have the flexibility to negotiate in good faith. The Council in its Response states that the salary increase could be reduced from 5% to 3% as per the teacher's contract, but does not change the amount of the reduction. Since a 0% increase is unquestionably unrealistic, and since the Board must be able to negotiate in good faith, the Commissioner orders the restoration of the $18,452 reduction.

11-000-240-600	Supplies and Materials - School Adm.	$10,500

The Council reduces this account because it states an increase of $37,000 over the 1993-94 appropriation is excessive. The Board states that this increase is due to a realignment of expenses in compliance with GAAP. The Board provides no specific detail on any necessary expenditures, and, again, it must be noted that compliance with GAAP should have been implemented in 1993-94. The Commissioner sustains the reduction of $10,500.

Account		Reduction
11-000-260-800	Other Objects - Plant Operation/Maint.	$ 9,000

The Council bases the reduction on what they describe as an appropriation for a miscellaneous-miscellaneous of $17,596, which a states indicates a reduction appears warranted. The Board states that the defeated bond referendum for building work necessitates increased budgeting for plant operation and maintenance. The Board adds that the employment of more qualified personnel allows more "in-house" maintenance which necessitates an increase in purchase of materials. The Board in its Position Statement claims that this increase in "in-house" maintenance lowers the amount needed for contracted services. In its Summation, however, the Board acknowledges that the overall contracted services line items did not decrease owing to added costs for major item maintenance. The appropriate maintenance of facilities is indisputably essential to the provision of a thorough and efficient education. The Council states that the reduction they propose still allows an increase in the line item of over $7,000. This is not supported by the budget document submitted, which shows $37,835 budgeted for this item for 1993-94, $46,156 proposed by the Board, and reduced to $37,196 with the Council cut. This would obviously provide less funds in 1994-95 than in 1993-94. Based on these facts, the Commissioner orders the restoration of the $9,000 reduction.

11-000-290-100	Salaries - Business Services	$ 2,922

As with the reduction for salaries for the principal and assistant, the Council reduced the salary increase in this area from 5% to 0%. The Board, also as in the prior issue, states that there must be sufficient funds for the current negotiations to be

conducted in good faith. As noted above, a 0% increase is unrealistic and sufficient funds must be provided for negotiations. The Commissioner orders the restoration of the $2,922 reduction.

Account		Reduction
11-000-290-100	Salaries - Business Services	$14,773

The Council also reduces this line item by eliminating a secretarial position (Bell position). The Council in its resolution and Position Statement offered no reason for the elimination of this position. The Board states that this is a crucial support position in the school business administrator's office and has been instrumental in effecting a smooth flow and accuracy in the business office operations. In the absence of any stated reason for the elimination of this position, the action must be deemed to be arbitrary. Support staff are essential to the efficient operation of a school district. The Commissioner orders the restoration of the $14,773 reduction.

11-000-290-220	Social Security	$33,016

The Council reduced this account by $82,000 because of its belief that there was excess budgeting and by $1,016 as the amount attributable to the secretarial position reviewed above. The Board accepts a reduction of $50,000 and states the balance is needed for additional employee benefit premiums. As stated earlier in this document, the Commissioner cannot restore funds to lines for which those funds are not required. The Commissioner, therefore, sustains the reduction of $32,000. Based on the decision above to retain the secretarial position, the Commissioner orders the restoration of the $1,016 reduction.

Account		Reduction
11-000-290-290	Other Employee Benefits	$ 7,900

The Council bases this reduction on cost savings because of retired and RIFFED employees. The Board states that no employees have been RIFFED and that cost savings of retired employee benefits have already been calculated. Based on the information presented and the fact that this account is less in 1994-95 than in 1993-94 by over $500,000, the Commissioner orders the restoration of the $7,900 reduction.

11-000-290-831	Interest on Current Loans	$10,000

The Council bases its reduction in this account on its belief that the purchase of computers was through lease-purchase and charged elsewhere. The Board states that this account includes the interest on the lease-purchase and that the principal is budgeted elsewhere. It must be noted that interest on lease-purchase should be recorded in account 11-000-290-832 and not 11-000-290-831. It must also be noted that the interest on lease purchases of equipment items should be budgeted as a rental cost in the applicable program area. Only the interest on the lease purchase of land and buildings should be recorded in 11-000-290-832. The Board in its Summation states that the appropriation on this line is for the NCR Tower computer purchased 4 1/2 years ago, not for the 160 computers purchased for the Basic Skills Program. The Board adds that this line item also includes the interest on a previously contracted district lighting project. The Council in its Summation acknowledges receiving information from the Board on the necessity for this appropriation. Based on the information presented, the Commissioner orders the restoration of the $10,000 reduction.

Account		Reduction
11-000-310-930	Transfer to Cover Deficit - Food Services	$50,000

The Council states that the $63,347 budgeted on this line is to pay for cafeteria employees' medical expense but that this should be paid by Food Services which has sufficient funds. The Council reduced the appropriation by $50,000. The Board states that the food services program is not self-sustaining and requires subsidizing. The Council in its Position Statement notes that the school audit indicated a surplus for food services as of June 30, 1993, of $166,755 and that there appeared to be no substantial change through June 30, 1994. The Board in its Summation does not dispute the Council's claims regarding the surplus, but states that GAAP provides for a contribution by the Board for the food services operation and that a deficit in food services is not required for this contribution. This is a very difficult issue to address because sufficient funds must be provided and the information presented is somewhat contradictory. Two facts, however, are critical for the decision. The Board did not dispute the Council's claim of a surplus. Also, the Board's interpretation of the GAAP criteria tends to ignore a logical interpretation that there should be a need, a deficit, for the Board to make a contribution. The title/description of the line item is "Transfers to Cover Deficit." Based on the facts as presented, the Commissioner sustains the reduction of $50,000.

Thus, for the reasons set forth above, the Commissioner determines to restore $139,240 and sustain $253,187 of the reduction in the General Fund tax levy appealed herein, as summarized by the chart below:

Account #	Title	Appealed Reduction	Sustained	Restored
11-110-100-101	Pre-School K Salaries	$ 2,112	$ 2,112	
11-120-100-101	Gr. 1-5 Salaries	18,524	18,524	
11-120-100-101	Summer Salaries	3,000		$ 3,000
11-130-100-101	Gr. 6-8 Salaries	11,049	11,049	
11-140-100-101	Gr. 9-12 Salaries	23,419	23,419	
11-190-100-610	General Supplies	7,500	2,500	5,000
11-190-100-640	Textbooks	2,000		2,000
11-190-100-800	Other Objects	12,000	12,000	
11-201-100-101	Mentally Ret.-Salaries	785	785	
11-205-100-101	Perc. Imp.-Salaries	5,450	5,450	
11-205-100-106	Other Salaries/or Inst.	937	937	
11-213-100-101	Resource Room-Salaries	5,410	5,410	
11-213-100-101	Retirement of Graner	1,000	1,000	
11-218-100-101	Speech Inst.-Salaries	720	720	
11-219-100-320	Home Inst.-Purch. of Prof Serv.	2,000		2,000
11-230-100-101	Basic Skills-Salaries	5,938	5,938	
11-230-100-610	General Supplies	4,372	2,922	1,450
11-230-100-640	Textbooks	2,000	2,000	
11-230-100-800	Other Objects	1,000	1,000	
11-402-100-100	Athletic Inst.-Salaries	3,608	3,608	
11-402-100-500	Purchased Services	7,000	7,000	
11-402-100-600	Supplies & Materials	4,000	4,000	
11-000-213-100	Health Services-Salaries	1,357	1,357	
11-000-213-100	Retirement of Dague	5,912	5,912	
11-000-218-104	Salaries-Other Prof. Reg.	4,452	4,452	
11-000-219-104	Salaries-Other Prof. Spec.	2,219	2,219	
11-000-219-390	Other Purch. Prof. Serv.	3,000	3,000	
11-000-219-600	Supplies & Materials	2,000	2,000	
11-000-221-104	Salaries-Other Prof. Staff	3,873	3,873	
11-000-221-104	Elim. of Carlson position	57,000		57,000
11-000-221-600	Supplies & Materials	1,500	1,500	
11-000-222-800	Other Objects	2,500	2,500	
11-000-230-100	Salaries-Gen. Admin.	4,727		4,727
11-000-230-331	Legal Services	5,000	5,000	
11-000-230-339	Other Purc. Prof. Serv.	6,500	6,500	
11-000-230-590	Other Purc. Services	5,200	5,200	
11-000-230-890	Miscellaneous	6,800	6,800	
11-000-240-103	Salaries-Prin. & Asst.	18,452		18,452
11-000-240-600	Supplies & Material	10,500	10,500	
11-000-260-800	Other Objects	9,000		9,000
11-000-290-100	Salaries-Bus. Servs.	2,922		2,922
11-000-290-100	Eliminate Bell position	14,773		14,773
11-000-290-220	Social Security	32,000	32,000	
11-000-290-220	Social Security-Bell	1,016		1,016
11-000-290-290	Other Employee Benefits	7,900		7,900
11-000-290-831	Interest on Current Loans	10,000		10,000
11-000-310-930	Transfer to Cover Deficit	50,000	50,000	
	Totals	$392,427	$253,187	$139,240

After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus. In this review for the purpose of determining potential revenue to be appropriated in lieu of increasing the tax levy, the Commissioner concluded that the undesignated surplus did not materially exceed the budgeted amount.

Accordingly, the Salem County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $1,822,349 to be raised in tax levy for General Fund purposes by the City of Salem for the 1994-95 school year.

	General Fund
Tax Levy Certified by Council	$1,683,109
Restored by Commissioner	139,240
Total	$1,822,349

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 3, 1995

DATE OF MAILING - JANUARY 3, 1995

368-94

368-94

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON,

PETITIONER,

V.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $1,100,000 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $410,845; however, this amount was ordered to be appropriated from surplus.

JANUARY 3, 1995

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON,

PETITIONER,

V.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

John E. Collins, Esq., (Carroll & Weiss) for Petitioner

Brian E. Rumpf, Esq., (Hiering, Hoffman & Gannon, Esqs.) for Respondent

This matter was opened before the Commissioner on June 9, 1994 through the filing of a Petition of Appeal of a defeated budget by the Jackson Township Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration, on the grounds of necessity for a thorough and efficient education, of reduction by the Jackson Township Committee (Township) following voter rejection on April 19, 1994, of the Board's proposed General Fund tax levy for the 1994-95 school year. Subsequent to the defeat, the Board and Township, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2, consulted on the defeated budget and the Township reduced the General Fund tax levy, Current Expense portion, by $1,100,000. Consequently, the monies in contention in this matter are as set forth below:

Proposed Tax Levy Adopted by Board of Education	Amount of Tax Levy Certified by Governing Body
$25,[illegible]00,000	$23,952,152

Amount of Reduction in Dispute
by the Commissioner

$1,100,000

On June 30, 1994, the Township submitted its Answer to the Petition, with additional materials relevant to the Answer received on July 26, 1994, though dated July 20, 1994. Position Statements were filed by the Board on July 21, 1994, and by the Township on August 11, 1994. An objection to the Township Position Statement was filed by the Board on August 17, 1994. The Board states that the Township Position Statement was filed so late that it is "in reality a response to the Board of Education's Statement of Position.***" On this basis, the Board states it has no Township Position Statement to which it can respond and requests that the Township's Position Statement not be considered in this matter. A letter was sent on August 19, 1994, to the Board by the Director of the Bureau of Controversies and Disputes acknowledging receipt of the Board letter. By copy of the Director's letter, the Township was asked to respond to the Board's arguments within ten (10) days. The Township's response to this letter was received on August 31, 1994. The Township states that since the filing of the Answer was not completed until July 20, 1994, the Position Statement, due twenty (20) days later, was not due until August 10, 1994 and that it was advised that mailing on that date would be acceptable. The Township also states that its Position Statement is not a response

to the Board's Position Statement but is Township's detailed position by individual line item. The Towns contends that it would be an injustice to the taxpayers for th itions of both parties not to be fully evaluated in this matter reviewing the within appeal based upon the record and circum r known to or considered by the governing body at the time it a duce the budget which is the subject of this appeal, the Com n December 13, 1994, notified the parties that he intend official notice of the Board's 1993-94 year-end aud Commissioner reviewed the audit for the purpose of iden whether the Board underestimated in its 1994-95 budget the amou anticipated undesignated surplus.

The specific reductions in the General Fund tax levy are as follows:

Account #	Title	Reduction
11-000-213-300	Purchased Prof. & Tech. Services	$ 50,000

Reason: 1994-95 budget amount was based on 1993-94 budget amount plus inflation adjustment; however, expenses in 1993-94 were less than budgeted and a portion was transfered to other areas.

11-000-240-XXX	School Administration	$ 25,000

Reason: 1994-95 budget amount was based on 1993-94 budget amount plus inflation adjustment; however, expenses in 1993-94 were less than budgeted and a portion was transfered to other areas as of March 31, 1994.

11-000-260-420	Cleaning, Repairs & Maintenance	$ 50,000

Reason: 1994-95 budget amount was based on 1993-94 budget amount plus inflation adjustment; however, expenses in 1993-94 were

less than budgeted and a portion was transfered to other areas as of March 31, 1994.

11-000-270-420 Cleaning, Repairs & Maint. - Trans. $ 25,000

Reason: 1994-95 budget amount was based on 1993-94 budget amount plus inflation adjustment; however, it was not expected that the full balance would be utilized through June 30, 1994.

Account #	Title	Reduction
11-000-290-241	Other Retirement Contribution	$250,000

Note - The account was listed as 11-000-290-240, but should be 241.

Reason: 1994-95 budget amount was based on 1993-94 budget amount, but reduced as the result of reevaluation of the PERS program as advised by N.J. Division of Pensions. Although the amount proposed was in accord with the reevaluation, a portion of the 1993-94 funds were transfered to other areas.

11-000-290-290 Other Employee Benefits $250,000

Reason: The Major component of this account, Health Benefits, is based on 1993-94 budgeted amount; however, a rebate from the insurance company should be considered.

11-213-100-101 Salaries of Teachers - Resource Room $100,000

Reason: 1994-95 budget amount was based on 1993-94 budget amount plus inflation adjustment; however, expenses in 1993-94 were less than budgeted and transfers were made to other areas.

10-303 Fund Balance $350,000

Reason: Additional surplus appropriation would provide 2% available surplus.

Total $1,100,000

It must be noted that the objection filed by the Board regarding the Township's Position Statement and the reply by the Township have been duly considered in this matter. Though there are specific timeline requirements in N.J.A.C. 6:24-7.4 to 7.8 for the filing of documents in a budget dispute, the Commissioner must base his review and determination on the constitutional standard for a thorough and efficient education.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with

respect to the reduction in the General Fund tax levy effectuated by the Township.

Account #	Title	Reduction
11-000-213-300	Purchased Prof. & Tech. Services	$50,000

The Township bases this reduction on the position that the 1994-95 budget was based on the 1993-94 budget with an additional amount for inflation, but that the expenditures in 1993-94 as of March 31, 1994, were only $42,832 with $30,225 having been transferred to other budget areas. The Board states that at the beginning of 1993-94 some changes were erroneously made to this account and a transfer was made to the proper account at mid-year. The Board continues that not all paid invoices were transferred, resulting in an anticipated balance in the "new" account and a zero ($0.00) balance in this account at the end of 1993-94. The Board's position does confirm that all of the funds in this account were not necessary in 1993-94 since the zero ($0.00) balance at the end of the year was due at least partially to the transfer of funds to another account and the retention in this account of some incorrectly charged expenditures. The Board states that the funds cut by the Township are needed in 1994-95 to provide mandated services. Though mandated services must unquestionably be provided, the Board has not documented the need for funds beyond those certified by the Township in this account. The Commissioner sustains the reduction of $50,000.

Account #	Title	Reduction
11-000-240-XXX	School Administration	$25,000

The Township again bases this reduction on the position that the 1994-95 budget was based on the 1993-94 budget with an

additional amount for inflation. It also asserts that there were excess funds transferred out of this account in 1993-94. The Board states that the originally budgeted figure for 1993-94 is almost $30,000 less than the amount budgeted in 1994-95. Using the revised reduced appropriation for this account as per the submitted budget document and the balance cited by the Board as of June 28, 1994, the amount certified by the Township provides an increase over the 1993-94 expenditures. The Board has not documented the need for additional funds to provide a thorough and efficient education. The Commissioner sustains the reduction of $25,000.

Account #	Title	Reduction
11-000-260-420	Cleaning, Repairs & Maintenance	$50,000

The Township again bases this reduction on the position that the 1994-95 budget was based on the 1993-94 budget with an additional amount for inflation with a finding that there were excess funds transferred out of this account in 1993-94. The Board states that $318,316 was budgeted for this account in 1993-94 and that there is a balance of $5,204.41 as of June 28, 1994. This budget figure of $318,316 does not agree with the budget document which has over $411,000 budgeted for this account in 1993-94. Also, the additional expenses itemized by the Board for 1994-95 would not be applied to this account since they relate to salaries, benefits, rental of trailers, utilities and energy. The amount certified by the Township is significantly more than the amount listed above as spent by the Board in 1993-94 and more than the amount for 1993-94 in the budget document. The Commissioner therefore sustains the reduction of $50,000.

Account #	Title	Reduction
11-000-270-420	Cleaning, Repair, Maint. - Trans.	$25,000

The Township states that this reduction is based on its belief that the 1994-95 budget was based on the 1993-94 budget with an additional amount for inflation. There were unexpended funds as of March 31, 1994, which it did not anticipate would be spent by June 30, 1994. The Board states that more than $165,000 was spent in 1993-94 and that the additional funds are necessary for the increased maintenance and repairs of the school buses which will be one year older. The amount certified by the Township would provide less funds in 1994-95 than the amount spent in 1993-94. Although properly maintained school buses are a vital element in the provision of a thorough and efficient education, the Board has submitted no documentation to support the additional expenditure. Therefore, the Commissioner sustains the $25,000 reduction.

Account #	Title	Reduction
11-000-290-241	Other Retirement Contributions	$250,000

The Township bases this reduction on the position that the amount budgeted in 1994-95 was based on the 1993-94 budget and reduced as a result of the PERS reevaluation pursuant to the advisory of the N.J. Division of Pensions. The Township adds that funds were transferred out of this account during 1993-94. The Board states that it must pay $294,919 for this obligation in 1994-95 and verifies this amount with a letter from the Division of Pensions. The Board adds that they will also have an obligation to pay an estimated $30,000 for health benefits for early retirees. These expenditures, however, would not be budgeted in this account, but would be in either 11-000-290-232 or 11-000-290-242, depending on the classification of the employee. The pension obligation must

be met by this account, however, and the amount of $184,074 is insufficient to pay the amount due of $294,919. The Township claims in its Position Statement that there are additional funds budgeted for the pension contributions in 11-000-290-290, but there is no verification to this claim in either the Township resolution with rationale for reductions or in the documentation submitted in opposition to the appeal. The Commissioner, therefore, orders the restoration of $110,845 to provide funds for the pension obligation in accordance with documentation submitted by the Board and sustains the reduction of $139,155.

Account #	Title	Reduction
11-000-290-290	Other Employee Benefits	$250,000

The Township states that the major component of this account, Health Benefits, was estimated at the 1993-94 budgeted amount; however, the insurance company rebate of $651,514 should be considered. The Board states that the expenditures in this account totalled $6,638,914.03 in 1993-94, which is more than the Township certified for 1994-95. The Board also states that the insurance company rebate of $651,514 was applied as a Budgeted Fund Balance in the 1994-95 budget. No evidence was presented as to any potential rebate for the 1994-95 year. It must also be noted that it would be fiscally irresponsible for boards to anticipate and budget for potential insurance company rebates in advance of notification by the company. Based on the information presented, the Commissioner orders the restoration of $250,000.

11-213-100-101	Salaries of Teachers - Resource Room	$100,000

The Township states that the reduction is based on its belief that the 1994-95 budget was based on the 1993-94 budgeted amount with an increase for inflation. Again, there were excess funds transferred out of this account in 1993-94. The Board states that $487,691.12 was spent from this amount in 1993-94. The Board also states that three additional resource room teachers are required for 1994-95, with a cost for each teacher of $37,133 for salary and benefits. It must be noted that benefits would not be charged to this account. The services of resource room teachers are essential to the provision of a thorough and efficient education. The Board, however, does not justify the need for the restoration of the entire $100,000 on the basis of the 1993-94 expenditures and three new teachers, not including benefits. The Commissioner orders the restoration of $50,000 and sustains the reduction of $50,000.

Account #	Title	Reduction
10-303	Fund Balance	$350,000

The Township states that the additional appropriation of fund balance will still provide a two percent (2%) balance and that additional surplus can be anticipated in 1994-95. The Board states that the additional reduction would reduce the surplus to approximately one percent (1%). It is not clear how the Board calculated its figures, since the surplus figure used by the Township agrees with the Recapitulation of Balances in the budget document. Although the Township's appropriation of the $350,000 in light of the circumstances known to it at the time it acted would have provided the district with a two percent (2%) fund balance, the Commissioner, in his review of the 1993-94 year-end district audit

has determined that the actual amount of surplus after designation of $1,130,514 to the 1994-95 budget was $1,683,286. The Board in its response to the Commissioner's letter advising it that he would take official notice of the year-end audit asserted, in pertinent part, as follows:

> ...please be advised that the Board['s]... surplus, according to the 1993-94 year end audit, was $1,683,285.57. However, it is already planned that $1,000,000.00 will be appropriated from this surplus into the 1995-96 budget, leaving a small surplus of $683,285.57. Therefore, while the Commissioner may take official notice of the surplus, the surplus is not available to fund the reductions made by the Township Committee in the 1994-95 budget.

The Commissioner rejects this argument. A school district is required in its annual budget to determine the amounts of money necessary for the use of the public schools in the "ensuing year." (N.J.S.A. 18A:22-33) Consequently, the Commissioner sustains the Township's $350,000 appropriation from surplus.

Thus, for the reasons set forth above, the Commissioner determines to restore $410,845 and sustain $689,155 of the reduction in the General Fund tax levy for Current Expense appealed herein as summarized by the chart below:

Account #	Title	Restored	Sustained
11-000-213-300	Purchased Prof. & Tech Servs.		$ 50,000
11-000-240-XXX	School Administration		25,000
11-000-260-420	Cleaning, Repairs & Maint.		50,000
11-000-270-420	Cleaning, Repairs & Maint. Trans.		25,000
11-000-290-241	Other Retirement Contribution	110,845	139,155
11-000-290-290	Other Employee Benefits	250,000	
11-213-100-101	Salaries of Teachers - Resource Room	50,000	50,000
10-303	Fund Balance		350,000
	Totals	$410,845	$689,155

In addition, the Commissioner's review of the 1993-94 year-end audit as discussed, above, establishes that the amount of the restoration determined herein may be made by appropriating additional amounts from surplus. In instances such as this where there is money available to be allocated in order to fund the restoration while still leaving a surplus of $922,441 or more than twice the amount ($409,213) budgeted by the Board in its 1994-95 Budget Statement, it would be a manifest injustice to the taxpayers not to so order. Consequently, the Commissioner directs the Board to appropriate from surplus amounts necessary to fund this restoration. The tax levy for General Fund purposes by the Township of Jackson for the 1994-95 school year shall stand.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 3, 1995

DATE OF MAILING - JANUARY 3, 1995

369-94

BOARD OF EDUCATION OF THE BOROUGH OF SOMERDALE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOROUGH COUNCIL OF THE BOROUGH OF SOMERDALE, CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $149,191 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $88,222 for a total General Fund tax levy of $1,757,034 for 1994-95 school purposes.

JANUARY 3, 1995

BOARD OF EDUCATION OF THE BOROUGH OF SOMERDALE,

PETITIONER,

V.

BOROUGH COUNCIL OF THE BOROUGH OF SOMERDALE, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Betty M. Belofsky, Esq. (Mitnick, Josselson, DePersia & DePersia)

For Respondent, Gerald A. Sinclair, Esq.

This matter was opened before the Commissioner on June 16, 1994, through the filing of a Petition of Appeal of a defeated budget by the Somerdale Borough Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.4. The Board sought restoration, on the grounds of necessity for a thorough and efficient education of reductions by the Somerdale Borough Council (Borough) following voter rejection on April 19, 1994, of the Board's proposed General Fund tax levy for current expenses purposes for the 1994-95 school year. Subsequent to the defeat, the Board and Borough, pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)(2), consulted on the defeated budget and the Borough reduced the General Fund tax levy by $149,191. Consequently, the monies in contention in this matter are as set forth below:

Amount of Tax Levy Proposed by Board		Amount of Tax Levy Certified by Governing Body	
General Fund	$1,818,003	General Fund	$1,668,812
Amount of Reduction by Governing Body		**Amount of Reduction in Dispute**	
General Fund	$149,191	General Fund	$149,191

It must be noted that the Petition filed by the Board included with the Board resolution for appeal a response for each of the reductions certified by the Borough. On July 1, 1994, the Borough submitted what they termed a "Response to Petition of Appeal." This document did not answer the specific allegations in the Petition of Appeal, but rather included a list of "reasons and facts" in the matter as determined by the Borough and response to each of the arguments presented by the Board in its Petition. A Position Statement was submitted by the Board on July 20, 1994. In addition, on December 16, 1994, the Commissioner notified the parties that he intended to take official notice, pursuant to N.J.A.C. 1:1-15.2, of the district's 1993-94 year-end audit as it relates to undesignated surplus.

The specific reductions in the General Fund tax levy are as follows:

Account Number	Title	Amount
11-190-100-340	Purchased Technical Services	$2,000

Rationale: Only $65 spent in 1993-94 so $2,000 should be adequate and new computer equipment should not require costly or frequent repairs or maintenance.

Account Number	Title	Amount
11-190-100-500	Other Purchased Services	$500

Rationale: Nothing spent in 1993-94 so $500 should be adequate.

Account Number	Title	Amount
11-190-100-610	General Supplies	$6,000

Rationale: Reduction to 1993-94 budget amount which was not all spent.

Account Number	Title	Amount
11-190-100-640	Textbooks	$13,500

Rationale: Reduction to 1993-94 budget amount which was not all expended.

Account Number	Title	Amount
11-000-218-104	Salaries Guidance	$13,087

Rationale: Reduction to amount for three days per week which is adequate based upon anticipated need.

Account Number	Title	Amount
11-000-213-500	Other Purchased Services	$1,000

Rationale: Reduction still represents an increase over the amount expended out of the 1993-94 budget.

Account Number	Title	Amount
11-000-230-340	Purchased Technical Services	$6,000

Rationale: Reduction still leaves tenfold increase over 1993-94 budget amount. The amount may not be necessary if a three-year contract is negotiated.

Account Number	Title	Amount
11-000-260-300	Purchased Professional/Technical Services	$3,500

Rationale: Reduction provides more than anticipated need.

Account Number	Title	Amount
11-000-260-420	Repairs and Maintenance	$3,000

Rationale: Provides increase over 1993-94 budget and adequate for anticipated need.

Account Number	Title	Amount
11-000-260-620	Heat and Electricity	$4,000

Rationale: Provides increase over 1993-94 budget and adequate for any increases in charges.

Account Number	Title	Amount
11-000-260-490	Lease Purchase/Rentals	$1,500

Rationale: Reduced to 1993-94 amount.

Account Number	Title	Amount
111-000-290-220	Social Security	$5,265

Rationale: Reduced to reflect loss of personnel and 3% rather than 6% salary increase.

Account Number	Title	Amount
11-000-290-290	Employee Benefits	$15,000

Rationale: Reduced to reflect loss of personnel and 3% rather than 6% salary increase.

Account Number	Title	Amount
11-000-260-100	Salaries Custodians/Aides	$11,584

Rationale: Reduction to reflect loss of personnel and 3% rather than 6% salary increase.

Account Number	Title	Amount
*11-000-290-105	School Clerk Salary	$20,670

Rationale: Reduction to reflect loss of personnel and 3% rather than 6% salary increase.

Account Number	Title	Amount
11-000-240-105	Salaries Secretarial/Clerical	$19,879

Rationale: Reduction to reflect loss of personnel and 3% rather than 6% salary increase.

*Note: Both parties listed an incorrect account number, 11-000-260-105 for this item. Account number 11-000-290-105 is the correct one.

Account Numbers	Titles	Amounts
11-000-222-100	Library Salaries	$1,238
11-000-240-103	Salary Assistant Principal	1,219
11-000-290-104	Business Administrator Salary	1,200
11-000-213-100	Salary Health Services	1,352
11-000-230-100	Salary Administration	2,197
11-000-290-241	Retirement Contribution	1,000
11-208-100-106	Other Salaries C.H.	368
11-205-100-106	Other Salaries P.I.	436
11-000-219-105	Salaries CST Secretary	240
11-000-260-610	General Supplies Custodial	1,000

Rationale: These ten items - all reduced to reflect a 3% salary increase rather than 6%.

Account Number	Title	Amount
10-303	Surplus	$13,675

Rationale: Present surplus is unusually and unnecessarily large.

	TOTAL	$150,410

It must be noted that both parties recorded an incorrect total, $149,191, for the reduced items, and the reduction in the tax levy certified by the Borough is $149,191. The difference of $1,219, therefore, will be subtracted from the total of sustained reductions to provide agreement with the reduced tax levy.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature, pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the

amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in the standard of review, the Commissioner makes the following determination with respect to the reduction in the General Fund tax levy effectuated by the Borough.

Account	Reduction
11-190-100-340 - Purchased Technical Services	$2,000

The Borough bases this reduction on the position that only $65 was expended from this line item in 1993-94 and that the $2,000 remaining after the reduction should be adequate in 1994-95. The Board provides a list of equipment and costs for technical and repair services; however, it prefaces this listing with the statement that the costs "are based on costs incurred in previous years." Since the budget document provided to the Borough does list $65 as the amount expended in 1993-94, the Board's statement does not support an increase beyond that provided by the Borough's reduced amount. The Commissioner sustains the reduction of $2,000.

Account	Reduction
11-190-100-500 - Other Purchased Services	$500

The Borough states that nothing was expended from this line item in 1993-94 and that the $500 remaining after the reduction should be adequate in 1994-95. The Board initially states that the money is required for honor students' transportation to Sterling High School, but then, in its Position Statement, states that this was in error and changes the argument to one for the growth and

expansion of the media center alleging that certain specified amounts should properly have been expended from this account in 1993-94. No evidence was presented, however, as to why this expansion is essential to the provision of a thorough and efficient education. The Commissioner sustains the reduction of $500.

Account	Reduction
11-190-100-610 - General Supplies	$6,000

The Borough again bases its reduction on 1993-94 expenditures which were $21,938.79 for this line item. Its position is that the $29,000 remaining after the reduction is the same as budgeted but not all expended in 1993-94. The Board states that the balance in this account occurred because the account was frozen to generate surplus. The Board provides a detailed listing of general supply needs for 1994-95, but it must be recognized that freezing an account to generate surplus does not support a need for additional funds. Also, the Borough reduction still provides funds with a greater than 30% increase over the amount spent in 1993-94. The Commissioner sustains the reduction of $6,000.

Account	Reduction
11-190-100-640 - Textbooks	$13,500

The Borough again bases its reduction on 1993-94 expenditures which were $21,426.17 and on the position that the $21,500 remaining after the reduction is the same as the 1993-94 budgeted amount. The Board provides a detailed list of books they state should be purchased in 1994-95 to update some texts, to provide additional books for the implementation of all day kindergarten classes, to provide new "hands on" science texts for seventh grade in order to coordinate with those purchased for eighth

grade in 1993-94, and to address the interdistrict articulation efforts in the Sterling Region. The provision of appropriate and updated textbooks is certainly an essential component in a thorough and efficient educational program. Based on the data presented, the Commissioner restores $13,500.

Account	Reduction
11-000-218-104 - Salaries Guidance	$13,087

The Borough states that the reduced amount in the budget is adequate to cover three days per week for this position. The Board states that this position was increased from a three-day position to full-time in 1994-95 to address student needs and incidents. Although guidance services for elementary students may be beneficial, the Board has not detailed the increased need for such services for a thorough and efficient education and, therefore, in this matter cannot be increased beyond that certified by the Borough. The Commissioner sustains the reduction of $13,087.

Account	Reduction
11-000-213-500 - Other Purchased Services	$1,000

The Borough bases this reduction on the 1993-94 expenditures of $12,736 and the provision for 1994-95 of $14,000 after the reduction. The Board states that there is an increased need for psychological and neurological screening for students, a need for services for a preschool autistic child, and the need to estimate costs for other services which may be required. The Board does not, however, provide any financial data to support its budgeted figure. These services may indeed be essential to the provision of a thorough and efficient education, but the amount

certified by the Borough does provide an increase over the amount expended in 1993-94. the Commissioner sustains the reduction of $1,000.

Account	Reduction
11-000-230-340 - Purchased Technical Services	$6,000

The Borough again bases this reduction on 1993-94 expenditures of $1,500 in this line item and the provision of $10,500 for 1994-95 after the reduction. The Board states that these funds are necessary for contract negotiations and that $16,500 was spent for the last negotiations. Although contract negotiations can be a difficult and often stressful procedure in a school district, there is no requirement that the procedure include costs for professional services. The Commissioner, therefore, must sustain the reduction of $6,000.

Account	Reduction
11-000-260-300 - Purchased Prof./Tech. Services	$3,500

The Borough states that the amount provided in this account after the reduction is more than adequate based on anticipated need. The Board states that the entire budgeted amount is necessary to address the five-year maintenance plan which was submitted effective 1993-94 as required by the Department of Education, plus other maintenance and repair items. The Borough provides only a general position and does not challenge any specific project. The Board provides an itemized list of projects with estimated costs. It is also of interest that the amount budgeted for 1994-95 by the Board is already significantly less than the amount expended in 1993-94. The proper maintenance of facilities and compliance with all relevant codes and statutes are absolutely integral to a

thorough and efficient education. Based on the information presented, the Commissioner orders the restoration of $3,500.

Account	Reduction
11-000-260-420 - Repairs and Maintenance	$3,000

The Borough bases this reduction on the position that there is, after the reduction, an increase of $16,425 over the 1993-94 budget. The Board states that the increase is because the cleaning service started in mid-year during 1993-94 and is being budgeted for a full year in 1994-95. It contends that the contracted cleaning service provides better service at a cheaper cost than janitors hired as school employees. The Board provides a list of items and costs. It must be noted that, although the proper maintenance of facilities is essential as stated above, an increase of more than sixty-five percent (65%) over the previous year is not justified by the Board's presentation. If all the other expenditures listed by the Board were exactly the same in 1993-94, the cleaning service fee for half a year would have been $16,033. The amount listed by the Board is more than double that amount. Based on the information presented, the Commissioner sustains the reduction of $3,000.

Account	Reduction
11-000-260-620 - Heat and Electricity	$4,000

The Borough states that the reduction still provides an increase of $1,000 over the 1993-94 budget and that it should be adequate for any increase in charges. The Board states that the 1993-94 costs exceeded the budgeted amount and that the amount budgeted is necessary to meet present utilities costs plus any increases. The Board states that expenses for this item in 1992-93 were $43,692 and in 1993-94 were $45,912, an increase of

approximately $2,200. The Board also states that the actual costs, anticipated increases in utility costs and increased usage due to new equipment justify the budgeted amount as reasonable and necessary. Based on the information presented the Commissioner restores $4,000.

Account	Reduction
11-000-260-490 - Lease Purchase/Rental	$1,500

The Borough states there is no justification for an increase over the 1993-94 budgeted amount of $13,000 because only $12,830 was expended. The Board states that this account covers lease purchase and rentals. It asserts that there are always unanticipated increases in both utilities (CCMUA and water) and lease agreements such as for copies and for software. Moreover, it argues that funds were also budgeted for unanticipated future lease purchase agreements to rent equipment while old equipment is being repaired and various other rentals throughout the year. Although estimates are the only possible way to determine a proposed budget figure, "unanticipated future lease purchase agreements" and "various rentals throughout the year" are not sufficient to validate the need for funds to provide a thorough and efficient education. The Commissioner sustains the reduction of $1,500.

Account	Reduction
11-000-290-220 - Social Security	$5,265

The Borough reduces this line item to reflect a loss of personnel and a three percent (3%) rather than a six percent (6%) salary increase. The Board states that it is necessary to maintain the present staffing level and that the non-bargaining staff salary increases have not yet been determined for 1994-95. A critical

factor relevant to this item is that expenditures in 1993-94 were $16,627.59. The amount certified by the Borough, after the reduction of $5,265, is $21,235. This represents an increase of greater than twenty-five percent (25%) in 1994-95 over the 1993-94 expenditures. Based on these facts, the Commissioner sustains the reduction of $5,265.

Account	Reduction
11-000-290-290 - Employee Benefits	$15,000

The Borough's reduction of this line item is based on the same position as noted above, to reflect a loss of personnel and a three percent (3%) rather than a six percent (6%) salary increase. The Board's position is also the same as above, that present staff must be maintained and that non-bargaining staff salary increases have not been determined for 1994-95. It must be noted that the amount proposed by the Board for this line item is almost $20,000 less than the budgeted amount for 1993-94 and almost $15,000 less than the projected expenditures for 1994-95. An additional decrease of $15,000 could result in insufficient funds for benefits which are required by statute or contractual agreements. The Commissioner orders the restoration $15,000.

Account	Reduction
11-000-260-100 - Salaries Custodians/Aides	$11,584

The Borough reduces this line item to reflect a loss of personnel and a three percent (3%) rather than a six percent (6%) salary increase. The Borough does not identify the specific "loss of personnel." The Borough also states that the reduction reflects the head custodian being fired and a new person hired in the middle of 1993-94. The Board states that the reduction was for the

elimination of a part-time custodian position, and that this position is essential for the four hours of lunch serving, set up and breakdown time each day. It is very difficult to determine the level of support staff required to assist in the proper operation of a building and all the activities. However, a critical fact in the review of this item is that the Borough is eliminating an existing position but does not in the documents presented specify which position or the reasons for the reduction. The Board does outline the duties of the part-time custodian, which it believes is the one position to be eliminated. Finally, this line item has an increase of only $57 over 1993-94 which would indicate that the change in head custodian salary is addressed. Based on the facts presented, the Commissioner orders the restoration of $11,584.

Account	Reduction
11-000-290-105 - School Clerk Salary	$20,670

The Borough again bases this reduction on a loss of personnel and a three percent (3%) rather than a six percent (6%) salary increase. The Borough states that the services of the present Board secretary would be duplicated by another school clerk. The Board states that the auditors recommended the hiring of a clerk/assistant to Board secretary because one person cannot complete all the duties of the Board secretary plus the additional duties necessitated by GAAP, the new accounting system. Although the qualifications for this position as articulated in the job description submitted by the Board require knowledge of double entry accounting, GAAP, and appropriate bookkeeping and typing skills, the duties include answering the telephone, typing and filing, processing purchase orders and receipt of merchandise, running

errands and entering data into the computer. The duties of this position do appear to be for clerical assistance in the Board office as opposed to the appointment of an assistant secretary as per N.J.S.A. 18A:17-13. These duties are not duplications of the responsibilities of a Board secretary, whose duties are clearly specified in N.J.S.A. 18A:17-5 et seq. and include detailed accounting and reporting on the district's financial transactions and status, handling school election requirements, maintaining Board documents, records and contracts, notifications on all Board meetings and completion of minutes of all meetings, plus other varied tasks. The Board asserts that the 1992-93 Audit contained 21 recommendations for improvement and assert that the auditors indicated that one person cannot fulfill all the duties. The Commissioner therefore orders the restoration of $20,670.

Account	Reduction
11-000-240-105 - Salaries Secretarial/Clerical	$19,879

The Borough again based its reduction on a loss of personnel and a three percent (3%) rather than a six percent (6%) salary increase. The Borough also states that the present staff should be sufficient and that the additional position is not necessary. The Board states that this is not a new position and that it has been in existence for five (5) years. The Board lists the specific duties for this position and the two other secretarial positions in this account. Many of the duties for the position in question are duplicates of those for the clerk in the Board Secretary's office and/or relate to the duties of that office. Other duties are duplicates of those in the job description for the

school secretary. The Board has not documented the need for this position and the Commissioner sustains the reduction of $19,879.

Accounts		Reductions
11-000-222-100	Library Salaries	$1,238
11-000-240-103	Salary Assistant Principal	1,219
11-000-290-104	Business Administrator Salary	1,200
11-000-213-100	Salary Health Services	1,352
11-000-230-100	Salaries Administration	2,197
11-000-290-241	Retirement Contribution	1,000
11-208-100-106	Other Salaries CH	368
11-205-100-106	Other Salaries PI	436
11-000-219-105	Salaries CST Secretary	240

The Borough combines these items in its resolution and bases the reduction for each on a three percent (3%) rather than a six percent (6%) salary increase. The Board states that the salary increases for non-bargaining personnel have not yet been determined for 1994-95. The Board adds that the teaching staff will receive a six percent (6%) increase for 1994-95 and that it has been past practice to give non-teaching staff the same percentage of salary increase as the teaching staff. Boards must certainly realistically and reasonably estimate to budget for salaries when the percentage of increase has not yet been determined. The Commissioner makes the following determination on these items:

Library Salaries

Salary Assistant Principal

The reductions certified by the Borough still provide a greater than six percent (6%) increase over the 1993-94 budget and expenditures. The Commissioner sustains the reductions of $1,238 and $1,219 for these items.

Business Administrator Salary

The budget for this line item proposed by the Board is more

than thirty percent (30%) less than the 1993-94 budget and expenditures. The Commissioner orders the restoration of $1,200.

Salary Health Services

The amount for this item proposed by the Board represents an increase of approximately six percent (6%) over the 1993-94 budget and expenditures. The Commissioner orders the restoration of $1,352.

Salaries Administration

The amount for this item proposed by the Board represents an increase of approximately five hundred dollars ($500) greater than a six percent (6%) increase over 1993-94 budget and expenditures. The Commissioner sustains the reduction of $500 and orders the restoration of $1,697.

Retirement Contribution

Based on information provided by the Division of Pensions, the amount budgeted by the Board for this item is accurate. The Commissioner orders the restoration of $1,000.

Other Salaries CH and Other Salaries PI

The amount budgeted by the Board for each of these items is less than a six percent (6%) increase. The Commissioner orders the restoration of $368 and $436.

Salaries CST Secretary

The amount budget by the Board for this item is less than the 1993-94 budget and expenditures. The Commissioner orders the restoration of $240.

Account	Reduction
11-000-260-610 - General Supplies Custodial	$1,000

The Borough included this item with the items above as

decreased to reflect a three percent (3%) rather than a six percent (6%) salary increase. This item is obviously not a salary line but that issue was not addressed by either party. The Board states that the reduction maintains that same amount as expended in 1993-94 and does not provide for the continuing increase in costs. According to the budget document submitted, however, the amount certified by the Board provides an increase of greater than five percent (5%) over the 1993-94 expenditures. The Commissioner sustains the reduction of $1,000.

Account	Reduction
10-303 - Surplus	$13,675

The Borough states that the present surplus fund is "unusually and unnecessarily" large and that the amount after the reduction is more than adequate. The Board states that the surplus as of June 30, 1994, after the Board's appropriation of $50,000 for 1994-95 will be $11,270.61. The budget document submitted has an estimated surplus after the appropriation for 1994-95 of $34,399.00. Apart from the difference in these numbers, the determination of an appropriate surplus or fund balance is always difficult. One critical factor is that there must be an equitable standard applied in reviewing this matter. The Commissioner orders the restoration of $13,675.

Thus, for the reasons set forth above, the Commissioner determines to restore $88,222 and sustain $60,969 of the reduction in the General Fund tax levy appealed herein, as summarized by the chart below:

Account	Title	Restored	Sustained
11-190-100-340	Purch. Tech. Ser.		$2,000
11-190-100-500	Other Purch. Ser.		500

Account	Title	Restored	Sustained
11-190-100-610	General Supplies		6,000
11-190-100-640	Textbooks	$13,500	
11-000-218-104	Salaries Guidance		13,087
11-000-213-500	Other Purch. Ser.		$1,000
11-000-230-340	Purch. Tech. Ser.		6,000
11-000-260-300	Purchased Prof./Tech. Services	$3,500	
11-000-260-420	Repairs and Maint.		3,000
11-000-260-620	Heat and Electricity	4,000	
11-000-260-490	Lease Purch./Rentals		1,500
11-000-290-220	Social Security		5,265
11-000-290-290	Employee Benefits	15,000	
11-000-260-100	Salaries Custodians/Aides	11,584	
11-000-290-105	School Clerk Salary	20,670	
11-000-240-105	Salaries Sec./Clerical		19,879
11-000-222-100	Library Salaries		1,238
11-000-240-103	Salaries Asst. Prin.		1,219
11-000-290-104	Bus. Admin. Salary	1,200	
11-000-213-100	Sal. Health Ser.	1,352	
11-000-230-100	Sal. Admin.	1,697	500
11-000-290-241	Retirement Contri.	1,000	
11-208-100-106	Other Sal. C.H.	368	
11-205-100-106	Other Sal. P.I.	436	
11-000-219-105	Salaries CST Sec.	240	
11-000-260-610	General Sup. Cust.		1,000
10-303	Surplus	13,675	
	TOTALS	$88,222	$62,188
	Adjustment for mathematical error by both parties as noted at beginning of decision		- 1,219
		$88,222	$60,969

Accordingly, the Camden County Board of Taxation is directed to make the necessary adjustments as set forth below to reflect a total of $1,757,034 to be raised in tax levy for General Fund purposes by the Borough of Somerdale for the 1994-95 school year.

	General Fund
Tax Levy Certified by Borough	$1,668,812
Restored by Commissioner	88,222
	$1,757,034

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 3, 1995
DATE OF MAILING - JANUARY 3, 1995

370-94

BOARD OF EDUCATION OF THE BOROUGH OF FREEHOLD, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF FREEHOLD, COUNTY OF MONMOUTH, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $730,067 made by governing body following voter rejection of proposed budget on April 19, 1994.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $546,427 for a total General Fund tax levy of $4,621,521 for 1994-95 school purposes.

JANUARY 3, 1995

BOARD OF EDUCATION OF THE BOROUGH OF FREEHOLD,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF FREEHOLD, COUNTY OF MONMOUTH,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Vincent C. DeMaio (DeMaio & DeMaio), for Petitioner

Kerry E. Higgins, Esq. (Cerrato, Dawes, Collins, Saker & Brown) for Respondent

This matter was opened before the Commissioner on May 27, 1994, through the filing of a Petition of Appeal of a controversy which has arisen pursuant to the authority vested in the Commissioner by N.J.S.A. 18A:6-9 to hear and determine controversies under the school laws of this State, by reason of the following facts:

1. Petitioner is the Board of Education of the Borough of Freehold (hereinafter referred to as "the Board") and is required both by the Constitution and Statutes of New Jersey to provide a thorough and efficient education to its students.

2. Pursuant to its legal obligation, the Board adopted a budget for the 1994-95 school year and submitted a tax levy amount of $4,805,161 to the public at the April 19, 1994, school election. The tax levy question was defeated by the voters.

3. Freehold Borough is a political subdivision of the State of New Jersey and is located in the County of Monmouth (hereinafter referred to as "the Borough")

4. Pursuant to law, because of the defeat of the tax levy referendum, it became the obligation of the governing body of the Borough to consult with the Board and to certify to the Monmouth County Board of Taxation the amount to be raised by tax levy for the 1994-95 general fund.

5. On May 12, 1994, the Borough adopted a resolution certifying that the amount to be raised by local taxation for the 1994-95 would be in the amount of $4,075,094. Said amount was $730,067 less than the $4,805,161 originally proposed by the Board for all accounts. The net effect of the reduced tax levy was to decrease the General Fund Budget from $7,914,389 to $7,184,322.

6. On May 16 the Board adopted a resolution authorizing an appeal of the $730,067 tax reduction to the Commissioner of Education on the grounds that the amount certified by the Borough would not be sufficient to provide a thorough and efficient system of education (T&E).

On December 16, 1994, the Commissioner advised the parties that, pursuant to N.J.A.C. 1:1-15.2, he intended to take official notice of the 1993-94 year-end district audit as it relates to the amount of undesignated surplus available to the district.

Accounts and amounts in dispute in this matter are as follows:

Account Title	Account No.	Amount In Original Budget	Borough Reduction	Revised Amount
General Current Expenses Regular Program Instruction Salaries	11-1XX-100	$2,894,200	$233,760	$2,320.

Account Title	Account No.	Amount In Original Budget	Borough Reduction	Revised Amount
Support Services Administration	11-000-240	310,000	86,236	223,764
Other Support Services				
Special	11-000-219	311,000	132,281	178,719
Regular	11-000-218	106,000	42,312	63,688
Food Services	11-000-310	82,000	16,000	66,000
Business & Other Support Services	11-000-290	1,297,168	119,478	1,177,690
Operation & Maint. of Plant	11-000-260	659,000	40,000	619,000
Capital Outlay				
Equipment	12-120-100-730 12-130-100-730 12-000-260-730	53,000	10,000	43,000
Total		$5,372,168	$680,067	$4,692,101
Revenue Revision Budgeted Fund Balance Board Appropriation		475,000	50,000	525,000
Total Borough Revisions			$730,067	

Standard of Review

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See, also, Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford

Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction is imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Moreover, the Commissioner has the constitutional obligation to ensure that a school district budget is sufficient for the provision of a thorough and efficient education. Robinson v. Cahill, 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990); Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, decided by the State Board of Education July 6, 1994.

Mindful then of the balance to be applied in this standard of review with respect to the various line items the Commissioner makes the following determination with respect to the petition of appeal before him:

Instruction Salaries	11-1XX-100	$233,760

After reviewing the initial positions and the subsequent rebuttals the Commissioner reduces the request of the Board by one position ($26,000) in accordance with the response of the Board to the Governing Body. These funds are being restored because of the compelling argument advanced by the Board as to the impact on the educational process and its State approved voluntary desegregation. In particular the Board asserts that all day kindergarten is both an essential element of the district's desegregation plan and

drastically reduces the number of students in need of remediation. Arguments by Borough counsel, in effect, programs not mandated by law should be eliminated ignores the T&E process which requires educational programs to meet district goals and objectives, as long as they are not inconsistent with State requirements. The Commissioner sustains a reduction of $26,000 and determines that $207,760 is restored.

Support Services Administration 11-000-240 $ 86,236

The request of the Board to restore the position of Principal and supporting secretary is approved. Strong leadership in the form of a principal is essential to the orderly progression of the educational process (N.J.A.C. 6:8-3.2(b)). The Board asserts that when the principalship of one of the two elementary schools was eliminated there was a negative impact upon the racial composition of both schools. Counsel's argument that the position did not exist in 1988 ignores differences in programs and needs that have occurred since that date. Accordingly, the Commissioner orders the restoration of the $86,236 reduction.

Other Support Services

Special	11-000-219	$132,281
Regular	11-000-218	42,312

The request of the board to restore funds for the above services is reduced by $67,000. The Borough provided little rationale or justification for combining the Director of Curriculum and Special Services into a single position. Combining positions raises questions of organizational and services changes that must be planned and provision made for the coordination of services. Absent such a plan the action could result in a disruption of services. In its response, however, the Board indicated that an administration position could be eliminated.

The Board presented compelling arguments supporting the need for guidance counseling as a vital service and is essential to the T&E process. Accordingly, the Commissioner sustains $67,000 of the reduction to 11-000-219 and restores $65,281. As to 11-000-218 the Commissioner orders the restoration of the $42,312 reduction.

Food Services 11-000-310 $ 16,000

The Board's request to restore funds to continue its food service operation as two separate lunch rooms at Park Avenue Elementary School and the Intermediate School is approved. Provision for adequate food areas is essential to the educational process. The Board asserts that, although housed in the same building, the program operates separately. Space, control and program necessities including the ability to prepare, serve, collect money and clean-up in a reasonable time are the reasons proffered for its current operational needs. The Commissioner, therefore, orders the restoration of the $16,000 reduction.

Business & Other Support Services 11-000-290 $119,478

The Board's request to restore funds in this area is approved less a reduction of $15,640 for health benefits savings due to the two positions eliminated in this decision. Based upon the analysis of the assertions of the parties the Commissioner determines that $15,640 of the reduction is sustained and $103,838 of the reduction is restored.

Operation and Maintenance of Plant 11-000-290 $ 25,000

The Board request for the restoration of $40,000 is reduced to $25,000, based on Board concurrence that the rental facility will not be needed. The Board asserted that the district has no in-house maintenance staff and must contract for repairs. Borough arguments

concerning maintenance were not based on any analysis of maintenance needs, but rather on historical budgeting practices.

Capital Outlay Equipment	12-130-100-730	12-000-260-730	12-120-100-730	$10,000

The Board's request for restoration of this item is denied. The Board's indication that the reductions were arbitrary and capricious did not provide an educational justification for the restoration of the funds involved.

Revenue Revision $50,000

After reviewing the within appeal based upon the record and circumstances known to or considered by the governing body at the time it acted to reduce the budget which is the subject of this appeal, the Commissioner, on December 16, 1994, notified the parties that he intended to take official notice of the Board's 1993-94 year-end audit. The Commissioner reviewed the audit for the purpose of identifying whether the Board underestimated in its 1994-95 budget the amount of anticipated undesignated surplus.

In light of this review, the Board's request for restoration of the balance appropriation is denied. Even with the appropriation made by the Borough, the amount of surplus available to the Board is consistent with accepted fiscal policies concerning the retention of surplus for emergencies in light of the amount of the total budget and the potential contingencies asserted. The direction to appropriate the $50,000 to the General Fund Balance is consequently sustained.

The accounts and amounts under appeal and as determined by the Commissioner in this matter are as follows:

Account Title	Account No.	Amount Under Appeal	Amount Not Approved	Approved by Commissioner
General Current Expenses				
Regular Program Instruction				
Salaries	11-1XX-100	$233,760	$ 26,000	$207,760
Support Services				
Administration	11-000-240	86,236		86,236
Other Support Services				
Special	11-000-219	132,281	67,000	65,281
Regular	11-000-218	42,312		42,312
Food Services	11-000-310	16,000		16,000
Business & Other Support Services	11-000-290	119,478	15,640	103,838
Operation & Maint. of Plant	11-000-290	40,000	15,000	25,000
Capital Outlay				
Equipment	12-120-100-730			
	12-000-260-730			
	12-000-260-730	10,000	10,000	-0-
Total		$680,067	$133,640	$546,427
Revenue Revision				
Budgeted Fund Balance				
Board Appropriation		$ 50,000	$ 50,000	-0-
Total Restoration				$546,427

In summary, upon review of the documentation submitted on this matter, the Commissioner finds and determines that the $546,427 is essential to provide a thorough and efficient educational system and that a further reallocation of funds within the districts maximum permissible budget is not possible (Board of Education of the Borough of Rutherford v. Mayor and Council of Rutherford, Bergen County, decided by the State Board of Education, July 7, 1993.)

Accordingly, the Monmouth County Board of Taxation is directed to make the necessary adjustments as set forth below to

reflect a total of $4,621,521 to be raised in tax levy for General Fund purposes for the 1994-95 school year.

	General Fund
Tax Levy Certified by Council	$4,075,094
Ordered by Commissioner	546,427
TOTAL	$4,621,521

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

JANUARY 3, 1995

DATE OF MAILING - JANUARY 3, 1995