NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1979 to December 31, 1979

vol. 2

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

New Jersey
State Department of Education
Trenton

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FRED G. BURKE
COMMISSIONER OF EDUCATION

"C.R.," a minor by his parent and natural guardian, "Y.R.,"	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Stephen Eisdorfer, Esq.

For the Respondent, Terrill Brenner, Esq.

"C.R.," hereinafter petitioner, is a fourteen year old ninth grade pupil enrolled in the New Brunswick High School, hereinafter "high school," who was suspended, afforded home instruction and subsequently placed in an in-school suspension instructional program, hereinafter "P.M. program," for the remainder of the 1978-79 school year by the New Brunswick Board of Education, hereinafter "Board," for his alleged use of an instrument to strike and injure a teaching staff member on November 14, 1978. Petitioner filed a Petition of Appeal accompanied by a Motion for Interim Relief in the instant matter on March 5, 1979 before the Commissioner of Education. Petitioner asserts that the Board's suspension action against him is arbitrary, capricious, violative of procedural due process and contrary to the provisions of N.J.S.A. 18A:37-5. He prays that the Commissioner declare the actions of the Board illegal and order his immediate reinstatement to the classes from which he has been suspended. The Board denies that its action was arbitrary or capricious and asserts that at all times it was in compliance with petitioner's rights of due process and the statutory provision pursuant to N.J.S.A. 18A:37-5.

Oral argument on the Motion was presented by counsel to the Commissioner's representative at the State Department of Education, Trenton, on March 19, 1979, and the transcript of the above proceedings, together with the pleadings and an exhibit filed by the Board, are herewith submitted to the Commissioner for his determination.

The Commissioner finds that the following relevant facts giving rise to the instant matter are not in dispute:

On November 14, 1978 at approximately 11:40 A.M., in the high school parking lot, petitioner and a high school teacher were involved in an incident during which it was alleged that

petitioner struck the teacher on the arm with a piece of pipe, fracturing the teacher's arm. Petitioner was suspended from the high school effective November 15, 1978.

On December 4, 1978, the Board held a hearing and witnesses were heard and cross-examined. The Board did not reach a conclusion with regard to petitioner but, rather, continued petitioner's suspension pending receipt of the transcript of the hearing and an evaluation of petitioner by its Child Study Team, hereinafter "C.S.T."

The Board held regular monthly meetings on December 19, 1978 and January 16, 1979 and on January 29, 1979, at a special closed meeting, suspended petitioner from the regular school program. In its suspension action the Board was to provide petitioner with ten hours per week home instruction after school hours at the high school, and to consider on February 26, 1979 whether petitioner should be permitted to attend physical education and woodworking classes during the seventh and eighth periods of the regular school day, in addition to the P.M. program.

With those undisputed facts set forth, ante, petitioner contends that the Board committed a series of procedural errors in the instant matter. He asserts that the Board was in violation of his due process rights pursuant to R.R. v. Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337 (Chan. Div. 1970). Petitioner argues that prior to the imposition of severe sanctions there must be a hearing at which a determination of a pupil's guilt or innocence is made. He argues that pursuant to R.R. the Board must conduct a preliminary hearing before any action may be taken and a full hearing within twenty-one days of an alleged incident. Petitioner asserts that the Board held a full hearing in a timely fashion, however, it failed to arrive at a decision in a timely manner. He contends that the hearing was held on December 4, 1978 and that the Board did not make its determination until January 29, 1979, one and a half months later. (Tr. 6) Petitioner further contends that the Board's action on January 29, 1979 was not taken at an open public meeting. "M.W." v. Board of Education of the Freehold Regional High School District, 1975 S.L.D. 120

Petitioner asserts that the Board's second violation of due process involved the receipt of reports from its C.S.T. and its school administrator, which were not a part of the record of the hearing held on December 4, 1978, but which formed the basis for the Board's determination to suspend petitioner on January 29, 1979. Petitioner contends that neither he nor his parents had access to these reports prior to the Board's determination and asserts that the courts of this State have held that a governing body must make its decision upon the record before the parties. Elizabeth Federal Savings and Loan Association et al. v. Howell et al., 24 N.J. 488 (1957); Mazza v. Cavicchia, 15 N.J. 498 (1954) Petitioner further argues that the Board did not

make its determination on the basis of the hearing held on December 4, 1978 and that such procedural defects render its actions illegal and require that petitioner be treated as if none of the Board's actions had taken place and that he be reinstated to the regular school program forthwith. Tibbs v. Board of Education of the Township of Franklin, 59 N.J. 506 (1971) (Tr. 7-10)

The Board argues that it was not in violation of N.J.S.A. 18A:37-5 and, further, that there was no procedural violation when it acted to suspend petitioner from its regular school program. It contends that the statute provides that no suspension of a pupil by a teacher or principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the Board. It argues the statute does not require a resolution but, rather, an action which it took at its meetings between December 4, 1978 and January 29, 1979. (Tr. 11)

The Board asserts that petitioner was suspended on November 15, 1978 and that either on November 16, or 17, 1978 his mother was called to a conference which served as the preliminary hearing on the matter. Thereafter, the Board conducted a hearing on December 4, 1978, which was within twenty days of the occurrence on November 14, 1978 which led to petitioner's suspension. (Tr. 11-12)

The Board asserts that at the conclusion of the December 4 hearing it advised petitioner, his parent and his representatives that it would seek to have a report submitted to it by the C.S.T. and the school's administration to determine the future course of petitioner's education. It contends that petitioner's mother represented that the Middlesex County probation department had administered an evaluation of petitioner and that it would be made available to the Board. It further contends that petitioner's mother indicated that she did not wish to have petitioner subjected to another evaluation. The Board asserts that subsequent to a number of telephone calls over a sustained period of time, it was advised that the probation department's evaluation of petitioner could not be made available to the Board. Thereafter, on January 11, 1979, petitioner's mother signed a release to the Board's C.S.T. for an evaluation which was completed and received by the Board on January 18, 1979. The Board argues that the delays in connection with the instant matter were the result of petitioner's failure to produce the probation department evaluation and of petitioner's mother's refusal to sign the C.S.T. report release until January 11, 1979. It contends that the C.S.T. report was available to petitioner upon request. (Tr. 12-14)

The Board avers that on January 29, 1979 it determined that petitioner was guilty of the offense as charged but should continue to receive an instructional program and placed him in the P.M. program which was scheduled from 2:30 P.M. until

4:30 P.M. at the high school, five days a week. The Board asserts that petitioner was continued in the P.M. program until the end of February 1979 at which time his progress was to have been evaluated and, had he demonstrated success in the P.M. program, he would have been afforded additional instruction in physical education and woodworking commencing March 1, 1979. The Board contends that petitioner failed to attend the first eleven days of P.M. program instruction and that it was unable to determine his progress by March 1, 1979. (Tr. 14-15)

The Board assumed that it would evaluate petitioner's status as of April 1, 1979 and, with satisfactory progress, place him in the physical education, woodworking and P.M. program for the remainder of the 1978-79 school year. (Tr. 22)

The Commissioner has carefully reviewed the contentions of the parties as set forth in the record herein and cannot agree with the position advanced by petitioner that the Board violated his procedural due process rights. The record is clear that, subsequent to his suspension, petitioner was afforded a preliminary suspension conference before the high school principal and, thereafter, he was provided a full plenary hearing before the Board, both in a timely manner. The record further reveals that it was petitioner, or his representative, who caused the delay in the Board's action from the date of the hearing held on December 4, 1978 until its final action on January 29, 1979. For petitioner to cause such a delay and thereafter set forth a claim of a violation of procedural due process is without merit.

The Commissioner does agree with petitioner's allegation that the Board failed to act in an open public meeting when it suspended petitioner at its meeting of January 29, 1979. The record is barren of evidence that the Board's action in the instant matter was conducted in the appropriate manner. In a similar matter the Commissioner stated in "M.W." v. Board of Education of the Freehold Regional High School District, 1975 S.L.D. 127, as follows:

> "***The Commissioner is constrained to comment that holding expulsion hearings at closed sessions of boards of education is in the best interests of minor pupils and their parents and families in that it preserves their rights to privacy. It is also in the best interests of maintaining an orderly proceeding. Likewise, a board may consider its findings in caucus session. It is not proper, however, to reach a final determination by voting to expel or not to expel while in caucus session. To do so reduces to a sham the official legal action of a board which must be taken in public session as required by N.J.S.A. 18A:10-6. American Heating and Ventilating Co. v. Board of Education of the Town of West New York, 81 N.J.L. 423, 79 A. 313 (1911) (Emphasis supplied.) (at 132)

The Commissioner does not find the Board's failure, herein, to be fatal to its case. In the matter of "M.W." supra, petitioner was expelled and denied the right to attend public school. In the instant matter, petitioner was suspended, afforded home instruction and subsequently provided an alternative instructional program at the Board's high school. To find that the Board's actions were totally defective would place form over substance. Accordingly, the Commissioner concludes that, absent a clear showing that due process was denied, the Board's suspension of C.R. pursuant to N.J.S.A. 18A:37-5 is entitled to a presumption of correctness. Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); Schinck v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448, 476 (App. Div. 1960)

For the reasons stated, the Motion for Interim Relief is denied. The alternate program of education has been continued by the Board for the remainder of the 1978-79 school year.

Accordingly, the Commissioner finds and determines that no further relief can be accorded petitioner in this regard. Consequently, the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 23, 1979

CAROL COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Paul T. Koenig, Jr., Esq.

For the Respondent, Sirkis & Schweighardt
(Thomas Schweighardt, Esq., of Counsel)

Petitioner was employed as a school social worker on a part time basis since the 1971-72 academic year by the Board of Education of the Town of Hackettstown, hereinafter "Board." Petitioner alleges the Board created another part time school social worker position which, if joined to hers, would have been equivalent to a full time position. Petitioner lays claim to entitlement to the full time position of school social worker she alleges the Board created. The Board denies the allegations and further denies petitioner has any claim to employment with it since she has tendered her written resignation from its employ. The Board seeks dismissal of the Petition on the grounds that petitioner fails to state a cause of action upon which relief could be granted.

The Board's Motion to Dismiss, with supporting letter memorandum, and petitioner's letter memorandum in opposition to the Motion to Dismiss are referred directly to the Commissioner of Education for adjudication.

The Commissioner observes that petitioner's claim to entitlement to a full time position as school social worker in the employ of the Board is grounded upon the following allegations set forth in her Petition:

1. Petitioner was employed by the Board since September 1971 as a school social worker on a two day a week basis and continued in that part time employment each year thereafter through the completion of the 1977-78 academic year.

2. Petitioner acquired tenure of employment in that position pursuant to the provisions of N.J.S.A. 18A:28-5.

3. The Board created another separate school social worker position on a three day a week basis for the 1978-79 academic year.

4. The Board did not combine petitioner's two day a week position with its newly created three day a week position; rather, the Board did keep the two part time positions separate.

5. The Board did appoint a person, other than petitioner, to its three day a week position of school social worker.

It is upon these allegations that petitioner prays the Commissioner to determine that the Board created a de facto full time position of school social worker and that by virtue of her tenure of employment she is entitled to that full time position.

The Commissioner takes notice that petitioner, subsequent to the completion of the 1977-78 academic year and subsequent to her acquiring knowledge that the Board appointed a person to its newly created three day a week position, advised the Board in writing on August 3, 1978 as follows:

> "In face of the Board's action in hiring *** for the alleged three fifths time position as School Social Worker, despite the Administrators' recommendations that I be hired for the full time position of School Social Worker, I have been forced to seek a full time position elsewhere.
>
> "I am therefore resigning as two fifths time School Social Worker. I have no intention of abandoning my claim to tenure to what I conceive to be a single de facto full time social worker position in the Hackettstown school district.
>
> "I am ready, willing and able to perform the duties that this position requires." (C-1)

The Commissioner, considering petitioner's allegations in a way most favorable to her complaint, agrees with the Board when it argues that petitioner's acquisition of tenure of employment in a two day a week position does not entitle her to a legitimate claim to a full time position. Woodbridge Township Federation of Teachers Local No. 822, AFL-CIO v. Board of Education of the Township of Woodbridge: Woodbridge Township School Administrators' Association v. Board of Education of the Township of Woodbridge, 1974 S.L.D. 1201 Consequently, it is immaterial for purposes of the Petition herein whether the Board created a de facto full time position of school social worker as alleged. Even if the Board created a separate full time position of school social worker and so long as petitioner's two day a week position was not abolished by the Board, petitioner's entitlement to employment was limited solely to her two day a week position.

Petitioner does not allege that the Board took any action which affected her two day a week position to which she had a tenure claim. Rather, petitioner complains that she was not appointed by the Board to a position to which she had no claim.

It may well be that the administrators recommended her to the Board for appointment to the additional three day a week position as she alleges. It is well established, however, that a board of education need not follow the recommendations of its administrators with respect to the appointment of personnel. (See Ronnie Abramson v. Board of Education of the Borough of Colts Neck, 1975 S.L.D. 418, aff'd State Board of Education 424, aff'd Docket No. A-780-75 New Jersey Superior Court, Appellate Division, September 27, 1976 (1976 S.L.D. 1103).) N.J.S.A. 18A:16-1 gives boards of education alone the authority to employ personnel, including teachers.

Whether the Board desired to create an additional part time school social worker position, so long as it took no action adversely affecting petitioner's two day a week position, is a matter wholly within the authority of the Board. The Commissioner so holds.

A final matter remains. Petitioner tendered her written resignation from the Board's employ on August 3, 1978, twenty eight days before the commencement of the 1978-79 academic year. N.J.S.A. 18A:28-8 is specific when it states:

> "Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year."

The Board did not complain of the untimeliness of petitioner's resignation at the time. Consequently, the Commissioner finds no useful purpose would be served by invoking the discipline set forth in the statute against petitioner.

The Commissioner is constrained to observe that petitioner's resignation from her tenure position with the Board effectively terminates any employment claim against the Board. Although there is nothing in the record to establish that the Board formally accepted petitioner's resignation, it strains credibility to assume that since August 1978 when petitioner ceased her employment to the present date her resignation has not been accepted by the Board. There is nothing in the record to establish, nor is it even alleged, that petitioner ever attempted to rescind her written resignation.

The Commissioner finds and determines that under the circumstances herein petitioner has failed to state a cause of action upon which relief could be granted. The Board's Motion to Dismiss is hereby granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 24, 1979

IN THE MATTER OF THE APPLICATION)
OF THE BOARD OF EDUCATION OF THE)
UPPER FREEHOLD REGIONAL SCHOOL)
DISTRICT, MONMOUTH COUNTY)

INITIAL DECISION

For the Board of Education, Peter Kalac, Esq.
For the Municipal Governing Bodies of Upper
Freehold Township and the Borough of Allentown,
Dawes, Gross & Youssouf, (John I. Dawes, Esq. of Counsel)

BEFORE THE HONORABLE ERIC G. ERRICKSON, A.L.J.

The Upper Freehold Regional Board of Education, hereinafter "Board", on April 30, 1979 filed a Petition of Appeal requesting that the Commissioner of Education make available for the Board's use $2,300,000 to replace the roof on its high school and to construct an addition to that school to alleviate crowded conditions. The Borough Council of Allentown and the Township Committee of Upper Freehold Township, hereinafter "Governing Bodies," while not denying that there is imperative need for replacement of the roof, assert that any resolution of the needs of the Board should be effected without the levying of additional local property taxes.

At a pre-trial conference conducted on June 11, 1979 an agreement was reached which resulted in the Board's Amendment of its Petition of Appeal by eliminating therefrom all reference to construction and financing of the proposed building addition. The elimination of the proposed addition reduces the Board's request for aid from $2,300,000 to $1,643,000. A hearing was conducted at the Board's offices, Allentown, on June 19, 1979. A Brief and Memorandum of Law were submitted thereafter.

There is no dispute over the essential facts. I FIND the following to be uncontroverted relevant facts in the contested matter:

The Allentown High School, constructed as a one story structure in 1963, currently enrolls approximately 1,050 pupils from grades nine through twelve. During 1975 the Board became aware of alarming cracks in certain corridor floors, deflection of portions of the roof and distortion of the windows in that part of the building known as the 300 wing. The Board, thereupon, ordered its engineering consultant to prepare a report on the condition of the building. After the engineering report was submitted during the summer of 1975, the Board instituted legal proceedings in court against the architect and others who had worked on plans and construction of the Allentown High School. That suit for damages has not been determined to date.

The engineering report revealed that, when portions of the roof had been subjected to load testing of sixty pounds per square foot (twice the required total load bearing capacity), the vertical deflections were less than expected and the

deflection recovery ranged from ninety seven point eight (97.8) per cent to one hundred (100) per cent within three hours of load removal. The engineering consultant advised the Board that no indication of weakness or failure was observed as a result of the load testing. (J-1, Section 2) Similar results were reported from load testing of corridors in which cracking had been noticed.

The existing roof of the school is constructed as a built up roof over Dox planks which, running parallel to the window walls of classrooms, span distances of twenty-four to twenty-seven feet between bearing walls. Dox planks consist of precast, reinforced hollow core concrete slabs designed to deflect to a level parallel to the ground when installed carrying both their own dead weight and the weight of the built up roof above. Ceilings installed in the school's classrooms consist of acoustical tiles attached by mastic to the bottoms of the Dox plank itself.

Between 1975 and the spring of 1978 conditions at the school worsened. The engineer testified that in May 1978, after further load testing, he again found the building structurally safe for occupancy but that the roof membrane had blistered and cracked, that ceiling tiles had fallen as the result of water leaking into the building, and that water in the building had created potential hazards to its occupants. He further testified that some Dox planks had a two inch downward deflection from the horizontal. He also testified that one Dox plank had disengaged from the tongue and groove alignment with the adjacent plank and had moved laterally causing damage to the window-wall on which it rested because of its excess downward deflection. (J-6) He stated that it is his professional opinion that although the excess deflection had caused serious damage to the roof's "skin" surface itself and the building below, there was no evidence of inability of the Dox plank to carry the load for which it is designed. (tr. 47-90; J-1,5).

The testimony and written report dated October 16, 1978 of the Chief Safety Consultant of the Department of Education are corroborative of the reports and testimony of the Board's engineering consultant. (J-1, Section 3) Similarily corroborative, is the uncontroverted, convincing and forthright testimony of the Superintendent and the building principal who testified that despite stop-gap roof repairs costing over $10,000, the operation of the building during rain and melting snows continues to be an intolerable headache and nightmare. They testified that on at least thirty occasions during the 1978-79 school year classes had to be relocated because of dripping water, falling ceiling tiles and potential hazards presented by pails and puddles in classrooms. They testified that on one occasion an electrically operated fire sensor had been activated by leaking water, that as a safety precaution windows in certain rooms are taped, curtains kept constantly drawn, that buckets are in constant evidence in corridors and classrooms during rains, that floor tiles are lifting, that some furniture has been ruined because of water damage, and that puddles on corridor and classroom floors are hazardous. Both testified that faculty and pupil morale has suffered, that parents regularly express concern over their children's safety, and that in their opinions the condition of the building does not now comply with thorough and efficient standards as set forth in N.J.S.A. 18A:7A-1 et seq. (Tr. 15-23, 26-38).

The uncontroverted testimony of the Superintendent establishes the fact that a referendum proposal to issue bonds to rebuild the roof at a cost of $1,643,000 and a second proposal to construct a building addition at an additional cost of $699,000 were defeated by the voters on December 13, 1978. Further uncontroverted

testimony of the Superintendent reveals that the Board then established a community based twenty-one member Ad Hoc Advisory Task Force with representative members from the Board, sending district boards, the Governing Bodies, the education association, a taxpayers committee, and community organizations. After numerous meetings the Ad Hoc Task Force on March 7, 1979 endorsed, inter alia, the construction of an open web/steel joist, permanent, bondable, positive pitched roof as recommended by the Board's architect. (J-1,3) Thereupon, the Board again submitted to the voters at the annual school election on April 3, 1979 a proposal to issue bonds in the amount of $1,643,000 to construct such a roof, to remove the existing Dox-plank roof, and to make attendant repairs to the building. When the voters again defeated the Board's proposal by approximately a two-to-one vote, the Board appealed to the Commissioner of Education to exercise his broad powers under the education laws of the State to provide financial aid from funds within his control or, in the alternative, to authorize the issuance of bonds. The Board has since been notified that it is not eligible for any existing emergency funds.

I FIND no evidence within the record on which to base a conclusion that the roof or walls of the building are in imminent danger of collapsing as a result of the unfortunate and unexpected downward deflection of the Dox roof planks. Nevertheless, the frequent presence of quantities of water in the building, the deflection of windows and window sills, and the entry of water into at least one electrically operated sensor, even after expensive stop-gap repairs to the built up roof, lends credence to the expressed opinion of the Chief Safety Consultant that the danger of breaking glass and possible injury to the building occupants is very real. The specter of liability of the Board and the communities it serves in the event of serious injury to pupils in the school becomes more painfully evident with the written notice of its insurance carrier that property and liability coverage will not be continued in the ensuing school year unless immediate and permanent repairs are begun prior to September 1979. (J-4)

Both the Board and the Governing Bodies agree that proper action to effect a permenent solution should be undertaken. The Board relies on its architect's recommendation. The Governing Bodies, conversely, favor a solution recommended by a minority of the Ad Hoc Task Force which solution, at an estimated cost of $1,368,000, calls for construction of a completely separate, independent self-supporting roof system utilizing prefabricated, engineered steel trusses straddling the present structural system. Both proposals call for the removal of the existing Dox planks.

A careful review and balancing of the documents in evidence and the parol evidence entered at the hearing and the facts herein before set forth leads to the finding that the Board has given proper consideration to both the proposal of its architect and the alternate proposal submitted by the minority of the Ad Hoc Task Force. The Board has discretionary authority conferred by the Legislature to make decisions regarding the management of property of the school district.. N.J.S.A. 18A:11-1 Absent a showing of bad faith, arbitrariness or violation of the statutes or rules of the State Board of Education, such decisions of education boards are entitled to a presumption of correctness. As was stated by the Court:

> The authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. Commarata v. Essex County Park Commission 26 N.J. 404, 411 (1958)
>
> Similarily, the Commissioner stated that:
>
> "***it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" Boult and Harris v. Board of Education of the City of Passaic 1939-49 S.L.D. 7, 13, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 E. & A. 1947)

The Board relies on the recommendation of an architectural firm which not only has provided services to over 700 schools districts projects since 1950, but also works on numerous roof projects for schools annually. (Tr. 117; P-1) By contrast the minority report which the Board considered but rejected is the work product of an engineer whose experience in roof projects for schools is much less extensive and who for the past approximately ten years has not been engaged in such school roof projects. (Tr. 156-157) The Board's reliance on its architectural firm's recommendation in such circumstances, while somewhat more costly, cannot be considered evidential of bad faith or arbitrariness. Green Village Road School Association v. Board of Education of the Borough of Madison, Morris County, 1976 S.L.D. 716 Nor is the tax burden which would result from its proposal such that it cannot be borne when spread over a number of years. The estimated tax increase to the resident taxpayer which would result from the Board's proposal, as computed by the Ad Hoc Task Force would be 2.7 cents per $100 of assessed valuation in the Allentown Borough and 4.55 cents per $100 of assessed valuation in Upper Freehold Township. (J-3) Through tuition payments sending districts would bear their fair share or 70 per cent of the cost. Such additional tax cost would pale into insignificance were a series of unfortunate accidents to occur, disabling pupils in the building as the result of conditions where water is frequently present on the corridors and in proximity to electrical fixtures.

Remedial action is clearly necessary to reestablish normal conditions in the school. The Board has twice presented proposals which were rejected by adverse expression of the voters.

The Commissioner has never heretofore authorized the issuance of bonds for building construction or renovation. Rather, he has relied, when such petitions were presented to him, on the statutory authority of a local board to present a referandum question to the voters for capital projects. Central Regional Education Association, et al. v. Board of Education of the Central Regional High School District, Ocean County, 1977 S.L.D. (decided May 6, 1977) The instant matter, however, is importantly distinguished from Central Regional in that, herein, there is clearly present danger to

the health and safety of pupils within the Allentown High School. Such conditions and the distractions and lowered morale which have had a deleterious effect on a viable educational program may not await a long series of referenda spanning seven years as found necessary in Central Regional before a building program was approved by the voters. More timely action is urgently required in the instant matter.

While no statute by its specific wording authorizes the Commissioner to approve a bond issue which has been rejected by the voters, the Commissioner is not without authority under his broad powers conferred by the Legislature to take such action. In similar circumstances where specific statutory wording was absent, the New Jersey Supreme Court stated that the Commissioner under his broad powers had authority to direct a merger of school districts. Jenkins, al., v. Morris Township School District, et al., 50 N.J. 483 (1971) Similarly, the Commissioner without specific statutory wording in The Matter of the Application of the Upper Freehold Regional Board of Education, Monmouth County, 1978 S.L.D. (decided March 22, 1978) certified to the Monmouth County Board of Taxation additional taxes to be raised for a supplemental budget to enable the Board to avert the necessity of closing its schools on April 1, 1978 after the voters had refused to authorize a supplemental budget. Therein the Commissioner stated, inter alia, that:

> "*** The Commissioner may not be unmindful of the authority elsewhere conferred upon him to attain the objective of the Public School Education Act of 1975. N.J.S.A. 18A:7A-1 et seq. The adjustment of budgets is specifically conferred therein, as follows:
>
> "If, after a plenary hearing, the Commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district***." N.J.S.A. 18A:7A-15.
>
> "The Supreme Court, in passing on the validity of the 1975 Act, in Robinson v. Cahill, 69 N.J. 449, 463 (1976), confirmed that the State, in order to meet its constitutional obligation, must have available the authority to compel a local school district to raise necessary funds to conduct a thorough and efficient program of education.
>
> "In the instant matter it has been concluded that sufficient necessary funds have not been provided. The purpose of the Legislature to anticipate and take action to forestall deficiencies in a given educational program would surely be frustrated if the program in toto were to be allowed to become non-existent for nearly one third of the scheduled academic year. It is precisely such impermissible result that the 1975 Act and the decision in Robinson, supra, were intended to

> prevent. The fact that the instant matter results from voter reluctance to approve necessary expenditures does not render the Commissioner powerless to take corrective action. To conclude otherwise would be to arrive at an absurd and anomalous result. State v. Madewell, 117 N.J. Super. 392 (App. Div. 1971), aff'd 63 N.J. 506 (1973) Accordingly, the Commissioner determines that he has authority and does hereby certify to the Monmouth County Board of Taxation the amount of $298,469 as the additional sum to be raised by local taxation for current expenses of the Board in order to insure a thorough and efficient educational program throughout the remainder of the 1977-78 school year.***"
> (at p. __)

Similarly, herein, the Commissioner is both clothed with authority and has responsibility to take corrective action to enable the Board to restore the Allentown High School to a condition which comports with the thorough and efficient requirements written into the New Jersey State Constitution in 1875 and further defined by the Legislature by the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq. See in this regard Elizabeth Board of Education v. Elizabeth City Council, 55 N.J. 501 (1970) wherein the Court stated:

> "../I/t is the duty of the Commissioner to see to it that every district provides a thorough and efficient school system. This necessarily includes adequate physical facilities and educational materials, proper curriculum and staff and sufficient funds."
> 55 N.J. at 506.

While the Public School Education Act of 1975 did not address the specifi authority of the Commissioner to authorize and direct that capital expenditures be undertaken, that authority in such a context as presented herein is inherent since N.J.S.A. 18A:7-5(B) requires that pupils be provided with "Adequately equipped, sanitary and secure physical facilities***" See Robinson v. Cahill, 69 N.J. 449 at 463 (1976).

For the reasons set forth above, and pursuant to the broad powers conferr upon the Commissioner by the Constitution and Legislature in his capacity as chief State school officer, the issuance of school district bonds in the amount of $1,643,000 is herewith authorized for a capital project to replace the roof of the Allentown High School and to make attendant repairs to that structure.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record of these proceedings. The parties have, pursuant to the rules of the State Board of Education and the Administrative Procedures Act a period of fifteen (15) days to file exceptions with the Commissioner should they so desire. This Initial Decision shall become final forty-five (45) days after receipt by the Commissioner of Education unless accepted, rejected or modified by him within forty-five (45) days.

July 16, 1979
DATE

Eric G. Errickson A.L.J.
ERIC G. ERRICKSON, A.L.J.

IN THE MATTER OF THE APPLICATION :
OF THE BOARD OF EDUCATION OF THE :
UPPER FREEHOLD REGIONAL SCHOOL :
DISTRICT, MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the initial decision in the instant matter. He observes that counsel for the Governing Bodies filed two points of exception pursuant to N.J.A.C. 6:24-1.17(b).

The Commissioner finds no merit in the Governing Bodies' initial argument that the Judge erroneously relied on the contention that the engineer for the Governing Bodies had less extensive experience and had not been engaged in the past ten years in school roof projects. On cross-examination the engineer consultant for the Governing Bodies could not name a single school for which he had done structural design work while employed by the Redevelopment Agency in the mid 1950's. (Tr. 155) The engineer testified further that he had been consultant on one school in the late 1960's, the Ethel McKnight School, which is a geodesic structure in the East Windsor Regional School District. (Tr. 156) The Commissioner finds this experience to be in marked contrast to the unrefuted record of the architectural consultant to the Board with services to over 700 school districts since 1950 and numerous roof projects for schools annually. (Tr. 117; P-1)

The Commissioner can find no significance in the second point of exception of the Governing Bodies wherein it is stated "***at no time was there any testimony that the issue of whether a bond should be issued in the amount of $1,643,000.00 was submitted to the voters as the sole issue to be determined***." The initial decision makes it clear that the two referenda proposals, one for $699,000 to construct a building addition and one for $1,643,000 to rebuild the roof, were presented to the voters at a special election on December 13, 1978. It is also clear that the Task Force subsequently recommended that the question of the roof replacement alone be placed on the April 3, 1979 ballot. Thus the voters of the district had two distinct opportunities to authorize a bond issue for repair of the roof. It is of no moment that on those occasions there were other matters to be voted upon.

In the Commissioner's judgment, the findings and conclusions in this matter are consistent with school law and prior determinations of the courts concerning the Commissioner's powers to effectuate constitutional and statutory goals because of his overall responsibility for supervision of the schools of the State.

In addition the Commissioner has authority to order alterations in school buildings where such changes are deemed by him to be proper. N.J.S.A. 18A:20-36 In Formal Opinion No. 26-77 the Attorney General said in pertinent part:

> "***[I]t is our opinion that under the Education Clause of the State Constitution and the Public School Education Act of 1975, the Commissioner and the State Board are authorized to direct a local district to undertake a capital project where such a project is deemed essential to a constitutionally mandated thorough and efficient educational system even though the issuance of bonds for such expenditures may have been disapproved by the voters."
> (at p. 5)

Accordingly, the Commissioner accepts the findings and conclusions in the instant matter and directs the issuance of school district bonds in the amount of $1,643,000 for a capital project to replace the roof of Allentown High School and necessary attendant repairs.

COMMISSIONER OF EDUCATION

August 24, 1979

IN THE MATTER OF THE APPLICATION :
OF THE BOARD OF EDUCATION OF UPPER :
FREEHOLD REGIONAL SCHOOL DISTRICT, : STATE BOARD OF EDUCATION
MONMOUTH COUNTY. : DECISION
:

Decided by the Commissioner of Education, August 24, 1979

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

For the Respondent-Appellant, Dawes, Gross & Youssouf (John I. Dawes, Esq., of Counsel)

Relying upon the Public School Education Act of 1975, the Commissioner has directed the issuance of school bonds in the amount of $1,643,000 for a capital project to replace the roofing of the Allentown High School and to make other necessary repairs to that structure. The Commissioner took this action after the voters of the District had twice defeated bond issues which would have provided the funds needed for this capital project. The Commissioner adopted the findings and conclusions of the administrative law judge that this expenditure was essential to providing a thorough and efficient education in Allentown High School.

The State Board affirms the Commissioner's decision for the reasons set forth therein. In so holding we wish to add a comment with respect to Central Regional Education Association v. Board of Education of Central Regional High School District, 1977 S.L.D. 543, appeal to the State Board dismissed May 3, 1978. In that case the Commissioner determined that he had no authority to order capital expenditures by a Type II District without an affirmative vote of the electorate. We believe that decision should now be overruled as being inconsistent with the Public School Education Act of 1975 and related statutes as they have been interpreted by the New Jersey Supreme Court. See Elizabeth Board of Education v. Elizabeth City Council, 55 N.J. 501, 506 (1970); Robinson v. Cahill, 69 N.J. 449, 463 (1976); Formal Opinion of the Attorney General No. 26-77.

December 5, 1979

Pending N.J. Supreme Court

UNION TOWNSHIP TEACHERS ASSOCIATION, on behalf of JOSEPH CALIGUIRE, JR., ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioners, Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld, Esq.)

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

Petitioners allege that it has been the policy of the Board of Education of the Township of Union, hereinafter "Board," to not give equivalent years of employment credit for time spent in the military service of the United States, pursuant to N.J.S.A. 18A:29-11. Petitioners pray that the Commissioner of Education enter an order directing the Board to comply with N.J.S.A. 18A:29-11, place each petitioner at the appropriate step of the salary guide, compensate each petitioner the appropriate amount of back pay and, further, to make pension contributions for each petitioner as is deemed appropriate.

Oral argument was held on petitioners' Motion for Summary Judgment on February 14, 1979 at the State Department of Education.

The Board avers that the Petition is barred by laches, by the statute of limitations applicable to contracts, by the rules of practice as promulgated by the State Board of Education, and by estoppel.

Most facts were stipulated and essential documents have been provided to the hearing examiner, who now submits the controverted matter to the Commissioner for Summary Judgment based on the pleadings, facts and arguments.

The Commissioner determines that petitioners are not barred from advancing their claims by the equitable defense of laches, the statute of limitations, the rules of practice or estoppel. As was stated in Howard J. Whidden, Jr. v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977 (1977 S.L.D. 1312):

> "***The determination***is grounded in the nature of the claim and in a judgment that the Board has not been prejudiced. This is not a case wherein a decision in favor of petitioner will result in the payment of two salaries for one position by the Board as the result of petitioner's delay. (See William Gleason v. Board of Education of the City of Bayonne, 1938 S.L.D. 138.) It is a case in which it is alleged that a statutory entitlement to placement on or movement within an adopted salary schedule was ignored.***" (at 359)

The Court also determined in Whidden, supra, that N.J.S.A. 18A:29-9, which authorizes a local board of education to establish the initial salary of a newly employed teaching staff member "*** at such point as may be agreed upon***" by the teacher and the board, was not a waiver of the requirement that credit be given for military service at the time of employment.

The Court said in these respects that:

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

And,

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

The Commissioner will address the respective claims, based upon N.J.S.A. 18A:29-11, which reads in pertinent part as follows:

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

The Court considered this statute in Whidden, supra, and determined that the word "shall" as contained therein mandated that military service credit must be awarded to a maximum of four years at the time of employment.

Subsequent to the Court decision in Whidden, supra, the Commissioner held in Michael J. Watsula v. Board of Education of the Township of Plumsted, 1977 S.L.D. 692 and reiterated in Lester Bernardo v. Board of Education of the Township of Ewing, Mercer County, 1978 S.L.D. ___ (decided July 28, 1978):

> "***The words of the Court are clear and the Commissioner holds that all teaching staff members who have served in the armed forces are entitled to count the years of such service to a maximum of four years for employment increments within the scope of the Board's adopted salary schedule.***"
>
> (at _____)

The issue of granting salary credit for less than a full year of active military service was addressed by the Commissioner in Marjorie A. Lavin v. Board of Education of the Borough of Hackensack, 1979 S.L.D. _____ (decided June 6, 1979) when he said:

> "***It is the Commissioner's determination that military service of six months or more shall be construed to be one year of salary credit. Conversely, military service of less than six months shall not be recognized.***"
>
> (at ____)

Robert Allen - Petitioner was employed on Step 2 and stipulates receiving 1 year of military service credit, which was verified by Board records. Active military service is verified as 1 year 4 months 8 days. Petitioner claims an additional 6 months' salary credit. His claim is dismissed.

Gerard Anderson - Petitioner was discharged from 1 year 11 months of active military service on September 3, 1956 and employed by respondent in September 1963 on Step 8 of the salary guide. He demands 2 years of salary credit. The unanswered question is whether the 7 years of salary credit included any credit for military service. Petitioner has not met his burden of proof that the salary credit granted by the Board excluded credit for military service. Claim is dismissed.

Edward Beach - Petitioner was employed by the Board in September 1955 after 1 year 11 months of verified active military service. He was placed on Step 4 of the salary guide, having been granted salary credit for 1 year of military service, which is verified by Board records. Petitioner claims 1 additional year of salary credit, which is hereby determined to be his statutory right. The Board is ordered to pay petitioner, forthwith, the amount of back pay as indicated below.

SALARY AND GUIDE PLACEMENT

	Actual		Proper		Amount Due
-955-56	Step 4	$4200	Step 5	$4400	$200
1956-57	Step 5	4600	Step 6	4800	200
1957-58	Step 6	5100	Step 7	5300	200
1958-59	Step 7	5600	Step 8	5800	200
1959-60	Step 8	6000	Step 9	6200	200
1960-61	Step 9	6400	Step 10	6600	200
1961-62	Step 10	6900	Step 11	7100	200
1962-63	Step 11	7400	Step 12	7600	200
1963-64	Step 12	7800	Step 13	8000	200
1964-65	Step 13	8500	Step 14	8800	300
1965-66	Step 14	9100	Step 15	9400	300
1966-67	Step 15	9800	Step 16	10100	300
1967-68	Max	10700	Max	10700	0
1968-69	Max	13000	Max	13000	0
1969-70	Max	14160	Max	14160	0
1970-71	Max	16000	Max	16000	0
1971-72	Max	16900	Max	16900	0
1972-73	20 year	17700	20 year	17700	0
1973-74	20 year	18200	20 year	18200	0
1974-75	M-23	19400	20 year	19400	0
1975-76	M-24	20400	20 year	20400	0
1976-77	M-25	21200	20 year	21200	0
1977-78	M-26	22100	20 year	22100	0
1978-79	SM	23050	SM	23050	0
				TOTAL AMOUNT DUE	$2700

Joseph Caliguire - Petitioner was employed by the Board in September 1967 after 2 years of verified military service and placed on Step 2 of the salary guide. He stipulates that he received salary credit for 1 year of military service and demands 1 additional year, which is hereby determined to be his statutory right. The Board is ordered to pay petitioner, forthwith, the amount of back pay as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1967-68	Step 2	$6200	Step 3	$6500	$300
1968-69	Step 3	7200	Step 4	7545	345
1969-70	Step 4	8095	Step 5	8440	345
1970-71	Step 5	9600	Step 6	9900	300
1971-72	Step 6	10600	Step 7	11000	400
1972-73	Step 7	11300	Step 8	11700	400
1973-74	Step 8	12000	Step 9	12450	450
1974-75	Step 9	13100	Step 10	13600	500
1975-76	Step 10	14400	Step 11	14900	500
1976-77	Step 11	15500	Step 12	16200	700
1977-78	Step 12	16700	Step 13	17600	900
1978-79	Step 13	18200	Step 14	19100	900
				TOTAL AMOUNT DUE	$6040

Salvatore Ciccotelli - Petitioner was employed in September 1958 and placed at Step 3 of the salary guide. He has stipulated that 1 year of salary credit was received for 3 years 1 month 1 day of verified active military service, which is documented by Board records. The Commissioner determines that petitioner is entitled to 2 additional years of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1958-59	Step 3	$ 4600	Step 5	$ 5000	$400
1959-60	4	5000	6	5400	400
1960-61	5	5400	7	5800	400
1961-62	6	5700	8	6200	500
1962-63	7	6300	9	6700	400
1963-64	8	6700	10	7200	500
1964-65	9	7200	11	7700	500
1965-66	10	7800	12	8300	500
1966-67	11	8400	13	9000	600
1967-68	12	9200	14	9800	600
1968-69	13	10650	Max	11050	400
1969-70	Max	11700	Max	11700	0
1970-71	Max	13000	Max	13000	0
1971-72	Max	13800	Max	13800	0
1972-73	Max	14400	Max	14400	0
1973-74	Max	14800	20 year	14900	100
1974-75	Max	1600	Max	16000	0
1975-76	Max	16900	Max	16900	0
1976-77	Max	17600	Max	17600	0
1977-78	Max	18300	Max	18300	0
1978-79	SM	19200	SM	19200	0
				TOTAL AMOUNT DUE	$5300

Nelson Claypoole - Petitioner has 3 years of verified active military service and stipulates that he was granted 1 year for salary credit when he was employed in September 1969. He now claims 2 additional years of salary credit. A review of petitioner's employment record reveals an initial salary which does not match any step on the salary guide and falls between the 9th and 10th steps. Petitioner has not met his burden of proof that the salary credit of 9 plus years granted by the Board excluded full credit for military service. Claim is dismissed.

Gene Consales - No teacher certification or verification of military service time has been submitted. Claim is dismissed.

Paul Corrigan - Petitioner was employed in September 1951 at Step 2 of the salary guide. He alleges that he did not receive any salary credit for military service and claims 3 years for his verified 3 years 17 days of military service. The Commissioner determines that petitioner has not met his burden of proof that the Board's granting of one year of salary credit was not for military service but is entitled to 2 years of credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1951-52	Step 2	$2650	Step 4	$2950	$300
1952-53	Step 3	3000	Step 5	3300	300
1953-54	Step 4	3300	Step 6	3600	300
1954-55	Step 5	3900	Step 7	4300	400
1955-56	Step 6	4600	Step 8	5000	400
1956-57	Step 7	5000	Step 9	5400	400
1957-58	Step 8	5500	Step 10	5900	400
1958-59	Step 9	6000	Step 11	6400	400
1959-60	Step 10	6400	Step 12	6800	400
1960-61	Step 11	7000	Step 13	7400	400
1961-62	Step 12	7500	Step 14	7900	400
1962-63	Step 13	8000	Step 15	8400	400
1963-64	Step 14	8500	Step 16	8900	400
1964-65	Step 15	9400	Step 17	10000	600
1965-66	Step 16	10000	Step 18	10600	600
1966-67	Step 17	10700	Max	11200	500
1967-68	Max	11800	Max	11800	0
1968-69	Max	13000	Max	13000	0
1969-70	Max	14160	Max	14160	0
1970-71	Max	16000	Max	16000	0
1971-72	Max	16900	Max	16900	0
1972-73	20 year	17700	25 year	17900	200
1973-74	20 year	18200	25 year	18400	200
1974-75	M-24	19400	Max	19400	0
1975-76	M-25	20400	Max	20400	0

1976-77	M-26	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
				TOTAL AMOUNT DUE	$7000

John D'Alessio - No teacher certification or verification of active military service submitted. Claim is dismissed.

Albert D'Amato - Petitioner was employed in September 1952 at Step 2 of the salary guide. He served a verified 2 years 3 months 12 days of active military service and stipulates that he was granted 1 year of salary credit for military service. The Commissioner determines that he is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1952-53	Step 2	$2850	Step 3	$3000	$150
1953-54	Step 3	3150	Step 4	3300	150
1954-55	Step 4	3500	Step 5	3700	200
1955-56	Step 5	4400	Step 6	4600	200
1956-57	Step 6	4800	Step 7	5000	200
1957-58	Step 7	5500	Step 8	5700	200
1958-59	Step 8	6000	Step 9	6200	200
1959-60	Step 9	6400	Step 10	6600	200
1960-61	Step 10	6800	Step 11	7000	200
1961-62	Step 11	7300	Step 12	7500	200
1962-63	Step 12	7800	Step 13	8000	200
1963-64	Step 13	8300	Step 14	8500	200
1964-65	Step 14	9100	Step 15	9400	300
1965-66	Step 15	9700	Step 16	10000	300
1966-67	Step 16	10400	Step 17	10700	300
1967-68	Step 17	11500	Step 18	11800	300
1968-69	Max	13000	Max	13000	0
1969-70	Max	14160	Max	14160	0
1970-71	Max	16000	Max	16000	0
1971-72	Max	16900	Max	16900	0
1972-73	20 year	17700	20 year	17700	0
1973-74	20 year	18200	20 year	18200	0
1974-75	M-24	19400	Max	19400	0
1975-76	M-25	20400	Max	20400	0
1976-77	M-26	21200	Max	21200	0
1977-78	M-27	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
				TOTAL AMOUNT DUE	$3500

Joseph DiMatteo - Petitioner was employed in September 1950 and placed on Step 2 of the salary guide with verified active military service of 1 year 8 months 12 days. The Commissioner determines that he is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1950-51	Step 2	$2350	Step 3	$2500	$150
1951-52	Step 3	2800	Step 4	2950	150
1952-53	Step 4	3150	Step 5	3300	150
1953-54	Step 5	3450	Step 6	3600	150
1954-55	Step 6	3900	Step 7	4100	200
1955-56	Step 7	4600	Step 8	4800	200
1956-57	Step 8	5000	Step 9	5200	200
1957-58	Step 9	5500	Step 10	5700	200
1958-59	Step 10	6000	Step 11	6200	200
1959-60	Step 11	6600	Step 12	6800	200
1960-61	Step 12	7000	Step 13	7200	200
1961-62	Step 13	7500	Step 14	7700	200
1962-63	Step 14	8000	Step 15	8300	300
1963-64	Step 15	8400	Step 15	8600	200
1964-65	Max	9400	Max	9400	0
1965-66	Max	9700	Max	9700	0
1966-67	Max	10100	Max	10100	0
1967-68	Max	10700	Max	10700	0
1968-69	Max	12000	Max	12000	0
1969-70	Max	12900	Max	12900	0
1970-71	Max	14500	Max	14500	0
1971-72	Max	15400	Max	15400	0
1972-73	20 year	16100	24 year	16300	200
1973-74	20 year	16600	Max	16800	200
1974-75	Max	17800	Max	17800	0
1975-76	Max	18800	Max	18800	0
1976-77	Max	19550	Max	19550	0
1977-78	Max	20350	Max	20350	0
1978-79	SM	21250	SM	21250	0
				TOTAL AMOUNT DUE	$ 3100

Robert Drew - Petitioner was employed in September 1959 and placed at Step 3 of the salary guide. He stipulates receiving 2 years of salary credit for military service and has verified active military service totaling 3 years 7 months 21 days. The Commissioner determines that petitioner is entitled to 2 additional years of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1959-60	Step 3	$4800	Step 5	$5200	$400
1960-61	Step 4	5200	Step 6	5600	400
1961-62	Step 5	5500	Step 7	6000	500
1962-63	Step 6	6000	Step 8	6500	500
1963-64	Step 7	6500	Step 9	6900	400
1964-65	Step 8	6900	Step 10	7500	600
1965-66	Step 9	7500	Step 11	8000	500

1966-67	Step 10	8300	Step 12	8900	600
1967-68	Step 11	9200	Step 13	9800	600
1968-69	Step 12	10905	Step 14	11600	695
1969-70	Step 13	12000	Step 15	12900	900
1970-71	Step 14	13700	Max	14500	800
1971-72	Max	15400	Max	15400	0
1972-73	Max	16000	Max	16000	0
1973-74	Max	16500	Max	16500	0
1974-75	Max	17800	Max	17800	0
1975-76	Max	18800	Max	18800	0
1976-77	Max	19550	Max	19550	0
1977-78	Max	20350	Max	20350	0
1978-79	(Not indicated)		Max	20950	0
				TOTAL AMOUNT DUE	$6895

Louis Faranda - Petitioner was employed in September 1959 and placed at Step 7 of the salary guide. He stipulates he received 3 years' salary credit for verified active military service of 5 years 1 month 26 days. Petitioner has not met his burden of proof that the salary credit of 6 years granted by the Board excluded his statutory entitlement of 4 years of credit for military service. Claim is dismissed.

Howard Fenton - Petitioner was employed in September 1954 at Step 6 of the salary guide. He stipulates that he was credited for 1½ years of his verified 2 years 8 months 10 days of active military service, and claims an additional 1¼ years' salary credit. The Commissioner determines that petitioner has not met his burden of proof that the Board did not grant his full statutory entitlement of 3 years of salary credit for active military service. Claim is dismissed.

Frank Gargano - Petitioner was employed in September 1957 at Step 7 of the salary guide. He claims 1 year of salary credit for his verified 1 year 21 days of active military service but has not met his burden of proof that his statutory entitlement was excluded from the 6 years of salary credit granted by the Board. Claim is dismissed.

John Garrabrant - Petitioner was employed in September 1951 and placed on Step 6 of the salary guide. He stipulates he was granted 2 years of salary credit for his verified 2 years 9 months 13 days of active military service, but has not met his burden of proof that the Board did not include his full statutory entitlement in the 5 years of salary credit granted. Claim is dismissed.

Ernest Gebler - Petitioner was employed in September 1949 and placed on Step 2 of the salary guide. He stipulates he was granted 1 year of salary credit for his verified 3 years of active military service. The Commissioner determines that petitioner is entitled to 2 additional years of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1949-50	Step 2	$2350	Step 4	$2650	$300
1950-51	Step 3	2650	Step 5	2800	150
1951-52	Step 4	2950	Step 6	3250	300
1952-53	Step 5	3300	Step 7	3600	300
1953-54	Step 6	3600	Step 8	3900	300
1954-55	Step 7	4300	Step 9	4700	400
1955-56	Step 8	5000	Step 10	5350	350
1956-57	Step 9	5400	Step 11	5800	400
1957-58	Step 10	5900	Step 12	6300	400
1958-59	Step 11	6400	Step 13	6800	400
1959-60	Step 12	6800	Step 14	7200	400
1960-61	Step 13	7200	Step 15	7600	400
1961-62	Step 14	7700	Step 16	8200	500
1962-63	Max	8300	Max	8300	0
1963-64	Max	8900	Max	8900	0
1964-65	Step 17	10000	Max	10500	500
1965-66	Max	10600	Max	10600	0
1966-67	Max	11000	Max	11000	0
1967-68	Max	11800	Max	11800	0
1968-69	Max	13000	Max	13000	0
1969-70	Max	14160	Max	14160	0
1970-71	Max	16000	25 year	16300	300
1971-72	Max	16900	25 year	17200	300
1972-73	20 year	17700	25 year	17900	200
1973-74	20 year	18200	25 year	18400	200
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22652	Max	22100	0
1978-79	SM	23626	SM	23050	0
			TOTAL AMOUNT DUE		$6100

Sidney Gordon - Petitioner was employed in September 1958 and placed on Step 8 of the salary guide. He stipulates he was granted 1 year of salary credit for his verified 3 years 3 months 23 days of active military service. Petitioner claims 2 additional years of salary credit but has failed to meet his burden of proof that his full statutory entitlement was not included in the 7 years of salary credit granted by the Board. Claim is dismissed.

Robert Grebe - Petitioner was employed in September 1969 as a non-degree teacher and received a salary of $9000, which placed him between Steps 10 and 11 on the salary guide. He has 1 year 1 month 13 days of verified active military service, and alleges he did not receive any salary credit for military service and claims 2 years. The Commissioner determines that petitioner has not met his burden of proof that the Board excluded his statutory entitlement in the 9 plus years of salary credit granted to him with his initial employment. Claim is dismissed.

Albert Greenberg - Petitioner was employed in November 1958 and placed on Step 2 of the salary guide. He stipulates that he received 1 year salary credit for his verified 1 year 10 months of active military service. The Commissioner determines that petitioner is entitled to 1 additional year of credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1958-59	Step 2	$4400	Step 3	$4600	$200
1959-60	Step 3	4800	Step 4	5000	200
1960-61	Step 4	5200	Step 5	5400	200
1961-62	Step 5	5500	Step 6	5700	200
1962-63	Step 6	6200	Step 7	6500	300
1963-64	Step 7	7000	Step 8	7200	200
1964-65	Step 8	7400	Step 9	7700	300
1965-66	Step 9	8000	Step 10	8300	300
1966-67	Step 10	8600	Step 11	8900	300
1967-68	Step 11	9700	Step 12	10000	300
1968-69	Step 12	11555	Step 13	11900	345
1969-70	Step 13	12900	Step 14	13200	300
1970-71	Step 14	14600	Step 15	15300	700
1971-72	Step 15	16200	Step 16	16900	700
1972-73	Max	17600	Max	17600	0
1973-74	Max	18100	Max	18100	0
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
				TOTAL AMOUNT DUE	$4545

Philip Guida - Petitioner was employed in September 1959 and placed at Step 3 of the salary guide. He stipulates receiving 2 years of salary credit for his verified 4 years of active military service. The Commissioner determines that petitioner is entitled to 2 additional years of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1959-60	Step 3	$4800	Step 5	$5200	$400
1960-61	Step 4	5200	Step 6	5600	400
1961-62	Step 5	5500	Step 7	6000	500
1962-63	Step 6	6000	Step 8	6500	500
1963-64	Step 7	6500	Step 9	6900	400
1964-65	Step 8	7100	Step 10	7700	600
1965-66	Step 9	7700	Step 11	8200	500
1966-67	Step 10	8300	Step 12	8900	600

1967-68	Step 11	9200	Step 13	9800	600
1968-69	Step 12	10905	Step 14	11600	695
1969-70	Step 13	12000	Step 15	12900	900
1970-71	Step 14	14600	Step 16	16000	1400
1971-72	Step 15	16200	Max	16900	700
1972-73	Max	17600	Max	17600	0
1973-74	Max	18100	Max	18100	0
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78*	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0

*Paid less due to ½ year sabbatical leave

TOTAL AMOUNT DUE $8195

Robert Hassard - Petitioner was employed in September 1955 and placed at Step 5 of the salary guide. His verified active military service was 1 year 1 month 25 days. Board records indicate he was granted 3 years' experience and 1 year military service credit on the salary guide. The Commissioner determines that petitioner received his full statutory entitlement. Claim is dismissed.

Theresa Hatalosky - Petitioner has been employed since September 1965 as a secretary. The statutory entitlement is applicable to teaching staff members only; therefore this claim is dismissed.

William Hazelton - Petitioner was employed in October 1966 and placed at Step 3 of the salary guide. He stipulates that he received 1 year's salary credit for 2 years of verified active military service and this fact is verified by Board records. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1966-67	Step 3	$6100	Step 4	$6400	$300
1967-68	Step 4	6800	Step 5	7100	300
1968-69	Step 5	7890	Step 6	8235	345
1969-70	Step 6	9500	Step 7	9850	350
1970-71	Step 7	10300	Step 8	10700	400
1971-72	Step 8	12200	Step 9	12700	500
1972-73	Step 9	13000	Step 10	13600	600
1973-74	Step 10	13900	Step 11	14500	600
1974-75	Step 11	15100	Step 12	15700	600
1975-76	Step 12	16400	Step 13	17100	700
1976-77	Step 13	17700	Step 14	18500	800

1977-78	Step 14	19300	Step 15	20200		900
1978-79	Step 15	20800	Step 16	21700		900
					TOTAL AMOUNT DUE	$7295

George Hopkins - Petitioner was employed in September 1960 and placed at Step 3 of the salary guide. He stipulates that he received 2 years' salary credit for his alleged 3 years 6 months of active military service and claims 2 additional years' salary credit. Petitioner did not submit verification of either teacher certification or active military service as requested. Claim is dismissed.

John Knodel - Petitioner was employed in September 1960 and placed at Step 8 of the salary guide. He stipulates that he received 2 years' salary credit for his verified 3 years 5 months 27 days of active military service, but has not met his burden of proof that the Board did not include his full statutory entitlement in the 7 years of salary credit granted. Claim is dismissed.

Jerome Kracht - Petitioner was employed in September 1963 and placed at Step 6 of the salary guide. He stipulates that he received 2 years' salary credit for his verified 3 years 11 months 16 days of active military service but has not met his burden of proof that the Board did not include his full statutory entitlement in the 5 years of salary credit granted. Claim is dismissed.

Gordon LeMatty - Petitioner was employed in September 1958 and placed on Step 2 of the salary guide. He stipulates that he received 1 year of salary credit for 1 year 9 months 19 days of verified active military service. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1958-59	Step 2	$4400	Step 3	$4600	$200
1959-60	Step 3	4800	Step 4	5000	200
1960-61	Step 4	5200	Step 5	5400	200
1961-62	Step 5	5500	Step 6	5700	200
1962-63	Step 6	6000	Step 7	6300	300
1963-64	Step 7	6700	Step 8	6900	200
1964-65	Step 8	7100	Step 9	7400	300
1965-66	Step 9	7700	Step 10	8000	300
1966-67	Step 10	8300	Step 11	8600	300
1967-68	Step 11	9200	Step 12	9500	300
1968-69	Step 12	10905	Step 13	11250	345
1969-70	Step 13	12000	Step 14	12450	450
1970-71	Step 14	13700	Step 15	14500	800
1971-72	Max	15400	Max	15400	0

1972-73	Max	16000	Max	16000	0
1973-74	Max	16500	Max	16500	0
1974-75	Max	17800	Max	17800	0
1975-76	Max	18800	Max	18800	0
1976-77	Max	19550	Max	19550	0
1977-78	Max	20350	Max	20350	0
1978-79	Max	21250	Max	21250	0
				TOTAL AMOUNT DUE	$4095

Robert Linz - Petitioner was employed in September 1962 and placed at Step 3 of the salary guide. He stipulates that he received 1 year's salary credit for his verified 1 year 11 months 15 days of active military service but has not met his burden of proof that the Board did not include his full statutory entitlement in the 2 years of salary credit granted. Claim is dismissed.

William Marvin - Petitioner was employed in September 1959 and placed at Step 5 of the salary guide. He alleges that he was granted salary credits for 1 year of teaching experience and 3 years of work experience but did not receive any salary credit for his verified 10 months of active military service. His allegations are verified by the Board's records. The Commissioner determines that petitioner is entitled to 1 year of salary credit for his active military service as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1959-60	Step 5	$5000	Step 6	$5200	$200
1960-61*	Step 5	5300	Step 6	5500	200
1961-62	Step 6	5500	Step 7	5700	200
1962-63	Step 7	5900	Step 8	6100	200
1963-64	Step 8	6100	Step 9	6300	200
1964-65	Step 9	7200	Step 10	7500	300
1965-66	Step 10	7800	Step 11	8000	200
1966-67	Step 11	8400	Step 12	8700	300
1967-68	Step 12	9200	Step 13	9500	300
1968-69	Step 13	10650	Step 14	11050	400
1969-70	Step 14	12450	Step 15	12900	450
1970-71*	Step 14	13700	Step 15	14500	800
1971-72	Max	15400	Max	15400	0
1972-73	Max	16000	Max	16000	0
1973-74	Max	16500	Max	16500	0
1974-75	Max	17800	Max	17800	0
1975-76	Max	18800	Max	18800	0
1976-77	Max	19550	Max	19550	0
1977-78	Max	20350	Max	20350	0
1978-79	SM	21250	SM	21250	0
*No increment granted in 1960-61 and 1970-71				TOTAL AMOUNT DUE	$3750

Gerard Matte - Petitioner was employed in September 1965 and placed at Step 2 on the salary guide. Board records indicate that petitioner was granted 1 year of salary credit for military service. His active military service has been verified as 3 years. The Commissioner determines that petitioner is entitled to 2 additional years' salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1965-66	Step 2	$6100	Step 4	$6700	$600
1966-67	Step 3	6600	Step 5	7200	600
1967-68	Step 4	7600	Step 6	8200	600
1968-69	Step 5	9140	Step 7	9830	690
1969-70	Step 6	10310	Step 8	11000	690
1970-71	Step 7	11100	Step 9	11900	800
1971-72	Step 8	12200	Step 10	13200	1000
1972-73	Step 9	13000	Step 11	14200	1200
1973-74	Step 10	13900	Step 12	15100	1200
1974-75	Step 11	15100	Step 13	16300	1200
1975-76	Step 12	16400	Step 14	17900	1500
1976-77	Step 13	17700	Step 15	19400	1700
1977-78	Step 14	19300	Step 16	21100	1800
1978-79	Step 15	20800	Step 17	22700	1900
			TOTAL AMOUNT DUE		$15480

Laura Mellen - Petitioner was employed in September 1955 and placed on Step 5 of the salary guide. She alleges she received no salary credit for 2 years 2 months of verified active military service but has not met her burden of proof that the Board did not include her full statutory entitlement in the 4 years of salary credit granted to her. Claim is dismissed.

Nicholas Nugent - Petitioner was employed in September 1957 and placed on Step 2 of the salary guide. He stipulates he received 1 year of salary credit for 2 years of verified active military service. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1957-58	Step 2	$4100	Step 3	$4300	$200
1958-59	Step 3	4600	Step 4	4800	200
1959-60	Step 4	5000	Step 5	5200	200
1960-61	Step 5	5600	Step 6	5800	200
1961-62	Step 6	5900	Step 7	6200	300
1962-63	Step 7	6500	Step 8	6700	200
1963-64	Step 8	6900	Step 9	7100	200
1964-65	Step 9	7400	Step 10	7700	300

1965-66	Step 10	8000	Step 11	8200	200
1966-67	Step 11	8600	Step 12	8900	300
1967-68	Step 12	9500	Step 13	9800	300
1968-69	Step 13	11250	Step 14	11600	350
1969-70	Step 14	12450	Step 15	12900	450
1970-71	Max	14500	Max	14500	0
1971-72	Max	15400	Max	15400	0
1972-73	Max	16000	Max	16000	0
1973-74	Max	16500	Max	16500	0
1974-75	Max	17800	Max	17800	0
1975-76	Max	18800	Max	18800	0
1976-77	Max	19550	Max	19550	0
1977-78	Max	20350	Max	20350	0
1978-79	SM	21250	Max	21250	0
				TOTAL AMOUNT DUE	$3400

Robert Patton - Petitioner was employed in March 1960 and placed at Step 4 of the salary guide. He stipulates he received 1 year of salary credit for his verified 1 year 10 months of active military service and 2 years' salary credit for teaching experience, both of which are verified by Board records. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1960-61	Step 4	$5200	Step 5	$5400	$200
1961-62	Step 5	5500	Step 6	5700	200
1962-63	Step 6	6000	Step 7	6300	300
1963-64	Step 7	6500	Step 8	6700	200
1964-65	Step 8	6900	Step 9	7200	300
1965-66	Step 9	7700	Step 10	8000	300
1966-67	Step 10	8300	Step 11	8600	300
1967-68	Step 11	9200	Step 12	9500	300
1968-69	Step 12	10905	Step 13	11250	345
1969-70	Step 13	12000	Step 14	12450	450
1970-71	Step 14	13700	Step 15	14500	800
1971-72	Step 15	15400	Max	15400	0
1972-73	Max	16000	Max	16000	0
1973-74	Max	16500	Max	16500	0
1974-75*	Max	17800	Max	17800	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
*On sabbatical leave					
				TOTAL AMOUNT DUE	$3695

Kenneth Pinney - Petitioner was employed in September 1955 and was placed at Step 5 on the salary guide. He alleges that he was granted 3 years of salary credit for teaching experience and 1 year of salary credit for 1 year 11 months 6

days of verified active military service, which is supported by the Board's records. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1955-56	Step 5	$4200	Step 6	$4400	$200
1956-57	Step 6	4600	Step 7	4800	200
1957-58	Step 7	5100	Step 8	5300	200
1958-59	Step 8	5600	Step 9	5800	200
1959-60	Step 9	6000	Step 10	6200	200
1960-61	Step 10	6400	Step 11	6600	200
1961-62	Step 11	6900	Step 12	7100	200
1962-63	Step 12	7400	Step 13	7700	300
1963-64	Step 13	8000	Step 14	8200	200
1964-65	Step 14	8800	Step 15	9100	300
1965-66	Step 15	9400	Step 16	9700	300
1966-67	Max	10100	Max	10100	0
1967-68	Max	10700	Max	10700	0
1968-69	Max	12000	Max	12000	0
1969-70	Max	12900	Max	12900	0
1970-71	Max	14500	Max	14500	0
1971-72	Max	15400	Max	15400	0
1972-73	20 year	16100	20 year	16100	0
1973-74	20 year	16600	20 year	16600	0
1974-75	Max	17800	Max	17800	0
1975-76	Max	18800	Max	18800	0
1976-77	Max	19550	Max	19550	0
1977-78	Max	20350	Max	20350	0
1978-79	SM	21250	SM	21250	0
				TOTAL AMOUNT DUE	$2500

Jack Roland - Petitioner was employed in September 1963 and placed at Step 5 of the salary guide. He stipulates he received 1 year of salary credit for active military service, which he alleges to be 1 year 8 months. Petitioner has failed to submit verification of teacher certification as well as active military service. Claim is dismissed.

Goodrow Ryan - Petitioner was employed in September 1969 as a non-degree teacher at a salary of $9000, which placed him between Steps 10 and 11 of the salary guide. He alleges that he was not granted salary credit for his verified active military service of 1 year 5 months 24 days but has not met his burden of proof that the Board excluded his full statutory entitlement in the 9 plus years of salary credit granted to him. His claim is dismissed.

Anthony Saparito - Petitioner was employed in September 1954 and placed at Step 4 of the salary guide. He stipulates that he received 1 year of salary credit for his verified 2 years

4 months 18 days of active military service. Board records clearly reveal that petitioner received 2 years of salary credit for military service and 1 year for experience credit. The Commissioner determines that the Board granted petitioner his full statutory entitlement. Claim is dismissed.

John Shaffer - Petitioner was employed in September 1974 as a full time teaching staff member and placed at Step 2 of the salary guide. He stipulates he received 1 year of salary credit for his verified active military service of 1 year 4 months 2 days. The Commissioner determines that petitioner has been granted his full statutory entitlement. Claim is dismissed.

Walter Shallcross - Petitioner was employed in September 1949 and placed on Step 1 of the salary guide. He has 1 year 3 months of verified active military service. The Commissioner determines that petitioner is entitled to receive 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1949-50	Step 1	$2200	Step 2	$2350	$150
1950-51	Step 2	2500	Step 3	2500	0
1951-52	Step 3	2800	Step 4	2950	150
1952-53	Step 4	3150	Step 5	3300	150
1953-54	Step 5	3450	Step 6	3600	150
1954-55	Step 6	3900	Step 7	4300	400
1955-56	Step 7	4800	Step 8	5000	200
1956-57	Step 8	5200	Step 9	5400	200
1957-58	Step 9	5700	Step -0	5900	200
1958-59	Step 10	6200	Step 11	6400	200
1959-60	Step 11	6600	Step 12	6800	200
1960-61	Step 12	7000	Step 13	7200	200
1961-62	Step 13	7500	Step 14	7700	200
1962-63	Step 14	8200	Step 15	8400	200
1963-64	Step 15	8700	Step 16	8900	200
1964-65	Step 16	9700	Step 17	10000	300
1965-66	Step 17	10300	Step 18	10600	300
1966-67	Max	11000	Max	11000	0
1967-68*	Max	12765	Max	11800	0
1968-69	Max	14055	Max	13000	0
1969-70	Max	15350	Max	14160	0
1970-71	Max	17845	Max	16000	0
1971-72	Max	19270	Max	16900	0
1972-73	25 year	20592	25 year	17900	0
1973-74	25 year	21294	25 year	18400	0
1974-75	Max	22698	Max	19400	0
1975-76	Max	23868	Max	20400	0
1976-77	Max	24804	Max	21200	0
1977-78	Max	25857	Max	22100	0
1978-79	SM	26970	SM	23050	0
			TOTAL AMOUNT DUE		$3400

*Compensation for district wide responsibilities included in salary from this date to present

William Shortlidge - Petitioner was employed in September 1970 at a salary of $9700 which places him between Steps 10 and 11 or the non-degree salary guide. He has 1 year 6 months 28 days of verified active military service and alleges he received no salary credit for same. Petitioner has not met his burden of proof that his full statutory entitlement was excluded from the 9 plus years of salary credit granted by the Board. Claim is dismissed.

Herbert Smith - Petitioner was employed in September 1958 and placed on Step 2 of the salary guide. He has verified active military service of 2 years 1 day. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1958-59	Step 2	$4400	Step 3	$4600	$200
1959-60	Step 3	4800	Step 4	5000	200
1960-61	Step 4	5200	Step 5	5400	200
1961-62	Step 5	5700	Step 6	5900	200
1962-63	Step 6	6200	Step 7	6500	300
1963-64	Step 7	6700	Step 8	6900	200
1964-65	Step 8	7100	Step 9	7400	300
1965-66	Step 9	7700	Step 10	8000	300
1966-67	Step 10	8600	Step 11	8900	300
1967-68	Step 11	9700	Step 12	10000	300
1968-69	Step 12	11555	Step 13	11900	345
1969-70	Step 13	12900	Step 14	13200	300
1970-71	Step 14	14600	Step 15	15300	700
1971-72	Step 15	16200	Step 16	16900	700
1972-73	Max	17600	Max	17600	0
1973-74	Max	18100	Max	18100	0
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
			TOTAL AMOUNT DUE		$4545

Sidney Smith - Petitioner was employed in September 1952 and placed at Step 6 in the salary guide. He alleges that he did not receive any salary credit for his verified 3 years 10 days of active military service but has not met his burden of proof that the Board did not include full statutory entitlement in the 5 years of salary credit granted to him. Claim is dismissed.

Emanuel Solomon - Petitioner was employed in September 1949 and resigned at the conclusion of the 1950-51 school year. He was reemployed in September 1952 and placed at Step 4 on the salary guide. His employment is considered to have been initiated in September 1952 for purposes related to his claim. He stipulates that he received 1 year's salary credit for verified active military service of 3 years 3 months 28 days. Since petitioner is credited in Board records with 2 years of teaching from 9/49 through 6/51, the Commissioner must conclude that the Board granted but 1 year of salary credit for his military service and therefore determines that petitioner is entitled to 2 additional years of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1952-53	Step 4	$3350	Step 6	$3650	$300
1953-54	Step 5	3750	Step 7	4050	300
1954-55	Step 6	4300	Step 8	4500	200
1955-56	Step 7	5000	Step 9	5400	400
1956-57	Step 8	5400	Step 10	5800	400
1957-58	Step 9	5900	Step 11	6300	400
1958-59	Step 10	6400	Step 12	6800	400
1959-60	Step 11	6800	Step 13	7200	400
1960-61	Step 12	7200	Step 14	7600	400
1961-62	Step 13	7700	Step 15	8100	400
1962-63	Step 14	8200	Step 16	8600	400
1963-64	Step 15	8700	Step 17	9200	500
1964-65	Step 16	9700	Step 18	10300	600
1965-66	Step 17	10300	Max	10600	300
1966-67	Max	11000	Max	11000	0
1967-68	Max	11800	Max	11800	0
1968-69*	Max	13000	Max	13000	0
1969-70	Max	14160	Max	14160	0
1970-71	Max	16000	Max	16000	0
1971-72	Max	16900	25 year	17200	300
1972-73	20 year	17700	25 year	17900	200
1973-74	20 year	18200	25 year	18400	200
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
*On sabbatical leave					
			TOTAL AMOUNT DUE		$6100

Donald Summerkamp - Petitioner has not submitted verification of teacher certification or active military service. Claim is dismissed.

Howard Stein - Petitioner was employed in September 1975 and placed at Step 5 of the salary guide. He stipulates

that he received 2 years' salary credit for verified active military service of 2 years 10 months 22 days but has not met his burden of proof that the Board did not include his full statutory entitlement in the 4 years of salary credit granted to him. Claim is dismissed.

Michael Strano - Petitioner was employed in September 1952 and placed at Step 3 of the salary guide. He stipulates that he received 2 years of salary credit for verified active military service of 4 years 13 days. The Commissioner determines that petitioner is entitled to 2 additional years of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1952-53	Step 3	$3000	Step 5	$3300	$300
1953-54	Step 4	3300	Step 6	3600	300
1954-55	Step 5	3700	Step 7	4100	400
1955-56	Step 6	4400	Step 8	4800	400
1956-57	Step 7	4800	Step 9	5200	400
-957-58	Step 8	5500	Step 10	5900	400
1958-59	Step 9	6000	Step 11	6400	400
1959-60	Step 10	6600	Step 12	7000	400
1960-61	Step 11	7000	Step 13	7400	400
1961-62	Step 12	7500	Step 14	7900	400
1962-63	Step 13	8000	Step 15	8400	400
1963-64	Step 14	8500	Step 16	8900	400
1964-65	Step 15	9400	Step 17	10000	600
1965-66	Step 16	10000	Step 18	10600	600
1966-67	Step 17	10700	Max	11000	300
1967-68	Max	11800	Max	11800	0
1968-69	Max	13000	Max	13000	0
1969-70	Max	14160	Max	14160	0
1970-71	Max	16000	Max	16000	0
1971-72	Max	16900	Max	16900	0
1972-73	20 year	17700	25 year	17900	200
1973-74	20 year	18200	25 year	18400	200
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
				TOTAL AMOUNT DUE	$6500

Florence Sullivan - Petitioner was employed in September 1959 at Step 3 of the salary guide. She stipulates that she received 1 year of salary credit for 2 years 1 month 27 days of verified active military service but has not met her burden of proof that the Board did not grant her full statutory entitlement. Claim is dismissed.

Jack Trager - Petitioner was employed in September 1954 at Step 2 of the salary guide. He stipulated receiving 1 year of salary credit for 2 years of verified active military service, which is documented by Board records. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1954-55	Step 2	$3150	Step 3	$3300	$150
1955-56	Step 3	3800	Step 4	4000	200
1956-57	Step 4	4400	Step 5	4600	200
1957-58	Step 5	4900	Step 6	5100	200
1958-59	Step 6	5400	Step 7	5600	200
1959-60	Step 7	5800	Step 8	6000	200
1960-61	Step 8	6200	Step 9	6400	200
1961-62	Step 9	6800	Step 10	7100	300
1962-63	Step 10	7400	Step 11	7600	200
1963-64	Step 11	7900	Step 12	8100	200
1964-65	Step 12	8500	Step 13	8800	300
1965-66	Step 13	9100	Step 14	9400	300
1966-67	Step 14	9800	Step 15	10100	300
1967-68	Step 15	10900	Step 16	11200	300
1968-69	Step 16	13000	Max	13000	0
1969-70	Max	14160	Max	14160	0
1970-71	Max	16000	Max	16000	0
1971-72	Max	16900	Max	16900	0
1972-73	Max	17600	20 year	17700	100
1973-74	Max	18100	20 year	18200	100
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0
			TOTAL AMOUNT DUE		$3450

Kermit Vogel - Petitioner was employed in September 1959 at Step 3 of the salary guide. He stipulates receiving 2 years of salary credit for verified active military service of 4 years 5 months, which is documented by Board records. The Commissioner determines that petitioner is entitled to 2 additional years of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1959-60	Step 3	$4800	Step 5	$5200	$400
1960-61	Step 4	5200	Step 6	5600	400
1961-62*	Step 4	5500	Step 6	5900	400
1962-63	Step 5	6000	Step 7	6500	500

1963-64	Step 6	6400	Step 8	6900	500
1964-65	Step 7	7200	Step 9	7700	500
1965-66	Step 8	7700	Step 10	8300	600
1966-67	Step 9	8300	Step 11	8900	600
1967-68	Step 10	9400	Step 12	10000	600
1968-69	Step 11	11210	Step 13	11900	690
1969-70	Step 12	12555	Step 14	13275	720
1970-71	Step 13	13900	Step 15	15300	1400
1971-72	Step 14	15400	Step 16	16900	1500
1972-73	Step 15	16800	Max	17600	800
1973-74	Max	18100	Max	18100	0
1974-75	Max	19400	Max	19400	0
1975-76	Max	20400	Max	20400	0
1976-77	Max	21200	Max	21200	0
1977-78	Max	22100	Max	22100	0
1978-79	SM	23050	SM	23050	0

*No increment granted in 1961-62

TOTAL AMOUNT DUE $9610

Joseph Walsh - Petitioner was employed in September 1962 and placed on Step 5 of the salary guide. He stipulates that he received 1 year of salary credit for 1 year 11 months 15 days of verified active military service. This is documented by Board records. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1962-63	Step 5	$5800	Step 6	$6000	$200
1963-64	Step 6	6200	Step 7	6500	300
1964-65	Step 7	6700	Step 8	6900	200
1965-66	NO RECORD OF EMPLOYMENT				
1966-67	Step 8	7700	Step 9	8000	300
1967-68	Step 9	8600	Step 10	8900	300
1968-69	Step 10	10215	Step 11	10560	345
1969-70	Step 11	12160	Step 12	12555	395
1970-71	Step 12	13200	Step 13	13900	700
1971-72	Step 13	14700	Step 14	15400	700
1972-73	Step 14	16000	Step 15	16800	800
1973-74	Step 15	17100	Step 16	18100	1000
1974-75	Step 16	18600	Step 17	19400	800
1975-76	Step 17	20910	Max	20400	0
1976-77	Step 18	21730	Max	21200	0
1977-78	Max	22652	Max	22100	0
1978-79	NO SALARY RECORDED		SM	23050	0
			TOTAL AMOUNT DUE		$6040

Martin Zwillman - Petitioner was employed in September 1953 and placed at Step 2 of the salary guide. He stipulated receiving 1 year of salary credit for active military service, which is verified by Board records. Petitioner claims 2

additional years of salary credit based on his claim of 3 years of military service. His verified military service indicates enlistment on October 15, 1942 but entry into active service on July 15, 1943. His date of separation was October 18, 1945 which results in 2 years 3 months 3 days of active military service. The Commissioner determines that petitioner is entitled to 1 additional year of salary credit as indicated below:

SALARY AND GUIDE PLACEMENT

	ACTUAL		PROPER		AMOUNT DUE
1953-54	Step 2	$3000	Step 3	$3150	$150
1954-55	Step 3	3300	Step 4	3500	200
1955-56	Step 4	4200	Step 5	4400	200
1956-57	Step 5	4600	Step 6	4800	200
1957-58	Step 6	5300	Step 7	5500	200
1958-59	Step 7	5800	Step 8	6000	200
1959-60	Step 8	6200	Step 9	6400	200
1960-61	Step 9	6600	Step 10	6800	200
1961-62	Step 10	7100	Step 11	7300	200
1962-63	Step 11	7600	Step 12	7800	200
1963-64	Step 12	8100	Step 13	8300	200
			TOTAL AMOUNT DUE		$2150

Beginning in September 1964 petitioner was assigned to administrative positions as a vice-principal followed by appointment as principal in September 1968, a position petitioner holds today.

Board records clearly indicate that petitioner's salary no longer related to the teachers' salary guide. The burden of proof has not been met by petitioner that the salaries granted to him by the Board since September 1964 excluded his full statutory entitlement. Petitioner's claim for the period following the 1963-64 school year is dismissed.

Seymour Simon - Petitioner was employed in September 1952 and placed at Step 4 of the salary guide. He has verified active military service of 2 years 4 months 15 days but has not met his burden of proof that the Board did not include his full statutory entitlement in the 3 years of salary credit granted to him. Claim is dismissed.

Robert T. Fadden - Petitioner has verified active military service of 1 year 2 months 3 days. No employment record was submitted, as was noted in a letter under date of May 16, 1978 from the Assistant Director to petitioners' counsel. Claim is dismissed.

A summary of the Commissioner's determinations follows:

PETITIONER	AMOUNT DUE
Robert Allen	$ 0
Gerard Anderson	0
Edward Beach	2700
Joseph Caliguire	6040
Salvatore Ciccotelli	5300
Nelson Claypoole	0
Gene Consales	0
Paul Corrigan	7000
John D'Alessio	0
Albert D'Amato	3500
Joseph DiMatteo	3100
Robert Drew	6895
Louis Faranda	0
Howard Fenton	0
Frank Gargano	0
John Garrabrant	0
Ernest Gebler	6100
Sidney Gordon	0
Robert Grebe	0
Albert Greenberg	4545
Philip Guida	8195
Robert Hassard	0
Theresa Hatalosky	0
William Hazelton	7295
George Hopkins	0
John Knodel	0
Jerome Kracht	0
Gordon LeMatty	4095
Robert Linz	0
William Marvin	3750
Gerard Matte	15480
Laura Mellen	0
Nicholas Nugent	3400
Robert Patton	3695
Kenneth Pinney	2500
Jack Roland	0
Goodrow Ryan	0
Anthony Saparito	0
John Shaffer	0
Walter Shallcross	3400
William Shortlidge	0
Herbert Smith	4545
Sidney Smith	0
Emanual Solomon	6100
Donald Summerkamp	0
Howard Stein	0
Michael Strano	6500
Florence Sullivan	0
Jack Trager	3450

Kermit Vogel	9610
Joseph Walsh	6040
Martin Zwillman	2150
Seymour Simon	0
Robert T. Fadden	0
GRAND TOTAL AMOUNT DUE	$ 135,385

The Commissioner hereby orders the Board to place each petitioner who prevailed at the appropriate step of the salary guide as indicated under the column labeled "PROPER" above, and to compensate forthwith each petitioner the appropriate amount of back pay as indicated under the column "AMOUNT DUE".

The Commissioner does not possess the authority to order pension contributions for back pay, but does order the Board to make application for same to the Teachers' Pension and Annuity Fund for those prevailing petitioners.

Entered this 27th day of August 1979.

COMMISSIONER OF EDUCATION

Pending State Board

IN THE MATTER OF THE TENURE HEARING OF EDDIE LEE HARRELL, SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Complainant Board, Robert P. Swartz, Esq.

For the Respondent, Saul R. Alexander, Esq.

The Board of Education of the City of Paterson, hereinafter "Board," certified charges of conduct unbecoming a teacher and corporal punishment to the Commissioner of Education for determination against a teaching staff member with a tenure status in its employ. The Board suspended respondent without pay on April 18, 1977 pending a determination of the charges.

A hearing was conducted in the matter on August 10, 1977 at the Passaic County Vocational-Technical School, Wayne, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Board originally certified two charges of unbecoming conduct against respondent. One of the two charges, however, was withdrawn by the Board on June 23, 1977. (See Conference of Counsel Statement.) Thereafter, respondent moved to dismiss the remaining charge against him on the grounds that the Board violated the provisions of N.J.S.A. 18A:6-13 which will be discussed, post.

The event which precipitated the remaining charge herein occurred on January 11, 1977. Respondent was alleged to have slapped a male pupil in the face at the conclusion of a physical education class which was under his direction and supervision. The principal of the school was notified of the alleged incident by the pupil's mother on January 12, 1977. The principal submitted a report concerning this allegation on the same day. (J-1) The Superintendent, obviously having received the report on that day, determined to suspend respondent with pay from his teaching duties with approval of the Board President pursuant to N.J.S.A. 18A:25-6. On January 13, 1977 the Superintendent advised respondent in writing of the following:

> "Yesterday, you were advised that you have been suspended from your duties as a physical education teacher at School No. 6, by my direction, with the approval of the President of the Board of Education.

> "As you were informed, this action is necessary due to your unbecoming conduct as a teacher in your use of corporal punishment upon a student.
>
> "This matter will be referred immediately to the Board of Education." (P-2)

Respondent asserts that, since the Superintendent submitted a copy of his letter (P-2) to the Board Secretary, such letter actually forms the basis for the charge herein. Respondent reasons that forty-five days from the date of January 13, 1977, within which N.J.S.A. 18A:6-13 requires the Board to act on the filed charges, is March 2, 1977, and because the Board failed to act within the prescribed period, the remaining charge must be dismissed. Furthermore, respondent asserts that even if the Board granted him fifteen days to file a response to the charge pursuant to N.J.S.A. 18A:6-11, as amended, and the Commissioner's decision In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, Essex County, 1977 S.L.D. _____ (decided April 15, 1977), aff'd State Board of Education August 3, 1977), decision on Motion November 10, 1977, Commissioner's decision June 28, 1978, the latest date it could have acted would have been March 17, 1977. Respondent contends that because the Board did not certify the charge against him until April 14, 1977 its action must be considered fatally defective and invalid.

The Board asserts to the contrary that the letter of the Superintendent dated January 13, 1977 (P-2) does not constitute the filing of tenure charges as prescribed in N.J.S.A. 18A:6-11, but rather that formal charges were not filed with the Board Secretary by the Superintendent against respondent until March 11, 1977. The Superintendent, on that date, executed and submitted to the Board two specific charges against respondent (C-1) and a statement of evidence executed under oath. (P-1)

The hearing examiner has received the above-referenced documents and finds that the statement of the charges dated March 11, 1977 (C-1) does contain two specific charges against respondent, one of which, as previously noted, was withdrawn by the Board. The hearing examiner finds that this action of the Superintendent on March 11, 1977 constitutes the formal filing of charges with the Board against respondent. The Superintendent's letter of January 13, 1977 to respondent may not be considered the actual filing of charges with the Board Secretary as required by N.J.S.A. 18A:6-11 merely because a copy of that letter was sent to the Board.

The hearing examiner observes that once the Superintendent filed the charges with the Board, together with a statement of evidence, the Board was required to provide respondent at least fifteen days to respond to the charges. N.J.S.A. 18A:6-11 As the Commissioner stated in Feitel, supra,

the forty-five day period within which the Board must act (N.J.S.A. 18A:6-13) does not begin to toll until the expiration of the time for respondent to file such response. Fifteen days beyond March 11, 1977 is March 26, 1977. Forty-five days thereafter is May 10, 1977. The Board's action in certifying the charge herein on April 14, 1977, was well within the prescribed period of time.

The hearing examiner recommends, therefore, that respondent's Motion to Dismiss be denied.

The precise charge which remains against respondent is as follows:

> "On January 11, 1977, the said Eddie Lee Harrell did inflict corporal punishment upon M.F. a student in Public School Number Six by striking the said M.F. in the face without legal justification in violation of N.J.S.A. 18A:6-1." (C-1)

Respondent is assigned to teach physical education. M.F., the pupil respondent was alleged to have slapped, is in the fifth grade and assigned to one of respondent's classes. M.F. testified that at the conclusion of his physical education class on January 11, 1977, he and another pupil were wrestling in the boys' locker room. M.F. testified that respondent instructed them to stop and get into line to prepare to go to their next class. M.F. explained that he then fell down on his friend and that respondent "***hollered***" at them. M.F. state that he ran to a corner of the locker room and that respondent followed him, caught him and slapped him in the face. M.F. stated that he fell down and respondent pulled him to his feet, grabbed him by the back of his shirt and pushed him into line. (Tr. 43-53)

M.F. testified that while he did not report the incident to school authorities, he did relate the incident to his mother when he arrived home from school that day. (Tr. 45)

M.F.'s mother testified that when her son arrived home that day and informed her of what had occurred, she observed that the side of his face was red. M.F.'s mother testified that she applied alcohol to the red portion of his face. (Tr. 84-85)

M.F.'s mother testified that on the following day, January 12, 1977, she personally reported what her son had told her to his school principal. She testified that the principal called respondent to the office, in her presence, and questioned him about the allegation. M.F.'s mother testified that respondent admitted slapping her son and also stated that, if necessary, he would slap him again. (Tr. 74-77)

The principal testified that after the mother departed he talked with respondent about the use of corporal punishment in

regard to the incident and admonished him about its use. According to the principal, respondent stated that M.F. and his friend were, in fact, fighting, and that he merely broke up the fight. The principal testified that respondent admitted at that time slapping M.F. Furthermore, the principal testified that respondent stated that if he, as a teacher, were expected to break up fights between pupils he would take similar action again in the future. Otherwise, he would not break up any fights. (Tr. 105)

Respondent denies ever admitting to anyone, either to the principal or M.F.'s mother, at any time that he slapped M.F. on the side of the face. Respondent testified that he informed both the principal and M.F.'s mother that he merely broke up a fight between M.F. and his friend.

Respondent testified that when he was instructed by the principal not to use force to break up fights, he informed the principal he would break up no more fights. Rather, he would call the principal on the public address system and ask him to break up the fight. (Tr. 146-147)

The hearing examiner has considered the testimony of a teacher called by respondent who stated that M.F. told her during a conversation in April 1977 that respondent did not slap him. (Tr. 164-166) The hearing examiner does not attach credibility to this testimony. M.F. offered no such testimony during the hearing into the charge.

The hearing examiner has considered the testimony and finds that the charge of unbecoming conduct through the use of corporal punishment by respondent has been established to be true by the weight of credible evidence. The hearing examiner refers to the Commissioner for his determination the assessment of discipline to be imposed upon respondent. The hearing examiner's recommendation on respondent's Motion to Dismiss is also referred to the Commissioner for determination.

This concludes the report of the hearing examiner.

* * * * *

The Commissioner has carefully reviewed the record of the instant matter including the report of the hearing examiner and the exceptions thereto filed by the respondent pursuant to N.J.A.C. 6:24-1.17(b).

It is observed that respondent's exceptions to the hearing examiner's report rest on the contentions that:

Repondent's Motion to Dismiss the Board's charges against him which he advanced at the time of the hearing should have been granted by virtue of what is alleged to be the Board's failure to certify said charges within the prescribed time period pursuant to N.J.S.A. 18A:6-13; and

The findings of fact relied upon by the hearing examiner are erroneous and unsupported by clear and convincing evidence of the charge against respondent which the Board was required to produce.

The Commissioner has reviewed the record with respect to the procedural argument advanced by respondent against the Board in the first instance and finds it to be without merit.

The Commissioner concurs with the findings and recommendations of the hearing examiner regarding respondent's Motion and adopts them as his own.

Respondent argues in the second instance that his conduct with respect to the action he had taken involving M.F.'s behavior in his class on January 11, 1977, was reasonable and commensurate with his authority and responsibility as a teacher in light of what he believed to be a fight between M.F. and another pupil. Respondent categorically denies having slapped M.F. during the incident which occurred in his classroom and further asserts that the action taken by him at that time was without malice notwithstanding the fact that M.F. had resisted his directives to stop fighting and had used scurrilous and vituperative language toward him in his efforts to restrain his conduct at the time the incident occurred. (Tr. 142-143) (Respondent's Exceptions, at p. 2)

Respondent objects to the fact that the hearing examiner paid little or no attention to the testimony of another teaching staff member who testified that M.F., upon questioning by her, admitted that respondent did not slap him on the date the incident occurred. (Tr. 165) (Respondent's Exceptions, at p. 3)

Moreover, it is respondent's contention that the Board failed to produce testimony from any other pupil in M.F.'s class who observed the incident leading up to the charges filed against him. Respondent asserts that the absence of such additional

corroborative pupil testimony lends credibility to his denial that he had inflicted corporal punishment upon M.F. as charged herein.

Respondent concludes that while it may be determined by the Commissioner that his actions with respect to the matter controverted herein may have been imprudent or improper, such determination should not be made on the basis that corporal punishment was inflicted upon M.F., but rather that there may have been lack of restraint, not unprovoked, on his part in attempting to break up an altercation between M.F. and another pupil in his classroom.

The Commissioner observes from the record of this matter that the only first hand testimony produced by either party with respect to the incident that occurred in respondent's classroom on January 11, 1977 was the conflicting testimony of respondent and M.F. Consequently, the Commissioner is constrained to determine the effect and weight of the testimony of those witnesses who discussed with respondent or M.F. the circumstances surrounding the incident controverted herein.

In this regard, the Commissioner has reviewed the testimony of the teaching staff member who stated that M.F. told her approximately four months after the incident was reported to the principal that he was not slapped by respondent. On the other hand, there is the testimony of the principal and M.F.'s mother who met with respondent the day after the incident occurred. It is this testimony upon which the Board relies to support its contention that respondent admitted inflicting corporal punishment upon M.F.

The Commissioner observes that the testimony of the teaching staff member who questioned M.F. about the incident with respondent reveals that this conversation took place in April 1977, some four months after the incident occurred. It is further observed from the transcript of the testimony of this conversation that the teaching staff member had told M.F. that respondent could lose his job as the result of his allegation that respondent had slapped him.

The teaching staff member had also testified that she was requested by respondent's counsel to approach M.F. and inquire of him about the incident. (Tr. 164-165)

The Commissioner is also constrained to observe, that M.F.'s mother testified that respondent had admitted to her that he had slapped her son on January 11, 1977, when she questioned him about the incident in the principal's office on the following day. (Tr. 77) This testimony regarding respondent's admission to slapping M.F. is supported by that of the principal of the school in which respondent was employed. (Tr. 103-104)

The Commissioner has carefully weighed the testimony of the witnesses herein in connection with the Board's charge against respondent. In the Commissioner's judgment the weight of credible testimony supports his determination that respondent did, in fact, slap M.F. on January 11, 1977 in an effort to restrain M.F. from in what he considered to be an altercation M.F. was having with another pupil in his classroom. It is further determined, however, that the circumstances giving rise to this incident resulted in M.F.'s failure to obey respondent's directive to cease and desist from his physical encounter in which he was engaged on the floor of the classroom with another pupil.

The Commissioner also observes from the examination of the transcript of the testimony that while M.F. was not certain about the language he had used toward respondent during the incident (Tr. 69) nevertheless, is can be concluded from respondent's testimony that M.F.'s language toward him was, at the very least, abusive and disrespectful.

Accordingly, in view of the circumstances hereinbefore set forth, it is found and determined that respondent is guilty of unbecoming conduct as charged by the Board. The Commissioner does not condone respondent's action in this specific instance and cannot find any justification for the action complained of herein against respondent, namely the use of undue physical force by respondent against M.F. to maintain discipline in his classroom.

The Commissioner concludes after a careful study of this matter that respondent's actions, although regrettable, may not be construed as corporal punishment pursuant to the provisions of N.J.S.A. 18A:6-1.

The Commissioner in arriving at a determination in the instant matter relies on his ruling in a prior school law decision In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185 wherein it was held in pertinent part:

> "***The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion each such matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.***" (at 188)

In conclusion the Commissioner determines summary dismissal of respondent is not warranted; however, respondent's

conduct by the very nature of the methods he employed in disciplining one of his pupils may not be ignored or condoned.

Accordingly, the Commissioner directs that respondent forfeit a sum equal to two weeks' salary at his current rate of remuneration, to be deducted from that sum of money which is otherwise due him for the 120 days during his suspension without pay upon certification of the Board's tenure charge against him. In all other respects it is hereby directed that Eddie Lee Harrell be reinstated as a teaching staff member in the City of Paterson and that he be reimbursed for the remaining back pay, privileges and compensation due him, offset by mitigation of his earning during his suspension.

COMMISSIONER OF EDUCATION

August 30, 1979

WILLIAM C. and MARILYN L. HORNER, individually and as parents and natural guardians of "W.L.H." and "J.R.H.,"	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioners, William C. Horner, Esq., Pro Se

For the Respondent, Hannold, Caulfield, Paul & Marshall
(Martin F. Caulfield, Esq., of Counsel)

Petitioners, parents of two pupils enrolled in the fifth and eighth grades of the Woodland Country Day School during the 1977-78 school year and one pupil enrolled in the sixth grade for the 1978-79 school year, allege that the Board of Education of the Kingsway Regional School District, hereinafter "Board," denied their application and/or payment for private school transportation pursuant to N.J.S.A. 18A:39-1. Petitioners appeal to the Commissioner of Education for an order directing the Board to make payments in lieu of transportation for the school year 1977-78. The Board denies that the pupils reside within twenty miles, as properly measured, of the Woodland Country Day School according to statutes and regulations and requests that the Petition be dismissed.

Oral argument of the parties having been heard on January 12, 1979 at the State Department of Education by a representative of the Commissioner, the matter is referred directly to the Commissioner for adjudication on the pleadings, exhibits and Briefs of counsel filed in support of the respective positions of the parties.

The relevant material facts are not in dispute and have been stipulated as follows:

Petitioners live more than twenty road miles, but less than twenty radial (straight line) miles from the private non-public school their children attended.

The pertinent section of the statute N.J.S.A. 18A:39-1 in the instant matter provides, inter alia, as follows:

> "***When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil provided the per pupil cost of the lowest bid received does not exceed $250.00 and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school regardless of whether such transportation is along established public school routes.***"

Petitioners contend that the governing statute provides for reimbursement for transportation to the school when it is "not more than 20 miles from the residence of the pupil," and speaks only of distance between the two points, the home and the school, and does not refer to road distance. Petitioners assert that, if a road test were imposed, it would alter and modify the clear language of the statute as to the twenty mile maximum. Petitioners cite the New Jersey Supreme Court in the matter of Watt v. Mayor and Council of the Borough of Franklin, 21 N.J. 274 (1956) when it held that:

> "***A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to a doctrine of the separation of powers.***" (at 277)

Petitioners assert that the courts are not at liberty to indulge in a presumption that the Legislature intended something other than what it actually wrote into law. Graham v. Asbury Park, 64 N.J. Super. 385 (Law Div. 1960), aff'd 37 N.J. 166 (1962) Petitioners contend that the statute states twenty miles, and this means twenty miles between two points as measured by a straight line. They argue that in a matter which dealt with the constitutionality of N.J.S.A. 18A:39-1, the New Jersey Supreme Court in West Morris Regional Board of Education v. Sills et al., 58 N.J. 464 (1971) on two occasions referred to the twenty mile limit as a "***twenty-mile radius." (at 48) Black's Law Dictionary 1423 (rev. 4th ed. 1968) defines radius as "[a] straight line drawn from the centre of a circle to a point of the circumference.***" In other matters where the courts held that measurements were to be made by the straight-line method, petitioners cite Esso Standard Oil Co. v. North Bergen Township,

50 N.J. Super. 90 (App. Div. 1958); Langella v. Bayonne, 134 N.J.L. 235 (Sup. Ct. 1946); and Evans v. United States, 261 Fed. 902 (2d Cir. 1919).

Petitioners argue, for the reasons stated ante, that the use of a road test for measuring the twenty mile distance is incorrect and that a straight line measurement is required pursuant to N.J.S.A. 18A:39-1.

Petitioners contend that the word "remoteness" as used in N.J.S.A. 18A:39-1 and N.J.A.C. 6:21-1.3 refers only to the minimum distance for eligibility for pupil transportation and does not refer to the maximum distance in "remote from the schoolhouse." They argue that the caption for N.J.A.C. 6:21-1.3 is "Remote defined," and that in subsections (a) and (b) and in N.J.S.A. 18A:39-1, "remote" and "remoteness" refer to the minimum distance beyond which one is eligible for transportation and not to the maximum distance. They assert that the administrative regulation is lenient and liberal for determining who is eligible to meet the minimum distance for transportation to school and opine that a pupil might be closer than the two or two and one-half miles to the schoolhouse by a straight line measurement but if the road distance is longer the pupil would still be eligible for transportation, thus extending the benefit of transportation to the greatest number of pupils.

Petitioners contend that the same road test, if mistakenly applied to the twenty mile maximum distance, would act in a reverse manner and would be a restrictive and exclusionary test. Petitioners' children who live less than twenty miles in a straight line from their schoolhouse would be denied transportation if the distance were to be measured by roads, a result not intended by the Legislature or the State Board of Education. They continue to state that the State Board has promulgated no regulation regarding the maximum distance for transportation aid; however, if it did choose to do so, such regulation must be in harmony with the plain wording of the statute so as not to alter or limit its effect.

The Board asserts that it properly refused the relief sought by petitioners. It argues that the authorization for private school transportation is statutory and subject to the rules and regulations of the State Board. As a creature of the State, a local board is subject to laws and regulations which apply to it. It contends that whether or not the State Board has properly exercised its function and whether or not the Commissioner and the County Superintendent of Schools have interpreted and implemented the rules and regulations promulgated by the State Board, the status of the question of measuring distance for remote private school pupils is fixed and the only method acceptable to calculate mileage for reimbursement is road mileage. Thus, it argues, it acted in the only manner open to it.

The Board cites the pertinent parts of N.J.S.A. 18A:39-1 and specifically N.J.A.C. 6:21-1.3(b) which provides:

> "For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school."

The Board asserts that the word "remote" is used in the same context in connection with public school transportation and private school transportation and there is no reason to conclude that the use of the word in the same statute could or should have two different meanings. It argues that the Legislature enacted the statute N.J.S.A. 18A:39-1 which contains the mandate that private school transportation "shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school" knowing that the definition of "remoteness" had been promulgated.

The Board avers that the matter of West Morris, supra, dealt with the constitutionality of the private school transportation statute and considered whether or not the exclusion of pupils more than twenty radial miles was constitutional. Within its properly understood reference, it argues, the use of twenty-mile radius is not inconsistent with the regulation; i.e., a twenty-mile radius is the maximum possible distance for private school transportation if the home and the school are on the same roadway. This distance is applicable as the maximum distance for the constitutional argument and has no application to the implementation of the statutes by rules and regulations.

The Commissioner takes notice of the detailed and comprehensive review of nonpublic school pupil transportation in this State in the matter of Rev. Joseph J. Meyer v. Board of Education of the Township of Montville, 1971 S.L.D. 183. Therein, the Commissioner reviewed his own decisions, decisions of the courts and an historical note of pupil transportation statutes from 1907 until the present. He noted the observations of the Court with regard to the amended pupil transportation law in the matter of Woodbury Heights v. Gateway Regional High School District et al., 104 N.J. Super. 76 (Law Div. 1968) and quoted the Court at p. 84 as follows:

> "***In essence, then, all that the Legislature has done in N.J.S. 18A:39-1 is to expand the scope of its predecessor by effectuating legislatively what the court refused to do judicially in the Fox case. [Fox v. Board of Education, West Milford Tp., 93 N.J. Super. 544 (Law Div. 1967)] No longer need private, nonprofit school pupils

> living remote have to depend upon established public school bus routes in order to be entitled to transportation to school. Now, so long as any public school pupil living remote is transported by a school district, including a regional school district - except handicapped, vocational or technical school students - all nonpublic school pupils similarly situated are also to be transported. The Legislature not only drew no distinction based upon grade levels, it specifically mandated that they were irrelevant.***"

The Court further stated at pp. 85 and 86:

> "***N.J.S. 18A:39-1 clearly treats all similarly situated pupils equally. ***N.J.S. 18A:39-1, like its progenitor N.J.S. 18:14-8, is predicated essentially upon a remoteness criteria.***"

In the instant matter, the pivotal issue is the "remoteness criteria." The Commissioner observes that historically and since its inception, the practice of determining "remote" from the schoolhouse for transportation purposes has been to measure by the shortest route along public roadways. Such criterion is set forth in N.J.A.C. 6:21-1.3(b) as follows:

> "***For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school."
> (Emphasis supplied.)

The Commissioner observes that the aforementioned regulation is neither ambiguous nor equivocal. Such measurement criteria did not evolve by accident or chance but, rather, by deliberate design as the only feasible, fair and equitable manner in which to administer pupil transportation. The Commissioner further observes that the statute N.J.S.A. 18A:39-1 makes no reference to a "radius" criterion as set forth by petitioner in the instant matter. He notices, however, that the statute specifically provides, inter alia, as follows:

> "***Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school.***"

Thus, the Board applied the only "remoteness criteria" available to it when it denied petitioner's application for pupil transportation to a nonpublic school.

The Commissioner has reviewed the stipulated facts in the context of the arguments of the parties and finds no merit in petitioners' complaint. Nor does the Commissioner find that petitioners were treated unfairly, inequitably, or denied any of their constitutional rights. West Morris, supra

The Commissioner holds that the Board acted within its statutory authority pursuant to N.J.S.A. 18A:39-1 and N.J.A.C. 6:21-1.3 when it denied transportation to petitioners. Such actions pose no reason for intervention by the Commissioner pursuant to the principle enunciated in Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948) as follows:

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

Finding no evidence or proof that the Board acted in bad faith or outside its statutory authority, the Commissioner determines that petitioners' demand for relief for transportation to a private school, or reimbursement in lieu thereof, cannot be supported in the context of the record before him. The Commissioner finds that petitioners have no entitlement under State statute or decisions of the courts for the relief they seek. Jeremiah O'Connor v. Board of Education of the North Hunterdon Regional High School, 1968 S.L.D. 116

For the reasons expressed herein, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 30, 1979

WILLIAM C. AND MARILYN L. HORNER, individually and as guardians and natural guardians of "W.L.H." and "J.R.H.," PETITIONERS-APPELLANTS	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY, RESPONDENT-APPELLEE.	:	DECISION

Decided by the Commissioner of Education, August 30, 1979

For the Petitioner-Appellant, William C. Horner, Esq., Pro Se

For the Respondent-Appellee, Hannold, Caulfield, Paul & Marshall (Martin F. Caulfield, Esq., of Counsel)

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

December 5, 1979

PATRICIA DE FERRARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Trevor P. Corso, Esq.

For the Respondent, Marvin A. Stern, Esq.

Petitioner, a Secaucus resident and parent of a pupil enrolled in the Clarendon Elementary School operated by the Secaucus Board of Education, hereinafter "Board," alleges that, when the Board on March 2, 1978 appointed a principal to the Clarendon School, other than one recommended by its Superintendent, it acted in an arbitrary, capricious and unreasonable manner, violated its own stated policies and misinterpreted the necessary qualifications to the detriment of all candidates other than its appointee. Petitioner prays for an order of the Commissioner of Education directing that the appointment be set aside and instructing the Board to appoint a principal of the Clarendon School in accordance with its adopted rules and policies.

The Board avers that its appointment of a principal for the Clarendon School was a legal exercise of its discretionary authority and contends that it was not and could not be bound by the recommendation of its Superintendent in selecting a principal.

The matter comes before the Commissioner in the form of the pleadings, Notice of Motion requesting dismissal of the Petition of Appeal filed by the Board on August 31, 1978, together with affidavits and exhibits from its policy manual, and transcript of oral argument conducted at the State Department of Education, Trenton, on September 11, 1978.

The Commissioner has carefully examined the record of the controverted matter in the light of applicable education law. It is noticed that the submitted exhibits are stipulated to be from the Board's policy manual. (Tr. 11-12) The matter is ripe for adjudication.

The Superintendent, by memorandum dated February 28, 1973, recommended to the Board that candidates for the principal of the Clarendon School should present the proper New Jersey

certification and evidence of a minimum of five years' elementary teaching experience. Ten candidates certified to be elementary principals applied through the Superintendent who verbally and in writing recommended to the Board one candidate.

The Board maintains from its membership a standing "School Government Committee" which is charged with evaluating applicants for employment. The chairman of that committee, however, affirmed that it was the established practice for the entire Board to evaluate all candidates for administrative posts. She further affirmed that it was the role of her committee to conduct the interview of each candidate for the Clarendon principalship by asking questions from a list suggested by the Superintendent, which questions were supplemented by others from members of the entire Board. (Affidavit of Margaret Grazioli)

The Superintendent affirmed that he and certain Board members had pressed for acceptance of the candidate he recommended, in keeping with the practice of seventeen years of his superintendency during which time the Board had made no appointments contrary to his recommendation, approbation or approval. The Superintendent further affirmed that

> "***the Board of Education has the power and authority to make its own independent determination in its own discretion.
>
> "Irrespective of past practice, Board Policy and usage thereof, I am aware that the statutory responsibility of the Board can not be abrogated by promulgation of a Manual of Policies."
>
> (Affidavit of the Superintendent)

An examination of the Board's policies reveals that one stated function of the Board is

> "***Election or rejection of new employees recommended by the Superintendent of Schools.***"
>
> (Emphasis added.) (Policy No. 610)

It is further revealed that the Superintendent

> "***Nominates for appointment, assigns, and defines the duties of all personnel subject to the approval of the Board.***"
>
> (Emphasis added.) (Policy No. 4000.1)

While Policy Nos. 4111.2 and 4211 further emphasize the duties of the Superintendent in the recruitment, selection and

recommendation of candidates, they also recognize that the Board in each instance has authority to appoint.

This recognition is wholly in keeping with the statutory authority to appoint teaching staff members conferred upon local boards of education. To hold that a recommendation of the Superintendent was binding upon the Board, as petitioner suggests, would be contrary to N.J.S.A. 18A:27-1 which states that:

> "No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him."

While a board may make rules governing the employment and promotion of teaching staff members, those rules may not be inconsistent with the authority of local boards to determine who shall hold positions in their schools. N.J.S.A. 18A:27-4 N.J.S.A. 18A:16-1 clearly provides that:

> "Each board of education, subject to the provisions of this title and of any other law, shall employ *** principals *** as it shall determine***."
>
> (Emphasis added.)

The Board could not legally either through the promulgation of a rule or the interpretation thereof divest itself of the authority to make the determination of who shall teach in or administer its schools. As was said by the Commissioner in Margaret A. White v. Board of Education of the Borough of Collingswood, 1973 S.L.D. 261, 263:

> "***[A] board may not adopt a rule or policy which would in effect either amend a statute or deny the board's authority conferred by statute.***"

In Michael A. Fiore v. Board of Education of the City of Jersey City, 1965 S.L.D. 177, 178 the Appellate Division of the New Jersey Superior Court stated that:

> "***[W]e may not substitute our discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved.***"

Similarly, in Duke Power Co. v. Edward J. Patten, Secretary of State of New Jersey et al., 20 N.J. 42, 49 (1955) the Court stated;

> "***Where the wording of a statute is clear and explicit [the court is] not permitted to indulge in any interpretation other than that called for by the express words set forth***."

The Board, in the instant matter, acted within its statutorily conferred discretionary authority on March 2, 1978 when it appointed a principal to the Clarendon School. Petitioner's view that it could appoint no other candidate than the one recommended by its Superintendent is unduly restrictive and, if adopted, would constitute an illegal divestiture of the Board's statutorily conferred authority. The Commissioner so holds.

A board of education of course should not make appointments of principals without proper regard for the recommendation of its superintendent who not only must work closely with them but also possesses the expertise and training to screen and evaluate candidates for those vital positions within the school system. When such procedures are not utilized and a board rejects a recommendation of its superintendent, a desirable practice is to request that the superintendent withdraw his recommendation and make an alternate recommendation of a candidate to fill an administrative post, thus insuring compatibility of those on the administrative team. In the instant matter, the Commissioner perceives no improper disregard since the Board interviewed and evaluated all candidates.

Petitioner's remaining allegation that the Board improperly failed to consider the remaining candidates is inconsistent with the sworn testimony of the Superintendent and the chairman of the School Government Committee who confirmed that each and every candidate was given opportunity of an interview before the entire Board.

Absent a showing that the Board acted in contravention of either the statutes or its own written policies, its action appointing a principal to the Clarendon School on March 2, 1978 is affirmed as being a legal exercise of its own discretionary authority which is entitled to a presumption of correctness. Boult and Harris v. Board of Education of Passaic, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948)

Finding no valid reason to interpose his judgment for that of the Board and no relevant facts in dispute which require further action, the Commissioner grants the Board's Motion and dismisses the Petition of Appeal.

COMMISSIONER OF EDUCATION

August 30, 1979

PETITION OF ROBERT E. TURTZ, EDYTHE B. TURTZ AND DOUGLAS S. TURTZ V. BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH AND DR. MATTHEW WAINER	))))))	INITIAL DECISION O.A.L. DKT. NO. EDU 2314-79

APPEARANCES:

Robert E. Turtz, Esq., Pro Se, Attorney for Petitioner

Brian D. Burns, Esq., Attorney for Respondent

Dr. Matthew Wainer

BEFORE THE HONORABLE WARD R. YOUNG, A.L.J.:

Petitioners on behalf of their infant son, "DST", allege that he is entitled to admission to grade one (1) in the Randolph Township school system under the written admission policy of the Board of Education, hereinafter "Board." It is further alleged that the Board's action in implementing its policy and/or denying DST's admission to grade one (1) was arbitrary, capricious or unreasonable.

The Board avers that its actions were within its discretionary authority and were consistent with its own policy, the statutes, and rules and regulations of the State Board of Education.

The matter was first brought before the Honorable Bertram Polow, Superior Court, who directed it to the Commissioner of Education with an Order for Decision by July 31, 1979. It is noted that the petition was filed with the Commissioner on July 2, and respondent's answer was filed with the Commissioner on July 10. The case file was transferred to the Office of Administrative Law on July 20. A prehearing conference was held on July 24, and a one day hearing was held in the Morris County Courthouse on July 26.

The relevant uncontroverted facts were stipulated and are as follows:

1) DST will be six (6) years of age on October 26, 1979.

2) DST attended kindergarten in a private school during 1978-79 and was recommended for first grade placement by the authorities of that school.

3) DST was denied admission to grade one (1) in September 1979 in respondent's school system by the Board at its May 8, 1979 public meeting, after having heard a parental appeal of the administrative decision which denied the desired first grade admission.

4) The sole reason for the denial of first grade admission for DST was his failure to meet the age requirement of the Board's policy, in evidence as P-2.

The Board's policy, in pertinent part, is reproduced here:

> "...2. Entrance Requirements to Grade one (1):
>
> A. The pupil must be six years of age on or before October 1st of the current school year or be promoted from the kindergarten classes in Randolph Township Schools.
>
> B. The pupil must have had one year of approved kindergarten experience or be classified by the Child Study Team as qualified for placement in grade one (1).
>
> C. The school in which the child has gained kindergarten experience must recommend promotion.
>
> D. Immunization certificates must be presented as indicated for kindergarten requirements...."

The only witness to testify was the Superintendent of Schools. His testimony related to the Board's admission policy and revealed that initial placement on admission is in accord with the age requirement of that policy. (P-2) He further testified that a pupil may be promoted to grade one (1) from within its own school system, regardless of age, by recommendation of school personnel after a period of observation and evaluations by the teacher and child study team determines it to be the best educational placement for the pupil. DST as well as all other pupils are not precluded from the assessment process described.

I am constrained to distinguish between admission, placement and promotion. Admission is the acceptance of a pupil into the school system upon registration or application. Placement at a grade level occurs at the time of admission or at any time thereafter. Promotion is a placement upwards after an assessment of evaluative criteria by properly certificated professional personnel based on in-school experiences with a pupil.

Upon examination of the Superintendent, there was but one (1) deviation by the Board from the precise implementation of its admission policy. In that instance, the matter was concerned with a kindergarten admission, and the Board's action was contrary to the Superintendent's recommendation; was due to extenuating circumstances; and was not contested by petitioner.

The contention of petitioner is that the Board must admit DST and place him in grade one (1) in September 1979 as it is his statutory entitlement. Failure of the Board to do so, he contends, would deny DST of his constitutional rights as an individual and result in the claim and determination that the Board's policy itself is arbitrary, capricious and unreasonable.

> N.J.S.A. 18A:38-5 reads in pertinent part:
> "...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 be established by rules or regulations of the board."
>
> N.J.S.A. 18A:11-1 reads in pertinent part:
> "The board shall...make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for...the government and management of the public schools..."

The granting of authority to local school boards by the legislature as cited above is a clear indication of its intent not to substitute its judgment for local boards relative to pupil placement.

A further contention of petitioner is that the criteria in its admission policy must be separately applied, with the exception of "2 D" (immunization certificates), as there are no "ors" or "ands" between sub-titles 2A, 2B and 2C.

The Board's policy in each sub-title includes the word "must" and therefore must be applied in pari materia. To do otherwise would make it possible for residents with sufficient economic resources to enroll a child in private kindergarten who did not meet the Board's kindergarten age requirement, and then transfer the child to the public school in grade one (1) and circumvent the kindergarten admission policy.

I FIND that DST is not entitled to admission and placement in grade one (1) under the Board's written policy, and further that the action of the Board in implementing its policy and/or denying DST admission to grade one (1) was within their discretionary

In Schinck v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448,476 (App. Div. 1960) it was stated:

> "...We are mindful of the general principle that on appellate review we should not substitute our judgment for the specialized and expert judgment of the Commissioner and the Board, and also of the local school board, all of whom have been entrusted with the fulfillment of the legislative policy...."

In Quinlan v. Board of Education of North Bergen, 73 N.J. Super 40 (App.Div. 1962) it was stated that:

> "...When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable...." (at 46-47)

I CONCLUDE, therefore, that the petition IS DISMISSED.

This decision does not become final until forty-five (45) days from the date of agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

31 July 1979
DATE

WARD R. YOUNG, A.L.J.

ROBERT E. TURTZ, EDYTHE B. TURTZ AND DOUGLAS S. TURTZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH AND DR. MATTHEW WAINER, MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

The Commissioner has reviewed the initial decision in the instant matter. It is observed that exceptions were filed by the parties regarding the above determination pursuant to N.J.A.C. 6:24-1.17(b). The Commissioner is aware of the expressed concern of petitioners and the time constraints in this matter.

The Commissioner determines that the arguments set forth in the exceptions deal largely with semantic interpretations that place form over substance. He finds that items C and D of the Board's written admission policy have been satisfied. He now turns his attention to items A and B repeated herein:

> "A. The pupil must be six years of age on or before October 1st of the current school year or be promoted from the kindergarten classes in Randolph Township Schools.
>
> "B. The pupil must have had one year of approved kindergarten experience or be classified by the Child Study Team as qualified for placement in grade one."

The Commissioner finds the meaning to be clear and a proper exercise of the Board's discretionary authority. The policy provides that a pupil who is less than six years of age on or before October 1st of the current school year can be promoted to grade one if he has had a year of approved kindergarten experience or is determined by the Child Study Team to be qualified for placement in grade one.

The Commissioner refers to the Board's exceptions at page 1 wherein it is stated:

> "***Paragraph 2A contains within itself an exception to the age requirement, i.e., promotion from a Randolph Township kindergarten after enrollment, observation

> and favorable education. A child who is so promoted from a Randolph kindergarten will simultaneously satisfy the requirements of both Paragraph 2A and Paragraph 2B.***"

The Board has stipulated that "***there is no contention in this case that REM Country Day School is not an approved school." The Commissioner, therefore finds that DST has satisfied provision B of the Board's admission policy by attendance at REM Country Day School.

Accordingly, the Commissioner directs that DST be enrolled in the Randolph Township kindergarten class and further that the Child Study Team observe and evaluate DST within the initial two week period of school opening by means used to evaluate every other pupil being tested for first grade eligibility. If the Child Study Team determines that DST is qualified for placement in grade one, such placement is to be accomplished immediately. If DST is found to be unqualified for placement in grade one, he will remain in the kindergarten class as enrolled and will suffer no embarrassment of demotion. The decision of the Child Study Team shall be binding on the parties in this matter. The Commissioner so directs.

COMMISSIONER OF EDUCATION

August 30, 1979

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Dawes, Gross & Youssouf (Joseph D. Youssouf, Esq., of Counsel)

Petitioner, the Manalapan-Englishtown Education Association, hereinafter "Association," on behalf of individual petitioners, four teaching staff members in the employ of the Board of Education of the Manalapan-Englishtown Regional School District, hereinafter "Board," did on May 31, 1978 file a statement of charges of unbecoming conduct against a tenured principal of the district with the Secretary of the Board pursuant to N.J.S.A. 18A:6-10 et seq.

Petitioners specifically allege that the Board acted improperly by adopting a resolution at a special meeting held on August 1, 1978, wherein it declined to certify petitioners' charges of unbecoming conduct against the principal to the Commissioner of Education in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

The Board admits to certain allegations as set forth in the Petition of Appeal but denies that it misapplied the standard required under the statute and further denies that it did not fairly and properly evaluate the Statement of Charges submitted by petitioners.

Petitioners pray for relief in the form of an Order of the Commissioner directing the Board to certify the charges, ante, to the Commissioner for plenary hearing under the Tenure Employees Hearing Law.

The Board requests that the Commissioner issue an Order denying petitioners' prayer for relief.

A conference of counsel was conducted on January 24, 1979 and thereto it was agreed that:

> "***1. The statement of charges and supporting evidence filed with the Board by the Association against [the] Principal *** [will] also be filed before the Commissioner.
>
> "2. [The] Principal's *** written statement of position and/or a written statement of evidence with respect to such charges [will] be filed before the Commissioner.
>
> "The hearing examiner will place the relevant documents before the Commissioner for a determination as to whether or not the Board will be compelled to certify the tenure charges advanced by the Association. In the Matter of the Tenure Hearing of Milton Belford, School District of the City of Long Branch, Monmouth County, 1978 S.L.D. ___ (decided August 3, 1978; James McCabe v. Board of Education of the Township of Brick, Ocean County, 1974 S.L.D. 299, aff'd Docket No. A-3192-73, New Jersey Superior Court, App. Div., April 2, 1975 [1975 S.L.D. 1073].***"

The parties subsequently filed Memoranda of Law in support of their respective positions. The matter is now directly before the Commissioner for his determination. The relevant material facts to the herein controverted issue are these:

The principal against whom petitioners filed charges of unbecoming conduct enjoys a tenure status in his position and therefore cannot be dismissed nor reduced in compensation except as provided by the Tenure Employees Hearing Law.

The specific statute which is pertinent to the instant matter is N.J.S.A. 18A:6-11. This statute reads in its entirety as follows:

> "Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the

> charges, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.
>
> The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting."

Petitioners, by affidavits, individually charge the principal with unbecoming conduct and allege, inter alia, that:

1. Beginning with the 1976-77 school year and carrying through the present time the principal used loud and profane language and threatened physical force upon the teacher;

2. The principal recommended not to renew the employment of a nontenured teaching staff member. The matter was subsequently litigated and thereto the Commissioner of Education reinstated the teacher in the matter of Thomas Aitken v. Board of Education of the Township of Manalapan, 1974 S.L.D. 207;

3. Prior to April 7, 1977 a tenured teaching staff member's performance had been excellent. Subsequent thereto, the principal commenced to criticize the teacher, maintained a personal personnel file contrary to Board policy, lost commendations placed in teacher's personnel file, orally reprimanded the teacher in the presence of pupils;

4. Physically ejected a teaching staff member from the principal's office which led to the filing of charges of simple assault and battery against the principal and the charge was subsequently dismissed in Re: State v. Murphy/State v. Daccurso, Leslie B. Tinkler, Judge, Municipal Court, Manalapan Township.

The principal, on July 25, 1978, filed an affidavit with the Board in answer to the charges and stating his position with regard to said charges. He denied the charges as set forth with affirmative defenses to each charge and a summary of position.

On August 1, 1978 the Board held a special meeting at which it adopted a resolution to close the meeting to the general public to discuss personnel matters pursuant to N.J.S.A. 10:4-13 and 10:4-12(7)(b),(8). The closed meeting was held from 8:06 p.m. until 10:54 p.m.

By an affirmative vote of seven to zero, two Board members being absent, the Board determined that the charges were insufficient to warrant a certification to the Commissioner and adopted a resolution as follows:

> "Whereas, the Manalapan-Englishtown Regional Board of Education has received a Statement of Charges and supporting evidence filed by the Manalapan-Englishtown Education Association against Carmen Daccurso; and
>
> WHEREAS, said charges were properly filed in accordance with the provisions of N.J.S.A. 18A:6-11; and
>
> WHEREAS, after forwarding a copy of said charges to Carmen Daccurso, and receiving from Mr. Daccurso, an answer to said charges; and
>
> WHEREAS, on August 1, 1978, at a Special Meeting held at the Clark Mills School, the Board of Education did consider said charges, the answer to same, and all supporting evidence; and
>
> WHEREFORE, the Board of Education makes the following findings of fact:
>
> 1. As to the charge of Thomas Aitken, the Board finds that Mr. Aitken in his affidavit mis-stated the use of the word 'observation', and the Board agrees with Mr. Daccurso that his observations were not stated to be formal

observations. It is entirely possible and proper for a teacher to be informally observed by his principal sixty times during the school year.

The Board further finds that Mr. Aitken was, in fact, re-instated, but the sole basis for his re-instatement was the fact that the Board failed to give timely notice.

2. As to the statement of Robert Farino, the Board notes that in the statement of Mr. Farino, his use of the words 'observation' and 'formal observations' do (sic) not contradict the position taken on this matter by Mr. Daccurso, nor does it support Mr. Aitken's position.

3. As to the affidavit of William Hitzel, the Board notes that even if Mr. Daccurso's alleged intimidation of Mr. Hitzel prior to a meeting of the Association in the Spring of 1977 took place, there is no indication that it was sufficient to prevent the meeting from taking place as planned.

The Board also notes that if Mr. Daccurso intimidated Mr. Hitzel at various times, prior to June of 1978, there is a question as to why charges of unfair labor practices or at least, formal grievances were not filed before November.

The Board also finds that in the affidavit of Mr. Hitzel, there was not contention that the alleged profanity was uttered in front of children, nor do the charges specify the location where said language was used.

The Board finds that, if profanity was used by Mr. Daccurso on this occasion, it is not sufficient cause for certification of charges. The Board does not condone the use of profanity at any time in the school, by any employee.

The Board further finds that there are insufficient proofs to support the Hitzel allegation that there occurred a curtailment of Association activities in Mr. Daccurso's school. The Board believes that if Mr. Daccurso interfered with the Association activities, the Association would have filed an unfair labor practice charge, or a formal

grievance in accordance with the provisions of the Contract between the Manalapan-Englishtown Education Association and the Board of Education.

4. As to the affidavit of Marguerite Takach, the Board finds that the keeping of a working personnel file by the principal is not against Board policy.

As to the alleged missing letters, the Board questions why Miss Takach did not bring this to the attention of the Superintendent, why she waited so long to bring this matter to the attention of the Board, and why she made no attempt to obtain duplicate copies of the complimentary letters from the writers.

The Board finds that if there were several documents missing from her official personnel file, there was no proof that Mr. Daccurso removed them, nor that he did not, in fact, forward them to the Central Office.

The Board finds that the requirement by a principal for the preparation of lesson plans is proper.

The Board believes that, if there was a violation of the M.E.E.A. Employment Contract by Mr. Daccurso, while acting in his official capacity as an agent of the Manalapan-Englishtown Regional Board of Education, the proper procedural remedy would be the filing of a grievance according to the contract with the Association.

The Board further wishes to make it of record that the Board Secretary and School Auditor have reviewed all petty cash funds in the District, including the funds administered by Mr. Daccurso, and have certified to the Board that they are in order, and therefore finds that this charge is without foundation in fact.

5. As to the affidavit of Joseph Murphy, the Board finds that this matter has been adjudicated by the Municipal Judge of the Township of Manalapan, and the charges against Mr. Daccurso dismissed.

Furthermore, the matter was also heard by an Arbitrator and the Board is awaiting a decision in that case.

NOW, THEREFORE, BE IT RESOLVED by the Manalapan-Englishtown Regional Board of Education, that there is not probable cause to credit the evidence in support of the charges, and that the charges are insufficient to warrant the dismissal or reduction of salary of Carmen Daccurso; and

BE IT FURTHER RESOLVED that the charges are of insufficient substance to warrant a certification to the Commissioner of Education of the State of New Jersey, pursuant to the requirements of N.J.S.A. 18A:6-16; and

BE IT FURTHER RESOLVED that a copy of this Resolution be forwarded to the employee forthwith, by personal service, or by certified mail.

ROLL CALL VOTE:

AYES: Mrs. Bailey, Mrs. Becker, Mr. Ciullo, Mr. O'Neill, Mrs. Ridley, Mrs. Rucker, Mr. Morelli

NAYS: None

ABSENT: Mr. Klein, Mrs. Nelson

THIS IS TO CERTIFY that the foregoing resolution was adopted at the Special Meeting of the Manalapan-Englishtown Regional Board of Education held on August 1, 1978.

_____
Edward A. Barrett
Superintendent of Schools
Acting Board Secretary

DATED: August 1, 1978"

The issue to be determined in the instant matter is whether or not the Board abused its discretionary authority wherein it determined not to certify charges filed against a principal in its employ to the Commissioner.

Petitioners argue that pursuant to N.J.S.A. 18A:6-10 et seq. the Commissioner has, on many occasions, described the function of the local board of education in deciding whether to certify charges against a tenured employee to be rather perfunctory and need not involve significant educational

factfinding. In a recent order, In the Matter of the Tenure Hearing of Frank Morra, School District of the Township of Jackson, Ocean County, ordered January 26, 1979, the Commissioner denied a Motion to Dismiss for alleged procedural irregularities and fully explored the matter and role of the local board of education in administering the Teacher Tenure Act.

Petitioners contend that a review of the affidavits and documents submitted to the Board by the charging Association, as well as the response filed by the principal, supports a charge of conduct unbecoming a teaching staff member and should be fully explored at a plenary hearing before the Commissioner. It asserts that notwithstanding that a charging teacher's charges of simple assault and battery against the principal were dismissed by a Municipal Court Judge, there is no evidence that the teacher's wounds have been healed with the principal. In the Matter of the Tenure Hearing of Milton Belford, School District of the City of Long Branch, Monmouth County, 1978 S.L.D. ___ (decided August 3, 1978) It contends that if it is proven that the principal evidenced a chronic loss of self-control, accompanied by offensive language, as alleged by another teaching staff member, then it warrants a finding of conduct unbecoming a teaching staff member. Finally, petitioners contend that the incidents involving a teacher who alleged that the principal unduly and improperly criticized her while "loading up her personnel file" in an era when evaluations are a key to teacher review, the Commissioner ought to deal with a standard of conduct with regard to such allegations.

The Board challenges petitioners' position which is predicated upon an interpretation that the function of a local board of education in deciding whether to certify charges against a tenured employee is perfunctory. It asserts that while this analysis may have been correct under former practice, under the current New Jersey law the function of the Board pursuant to N.J.S.A. 18A:6-11 as amended, is much more than perfunctory.

The Board submits that, prior to 1975, N.J.S.A. 18A:6-11 required that a board of education perform a limited function when certifying tenure charges to the Commissioner. The proper function of boards of education under the former statute was described in McCabe, supra, as follows:

> "***The 'limited function' of '***preliminary review of the charge and the required certification to the Commissioner***,' in the words of the Court, strictly delimits the breadth of the Board's discretionary authority. The statute, N.J.S.A. 18A:6-11, requires a local board of education to view such charge as being true. The description of the charge as being 'true in fact,' prohibits a local board from exercising judgment regarding the truthfulness of the charge. A local board of

> education, assuming the truth of the written charge and having examined the evidence, exercises discretion solely by determining whether the charge would '***warrant a dismissal or a reduction in salary***.' ***."
> (1974 S.L.D. at 314)

The Board contends that the decision in McCabe, supra, was based upon the statement of law contained In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). The Board suggests that petitioners' position would, perhaps, be more credible had the statute in question not been amended by Chapter 304 of the Laws of 1975. It argues that N.J.S.A. 18A:6-11, as amended, now vests the Board with significantly greater responsibility.

The statute provides that a board of education must now supply a charged employee with a copy of the charge, a copy of the statement of evidence, and provide that employee with an opportunity to submit a written statement of position and a written statement of evidence under oath. The Board then must consider the charge, the statement of position, and statements of evidence presented to it by both parties and make a primary determination as to whether or not "***there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.***" N.J.S.A. 18A:6-11 The Board asserts that under the present circumstances in making a determination as to the credibility of the evidence presented by both sides, it performs a quasi-judicial evaluative function akin to a probable cause hearing in the criminal sector. A probable cause hearing requires, of necessity, the exercise of reasoned judgment and discretion. It asserts that when the Board is confronted with conflicting evidence, it must evaluate the evidence and determine which of the two statements submitted is more deserving of belief. It contends that in the instant matter the Board exercised its reasoned discretion, reviewed the statements of evidence and positions of the parties, and determined that the evidence was not credible enough to warrant the certification of charges to the Commissioner. It asserts that the materials submitted to the Commissioner clearly demonstrate the foundation for the Board's conclusion.

The Board argues that it is well established that the Commissioner will not substitute his judgment for that of the elected or appointed representatives of the citizens of a school district who comprise the local board of education and that the discretionary functions of the Board are entitled to a presumption of validity by the Commissioner. Fitch v. Board of Education of South Amboy, 1938 S.L.D. 292 (1913), aff'd State Board of Education 293 It contends that the Board acted properly and within the letter and spirit of the law when it evaluated the evidence submitted to it and found it insufficient to warrant a certification of charges against the principal.

The Commissioner has reviewed the contentions of the parties herein and has noted the substantive nature of the arguments with respect to the application of N.J.S.A. 18A:6-11. He must now consider the Board's action taken at the closed meeting held August 1, 1978, wherein it determined that there was not probable cause to credit the evidence in support of charges filed against a tenured principal by the Association and declined to certify such charges to the Commissioner.

In McCabe, supra, the Commissioner thoroughly reviewed the Tenure Employees Hearing Law and the Court's clarification of the then N.J.S.A. 18A:6-11 (L. 1960, c. 136) as set forth in Fulcomer, supra. Therein, the Court set forth the Legislative intent of the statute to remove all tenure hearing and decision making functions from the local boards of education and to place those functions squarely before the Commissioner.

The Court stated in Fulcomer that:

> "***Formerly all phases of the hearing and decision making function were performed by the local boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to 'decide *** all controversies and disputes arising under the school laws.' (R.S. 18:3-14) [now N.J.S.A. 18A:6-9] (at 411)
>
> "***There is nothing in the new act which suggests that the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than a preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to that limited function. Thus, the Legislature has transferred, from the local board to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.***" (at 412)

The Commissioner cited those dicta set forth in Fulcomer and stated in McCabe, supra, as follows:

> "***The 'limited function' of '***preliminary review of the charge and the required certification to the Commissioner***,' in the words of the Court, strictly delimits the breadth of the Board's discretionary authority. The statute, N.J.S.A. 18A:6-11, requires a local board of education to view

> such charge as being true. The description of the charge as being 'true in fact,' prohibits a local board from exercising judgment regarding the truthfulness of the charge. A local board of education, assuming the truth of the written charge and having examined the evidence, exercises discretion solely by determining whether the charge would '***warrant a dismissal or a reduction in salary***.'***" (Emphasis supplied.) (at 314)

Thus, the Commissioner determined in McCabe, supra, that the board had abused its discretion when it refused to certify tenure charges filed against its Superintendent by teaching staff members and remanded the said charges to the board for certification to the Commissioner.

The Commissioner observes that a new dimension has been added to the responsibility of local boards with regard to certification of tenure charges pursuant to the amended N.J.S.A. 18A:6-11 (L. 1975, c. 304). The amended statute no longer requires that boards view tenure charges as being "true in fact," but rather, subsequent to its consideration of the written charge, the written statements of position, written statements of evidence, under oath, the board must now determine "*** whether there is probable cause to credit the evidence in support of the charge ***." N.J.S.A. 18A:6-11 Accordingly, boards have now been granted certain discretionary parameters with respect to certifying tenure charges to the Commissioner which did not exist at the time of McCabe, supra. In any event, the Commissioner addressed certain arguments advanced by the parties in McCabe and cited the Rules Governing the New Jersey Courts, R. 3:4-3, inter alia, as follows:

> "***If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause, otherwise, the court shall discharge him***."

The Commissioner determines that the Board, in the instant matter, did not abuse its discretionary authority as alleged and further finds that it applied the standard as set forth in R. 3:4-3, ante, when it determined that there was not probable cause to credit the evidence in support of the charges.

Additionally, the Commissioner, after a careful review of the charges, finds that two such charges have been cured by courts of competent jurisdiction; i.e. Aitken, supra, and State v. Murphy/State v. Daccurso, supra. He further finds that the remaining charges lacked the necessary specificity and did not

rise to the level of tenure charges but, rather, were grievances ripe for disposition through the Board's adopted grievance procedure policy.

The Commissioner, therefore, remands the remaining alleged charges to the Board of Education of the Manalapan-Englishtown Regional School District for consideration as grievances and upon such consideration it may wish to take some appropriate action thereto.

For the reasons stated above, the Commissioner finds and determines that the contentions of petitioners are without merit. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 30, 1979

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

For the Petitioner, Rothbard, Harris & Oxfeld
(Nancy I. Oxfeld, Esq.)

For the Respondent, Lois N. Kauder, Esq.

Petitioner, employed as a teaching staff member by the Board of Education of the City of Newark, hereinafter "Board," for the 1971-72, 1972-73, and 1973-74 academic years, claims to have acquired a tenure status in the Board's employ notwithstanding a tenure status in the Board's employ since the commencement of the 1974-75 academic year. Petitioner justifies her failure to report to her assignment upon the allegation that the Board illegally transferred her from one school to another. Finally, petitioner alleges that the Board illegally issued stop orders on payroll checks it issued her sometime in the Spring of 1974. The Board denies the allegations and asserts that its actions with respect to petitioner's employment, her transfer from one school to another, and its issuance of stop orders on certain payroll checks tendered her are in all respects proper and legal. The Board seeks dismissal of the matter on the grounds that petitioner has failed to state a cause of action for which relief could be granted.

The Board's Motion to Dismiss is referred directly to the Commissioner of Education on the record, including the pleadings and amendments thereto, stipulation of fact, and letter memoranda of the parties in support of their respective positions on the Motion.

A brief recital of the history of this litigation is in order.

Petitioner originally filed her complaint on February 6, 1975 which was joined by the Board's Answer on March 3, 1975. A conference of counsel was scheduled for May 12, 1975 by the Commissioner's representative assigned to the matter. Counsel for petitioner did not appear at the scheduled conference because of her belief that the matter had been settled and that the Petition would be withdrawn.

The Commissioner's representative, by letter to the parties dated August 11, 1975, requested a status report on the possible settlement of the matter. The matter was not settled by the parties and by letter dated December 12, 1975 the Commissioner's representative scheduled another conference for February 2, 1976 which was adjourned because of snow. The conference was rescheduled and held on March 17, 1976. The parties agreed at that time to prepare, execute and submit a stipulation of fact in regard to the litigation.

The Commissioner's representative, by letter dated September 20, 1976 reminded the parties they had not yet submitted a stipulation of fact. Petitioner's counsel informed the Commissioner's representative by letter dated October 6, 1976 that she and Board counsel could not agree on a stipulation.

A second conference was scheduled for December 7, 1976 which was adjourned at the request of petitioner. The conference was rescheduled for March 10, 1977 which date was adjourned to March 24, 1977 at petitioner's request. The conference was conducted on March 24, 1077 at which time petitioner's application to file an Amended Petition was granted. Petitioner filed an Amended Petition on August 3, 1977 which was joined by the Board's Answer on December 21, 1977.

A third conference of counsel in regard to the amended pleadings was scheduled for April 27, 1978, which was adjourned at the request of the Board. The third conference was held on October 10, 1978 at which time the issues were refined, a stipulation of fact was entered, and a schedule of letter memoranda of the parties in support of their respective positions on the Board's Motion to Dismiss was established.

This concludes the recital of the history of the litigation.

The essential facts stipulated by the parties with respect to petitioner's claim of tenure in the Board's employ, together with her claim that the Board illegally transferred her from one school to another are brief and are as follows: (See conference of counsel statement, October 10, 1978)

1. Petitioner was employed as a teaching staff member by the Board for the 1971-72, 1972-73, and 1973-74 academic years.

2. During those three academic years, petitioner was assigned to the Board's Bragaw Avenue Elementary School.

3. The Board offered petitioner employment for the 1984-75 academic year and assigned her to its Bragaw-Lyons Annex Elementary School. Petitioner's assignment for the 1974-75 academic year was within the scope of her certificate to teach.

4. Petitioner did not appear for her duties at the commencement of the 1974-75 academic year nor has she appeared since.

5. Petitioner's failure to appear for her duties at the Board's Bragaw-Lyons Annex Elementary School at the commencement of the 1974-75 academic year, or thereafter, is predicated on her assertion that she was involuntarily transferred and that other teachers, with lesser seniority than she, should have been transferred first.

Petitioner's claim to a tenure status in the employ of the Board, upon these facts, must fail. N.J.S.A. 18A:28-5 sets forth the statutory requirements a person must meet to acquire tenure. At all times, petitioner was employed on an academic year basis. N.J.S.A. 18A:28-5 (b) and (c) set forth as follows the requirements for tenure which must be met by persons employed on an academic year basis:

> "(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 year***."

Petitioner was employed for three academic years and was, in fact, offered employment for the 1974-75 academic year. Had petitioner reported to her assignment, at the commencement of that year, she would have met the statutory requirements of N.J.S.A. 18A:28-5(b) for the acquisition of tenure. That petitioner failed to report at any time during the 1974-75 academic year, has barred her from acquiring tenure pursuant to N.J.S.A. 18A:28-5(c). The execution of an employment contract between the Board and petitioner for the 1974-75 academic year does not, standing by itself, result in the acquisition of a tenure status by petitioner. Petitioner had to perform duties at the beginning of that academic year for the statute of reference to become operable in her favor.

Petitioner's claims to tenure are without merit by reason of her failure to meet the precise conditions set forth in the statutes. Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962), cert. den. 371 U.S. 956, 83 S. Ct. 508, 9 L.Ed. 2d 502 (1963); Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941)

Next, it is well-established that boards of education have statutory authority at N.J.S.A. 18A:25-1 to transfer teaching staff members from one assignment to another and/or from one schoolhouse to another so long as the transfer is within the scope of the affected person's certificate. Greenway v. Board of Education of the City of Camden, 129 N.J.L. 461 (E. & A. 1942);

Petitioner admits herein that the Board transferred her from one school to another and within the scope of her certificate. Petitioner's claim, however, is grounded upon her assertions that the transfer was involuntary and that other teachers with less seniority should have been transferred first.

The Commissioner observes that the Board, in its determination to transfer personnel from one assignment to another, is not required to secure the affected person's agreement. Petitioner's allegation that she did not consent to her transfer is wholly without merit for purposes of the litigation herein.

The Commissioner will now address petitioner's complaint that the Board issued stop orders on her salary checks sometime in the Spring of 1974. The Board admits that it did issue stop-payment orders on certain salary chekcs issued to petitioner. The Board explains that regular salary payments in the form of checks were issued to petitioner during the Spring months of 1974. The final check was issued June 26, 1974. Petitioner had not cashed those checks as of March 3, 1975 when the Board filed its Answer to petitioner's Amended Petition. The Board asserts that on the advice of its school auditor it issued stop-orders on the checks. Petitioner does not deny this representation by the Board as the circumstances in which the Board issued the stop-orders. In fact, counsel for petitioner was directed by the Commissioner's representative to file a specific money claim against the Board for these moneys so that proper payment may be made.

Petitioner's counsel advised the Commissioner's representative by letter dated October 31, 1978 that petitioner

> "***has not responded to my requests that she submit to me any money claims owed to her by the Board***."

Obviously, the Board does owe petitioner certain moneys for the Spring 1974 period because checks were submitted to her which she has refused to cash. Petitioner also has failed to submit a specific salary claim to the Commissioner which would set forth the amount of money she claims is her due.

In these unusual circumstances, the Commissioner hereby grants counsel for petitioner forty-five days from the date of this decision to submit a specific salary claim against the Board for an amount equal to the amount of checks she refused to cash during the Spring of 1974. Should petitioner fail to submit such a statement, the Board may submit an appropriate order by which all money claims which may exist against it by petitioner would be dismissed with prejudice.

The Commissioner, having found petitioner's claim to a tenure status in the employ of the Board and her allegation that the Board illegally transferred her to be without merit, grants the Board's Motion to Dismiss those portions of the Petition. The Commissioner retains jurisdiction of petitioner's money claim pending an equitable resolution of that issue.

COMMISSIONER OF EDUCATION

August 31, 1979

PETITION OF EDWARD C. COYLE V. BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY	)))))	INITIAL DECISION DEPARTMENT OF EDUCATION DOCKET NO. 350-11/77

APPEARANCES:

James R. Bodnar, Esq., Attorney for Petitioner

Howard R. Yocum, Esq., Attorney for Respondent

Edward C. Coyle

Mira Milich

Paul Sieranski

Edward Stutzke

William McDevitt, Jr.

Horace McAdams

Levi Olsen

BEFORE THE HONORABLE WARD R. YOUNG, A.L.J.:

Petitioner has been employed as a teaching staff member by the Maple Shade Board of Education, hereinafter "Board", since February 1964. He was appointed to serve as Administrative Assistant to the Superintendent of Schools, effective October 22, 1974, and did serve in that position until June 30, 1977. He alleges that the Board transferred him to the position of Assistant Principal for the 1977-78 school year in bad faith, and claims tenure as Assistant Superintendent.

The Board avers that petitioner cannot claim tenure in a position to which he was not appointed and in which he did not serve; that he did not perform the duties of Assistant Superintendent, that petitioner's assignment as Administrative Assistant was not terminated in bad faith; and further, that the petitioner is guilty of laches.

A conference of counsel was held by Hearing Examiner Ann S. Giesguth on April 10, 1978. Two (2) days of hearings were held in the office of the Burlington County Superintendent of Schools on April 30, 1979 and May 16, 1979, and heard by Dr. Ward R. Young, Administrative Law Judge, then sitting as a hearing examiner appointed by the Commissioner of Education.

The relevant uncontroverted facts are as follows:

Petitioner began his employment with the Maple Shade public schools in February 1964 as a teacher of Social Studies and English in the ninth grade, and gained tenure as a teacher. From September 1969 until June 30, 1972 he held non-certified positions as an assistant to the junior high school and high school principals. From July 1, 1972 until October 22, 1974, petitioner served the school district in the certified position of assistant high school principal, a position in which he gained a tenure status. From October 28, 1974 to June 30, 1977 he served in the non-certified position of administrative assistant to the Superintendent after which he was assigned to his tenured position of assistant high school principal.

A recitation of relevant testimony begins with the petitioner, and reveals that the Board abolished the position of administrative assistant to the Superintendent by resolution on May 10, 1977 and created the certified position of school business administrator (Tr I-51). Petitioner did not apply for the newly created position as he was not certified for same (Tr I-109), albeit his testimony on redirect that "a principal's certificate....is good enough for an assistant superintendent." (Tr I-129,130). Since petitioner did not make application, I see no need to review petitioner's certification record (R-2) or address certification requirements for the positions of assistant superintendent or school business administrator.

The record is replete with testimony and documentary evidence that the controverted matter was triggered by a salary dispute resulting from conflicting views. Petitioner believed the salary for the position of administrative assistant should at least be on par with that of assistant high school principal (Tr I-49). The Board did not agree. (Tr I-171) The petitioner indicated in his testimony that he would go back to being an assistant principal if necessary to realize the salary and benefits of that position. (Tr I-77)

The petitioner was well aware of the Board's intention to reorganize the administrative staff and to abolish the position of administrative assistant. (R-5) The Board's concern for petitioner was reflected by their meetings with him to discuss the implications of reorganization (Tr I-87, 90, 95, 96).

The record of this matter clearly establishes that the duties and responsibilities of the position of administrative assistant as explained (Tr I-80) and performed cannot be construed to be that of either an assistant superintendent or a school business admisistrator.

I FIND that petitioner's claim of tenure as an assistant superintendent has no merit, and that the Board did not act in bad faith in reorganizing the administrative staff, abolishing the administrative assistant's position and returning petitioner to his tenured position of assistant principal to satisfy his demand for salary and benefits. Since the Board has prevailed, I need not address respondent's claim of laches on the part of petitioner.

I CONCLUDE, therefore, that the petition IS DISMISSED. This order cannot become effective until the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify, or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

19 July 1979
DATE

Ward R. Young
WARD R. YOUNG, A.L.J.

EDWARD C. COYLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the initial decision in the instant matter. He observes that the parties have filed exceptions pursuant to N.J.A.C. 6:24-1.17(b).

The instant decision denies petitioner's claim to tenure as Assistant Superintendent and asserts the Board's action to be proper in reorganizing the administrative staff, abolishing the position of administrative assistant and returning petitioner to his tenured position of assistant principal.

Petitioner in his exceptions argues that because the Board never complied with N.J.A.C. 6:11-3.6 by sending a job description for the position of Administrative Assistant to the County Superintendent of Schools for his approval, the Judge had no proper basis for his determination that the position petitioner held was not equivalent to that of Assistant Superintendent. The Commissioner does not agree.

Petitioner was appointed Administrative Assistant on October 22, 1976. At that time N.J.A.C. 6:11-3.6 entitled "Assignment of Titles" read as follows:

> "(a) School districts are urged to assign to personnel, titles which are recognized in these regulations.
>
> "(b) If use of unrecognized titles is necessary, a job description should be formulated and submitted to the county superintendent of schools, in advance of the appointment, on the basis of which determination may be made of the appropriate certificate for the position."
>
> (Emphasis supplied.)

The Commissioner notes the permissive language in the Administrative Code at that time. Although the responsibility for such action was basically that of the Board on a suggested

basis, it had to be shared with petitioner who, by his own professional discernment, should have determined the propriety of the title and its function, prior to accepting the assignment.

Petitioner served in his position until June 30, 1977. N.J.A.C. 6:11-3.6, amended November 9, 1977, now reads as follows:

> "(a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.
>
> "(b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year."
>
> (Emphasis supplied.)

The Commissioner observes that such mandatory language was adopted after petitioner's transfer from the position of Administrative Assistant. Prior to that time the Board's compliance with N.J.A.C. 6:11-3.6 was suggested and the fact that the Board did not do so is not fatal to this matter. The Commissioner finds that the record reflects extensive testimony establishing the duties and responsibilities of the position of Administrative Assistant sufficient for the determination of the non-equivalency of that position to that of Assistant Superintendent.

Petitioner pleads for entitlement to counsel fees; the Commissioner does not agree. He has consistently held that he is without authority to award counsel fees. Richard McGuire v. Board of Education of the City of Northfield, Atlantic County, 1979 S.L.D. ____ (decided May 24, 1979)

The Commissioner agrees with the findings in the instant matter and adopts them as his own. Additionally, he determines that petitioner's three years of service as Administrative Assistant accrue towards his tenured position of assistant high school principal. With this provision and for the foregoing reasons petitioner's appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION

September 24, 1979

IN THE MATTER OF THE TENURE HEARING OF CHARLES KANE, SCHOOL DISTRICT OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Complainant, Schenck, Price, Smith & King, (David B. Rand, Esq., of Counsel)

For the Respondent, Greenberg & Mellk, (William S. Greenberg, Esq., of Counsel)

The Board of Education of the Township of Parsippany-Troy Hills, hereinafter "Board," certified tenure charges against Charles Kane (respondent), who was suspended without pay, stating that it believes that probable cause exists that the charges are sufficient, if true, to warrant his dismissal pursuant to N.J.S.A. 18A:6-10 et seq. The Board filed thirty separate charges of conduct unbecoming a teacher and three charges of insubordination. A hearing was conducted on fourteen days in the office of the Morris County Superintendent of Schools, Morris Plains, before a hearing examiner appointed by the Commissioner of Education. Ninety-three documents were admitted in evidence, eighty by the Board and thirteen by respondent. Extensive Briefs and Reply Briefs were submitted on behalf of both litigants. The report of the hearing examiner follows:

CHARGE I(a)

> "Between February 28, 1974 and March 30, 1974, he [respondent] discussed his administrative evaluations with his students."

The high school principal and a vice-principal testified in support of this charge. The vice-principal testified that he did not witness respondent discussing his evaluations with pupils. However, as one of respondent's direct supervisors he attended an end-of-year conference with respondent, the principal and another vice principal where the "observation - evaluation" was addressed and respondent was directed not to discuss his evaluations with his pupils. (Tr. I-7, 11-17; P-2,8)

The principal testified that he also had not witnessed any discussions respondent had with his pupils concerning his evaluations. He testified, however, that he had received such complaints from staff members and parents and that he had a

lengthy conference with respondent concerning his discussions with his pupils. The principal testified that he told respondent that such discussions were unprofessional and that his observation reports were confidential. (Tr. I-51-52, 57-58)

When asked if he had discussed his observation reports with his pupils respondent testified, "That is possible, yes. In fact, it is probable." (Tr. IX-17) Respondent testified later that he

> "***would read an observation and if there were factual omissions or perhaps misunderstandings or anything that needed discussing, we would then discuss what the observer had said and if we all agreed that this was something we should add to our class or this was something we should delete, we use[d] that observation in the way it was meant to be used, to improve the learning situation in the classroom." (Tr. IX-22)

The hearing examiner notices that respondent concedes that he discussed his observation reports with his pupils while denying that he discussed any evaluations. In this regard he testified as follows:

> Q: "Well, did [the principal] ever say to you that you were discussing with your students administrative evaluations that had been given to you by the administration?
>
> A: "There was a discussion about that.
>
> Q: "And, what response did you make to that discussion on the part of [the principal]?
>
> A: "At one of the several times--I don't know if this was--if it was this one, I said that I couldn't have discussed the evaluations with my students because the evaluations were given at the end of the year. However, as a habit, I have always read observations to classes which were observed for educational purposes, since my entrance into the Parsippany School System and no one had ever complained before."
> (Emphasis added.) (Tr. I-99-100)

Respondent draws a sharp distinction between "observations" and "evaluations," and between "reading" them and "discussing" them with his pupils. In the hearing examiner's

judgment this is a distinction with little difference. It is clear that respondent's classroom observations were committed to writing by each observing supervisor. These were then discussed with respondent and compiled by the principal into an evaluation report which was discussed with respondent at the end of each school year. (Tr. IX-13-17) Further, he freely admitted discussing observations with his pupils and stated that it had to do with "***sharing, trust, the self images of the students***." (Tr. IX-18)

The hearing examiner finds that Charge I(a) is true in fact.

CHARGE I(b)

> "In February of 1974, he permitted a female student to visit him in his home without an adult chaperon and without parents' permission."

Respondent does not deny that a female pupil visited his home; however, he vigorously denies any innuendos which might be drawn from such a visit. The principal testified that he had received a warning from his vice- principal that a parent had called to complain that "***she could blow the lid off the whole school regarding her daughter and Mr. Kane***." (Tr. II-10) The principal testified about rumors concerning other pupils who were visiting respondent's home and he related a visit to his office by the parents of another girl who were upset because they could not control their daughter and keep her at home. (Tr. II-11-12) The principal cautioned respondent about having pupils in his home and pointed out to him the delicate personal and social relationship between pupils and teachers and between the school and the community. (Tr. II-14) The Board makes no statement regarding any untoward behavior by respondent during any visit by a pupil. It relies on a reading of respondent's deposition and the principal's memorandum memorializing his discussion with respondent about having pupils in his home. (Tr. II-40-47; P-7, 8)

Respondent admits that a great many pupils visited his home after school hours. In this regard he testified as follows:

> "***I have sole responsibility for three minor children who were four, eight and twelve at the time and my oldest child is a girl, she was entering into a very difficult period of her life at that time and some of my students and other people, boys and girls, during that period of time, although they were there for other reasons, class projects from my adult class in human relations at night, coming and going for various reasons. I had a boy placed with me by the Morris

> County Probation Department who had been in jail. I got him out of jail, he was living with me. Another boy, his mother placed him with me because he was having problems at the junior high school, so that my house is kind of a bustling type place with people coming and going all the time. Around this period, I remember that two girls in particular took my daughter shopping, helped her buy new clothes and other necessities for entering this period of her life that I really wasn't equipped to handle, they went out of their way to help me."
>
> (Tr. IX-37-38)

Respondent testified also that he was visited by "hundreds" of pupils. He assumed that they had parental permission since some drove cars and/or were over 18, and he testified that no one complained. (Tr. IX-37-44)

The hearing examiner determines that there is nothing in the testimony or the evidence to find anything improper in support of Charge I(b). Although respondent's good judgment may be questioned regarding these circumstances, and while it is clear that the school administration cautioned him about certain pupil visitations to his home, the Board was unable to show that this conduct was improper, even though true as admitted.

The hearing examiner recommends that Charge I(b) be dismissed.

CHARGE I(c)

> "In March of 1974, he permitted his students to use vulgar language in written compositions, and accepted them in that context without taking corrective measures."

Respondent testified that he gave one of his classes an assignment to write a composition on the topic, "Describe your feelings about yourself and school." (Tr. IX-46) He testified that he became depressed after reading the negative reactions and experiences expressed by the pupils' descriptions of themselves. Respondent took the papers to his immediate supervisor who shared them with a vice-principal. He testified that when he got the papers back he returned them to the pupils and tried to teach them to use different language, other than the "student vernacular," to express their negative feelings. (Tr. IX-46-47)

This testimony is in sharp contrast with that of a vice-principal who had supervisory responsibilities over respondent's subject area wherein this incident occurred. The vice-principal testified that he reviewed the compositions and found that many contained "vulgar and obscene" language. The specific

example he mentioned was "***an activity that might occur to a parent, the female parent." (Tr. II-55-56) He discussed the problem with respondent and he testified that respondent's reply was that he was pleased that the pupils were able to write a composition. The vice-principal testified that he advised respondent that the pupils should remove this kind of language from their compositions. This subject was discussed at respondent's end-of-year conference on June 24, 1974 and the vice-principal testified that respondent stated that he would try to improve according to the conference recommendations. (Tr. II-56-59)

The hearing examiner finds the charge to be true in fact. While teachers cannot control the precise words used by pupils, compositions generally reflect an attitude and a conditioning which indicates that they know what words are appropriate. Public school pupils, generally, do not write obscenities in assigned compositions. An isolated case would be understandable.

The hearing examiner finds the testimony of the vice-principal most credible and believes that respondent should have exercised the kind of guidance and direction to his pupils which would have minimized the vulgarities and obscenities he received.

CHARGE I(d)

> "On April 16, 1974, he invited students for lunch away from the school premises, contra to administrative procedure."

The vice-principal testified that he saw respondent transport two pupils away from the school parking lot and that he met with respondent two or three days later to remind him of the required sign-in, sign-out procedures and that parental permission was needed when pupils left the school grounds. In support of his testimony, the Board offered in evidence a document memorializing this meeting (P-9) and the "Student Handbook." (P-10; Tr. II-76-96; IX-56-61)

Respondent admits transporting pupils on the day in question but defends his action stating that he met them entering the school parking lot as they returned from a meeting with the Superintendent of Schools. He testified that they told him that they had not eaten lunch and because he believed the cafeteria was closed he drove them to a fast food store and immediately drove them back to school. (Tr. IX-57) The vice-principal testified that the cafeteria was available and open for lunch. (Tr. II-83, 85-86)

The testimony and documents in evidence support this charge. Although respondent's motive was meritorious, his own testimony indicates he knew a school regulation existed requiring certain permissions for pupils to leave school grounds. (Tr. IX-60) If the cafeteria were closed when the pupils

returned from their visit with the Superintendent, the pupils should have reported to the main office to arrange for lunch. Respondent's duty under those circumstances should have been to so advise them. Charge I(d) is true in fact.

CHARGE I(e)

> "On October 18, 1974, he used vulgar language in the presence of parents while discussing courses of study at the high school."

Respondent concedes that he utilized vulgar words in connection with a lesson he had taught his classes "hundreds of times." (Tr. IX-67) He testified that at a back-to-school night presentation he explained to parents and pupils the derivation of vulgar words as part of his course of study in either Problems of American Democracy or Social Science Multi-Course. He testified that the material was relevant to the course of study and that some of his pupils enjoyed the lesson so much that they requested that he demonstrate the lesson to their parents. The lesson consisted of "***any words of four letter variety from the Anglo-Saxon which they might consider to be vulgar.***" (Tr. IX-64) He testified that many parents thanked him for the presentation at the end of the class. (Tr. IX-63-69)

The principal testified that he received complaints from a parent after the back-to-school night presentation. He testified that this presentation was being offered to a ninth grade social studies class and that he had earlier admonished respondent about the teaching of vulgarities in his classes. He testified that he was assured that such lessons would not recur. (Tr. IX-101-111; P-3)

The hearing examiner finds that vulgarities were used by respondent as charged, specifically to a ninth grade social studies class and, according to respondent's own testimony, "hundreds of times." (Tr. IX-67) Finding no necessity to broach respondent's defense of his constitutional right to free speech, the hearing examiner will refer to Sallie Gorny v. Board of Education of the City of Northfield et al., 1975 S.L.D. 669 where the Commissioner stated as follows:

> "***In regard to petitioner's free speech issue, the Commissioner is constrained to observe that the expression used by petitioner in her classroom is totally improper, and the principal was correct in admonishing her not to resort to such offensive slang while teaching elementary children.***" (at p. 676)

Gorny had used the vernacular phrase "get off your rear end" to sixth grade pupils. (Id, at 675) Since such language was found

to be improper in Gorny that vulgar language introduced by respondent to his class is clearly inappropriate in the judgment of the hearing examiner.

The hearing examiner finds Charge I(e) to be true in fact.

CHARGE I(f)

> "On or about April 6, 1974, he permitted visitors to attend his classes without first reporting to the main office, and securing permission from his area chairman."

Respondent testified that the three persons who attended his class were municipal officials known to the administration and that they had been in the school a number of times. Because of their frequent visits to the school he assumed they had reported to the office for visitor passes. (Tr. II-115-126)

Although the charge is generally true, extenuating circumstances are such that the hearing examiner recommends that it be dismissed.

CHARGE I(g)

> "On or about May 16, 1974, he transferred students in and out of his class without receiving permission from the administration."

The record shows that pupils were allowed to attend respondent's classes when they had free time. There is no evidence that any pupil transfers were made by him and there is nothing in the record to show that this practice disturbed any other regularly scheduled classes. (Tr. III-61-63)

The hearing examiner recommends that Charge I(g) be dismissed.

CHARGE I(h)

> "On or about February 28, 1975, he discussed a student's personal problems in the class, and permitted the other students in the class to vote on whether she should remain in the class or leave. The class vote affirmed the removal of the student from the class. This resulted in an indignity and embarrassment to the student."

Respondent's immediate supervisor and the principal testified in support of this charge. Strong corroborative evidence was presented by his supervisor who memorialized her

conversation with respondent concerning this incident. (P-19) She expressed to him her concern about discussing pupil problems in front of his classes and she questioned him about giving a failing grade to the pupil in question for the entire year as early as February. (P-19, 20; Tr. III-64-69, 72-73; IX-100-106)

The hearing examiner finds that the testimony and the evidence adequately support the charge and that it is true in fact. Respondent himself testified that "[a]ll discussions take place openly at all times in my classes." (Tr. IX-102)

CHARGE I(i)

> "In February of 1975, he permitted a student to leave another teacher's class, and attend his class for the remainder of the School Year without permission from the administration."

The testimony and the evidence give little or no support for this charge. (P-10; Tr. IX-116-117) Further, it appears that the pupil's other teacher may have had an equal or greater responsibility in reporting that the pupil in question was cutting his class.

The hearing examiner recommends that Charge I(i) be dismissed.

CHARGE I(j)

> "On February 12, 1975, he made a derogatory remark directed at a fellow teacher by referring to him as 'radar ears.'"

Respondent denies that he directed the remark "radar ears" to his fellow teacher. The record shows that the affected teacher met and discussed the incident with respondent and was assured that it was a misunderstanding. After their conversation, the teacher withdrew a memorandum he submitted to an assistant principal complaining about the incident. However, he resubmitted it later because of other unrelated incidents involving respondent. (P-22, 23)

The hearing examiner finds that support for this charge, standing alone, is weak and inconclusive. The hearing examiner recommends that Charge I(j) be dismissed.

CHARGE I(k)

> "On March 11, 1975, he sanctioned the organization of, and accepted the responsibility for an unauthorized student meeting without receiving prior permission from the administration."

The testimony and the evidence do not support this charge. (Tr. IX-136-144) The hearing examiner recommends that it be dismissed.

CHARGE I(1)

> "On March 6, 1975, Mr. Kane appeared before a public meeting of the Board of Education regarding his grievance without first going through proper contractual grievance procedure."

This charge, standing alone, does not appear to be very serious. However, its importance takes on greater meaning when reviewing additional charges to be discussed, post. Respondent was the coach of the school's cross-country team and he served also as an assistant track coach.

He sought but was not appointed to the position of head track coach in the spring of 1975. (Tr. IX-150) He resigned earlier as head coach of the cross-country team, but he later rescinded that resignation. (P-33) Because he was not appointed as head track coach he attended a public meeting of the Board and read and distributed a prepared statement which begins:

> "I hereby confess guilt of the commission of a sin equal to the sum total of original sin plus the combined weight of the ten commandments. I openly supported a group of boys who dared to question a decision made in secret by a committee of administrators, [etc.]***." (P-33)

The Board asserts that this public reading was designed to incite and inflame the citizenry and that respondent's complaints should have been handled through the proper administrative channels. (Tr. IV-30-33; IX-145; P-34-36)

The hearing examiner finds that the charge is true in fact. No one has a right to demand an appointment as a coach and respondent would have been well advised to discuss his concerns with the administration and then privately with the Board if necessary. In effect he should have proceeded through properly established grievance channels, the athletic director and administrators.

In the hearing examiner's judgment, the language used in P-33 is inflammatory. Its tone and its delivery at a public Board meeting shows it was clearly designed to bring discredit on the school administration because he was not appointed head track coach. (P-33) Respondent testified that he had prepared enough copies of that document for everybody at the Board meeting.

As stated earlier this finding will have greater significance when viewed with other related charges to be discussed, post.

CHARGES I(m)(n)(o)(p)

These overlapping charges are closely related and they have a direct bearing on Charge I(1). They will be discussed as a single charge. Each charge is reproduced as follows:

(m) "On May 8, 1975, while Assistant Track Coach, he attended a meeting of the track team without the Head Coach's permission or his presence.

(n) "On May 8, 1975, while attending the meeting of the track team, he discussed the capabilities and professional coaching background of the other track coaches in the high school with student members of the track team.

(o) "On or about May 14, 1975, he was relieved of his assignment as assistant track coach because of failure to properly assume his responsibilities.

(p) "During the month of May 1975, teaching staff members conferred with the administration, and complained to the administration of his unprofessional conduct and interference with their responsibilities in the field of coaching track and football."

The record discloses a series of events involving respondent which caused a severe disruption on the track team between the coaches, between the boys, and between some of the boys and some of the coaches.

The head track coach, Nicholas Prudenti, testified that during the spring of 1975 respondent was one of two assistants and that it was the first time he had worked with respondent while he was employed as respondent's head coach. (Tr. IV-71) He called a meeting for May 6, 1975 with respondent and his other assistant coach, Walter Daniw, because he was concerned about a morale problem on the team and a split between respondent and Daniw. (Tr. IV-73) Prudenti testified that he wanted the team to remain intact so it could complete its season and he wanted to build better communications within the staff. (Tr. IV-73-74) During the meeting respondent stated that the only solution for him was to resign since he did not agree with a coaching decision made by Prudenti. Prudenti testified that he asked him not to resign until the end of the season so as not to affect the team.

(Tr. IV-76) Respondent did not commit himself and subsequently appeared at a track meet in Dover on May 12 seated in a separate section of the stands with members of the distance team.

Prudenti testified that he learned later of respondent's alleged resignation on May 7. The athletic director related to Prudenti that a school custodian had told him that respondent had resigned as an assistant track coach. Unknown to Prudenti or Daniw, the track team was aware of the alleged resignation and they met after school on May 8. Prudenti and Daniw learned about and went to the meeting in the auxiliary gymnasium and noticed respondent outside its door. The meeting was being conducted by one of the boys who wanted to discuss respondent's resignation with Prudenti. (Tr. IV-78-79)

The hearing examiner concludes from this testimony, and elsewhere, that respondent told the boys on the track team and others that he had resigned as an assistant coach. In fact he testified that he "might have" so informed them. (Tr. X-53) This disclosure and the meeting of the team on May 8 without notifying his colleagues or the athletic director is viewed by the hearing examiner as a breach of professional ethics to such a pronounced degree that its effect was to cause dissension and further divide the track team.

The hearing examiner cannot construct from the record any positive methods utilized by respondent that would have had the effect of keeping the team together for the rest of the season. Rather, it appears that respondent was using the team to assuage his personal problems with his colleagues and the administration.

The head coach was unable to dissuade the boys from continuing their meeting on May 8 and he could not get respondent to agree to a staff meeting rather than continue with the meeting in progress. He warned the boys that the outcome of the meeting might be a split in the team.

The meeting was extraordinary and emotional. A witness called by respondent testified that during the meeting respondent called Daniw a "bald-faced liar." (Tr. XIII-44) He testified also that respondent was critical of the other coaches in front of team members. (Tr. XIII-50-51)

Throughout these developments the head coach was unable to communicate with respondent and get his assistance in holding the team together. On Friday, May 9, 1975 fourteen team members turned in their uniforms. (Tr. IV-91-95) These were the same boys who did not go to practice after the meeting on the previous day as directed by the head coach. Instead, they went to still another meeting with respondent. (Tr. IV-91) Corroboration for this second meeting was offered by respondent's own witness. (Tr. XIV-21-23)

Respondent did not appear at track practice on May 9 or 10. He did appear at the Dover track meet, as stated ante, on May 12, accompanied by several of the boys who had quit the team. (Tr. V-28) Respondent then appeared on the high school track field on Tuesday, May 13 and stated to the head coach that he had decided not to resign. He was asked to leave by the head coach. (Tr. V-29) Respondent never resigned as far as the head coach knew. (Tr. V 30-31)

The athletic director testified that respondent never resigned orally or in writing, but he noticed that he did not show up for track practice on May 8 or 9. He discussed with Prudenti respondent's appearance on May 12 at the Dover track meet. He testified, also, that the girls' track coach asked him to notify respondent that she thought it best under the circumstances that he no longer advise the girls' track members. As a result of these occurrences the athletic director recommended to the principal that respondent should be relieved of his duties as an assistant coach. (Tr. V-35-38; P-44-45)

The hearing examiner concludes from the testimony and the evidence that respondent's actions herein caused the disruption, dissension and division of the track team in the spring of 1975. He finds, therefore, that Charges I(m)(n)(o) and (p) are true in fact, except for the reference to "football" in Charge I(p).

This finding of fact is based on respondent's specific conduct as a professional educator during the course of these aforementioned events and not on any requirement or rule that he seek permission to hold a meeting with high school athletes. The record shows that he did not conduct himself as a responsible teacher. Rather he pursued his own course of action for his own reasons when he believed the events referred to herein should be different than they were.

CHARGE I(q)

> "On September 16, 1975, he permitted unauthorized visitors in his class contrary to previous instructions."

Respondent's supervisor testified in support of this charge and it was further supported by her written evaluation of the lesson. (Tr. V-91; P-50) Respondent denies that any unauthorized persons were allowed to visit his classes. According to his supervisor, two seniors visited a freshman class without permission of respondent's supervisor as required.

The hearing examiner finds that the charge, though true, was accepted as a professional criticism and respondent acknowledged that he should have sought permission. Finding no conduct unbecoming a teacher, the hearing examiner recommends that Charge I(q) be dismissed.

CHARGE I(r)

> "On October 8, 1975, Mr. Kane, although in no capacity as a coach, but only as an individual, proceeded to run with the opposing track team, and encouraged them on the course in an effort to defeat our school. This infuriated our track coaches, some team members and parents."

The record shows quite clearly that the above charge is true in fact. It is set forth below in detail so the Commissioner may assess the seriousness of the charge.

Head track coach Prudenti testified that respondent and several former track team members, who had quit the team the previous spring, attended the Roxbury cross-country track meet on October 8, 1975 dressed in running outfits. He testified that respondent cheered for the opposing team runners and offered coaching tips as they passed. He testified that he heard respondent shout "***pump the arms ***take the hills*** pass on the straightaway***". (Tr. V-45-48; X-124, 127, 129-130) Respondent uttered these responses at several points along the course where he positioned himself to observe the runners. (Tr. XIII-11-15)

The head custodian of the Parsippany-Troy Hills High School attended the track meet and he testified that he saw respondent "motioning for the Roxbury boys to keep going." He later spoke to respondent about that incident and he told him that "***as a coach I thought he was all right, but as a man, I thought he stunk.***" (Tr. V-58-60)

Respondent admits he yelled encouragement to one member of the opposing team because he was a good friend whom he loved as a son, and he coached him at the request of Roxbury's track coach. He denies rooting for or encouraging the opposing team, but he wanted this boy to win the race. (Tr. X-128, 134-139)

At the conclusion of the race which Roxbury won by "a couple of points" (Tr. V-55) several of the Parsippany-Troy Hills boys complained to their coach that respondent had encouraged the opposing team. (Tr. V-56-57) The boys were upset and one had to be restrained physically from attacking respondent. Two of the boys were crying (Tr. V-59-60), obscenities were uttered by at least one boy, and their parents became involved in the unfortunate scene at the end of the race. Prudenti asked respondent to leave the field area but he refused. After the obscenity respondent challenged Prudenti to do something about the boys' profanity. (Tr. V-48-51; P-46) This testimony is corroborated by the assistant coach (Tr. V-61-64) and by respondent himself. (Tr. X-146-147)

By contrast, a witness, H.T., a former pupil and track team member, was called by respondent to give his recollection of what transpired during the race. He testified at length about the disturbance at the end of the race. He testified that team testified that to the day of the hearing he did not know why. (Tr. XIII-18-23)

Considering the testimony of others regarding this charge and the demeanor of this witness, the hearing examiner finds this testimony regarding the reason for the outburst at the end of the meet incredible and unacceptable.

In the hearing examiner's opinion this specific charge is not only true in fact, but also must be considered with the charges set forth in items (l)(m)(n)(o)(p), ante. It is apparent that those charges establish that respondent was unhappy about the selection of the head track coach and read an inflammatory statement (to the public) at a public meeting in that regard. Charge I(l) Thereafter, meetings of the boys and respondent resulted in a splitting of the track team wherein a number of the boys quit. According to respondent, the events which occurred at the conclusion of the October 8, 1975 track meet were the fault of the head track coach for being unable to control his runners. (Tr. X-146-147)

The hearing examiner finds respondent's conclusion to be incredible, particularly for a professional educator, experienced and previously employed as a coach. No one should understand more completely the desire, dedication, emotion and loyalty young athletes feel for their school and for each other. When they encountered the events which transpired at this track meet it is understandable that they would react emotionally. In the hearing examiner's judgment this ugly confrontation as set forth by one of respondent's witnesses (Tr. XIII-21-28) was attributable directly and solely to respondent's actions at the meet. (P-47, 48)

CHARGES I(s)(y)

These charges are combined by consent as a single charge. (Tr. VI-3-4)

> "(s) During the week of November 5, 1975, his Plan Book was reviewed, and found to contain material irrelevant to the course of study, such as 'silicone', 'Racquel Welch', 'mammary glands', 'nose jobs', 'plastic surgery', 'the Barrymore profile, fame, fortune, etc.'; and a love letter from an anonymous ninth grade student, stapled in his Plan Book, which was read and discussed in front of the class on March 29, 1976. There were also many days on which no Lesson Plans were provided."

"(y) On March 3, 1976, his Plan Book was again reviewed, and found to contain remarks which were not responsive to the questions asked by the administration, and contained material irrelevant to Ninth grade history."

A vice-principal testified in support of this charge. Introduced in evidence are a course of study for "You and Man in the Eastern World," (MEW) and respondent's lesson plan book. (P-56, 57)

The hearing examiner has reviewed these documents. The course of study is clearly delineated in P-56. A review of the lesson plan book supports the vice-principal's testimony that there are no lesson plans at all in many places. (Tr. VI-20-21, 32-34, 41, 43, 48) Additionally, he testified that he considered a list of words identifying "New Word Concepts" learned this year irrelevant to the course of study. (Tr. VI-58-59) They are "Whalepucky,*** Dinosaur Winds, Intercourse - U [you], tough cookies, good nigger, Uncle Tom, pussyfootin, parakeet, real meaning of love, motherly love, schizophrenia [and] phallic symbol***." (Tr. VI-59)

The letter referenced in the charge is stapled to the plan book. However, respondent testified that he read another such letter to the class and not the one included in his plan book. (Tr. XI-21-27)

Respondent asserts in his Brief that the partial word list set forth by the Board in its charge is not dissimilar to a word list used in the course of study. (Respondent's Brief, at p. 113) The hearing examiner cannot agree. An examination of the word lists in the course of study indicates that they do not contain sexual innuendos or other questionable words or phrases as set forth in the vice-principal's testimony.

It is not for the hearing examiner or the Commissioner to judge the relevance of the words used. Rather it is a proper subject to be judged by respondent's supervisors who have the responsibility to evaluate his performance. The record shows that respondent was so evaluated and that his plan book, in part, was found to be lacking or irrelevant. (Tr. VI-20-21, 58-59) The records supports that conclusion.

The hearing examiner finds Charges I(s),(y) to be true in fact.

CHARGES I(t)(u)

"(t) On November 24, 1975 while being observed, he told his class, 'I do not feel good about this observation.'

> "(u) On November 24, 1975, he discussed individual student grades with the entire student body present contra to administrative procedure."

Respondent's supervisor testified in support of these charges. She testified that he repeated the statement set forth in Charge I(t) "several times." (Tr. V-97-102; P-51)

Respondent does not deny that he made the statement set forth in Charge I(t); however, he explains that he was feeling ill and was uneasy about previous observations. (Tr. XI-50-57) He denies violating any rule or procedure regarding discussion of pupil grades and admits having such discussions at the request of pupils. (Tr. XI-59-63)

The hearing examiner finds these charges true in fact.

CHARGE I(v)

> "On December 3, 1975, while proctoring the Iowa Tests, he proceeded to disrupt the test procedures of the students by discussing irrelevant material such as a poem, and writing on the blackboard the conjugation of the verbs, 'love', 'care', and 'respect'."

In evidence is P-53 which is a copy of the words and phrases placed on the chalkboard during the Iowa Tests. A vice-principal testified that he went to the room and copied the words after a parent complained to him that her child had complained to her of the incident. The vice-principal testified that he told respondent of his concern about this activity while he was proctoring a test. He testified that respondent replied that if the pupils were "affected by this activity going on in front of [them] it was their problem and not his." (Tr. V-102-109)

Respondent admits writing on the chalkboard as evidenced by P-53. However, he testified that he did so during breaks between test segments. (Tr. XI-77-79) He concedes meeting with the assistant principal who told him he had used poor judgment during the test. (Tr. XI-85-87) Concerning the statement he made about the words on the chalkboard being distracting to the pupils, respondent testified that:

> "If I did say that, *** what I meant, was that during the test period they should have been taking the test and not reading anything on the board." (Tr. XI-88)

The hearing examiner finds the charge to be true in fact, particularly the direct testimony of the vice-principal who stated that at the meeting with respondent concerning this incident respondent had said "***that some of the youngsters were

finished with the test already and had nothing to do and he had them up to the board and they were conjugating." (Tr. V-107)

CHARGE I(w)

> "In January 1976, he discussed in the presence of his class, a personal vendetta with a secretary in the school administration."

The hearing examiner finds no proof in support of this charge and recommends that it be dismissed.

CHARGE I(x)

> "On March 3, 1976 he discussed his personal problems and problems of other teachers in front of his own class. He also discussed irrelevant material regarding divorce, marriage and his personal life, which were unrelated to the subject being taught, namely Ninth grade History."

A vice-principal testified about his observation of this lesson. His lengthy written evaluation is submitted in evidence. It discloses his detailed professional evaluation and criticism of respondent's class which adequately supports the charge. (Tr. VI-107-119; P-58) He testified that his evaluation was discussed with respondent at a meeting with the principal, respondent's department chairman and his representative from the local teachers' association also present. (Tr. VI-108)

Respondent made no written response to P-58 and, other than a general denial, he did not cast any doubt in the mind of the hearing examiner that the statements therein were true. (Tr. XI-124-135) It is pointed out that this written evaluation is a direct result of a classroom observation by respondent's supervisor.

The hearing examiner finds this charge true in fact.

CHARGE I(z)

> "On or about March 9, 1976, contrary to previous instructions, he discussed the psychological background of a student in his class. This required removal of the student from the class."

The hearing examiner finds no support of any untoward discussion of a pupil by respondent. On the other hand, respondent's explanation of this incident is entirely satisfactory. The hearing examiner recommends that Charge I(z) be dismissed. (Tr. VI-120-131; XII-2-12)

CHARGE I(aa)

> "On or about March 19, 1976, he failed to accept the responsibility to discipline one of his students or notify the administration about one of his students, who was attempting to promote 'a revolution' to remove the administration and the prinicipal from the school."

The hearing examiner finds the proofs in support of this charge to be weak and inconclusive. In any event the hearing examiner believes that there is no evidence herein to support a charge of conduct unbecoming a teacher. He recommends that this charge be dismissed. (Tr. VII-2-13; XII-12-25; P-64, 65)

CHARGE I(ii)

> "On or about April 27, 1976, a parent complained regarding his discussion of her in his class."

There was no direct testimony supporting this charge. The Board offered P-70 in evidence memorializing a conference held with respondent and the parent about the allegation. Respondent denies discussing the parent in his class. (Tr. VIII-7-15; XIII-26-28)

The hearing examiner recommends dismissal of the charge.

CHARGE I(iii)

> "On May 7, 1976 he permitted students to inquire of observers their reasons for observing the class."

A vice-principal testified that he and respondent's immediate supervisor attended his class to observe and were questioned by pupils as to their reason for being present. The pupils were told why the administrators were present. Respondent read a "love letter" from another pupil openly to the class. When questioned about the propriety of this reading, respondent did not respond; rather he stood against the chalkboard with arms outstretched. (Tr. VI-143-144) This position was demonstrated by the vice-principal at the hearing. In the hearing examiner's judgment it was a feigned crucifixion. (Tr. VI-144)

Respondent admits reading the aforementioned letter and does not deny that pupils questioned the administrators. (Tr. XII-29-36)

The hearing examiner finds respondent's conduct feigning crucifixion in front of his pupils to be a deliberate act to incite them against the administration. The record adequately reflects the pupils' negative and hostile attitude toward the administration. The vice-principal was asked why he was "interrupting the class." (Tr. VI-143) Respondent's immediate supervisor was also questioned about her presence, giving further evidence of the hostile attitude shown by the pupils. In this classroom atmosphere, the feigned crucifixion was demonstrated.

The hearing examiner finds the evidence adequately supports the charge and finds it true in fact.

CHARGE I(iv)

> "On or about May 11, 1976, he discussed with students the matters relating to a private, personal and confidential conference which was held with a representative of the New Jersey Education Association [NJEA], the Assistant Superintendent, two (2) Vice-Principals, and myself, [Principal] regarding his future status as a teacher."

The record shows that the aforementioned conference was held, but that respondent was not present. An example of the kind of problem which respondent was having was discussed at the meeting. The specific example set forth by a vice-principal to the NJEA representative was that respondent was accused by the track coaches of coaching a pupil to throw a race. (Tr. VI-151-156) The NJEA representative later asked respondent about the allegation and respondent became infuriated and denied doing so. (Tr. XIV-73-74) Subsequently, the "accused" pupil questioned the vice-principal about his alleged statement and the pupil stated to the vice-principal that respondent had so informed him of the allegation. (Tr. VI-151-156)

The credible testimony shows that respondent obviously discussed with the pupil the subject matter of the conference as set forth in the charge. The hearing examiner believes that respondent said to the pupil that he had been accused by the vice-principal of throwing a race. In fact, when asked if he had made that statement to the affected pupil, respondent replied, "I don't remember." (Tr. XII-45) This is precisely the question posed to the vice-principal by the pupil after talking to respondent. The vice-principal denied saying to anyone that he had accused the pupil of throwing the race. (Tr. VI-155)

This is yet another example of the contentious climate in the school involving respondent, pupils and the administration. In the hearing examiner's judgment there is no question but that the contentious atmosphere, in this instance, was fomented by respondent. If we can assume that respondent did

not say to the pupil that the vice-principal had accused him of throwing a race, what did he say to the pupil? If he did not coach the pupil to lose a race, there would have been no reason to ask the pupil a question, such as, "T.J., did I ever coach you to lose a race?" In fact, the record discloses that T.J. then testified that respondent called him on the telephone and said that he (the pupil) had been accused of throwing the race. (Tr. XIV-51-55) Although respondent argues that he was not present at the meeting set forth in the charge, and there is no proof that he had ever been cautioned about the confidentiality of the subject matter of that meeting, it would appear to the hearing examiner that the professional thing to have done when asked by the NJEA representative whether or not he had ever coached a pupil to lose a race would have been to approach the vice-principal directly and ask him whether or not he had made such a statement. In that manner, respondent could have found out what transpired at the meeting without involving the aforementioned pupil. Such an approach would have avoided creating the atmosphere of doubt and mistrust between the affected pupil and the administration.

The hearing examiner finds, therefore, that the charge is true.

CHARGE II(a)(b)(c)

"That Charles Kane was insubordinate on the following occasions:

"a. On June 24, 1975, Mr. Kane was informed that the administration had held thirty-five (35) conferences with him regarding his conduct unbecoming a teacher, extending over a period from January 24, 1974 to June 6, 1975; and at this time, he was informed that he must improve in the following areas during the 1975-1976 School Year:

"1. You will use proper and delicate language in your classroom. You will accept only proper and delicate language in compositions from students.

"2. You will make every effort not to embarrass students to the extent that they seek their removal from your class.

"3. You will avoid expounding staff and administration professional relationships with any students.

"4. You will not discuss students' personal problems with the class. You will follow the proper procedure by consulting guidance counselors, parents, area chairman, administrators.

"5. You will not accept unauthorized students from another teacher's classroom or students illegally absent from another classroom.

"6. You will use temperate conduct in dealing with students, parents, fellow staff members and administrators.

"7. You will participate and conduct yourself in a responsible manner in the development and implementation of administrative policies affecting the operation of the high school and the school system.

"8. You will follow Board of Education, administrative and contractual policies as presented by the administration, teachers' contracts, and staff handbook.

"9. You must keep the professional trust under which confidential information is exhibited.

"10. You will maintain an integrity when dissenting by basing your criticism on valued assumptions as established by careful evaluation of facts and hypothesis which are first discussed with your area chairman and your administration.

"11. You will seek medical assistance and stay home when you are in an emotional state that you cannot remember what you are teaching.

"12. You will develop self-reliance within your students and not create in them a dependency upon you.

"13. You will be expected to observe professional confidentiality regarding evaluations, infor-mation on professional conferences, and any other professional communications.

"14. You will obtain permission for student meetings through the area chairman and the administration.

"15. You will not allow, condone, nor accompany students in the halls to observe the operation of other classes unless approved by your area chairman or principals.

"b. During the School Year 1975-1976, he has failed to attend conferences after observations. At times, there have been seven (7) observations awaiting conferences with him.

"c. During the 1975-1976 School Year, as evidenced by the incidents referred to during Point I., he has failed to show improvement in all of the above recommended areas, and has failed to follow the instructions in regard to the same as evidenced by incidents which are enumerated under Point I."

Charges II(a) and II(c) will be discussed together. Essentially they allege insubordination by respondent during the 1975-76 school year for failure to follow directives given to him at the end of the 1974-75 school year. (P-3) The Board has withdrawn Items 14 and 15 as set forth in Charge II(a). P-3 is a rather exhaustive evaluation summary of respondent which reflects and summarizes the 1974-75 school year and his problems in the school as viewed by his supervisors. It does not offer any new evidence; rather, it is presented as background information to show that, in light of the evidence later offered by documents and testimony, respondent deliberately refused to correct those negative items on his evaluations which the Board eventually certified as charges of conduct unbecoming a teacher.

The record regarding all of the findings as categorized in Charge I is now complete and recommendations for each have been made by the hearing examiner. Consequently, there is no need for a review; rather, the Commissioner must determine (1) if all or any are true in fact as recommended; (2) if any constitute conduct unbecoming a teacher; and (3) if the record supports any failure by respondent to improve, whether that failure constitutes, also, a charge or charges of insubordination.

The record shows that respondent testified that he received a copy of P-3 at his end-of-year conference in June 1975. (Tr. XII-69-72) He testified that he reviewed the document and a twenty-page appendix attached thereto.

The hearing examiner points out that Charge II(a), Items 1-15 is exactly the same as the directives set forth in P-3. He recommends that the Commissioner not consider Charges II(a) and II (c) separately from the individual charges in I, ante. If the Commissioner concurs with his findings and recommendations and further determines that the charges found to be true constitute conduct unbecoming a teaching staff member, no useful purpose is served by giving them the label "insubordination." Suffice it to say that respondent was properly counselled on the need to improve as a teaching staff member. (P-3)

CHARGE II(b)

> "During the School Year 1975-1976, he has failed to attend conferences after observations. At times, there have been seven (7) observations awaiting conferences with him."

Respondent readily admits not attending some conferences as requested and his supervisors testified that he failed to attend meetings they scheduled with him. (Tr. VIII-33-40; P-74, 75) Respondent argues in his Brief that no administrative employee of the Board can require him to attend an observation conference. He states further that the teachers' association agreement with the Board provided that any such conference could be held only if the teacher thought it necessary. (R-10) He argues also that his NJEA representative advised him not to attend any conferences without an Association representative. (Respondent's Brief, at pp. 144-146)

In the hearing examiner's judgment, observations, evaluations and conferences are necessary and vital to the learning process. When the Board agreed that conferences were necessary only if so determined by the teacher, it improperly surrendered a management prerogative. However, it may not surrender its authority or abdicate its responsibility granted by statute. In that regard, N.J.S.A. 18A:11-1 reads as follows:

> "The board shall -
>
> a. Adopt an official seal;
>
> b. Enforce the rules of the state board;
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and

management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes ***; and

d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." (Emphasis added.)

Considering this statute, it must be regarded as a proper function of the Board to supervise its employees and improve the learning process.

A review of documents in evidence shows that representatives selected by respondent were welcome to his conferences following observations; nevertheless, he did not attend some of them. (P-74, 75; Tr. XII-96-97)

The hearing examiner finds in the testimony and the evidence that Charge II(b) is true in fact.

This completes the hearing examiner's exposition regarding his findings of fact in consideration of the truth or relevance of the several charges. Summarizing, the following charges were found to be true in fact:
Charges Ia, c, d, e, h, l, (m, n, o, p), r, (s, y), t, u, v, x, iii, iv, and Charge II(b). It is recommended that the following charges be dismissed: Charges Ib, f, g, i, j, k, q, w, z, aa, ii, and Charges IIa, c.

Finally, the hearing examiner finds that Charge I(r) deserves special attention and consideration by the Commissioner especially when viewed from the perspective of the findings of fact regarding the series of developments which divided the track team, i.e., Charges I(l)(m)(n)(o)(p).

The hearing examiner believes that Charge I(r) is an example of a flagrant incident which might demonstrate respondent's unfitness to teach.

The incidents which led to Charge I(r) reveal that respondent distributed to the public and read aloud a statement critical of his administrators for not having him appointed head track coach. Charge I(l) Thereafter, meetings of the track team occurred where the topic of discussion was the dissension among the coaches. The record shows that respondent did not cooperate with the head coach in an effort to unify the team; therefore,

even if he demonstrated no overt act to divide the team he contributed nothing to the team or the school as one would expect of a professional educator and coach. The coaches are there for the benefit of school pupils and not the reverse. (Charge Im, n, o, p)

Finally, with the team split, and after a number of its members loyal to respondent had quit the team, respondent appeared at a cross-country track meet and cheered on an opposing runner and the opposing team. His explanation of being like a father to the boy he cheered on cannot be accepted as the whole truth. You cannot cheer and encourage an opponent without at least giving the appearance of cheering for the opposition. Further, he could not possibly expect the members of the Parsippany-Troy Hills team to understand his motives or to believe him even if his motive were genuine. What those runners witnessed was their former coach, who was still a school teacher in Parsippany-Troy Hills High School, cheering on the opposition. Respondent's rationale of this incident and the testimony of those who supported him in this regard is not credible.

The resultant confrontation after the race with one boy wanting to fight respondent is not surprising. The record shows an ugly scene between respondent, a runner from Parsippany-Troy Hills High School, the head coach, parents and others and, incredibly, respondent stated that this confrontation got out of hand because of the head coach. (Tr. X-146-154) He characterized the boys who quit the team earlier as "a very courageous thing." (Tr. X-148)

In the hearing examiner's judgment the findings of fact regarding Charge I(r) are an example of unprofessional conduct. In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, 1971 S.L.D. 284; In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe, 1971 S.L.D. 387, aff'd State Board of Education 1972 S.L.D. 663; In the Matter of the Tenure Hearing of Joseph Maratea, Township of Riverside, 1966 S.L.D. 77, aff'd State Board of Education 106, aff'd Docket No. A-515-66 New Jersey Superior Court, Appellate Division, December 7, 1967 (1967 S.L.D. 351); In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, Township of Brick, 1972 S.L.D. 387, aff'd in part/rev'd State Board of Education 1973 S.L.D. 782, aff'd in part/rev'd in part on the question of retroactive salary pursuant to N.J.S.A. 18A:6-14 128 N.J. Super 149 (App. Div. 1974) (1974 S.L.D. 1418), cert den. 65 N.J. 573 (1974), cert. den. 419 U.S. 1057 (1974)

In Bacon, supra, the Commissioner found that even one incident of unprofessional conduct might be sufficient to warrant a judgment that the teachers had demonstrated unfitness for the positions they held, and quoted 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) to buttress this position. The Court in that decision said:

> "***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.***"
>
> (at 371)

The report of the hearing examiner is now complete. The Commissioner must review that report, the record and the exceptions when filed, to determine what remedy, if any, is required. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter, including the report of the hearing examiner, the Briefs of the Board and respondent, and the exceptions with respect to the report of the hearing examiner which have been filed by respondent.

Such exceptions are in their totality an expression of respondent's view that the Commissioner should reject the findings of fact by the hearing examiner and dismiss all charges against him as set forth by the Board. (Brief in Support of Exceptions, at p. 41) Respondent further avers that even if it is found that some of the charges do have a factual basis they "***do not rise to the level of unfitness to teach on the part of Mr. Kane.***" (Exceptions, at p. 38) He maintains that:

> "***The worst that could be said is at times Mr. Kane may have made errors in judgment. There is no evidence of any malice, bad faith or malicious intent on Mr. Kane's part.***"
> (at p. 38)

He cites a number of decisions of the Commissioner wherein even a showing of poor judgment, in the context of a long and previously unblemished career, has not resulted in penalty. In re Tenure Hearing of Marion A. Dix, 1964 S.L.D. 32; In re Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185; Palmer v. Audubon Board of Education, 1939-49 S.L.D. 183, aff'd State Board of Education 189; Rein v. Riverside Township Board of Education, 1938 S.L.D. 302 (1932), aff'd State Board of Education 306. He cites the following quotation from Rein to support such avowal:

> "***Most of the charges and the evidence purporting to substantiate them are too trivial to receive individual consideration. If incidental acts occurring in school administration and supervision are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature.***"
> (at 305-306)

Questions in the instant matter may now be set forth; namely, (1) which, if any, of the instant charges, have been substantiated by the proofs adduced at the hearing; (2) which, if any, of the charges substantiated by proofs are of so major an import as to warrant a consideration of penalty by the Commissioner; (3) if any such charges of major import and proofs are found, what penalty is warranted in the circumstances?

The Commissioner has reviewed all such charges and proofs and determines that allegations with the principal major import herein are those contained in Charges I(l)(m)(n)(o)(p) and (r). The hearing examiner found all of these charges to be true in fact with the exception of a reference to "football" in Charge I(p). The Commissioner concurs with such findings and determines that the net result is one of serious import. The events chronicled herein were no "trivial" matter (Rein, supra) to pupils and fellow staff members but ones of major professional and emotional concern. They occurred over a period of months from the time in March 1975 when respondent failed to be appointed head coach of the track team, to the time of the cross country meet of October 8, 1975. On that latter date, respondent, by his own actions and admission was present at the meet and actively encouraged at least one member of an opposing team in subversion of the team he had formerly coached and guided. Such encouragement, in the context of the total record was understandably viewed by pupils as one attributable to malice by respondent and one which could and must be characterized as conduct unbecoming a teacher in the public schools. The Commissioner so holds. The Commissioner further determines that all of the events of May-October 1975, as chronicled in the record, do in fact support a conclusion that respondent, by his actions, had caused disruption, dissension and division of the track team of which he was a subordinate assistant coach and that such actions constitute conduct unbecoming a teacher in the public schools and a failure to conform with the legal authority of a superior, the track coach, whose position respondent had wanted to fill.

Such determinations are grounded in the findings of the hearing examiner who, at the hearing in this matter, was able to impartially assess the testimony of respondent and other witnesses who appeared before him and determined that it was respondent himself who was the prime cause of disruption, dissension and division in May 1975 and who, in October 1975, caused an extreme emotional confrontation by his own act of disloyalty. He then challenged the head coach publicly in an emotionally charged atmosphere. (Tr. V-48, 51, 61-64; X-146-147)

The extreme disloyalty evidenced herein is directly at variance with standards set forth by the Superior Court of New Jersey in Kathleen M. Pietrunti, supra, which was similarly concerned with the obligations of teaching staff members to school districts and to staff members in positions of authority. The Court said:

> "***A teacher is something more than a classroom automaton. A teacher is a professional who has by education and training obviously dedicated himself or herself to the education of youth. A teacher is expected to exhibit loyalty to the district in which he or she is employed and

> to cooperate with the administration in seeking the educational goal.*** A teacher is expected to show a reasonable respect for the authority of his or her employer and to maintain a civility commensurate with his or her professional status.***
>
> "***The employer-employee relationship restrains the right of the employee to the extent reasonably necessary to retain that harmony and loyalty which is necessary to the efficient and successful operation of the educational system. Breen v. Larson College, 137 Conn. 152, 75A. 2d 39 (1950); cf. Marchitto v. Central R. Co. of 9 N.J. 456 (1952)***" (1974 S.L.D. at 1426-1427)

Such standards as set forth by the Court are as applicable herein as the result of an involvement with an athletic activity as they would be to activities limited to the regular school day. The athletic program of the schools has long been held to be part of the "***total curriculum.***" Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., 1968 S.L.D. 62, 65; Nello Dallolio v. Board of Education of the City of Vineland, 1965 S.L.D. 18, 20, 21

The Commissioner further concurs with the findings of the hearing examiner concerned with other charges against respondent except those set forth concerned with Charges I(s) and (y). These charges, while containing elements and proofs pertinent thereto which might be categorized as evidence of unbecoming conduct, contain elements as well of inefficiency by respondent. There was no indication in the record that he had ever been afforded notice in this respect as required by law. N.J.S.A. 18A:6-9 et seq. Respondent avers that such plans had in fact been routinely approved by supervisors over a long period of time. There is no evidence to the contrary.

Finally, the Commissioner determines that the charges and proofs, recited ante, comprise the "series of incidents" which the Court referred to in Redcay, supra, and that by his own actions respondent has forfeited the protection of tenure which the statutes otherwise afford. The incidents in question were not "trivial" (Rein, supra) but of major professional import. They rise above a categorization as errors of judgment to ones which constitute conduct unbecoming a teaching staff member in the public schools. The Commissioner so holds.

The position of the Commissioner with respect to protection of the tenure entitlement of teachers has been set forth in a number of decisions. In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, 1966 S.L.D. 77, aff'd State Board of Education 106, aff'd N.J. Superior Court 1967 S.L.D. 351; In the Matter of the Tenure Hearing of Ernest Tordo,

School District of the Township of Jackson, 1974 S.L.D. 74; In the Matter of the Tenure Hearing of William Fleming, School District of the Borough of Hawthorne, 1974 S.L.D. 246 In Maratea the Commissioner said:

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

The determination herein is that respondent has, by his own acts, created conditions which adversely affected the operation of his school. Accordingly, the protection of tenure has been forfeited. He therefore dismisses respondent as of the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

October 5, 1979

Pending State Board

PETITION OF: Dominick J. Mancia v. Board of Education of the City of Wildwood, Cape May County) · INITIAL DECISION

DKT. EDU #274-8/77

APPEARANCES:

For the Petitioner, McCarter and English (James Woller, Esq., of Counsel)

For the Respondent, Bruce M. Gorman, Esq.

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

Petitioner, employed by the Board of Education of the City of Wildwood, hereinafter "Board", alleges that his present assignment as a teacher of physical education is illegal and demands reinstatement to the position of assistant superintendent to which he lays a tenure claim. In the alternative, petitioner demands reinstatement to the position of high school principal in which, it is stipulated, he acquired a tenure status. The Board asserts petitioner's assignment as a teacher of physical education is proper; that petitioner has not acquired tenure in the position of assistant superintendent; and, that petitioner waived his tenure claim to the position of high school principal.

A hearing was conducted in the matter on February 21 and May 11, 1978 at the office of the Cape May County Superintendent of Schools. Thereafter, the parties filed Briefs in support of their respective positions. The record was ready for disposition on September 2, 1978. On July 2, 1979, the matter was transferred to the Office of Administrative Law as a then pending contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Petitioner was first employed by the Board as a classroom teacher for the 1956-57 academic year. Petitioner continued in that assignment until 1962-63 when he was appointed assistant principal. He was appointed to the position of high school principal for the 1964-65 academic year and served in that position until June 30, 1974.

Petitioner testified that on or about August 20, 1974, the Superintendent informed him of a pending grant of money to institute a Career Education Program in the district. Petitioner testified that he believed he was to be named assistant superintendent in charge of career education for 1974-75 because he was the only one on staff who possessed a school administrator's certificate.

Thereafter, the Superintendent advised petitioner by memorandum dated September 11, 1974 that the Board, on September 10, 1974, appointed him to the position of Assistant to the Superintendent in charge of career education. (J-12) Petitioner did not feel the title of Assistant to the Superintendent was appropriate and requested the Superintendent to have the title changed to Assistant Superintendent.

The Superintendent advised petitioner on September 19, 1974 that the Board changed the title of his position to that of Assistant Superintendent on September 18, 1974 as he requested. The Superintendent also requested petitioner to report to the Business Administrator's office to execute a contract of employment as Assistant Superintendent. (J-13)

Rather than executing the proffered contract, petitioner and his attorney entered negotiations with the Board in regard to the job description of the position of Assistant Superintendent. Finally, on April 16, 1975, petitioner did execute a contract for the position of Assistant Superintendent for 1974-75 which, on its face, is retroactive to September 10, 1974. Petitioner seeks to establish by virtue of an unsigned contract, that the retroactive date was agreed to be September 4, 1974. (P-7)

In any event, petitioner continued in the position of Assistant Superintendent for 1975-76 and was reappointed by the Board for 1976-77. Petitioner explained that during the summer of 1976 he was suffering from tension, among other ailments, and was under medication.

Petitioner, by letter to the Board dated August 26, 1976 accompanied by two medical statements, requested a meeting with the Board in regard to his taking sick leave. (J-14) The Board did meet with petitioner on or about August 30, 1976 and discussed petitioner's request for sick leave and the two medical statements supporting his request. (J-14A) (J-14B)

Dr. Robert J. Sorensen, whom petitioner identified as a cardiologist, states: (J-14A)

> "I have advised Mr. Mancia to take an indefinite leave of absence from his position for reasons of his health."

Dr. Norman Gordon, who is a general practitioner and the school medical inspector, advised the Board, inter alia, that: (J-14B)

> "The pressure of his /petitioner's/ position has caused his general health to regress to such a low level that I feel it necessary to recommend an indefinite sick leave to enable him to regain his health.

> "On return to this school system, I believe he should be placed in a tenured teaching position. I feel that he is unable to take the pressure of being an administrator."

Petitioner testified that he did not agree with the last paragraph of Dr. Gordon's letter in regard to being assigned as a teacher upon his return. (Tr. I-39) Dr. Gordon testified, to the contrary, that when petitioner requested from him a medical statement to support his request for sick leave, petitioner also stated "***he couldn't cope with the pressure of administration, that he would like to come back as a teacher***". (Tr. II-37)

The Board granted petitioner's request for sick leave, with pay, for the period September 3, 1976 through June 30, 1976. Petitioner testified he left the August 30 meeting with the feeling that the Board was very cooperative with him.

The following day petitioner, the Board President and Board counsel met and the following Agreement was prepared: (C-1)

"A G R E E M E N T

"BETWEEN BOARD OF EDUCATION, CITY OF WILDWOOD, COUNTY OF CAPE MAY AND STATE OF NEW JERSEY, AND DOMINIC J. MANICA, ASSISTANT SUPERINTENDENT OF SCHOOLS

> "ON this 30 day of August, 1976 an Agreement is made by and between the Board of Education, City of Wildwood, County of Cape May and State of New Jersey, party of the first part, hereinafter called Board, and Dominic J. Mancia, party of the second part, herein denominated Employee.
>
> "It is mutually agreed and understood by and between the parties that Employee has been certified by two doctors to require release from duty for an extended period of time because of the state of his personal health.
>
> "It is further agreed between the parties that Employee shall terminate his present duties at the end of the working day on Friday, September 3, 1976 and shall remain relieved of all duties until June 30, 1977.
>
> "It is further agreed that prior to June 30, 1977 Employee shall notify Board as to his state of health and his ability to undertake a tenured teaching assignment on September 1, 1977.

"It is further understood between the parties that the Employee's ability to return to work shall be certified by two physicians and that upon certification of fitness to resume work the Employee shall be assigned a teaching post and shall not be assigned to any administrative post.

"It is further understood and agreed that this Agreement has been concluded as the result of full scale deliberation between the Employee and the Board, sitting in its entirety as a Personnel Committee, and that said Agreement shall be subject to ratification by the Board at a regular or special meeting.

"It is specifically understood and agreed between the parties that Employee is being released by Board for medical reasons and that said period of release from duty shall constitute sick leave.

"IN WITNESS WHEREOF the Board has caused these presents to be signed by the Board Chairperson and the corporate seal to be affixed, and Employee has signed and sealed the same, all as their voluntary act and deed."

Though petitioner admits executing the Agreement by his signature thereto, he asserts that he did not request such an Agreement, that he attempted to have the Agreement worded differently in certain portions, though he cannot recall which portions, that he did inform the Board at the August 29, 1976 meeting that upon his return he did not want to disrupt the school administration, and that he signed the Agreement only because of his physical condition at that time.

In my view and contrary to petitioner's assertions in regard to the Agreement, the testimony of five Board members, the Board counsel involved in the preparation of the Agreement (C-1), Dr. Gordon, the Superintendent and petitioner's former secretary establish without doubt that the Agreement and the terms of the Agreement were arrived at by petitioner's insistence.

Upon his return to his duties for the 1977-78 year, petitioner was advised that he was assigned as a teacher of physical education. The petition herein followed.

I FIND with respect to petitioner's claim of tenure in the position of Assistant Superintendent to be wholly without merit. Petitioner's employment time as Assistant Superintendent is from September 10, 1974 (J-1) to September 3, 1976, when he was placed on sick leave. Petitioner's testimony that the retroactive date on the contract (J-1) was to be September 4, 1974 is not convincing. Furthermore, he executed the contract (J-1) for the period of time commencing on September 10, 1974. N.J.S.A. 18A:28-6 sets

forth the criteria for acquiring tenure upon promotion. The minimum passage of time in a position for such a claim is twenty-four months. Petitioner's employment as Assistant Superintendent was for a period of time seven days short of twenty-four months. (See Zimmerman v. Board of Education of Newark, 38 N.J. 65)

I have reviewed all relevant documents herein, the testimony of all witnesses and I have reviewed the legal arguments of the parties.

I FIND the Agreement (C-1) entered into between petitioner and the Board to be unenforceable and without legal authority for the following reasons:

1. It is stipulated petitioner acquired a tenure status as a high school principal which, I note, is an administrative position.

2. Tenure is a legislative status and is conferred only upon those who meet the precise conditions set forth in the statutes. Ahrensfield v. State Board of Education, 126 N.J.L. 543.

3. Tenure, as a legislative status, may only be lost or forfeited in the manner prescribed in the statutes at N.J.S.A. 18A:6-10, et seq., or by voluntary resignation.

4. The Agreement (C-1) is not a resignation by petitioner from the position of high school principal in which he acquired tenure. Rather, it is an "understanding" that petitioner would not exercise his legislative right to enforce his claim which he legally acquired.

5. Though the Agreement was created at petitioner's own request, the terms thereof are not enforceable.

I CONCLUDE, based on all the foregoing, that the Board assigned petitioner to a position of teacher of physical education for 1977-78 in violation of his tenure rights in the position of high school principal. The Board of Education of the City of Wildwood is ORDERED to immediately restore Dominick Mancia to the position of high school principal retroactive to the 1977-78 school year and is further ORDERED to pay him the difference between the salary he received as a teacher compared to the salary he would have received as a high school principal had the Board not violated his tenure rights.

This decision does not become final until forty-five (45) days from agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

DATE

DANIEL B. MC KEOWN, ALJ

DOMINICK J. MANCIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of the instant matter including the initial decision and the exceptions filed thereto by the Board.

No exception is taken by the Board to the factual circumstances giving rise to the matter herein controverted. The Board does oppose the finding that the agreement (C-1) ante, effected between it and petitioner is unenforceable and petitioner is entitled to the protection of tenure in his former position as high school principal, with back pay and all other emoluments attendant thereto.

The Board maintains that the agreement (C-1) had the full force and effect of a resignation from any administrative position which petitioner previously held at the time it was approved by the parties to grant petitioner extended sick leave with pay as of September 3, 1976. The Board maintains that pursuant to the agreement (C-1) between the parties, petitioner's sole entitlement and tenure status was that of a teacher upon his return to employment as of the 1977-78 school year.

In the Commissioner's judgment the pivotal issue herein is whether or not the agreement between petitioner and the Board (C-1) constitutes a bona fide resignation by petitioner from his administrative positions as assistant superintendent and high school principal. The intent of the agreement must be found within the four corners of the document (Duke Power Company v. Patten, 20 N.J. 42, 49 (1955)) and the language used must be construed according to the plain and ordinary meaning of the words used therein. Abbotts Dairies v. Armstrong, 14 N.J. 319, 325 (1954); State v. Sperry and Hutchinson Co., 23 N.J. 38, 46 (1956)

The significant portion is the sentence in the fifth paragraph which states that petitioner's fitness to return to active employment in the school district "***shall be certified by two physicians and that upon certification of fitness to resume work the Employee shall be assigned a teaching post and shall not be assigned to any administrative post.***" (C-1)

The Commissioner is constrained to point out that petitioner was at no time required to enter into such an agreement with the Board. Under existing law petitioner had only to request an extended leave of absence for illness and to certify at the Board's request that such request was legitimate. N.J.S.A. 18A:30-5 He provided proof of the medical basis for his request by submitting written statements from two physicians (Exhibits J-14A, J-14B), one of whom was the Board's own medical examiner.

The record shows that petitioner possessed approximately 240 accumulated days for sick leave at the time his request for sick leave was made to the Board. (Tr. I-47) This number of days was sufficient to ensure the continuation of his salary during the period of the requested leave of absence for personal illness.

Under such circumstances petitioner could have received the leave of absence without entering into any agreement with the Board. The Board did have the discretion to terminate petitioner's employment as assistant superintendent, but absent such action by the Board, petitioner would have acquired a tenure status as assistant superintendent, although absent because of illness during the latter portion of his two-year probationary period. N.J.S.A. 18A:28-6 The facts show, however, that petitioner's employment as assistant superintendent was terminated by the agreement (C-1).

Had petitioner not entered into the agreement (C-1), he would have had to furnish the Board, upon its request, proof, satisfactory to the Board, of his recovery. He then would have been entitled to return to his position as assistant superintendent. N.J.S.A. 18A:16-4 Assuming, arguendo, that the Board had terminated his services as assistant superintendent before he acquired a tenure status in that position, he would still have been entitled to return to his previous position as high school principal. N.J.S.A. 18A:28-6

The essential point is that petitioner, at his own insistence, entered into the agreement with the Board which provided that he would return only to the position of a tenured teacher (C-1). The Commissioner looks to the substance and not the form of the agreement. Under the circumstances hereinbefore described, the logical conclusion which must be reached is that petitioner intended by means of the agreement to submit his resignation from any administrative position to which he held an entitlement. That the word "resignation" does not appear in the agreement is of no moment. The intent of the parties is clear, although not artful. The particulars of the agreement could have been more precise and should at least have expressed the applicability of the controlling statutes. Nevertheless, the principles of the agreement between the parties are binding. The Commissioner so holds.

If petitioner had not been in sufficient command of his mental faculties to be held responsible for his insistence upon and acceptance of the agreement, the validity of the agreement would be suspect. In this regard, the unrefuted testimony of Dr. Gordon shows that petitioner's mental state was very clear, he knew what he wanted in regard to the agreement, he understood what he wanted stated in Dr. Gordon's letter (J-14B), and he suggested that the letter include the statement that upon his return from such leave he be placed in a tenured teaching position. (Tr. II-40) Accordingly, it must be concluded that petitioner was responsible for his actions when he entered into the agreement.

For all of the foregoing reasons, the Commissioner finds and determines that petitioner offered a bona fide resignation to the Board from any administrative position to which he held an entitlement, and such resignation was accepted by the Board (C-1).

Petitioner is entitled only to his present position as a teacher, with a tenure status, and his years of service as a high school principal and assistant superintendent must be added to his years of service as a teacher for purposes of determining his years of seniority as a teacher.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

October 5, 1979

Pending State Board

PETITION OF: William E. Schell y. Board of Education of the Township of Hazlet, Monmouth County

INITIAL DECISION

DKT # EDU 152-5/74

APPEARANCES:

For the Petitioner, Peter P. Frunzi, Jr., Esq.

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

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

Petitioner claims entitlement to higher salary amount than those amounts established by the Board of Education of the Township of Hazlet, hereinafter "Board", for each year of his employment as an assistant principal since 1969-70 to the present time. Petitioner alleges that the Board established his initial salary for 1969-70 contrary to the provisions of its own supervisors' and administrators' salary policy, thereby creating a lower base salary than that to which he was entitled and upon which the salary for his subsequent years of employment was based.

The matter, originally filed before the Commissioner of Education during May 1974, was transferred to the Office of Administrative Law on July 2, 1979 as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. It is noticed that the record was completed for disposition on November 2, 1978.

A review of the history of the litigation is in order. Subsequent to the joining of the pleadings on June 21, 1974, the Board's Motion for Summary Judgment in its favor by way of dismissal of the action on jurisdictional grounds was denied by the Commissioner of Education on October 1, 1975 in a written opinion dated February 27, 1975. The State Board of Education affirmed the Commissioner's decision on appeal to it by the Board. On November 19, 1975, the New Jersey Superior Court, Appellate Division, denied the Board's Motion for Leave to Appeal on an interlocutory basis the adverse decisions below. (See William E. Schell v. Board of Education of Hazlet Township, Monmouth County, 1975 S.L.D. _____ (decided on Motion, February 27, 1975), affirmed State Board of Education, 1975 S.L.D. ____, Motion for Leave to Appeal, denied, New Jersey Superior Court, Appellate Division, Docket No. AM-72-75)

Thereafter, the parties were granted time to arrive at an amicable resolution of their differences, which effort proved unsuccessful. Discovery, on a cooperative basis, was difficult and required this Court's intervention. Finally, two days of hearing were conducted in the matter on March 3, 1977 and August 22, 1978 at the Office of the Monmouth County Superintendent of Schools, Freehold. Thereafter, the parties filed Briefs in support of their respective positions.

Petitioner, who was employed by the Board as a classroom teacher since 1963, was appointed by the Board to the position of assistant principal on March 28, 1969 for the 1969-70 school year. The Board's salary policies at the time of that appointment and for two years thereafter provided that when a teacher from within its employ was appointed to an administrative position the starting salary would be determined by adding twenty percent to the amount of that person's teaching salary. In this case, the Board determined to add twenty percent to petitioner's salary at the time of his appointment, or his salary during 1968-69. Petitioner asserts that the twenty percent should have been applied to the teaching salary he would have received during 1969-70 or the year in which his administrative appointment as an assistant principal became effective.

Thus, the issue before me is whether petitioner has met his burden of persuasion to establish by a preponderance of credible evidence that the Board established his salary for 1969-70 contrary to its own salary policy. Petitioner's claims of entitlements to higher salaries in his subsequent years of employment are predicated upon an affirmative ruling on that issue.

I have heard the testimony of petitioner and I have considered the documentary evidence submitted by the parties in support of their respective positions.

I FIND AS FACT the following:

1. Petitioner was first employed by the Board as a classroom teacher for the 1963-64 academic year. He continued in that position through the completion of the 1967-68 academic year.

2. Petitioner was appointed to the nonteaching position of administrative assistant to an elementary school principal for 1968-69.

3. Petitioner's salary for 1968-69 was $7,800 plus a $200 stipend for the position of administrative assistant.

4. Petitioner's base salary of $7,800 for 1968-69 was the same amount he would have received according to the bachelor's scale of the Board's teachers' salary policy had he remained as a classroom teacher.

5. During that year, the Board, on March 28, 1969, appointed petitioner and six other persons to various positions of assistant principal for the 1969-70 school year. (C-31) (Tr. II-2)

6. The Board's supervisory and administrative salary policies for 1968-69, 1969-70 and 1970-71 each contained the following provision: (C-13) (C-10) (C-8)

> "2. When a teacher from within the system is appointed to a supervisory or administrative position, the initial salary shall be established as follows:
>
> "Present teaching salary plus 10% for extra month and 10% promotional increase.
>
> "Example:

Teaching salary	$ 9,000
10% for extra month	900
10% Promotional	900
Starting Salary	$10,800 "

7. Petitioner, subsequent to his appointment by the Board on March 28, 1969, executed a proffered notification of salary statement for 1969-70 on March 31, 1969. (C-20) There is no salary amount set forth on the document.

8. The Board, nonetheless, did establish petitioner's salary for 1969-70 by applying the ten percent and ten percent provision of its policy to petitioner's 1968-69 salary of $7,800, ante. Petitioner's salary for 1969-70 was $9,360.

9. The Board established each of the salaries of the other six persons it appointed to the various positions of assistant elementary principalships on March 28, 1969, to be effective for the 1969-70 school year, on the basis of their 1968-69 teaching salaries. (Tr. II-2)

10. Petitioner's own testimony establishes that he had knowledge (1) of the existence of the Board's supervisory and administrative salary policy provision in regard to the application of ten percent and ten percent to "present teaching salary", (2) that prior to the commencement of his duties as assistant principal he was aware that his salary for 1969-70 was to be established by using his 1968-69 salary as the base against which the percentages would be applied, (3) that while he was aware of the manner in which his salary would be established for 1969-70, he disagreed with the Board's use of his 1968-69 teaching salary as the base instead of what his teaching salary for 1969-70 would have been. (Tr. I-79, 80)

11. It is stipulated by the parties that on July 24, 1970 the Board appointed another person from among its teaching staff members to a position of assistant principal for 1970-71, effective August 1, 1970. It is also stipulated that the Board established that person's 1970-71 salary as assistant principal by applying the ten percent and ten percent provisions of its salary policy to his 1970-71 teaching salary. (Tr. II- 2, 3) (C-32) Finally, it is stipulated that that person's teaching salary for 1970-71 had already been established by the Board prior to his appointment on July 24, 1970.

12. It is stipulated by the parties that the Board, on June 25, 1971, appointed another person from among its teaching staff members to a position of assistant principal for the 1971-72 school year. It is also stipulated by the parties that this person already had his teaching salary for 1971-72 established by the Board. It was that 1971-72 teaching salary upon which the Board applied the ten percent and ten percent provisions of its salary policy to determine his salary as assistant principal for 1971-72. (Tr. II- 3, 4) (C-33)

13. Subsequent to the completion of the 1969-70 school year, petitioner's salary each year thereafter was based on percentage increases over his previous year's salary.

This concludes the recitation of my findings of facts necessary to determine whether the Board improperly applied its own salary policy through misinterpretation to establish petitioner's base salary for the 1969-70 school year.

DISCUSSION OF LAW

Boards of education have the statutory authority to "***/M/ake, amend and repeal rules *** for its own government and the transaction of its business***". N.J.S.A. 18A:11-1 A board of education also has the authority "***to make rules *** governing the employment *** and salaries of teaching staff members for /its/ district, and may from time to time change, amend, or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force and with reference thereto." N.J.S.A. 18A:27-4

Furthermore, a board of education has specific authority to adopt a salary policy for use in its district for its teaching staff members so long as the rates set forth therein are not lower than the statutory minimum salary schedule at N.J.S.A. 18A:29-7. N.J.S.A. 18A:29-4.1 An assistant principal, petitioner's position of employment, is defined at N.J.S.A. 18A:1-1 as a teaching staff member because N.J.A.C. 6:11-10.4(b) requires a person who holds the position of vice-principal (assistant principal) to hold an appropriate certificate.

Should a board exercise its authority at N.J.S.A. 18A:29-4.1 and adopt a salary schedule which sets forth higher rates of compensation than the legislatively mandated minimum rates, that policy is binding on that board and the next succeeding board, or for a total time of two years from the date of its adoption. Nothing prohibits the adopting board or the next succeeding board from paying higher rates than those rates set forth in such an adopted policy.

Here, petitioner complains that his compensation for 1969-70 was improperly established because the Board misinterpreted its own salary policy at the time of his appointment. Petitioner asserts his teaching salary he expected to receive for 1969-70 should have been the base against which the ten percent plus ten percent should have been applied.

I conclude based on the facts and upon the relevant law that petitioner's allegations are not supported in the record. The interpretation and meaning of a policy, just as of a statute, is to be found within the four corners of the document itself. Lane v. Holderman, 23 N.J. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al., 20 N.J. 42, 49 (1955)

The Board adopted a policy for supervisors and administrators for 1968-69. (C-13) The terms of that policy clearly state that when a teacher is appointed, his initial salary shall be based upon applying ten percent and ten percent to his "present" teaching salary. The Board interpreted the word "present" in its literal sense, not only for petitioner but for the six other appointees as well, to mean their present teaching salaries as of March 28, 1969. I find nothing in the record to conclude that "present" teaching salary should have meant a "prospective" salary petitioner would have received as a classroom teacher for 1969-70.

The fact that the Board, in 1969-70, interpreted the very same provision of its policy (C-10) in a different manner is neither illegal nor discriminatory against petitioner. N.J.S.A. 18A:29-4.1 does not prohibit future boards of education from viewing the same policy in a different fashion so long as the salaries of that future board's employees are not less than that required by the adopted policy.

I also conclude that the fact the Board in 1970-71 viewed the ten percent plus ten percent provision of its policy (C-8) to the advantage of its appointee by using as a base his salary he would have received as a teacher during the year his promotion was effective does not innure to the benefit of petitioner.

I FIND no basis to conclude that the Board in the first instance improperly established petitioner's salary for 1969-70. This being so, petitioner's claims of entitlement to higher salaries in subsequent years must fall.

The Petition is DISMISSED.

This decision does not become final until forty-five (45) days from agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

July 24, 1979
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

WILLIAM E. SCHELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the initial decision in the instant matter. He observes that counsel for petitioner filed an exception regarding the above determination pursuant to N.J.A.C. 6:24-1.17(b).

The Commissioner notices that in this matter Summary Judgment was denied in his Decision on Motion dated February 27, 1975 which was affirmed by the State Board on October 1, 1975.

In the matter herein controverted the initial decision states that the Board, after adopting a salary policy for supervisors and administrators for 1968-69 could properly interpret the very same provision in 1969-70 in a different manner. The Commissioner does not agree.

Petitioner's exception correctly points out that the initial decision hinges on the meaning of the word "present" in the Board's policy. The Commissioner observes that the Board's supervisory and administrative salary policy for 1968-69, 1969-70 and 1970-71 each contained the following provision ante:

> "2. ***
>
> Present teaching salary plus 10% for extra month and 10% promotional increase." (Emphasis supplied.)

The Commissioner finds nothing in such wording to construe "present" to refer only to a salary level determined to be that of 1968-69, rather he determines that "present" refers to the salary level to be held by the individual for the year in which he initially served as an administrator in any one of these different time periods established in the Board's policy. The Commissioner points to the action of the Board on July 24, 1970 to appoint an individual to an administrative position beginning August 1, 1970 based on his 1970-71 salary and in a like manner the action of the Board on June 25, 1971 to appoint an individual to an administrative position beginning August 1, 1971 based on his 1971-72 salary.

There is nothing in statutory law, rules or regulations that would prevent the Board from amending, altering or otherwise changing its policy. It did not do so. The Commissioner deems it improper and in violation of the doctrine of equity and fair play to interpret the identical policy in a different manner for different individuals in different years.

Petitioner's salary for the 1969-70 school year should have been used as the base amount in determining his appropriate salary as an administrator under the Board's policy. For the foregoing reasons the Commissioner directs the Board to reimburse petitioner a sum of money reflecting his position on the Board's salary guide for 1969-70, with proper remuneration for succeeding years.

COMMISSIONER OF EDUCATION

October 9, 1979

Pending State Bcard

GLADYS ASLANIAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Joseph T. Skelley (Eric Christopher Landman, Esq., of Counsel)

Petitioner, a teaching staff member in the employ of the Board of Education of the Borough of Fort Lee, hereinafter "Board," alleges it violated her tenure protection and seniority rights by abolishing her position and terminating her employment in favor of other persons with lesser seniority in the same area in which she is certificated. The Board denies the allegations and asserts that its actions with respect to the termination of petitioner's employment and its recognition of her seniority rights are in all respects proper and legal.

Cross-Motions for Summary Judgment, with supporting Briefs and with stipulated facts, have been filed before the Commissioner of Education for adjudication.

Subsequent to a review of the total record herein including the pleadings, Briefs of counsel and the cases cited therein, the Commissioner observes that the essential facts and arguments of the parties in the matter are these:

1. Petitioner possesses certification as a teacher of art for grades kindergarten through twelve.

2. Petitioner was initially employed by the Board as a teacher of art for the 1955-56 academic year.

3. Petitioner resigned the Board's employ as of June 30, 1956.

4. Petitioner was reemployed by the Board for the 1964-65 academic year, on a three-fifths of a full time basis, as a teacher to administer tests.

5. Petitioner continued thereafter in the employ of the Board as a teacher to administer tests, on a three-fifths of a full time basis, for the 1964-65 academic year through the conclusion of the 1971-72 academic year.

6. Petitioner continued in the employ of the Board as a teacher to administer tests, but on a four-fifths of a full time basis, for the 1972-73 academic year and thereafter through the conclusion of the 1977-78 academic year.

7. The Board, on June 22, 1978 determined to abolish the position of teacher to administer tests, the position in which petitioner was employed, as of June 30, 1978. (See Conference Statement, October 13, 1978.)

The Commissioner observes that petitioner's certification during all periods of employment with the Board was solely as a teacher of art.

The Board, during the time petitioner was employed as a teacher to administer tests, employed two other persons, each of whom is properly certified, as full time teachers of art. The first art teacher, hereinafter "teacher A," was first employed by the Board for the 1971-72 academic year on a full time basis. Teacher A continued her full time employment for the 1972-73 academic year, and the 1973-74 academic year. Prior to the conclusion of the 1973-74 year, teacher A began a leave of absence as of May 16, 1974 which continued until the commencement of the 1976-77 academic year. Teacher A was employed full time for the 1976-77 and for the 1977-78 academic years. The second teacher of art, hereinafter "teacher B," was first employed by the Board on a full time basis for the 1973-74 academic year and was reemployed by the Board, full time, each year thereafter.

Petitioner contends that by virtue of the length of her employment experience with the Board and because at all times she possessed solely a certificate to teach art, notwithstanding her assignment by the Board to the position of teacher to administer tests for which there is no specific certificate issued by the State Board of Examiners, she has greater seniority of employment than teacher A or teacher B. Petitioner seeks reinstatement to the Board's employ in one of the two teacher of art positions it still maintains, on at least a four-fifths of a full time basis.

The Board argues that petitioner was in its employ between 1964-65 through 1977-78 on a part-time basis. As such, the Board contends petitioner has no claim to either one of its two full time positions of teacher of art. The Board explains that petitioner's claim against it, if any exists, is limited solely to a part time position within the scope of her certificate. The Board concludes that because it does not have any part time positions for art teachers, petitioner has no claim. Consequently, the Board seeks dismissal of the Petition of Appeal.

The Commissioner agrees with the Board to the extent that it asserts a person who acquires tenure as the result of a part time position of employment which requires a certificate issued by the State Board of Examiners has no right to a claim for a full time position in the same or different area of certification which may exist. Tenure is a legislative status conferred upon persons who meet legislative requirements in specific positions articulated in the statutes at N.J.S.A. 18A:28-5. (See Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E.&A. 1941); Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962), cert. den. 371 U.S. 956.) Thus, a person who acquires a tenure status as the result of part time employment is protected to the extent that that part time employment and emoluments pertaining thereto may not be diminished or abolished except as provided by law. N.J.S.A. 18A:28-9 et seq.

The Commissioner does not agree with the Board in its argument that the total employment time of a person who has acquired tenure as the result of part time employment may not be considered, comparatively, with full time employees in the same area with respect to the abolishment of position and consequent employment.

N.J.A.C. 6:3-1.10, the State Board rule governing standards for determining, inter alia, seniority is clear on its face when it states, at paragraph (b):

> "Seniority***shall be determined according to the number of academic or calendar years of employment, or fraction thereof***in specific categories***." (Emphasis supplied.)

The fact that a person was employed on a part time basis does not, in the judgment of the Commissioner, bar that person from having his/her seniority of employment determined on a full time equivalency basis with other persons similarly situated whose employment is being continued by the Board following an action to abolish a position. (See Elinor H. Kuett et al. v. Board of Education of Westfield, 1976 S.L.D. 601.)

The issue now to be addressed is whether petitioner's employment with the Board may be equated with employment service in the specific category of teacher of art. The Commissioner notices at this juncture that the position of teacher of art must be considered a specific category for purposes of seniority by virtue of N.J.A.C. 6:3-1.10(k)30. This rule provides that when a specific certificate is issued for a certain area, that area shall be considered a specific category.

The State Board of Examiners does have a specific certificate for the teaching of art, the rules for which are set forth at N.J.A.C. 6:11-6.3(b)(1)(i).

Petitioner's total employment with the Board has been served by her in a professional capacity for which a certificate is required. N.J.S.A. 18A:27-2 Petitioner was in possession of a certificate to teach art. Petitioner's assignment by the Board as a testing teacher was and is proper pursuant to N.J.S.A. 18A:27-2 for she is in possession of a certificate, albeit to teach art, issued by the State Board of Examiners. There is no special certificate for one to be assigned the duties of testing teacher nor is there such a title recognized by the State Board of Education in its rules with respect to teacher certification at N.J.A.C. 6:11-1.1 et seq.

Consequently, petitioner's experience as a testing teacher must be considered as experience under her certificate to teach art. To hold otherwise would create an artificial barrier to petitioner's legitimate claims to a tenure status in art, her chosen field of endeavor, solely on the grounds the Board elected to assign her duties not specifically identifiable with that specific category.

The fact is, however, any person who possesses a certificate to teach any subject may be assigned duties as a testing teacher, absent an otherwise specifically required certificate by the board which makes such assignment. The Board in the instant matter had established no such specially required certificate other than its implied requirement that petitioner possess a certificate.

A comparison of petitioner's years of experience with the Board, on a full time equivalent basis, establishes that she has 10.6 years of full time experience for the 1955-56 academic year, together with the period 1964-65 through June 30, 1978. That petitioner resigned at the conclusion of the 1955-56 academic year does, in the Commissioner's judgment, negate that year as a year of experience for seniority purposes.

In a prior decision, it was held that a voluntary resignation terminated an accrued tenure status at the time of resignation and thereafter reemployment of that person by the same board required the person to meet anew the statutory requirements for tenure accrual. (See Elaine Solomon v. Board of Education of the Princeton Regional School District, 1977 S.L.D. 650, aff'd State Board of Education 657.) Seniority, in a similar fashion, does not apply until a person acquires a tenure status of employment. When seniority does apply, it applies only from that initial period of time of employment upon which the tenure status is conferred. Thus, in the instant matter petitioner's tenure status she now possesses was initiated in the 1964-65 academic year. Consequently, that year begins the year of seniority accrual for her, and her total seniority is 9.6 years.

Teacher A has 4 full years plus 8.5 months of seniority, while teacher B has 5 full years. It is clear that

petitioner has greater seniority as a teaching staff member assigned by the Board within the scope of her certificate than either of the two art teachers whose employment was continued for 1978-79. Such action by the Board is found to be contrary to law and in particular violation of petitioner's tenure rights and seniority status.

The Commissioner of Education directs the Board to reinstate petitioner to her position as teaching staff member and to assign her duties within the scope of her certificate. The Board is further directed to pay her all compensation and other emoluments withheld from her as the result of its illegal action.

COMMISSIONER OF EDUCATION

October 15, 1979

Pending State Board of Education

CONSTANCE MILEWSKI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Philip Feintuch, Esq.

For the Respondent, Louis Serterides, Esq.

Petitioner, a teaching staff member employed by the Board of Education of the City of Jersey City, hereinafter "Board," alleges that the Board failed to fulfill its responsibilities by providing hospital-medical coverage in a timely fashion.

A hearing on the controverted matter was held by a representative of the Commissioner of Education on November 30, 1978 at the office of the Hudson County Superintendent of Schools. A report of relevant uncontroverted facts follows:

Petitioner was employed as a pool substitute on October 6, 1975 and was appointed as a "contract" teacher on January 3, 1976. Both positions entitled the petitioner to coverage under the New Jersey Public and School Employees Health Benefits Plan. (J-1, Articles 1 and 27; Petition and Answer, par. 2) Petitioner was hospitalized during February 1976 and received a bill in the amount of $2,762.50 which was stipulated by counsel. (Tr. 8, 12) The effective date of petitioner's hospital-medical coverage was stipulated in the Petition and Answer as March 1, 1976, which was five days less than five months after petitioner's initial employment date.

Petitioner was the sole witness who testified at the hearing. Her relevant testimony revealed that she signed all forms provided by an agent of the Board (Tr. 9, 11); that she never took any forms home (Tr. 5, 12); and that there were no forms given to her that she did not complete, sign and return at the time she received them at the Board office. (Tr. 5, 12, 17-18) Petitioner also testified that she had to call the Board office from the hospital for her coverage identification number and, further, that she did not receive a Plan contract until after her hospitalization. (Tr. 7, 15) Petitioner believed the effective date of her hospital-medical insurance was December 6, 1975. The Board's personnel assistant in an affidavit (R-1) indicated the effective date was January 6, 1976. The latter date was, nevertheless, prior to hospitalization.

At the conference of counsel held on October 25, 1978, the Board agreed to provide verification of the effective enrollment date for petitioner's hospital-medical coverage following her initial employment. It was not produced at the hearing. The hearing examiner indicated his desire to receive this information directly from an authoritative source and counsel for both parties agreed that the hearing examiner's findings would be incorporated in the record of these proceedings. (Tr. 29)

A letter was received under date of December 13, 1978 from Gaius B. Mount, Chief of the Health Benefits Bureau of the State Department of the Treasury, Division of Pensions, which stated in relevant part:

> "***An individual employed on October 6, 1975 assuming that all the necessary applications have been completed in the correct manner would be enrolled in the State Health Benefits Program effective January 1, 1976. The statute administering the State program calls for two continuous months of service and thus in administration of the program if the individual is hired prior to the 5th of the month, we start from the first of the month in order to count the 60 day period. Anyone hired after the 5th of the month goes to the first of the following month in order to satisfy the 60 day waiting period.***"

The hearing examiner is satisfied that petitioner completed, signed and returned the necessary forms for obtaining the hospital-medical benefits to the Board's agent at the Board office at the time of her initial employment and, further, that the effective enrollment date for coverage was January 1, 1976, which was prior to her hospitalization. The hearing examiner also concludes that the Board failed to fulfill its responsibilities in processing the necessary forms in a timely fashion to provide petitioner with the hospital-medical coverage to which she was entitled as of January 1, 1976.

The hearing examiner recommends that the Commissioner order the Board to pay $2,762.50 for hospital-medical services mitigated by the charges for any items on the billing not covered by the New Jersey Public and School Employees Health Benefits Plan in effect at the time hospital-medical services were rendered to petitioner.

This completes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the instant matter, including the report of the hearing examiner, and observes that no exceptions were filed by either party pursuant to N.J.A.C. 6:24-1.17(b). He accepts the findings of fact set forth by the hearing examiner and holds them for his own.

The Commissioner observes that in a letter of December 13, 1978, the Chief of the Health Benefits Bureau of the Department of the Treasury, Division of Pensions, indicated that based on the assumption that all necessary applications were correctly completed an individual employed on October 6, 1975 (as petitioner was) would be enrolled in the State Health Benefits Program effective January 1, 1976.

The unrefuted testimony of petitioner revealed that she completed, signed and returned all forms when she received them at the Board's office. This testimony coupled with the affidavit of the Board's personnel assistant (R-1) indicating his belief that petitioner's effective date of hospital-medical insurance was January 6, 1976 convinces the Commissioner that petitioner properly completed all the requisite applications for enrollment in the State Health Benefits Program prior to her hospitalization in February 1976. The fact that the Board failed to fulfill its responsibilities to provide petitioner with the hospital-medical coverage to which she was entitled prior to her hospitalization cannot work to her detriment. The Commissioner so holds.

Accordingly, the Commissioner directs the Board to pay that portion of the billing of $2,762.50 covered by the New Jersey Public and School Employees Health Benefits Plan in effect at the time hospital-medical services were rendered to petitioner. Further, the Commissioner directs that such payment be made within sixty days of the date of this decision.

COMMISSIONER OF EDUCATION

October 15, 1979

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE MILLIGAN,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF WHITE, WARREN	:	DECISION
COUNTY.	:	
	:	

For the Complainant Board, James A. Tirrell, Jr., Esq.

For the Respondent, Rothbard, Harris & Oxfeld
(Nancy I. Oxfeld, Esq., of Counsel)

The Board of Education of the Township of White, hereinafter "Board," certified charges of unbecoming conduct on June 12, 1978 to the Commissioner of Education for adjudication pursuant to N.J.S.A. 18A:6-11 against respondent, a teaching staff member with a tenure status in its employ. The Board simultaneously suspended respondent from his teaching duties without pay. Respondent denies the allegations and demands immediate reinstatement to his position of employment together with all compensation withheld from him by the Board.

A hearing was conducted in the matter on October 16, 19, and 20, 1978 at the office of the Warren County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Thereafter, the parties filed written summations in support of their respective positions. The report of the hearing examiner is as follows:

Respondent has been employed as a teaching staff member since September 1966 and since 1969 has been assigned to teach eighth grade pupils. Since 1975, respondent has also been assigned to teach one or two seventh grade pupils in independent studies. (Tr. III-4-5)

The administrative principal, hereinafter "principal," filed charges of unbecoming conduct against respondent, with supporting statements of evidence, with the Board Secretary on April 25, 1978. Each charge is grounded upon certain alleged incidents in which respondent was to have been involved between March 15, 1977 and March 3, 1978. Each incident shall be discussed in chronological order with respect to the proofs offered.

CHARGE NO. ONE
Incident of March 15, 1977

The testimony of the principal, the principal's secretary and respondent establishes that two females, former pupils in the school, sought to visit their friends and/or former teachers at the White Township school during regular school hours on March 15, 1977. Respondent testified that the former pupils accompanied one of his present pupils, J.D., to school in the morning. J.D. asked respondent if they could remain. Respondent advised J.D. that he did not believe the former pupils could remain, but advised her to seek approval from the office.

The principal, who has administrative responsibility for the White Township schools, was in attendance at a meeting called and being conducted by the Warren County Superintendent of Schools. (Tr. I-11)

The principal's secretary testified that the two former pupils did appear at her office seeking permission to remain in the school. The secretary testified that she informed the former pupils they could not remain in the schoolhouse and that they had to leave the premises. The secretary explained that when the former pupils departed her office, she believed they left the premises. (Tr. II-5)

Respondent testified that at the beginning of the first period he observed the former pupils in the foyer of the exit doors located in close proximity to his classroom. (R-1) Subsequent to the completion of the first period, he observed the former pupils still standing in the foyer of the exit doors. (Tr. III-9) Respondent testified that between the first and second class periods of the day, he went to the office to complain and inquire whether anyone was to do anything about their presence in the school. Respondent testified that subsequent to his inquiry, he returned to his classroom.

The secretary testified that respondent did come to the office and wanted to see the principal. The secretary testified she explained that the principal was in attendance at a meeting. Respondent then made his query to her in regard to the presence of the two former pupils.

The secretary testified that when respondent returned to his class, she reported the matter of the former pupils' presence to the teacher in charge of the school while the principal was otherwise occupied. The teacher-in-charge told the secretary to telephone the principal at the meeting to secure his advice.

The secretary explained that she did call the principal at the meeting and advised him that respondent was upset because the former pupils were still in the building. The secretary testified that the principal directed her to request assistance from the State Police if they would not otherwise depart from the school premises.

The secretary testified that she did report the matter to the State Police who responded to her call. The secretary explained that the former pupils had apparently left the building

and gone to the school's playground. In any case, however, the secretary testified that thereafter the teacher-in-charge was handling the matter. (Tr. II-7)

Respondent testified that at approximately 10:30 a.m. that same morning, the former pupils ran past his classroom windows. The pupils in his class, respondent explained, left their desks, ran to the windows, and were shouting at them. Respondent told his pupils in what he characterizes as a raised tone of voice to take their seats. In the meantime, respondent explained, he saw the school janitor, the teacher-in-charge, and the school nurse in the corridor ostensibly on their way to remove the former pupils from the school premises.

The school janitor testified that he was in the corridor near respondent's classroom and that he heard respondent and the pupils yelling. (Tr. II-19) The janitor testified that respondent then came out of the classroom into the corridor, and while slamming the classroom door, looked at him and uttered "I can kill the fucking bastards." (Tr. II-19) The janitor testified that respondent was very upset. The janitor testified that he was not certain whether respondent's pupils heard the uttered obscenity. (Tr. II-12-13)

Respondent denied uttering the remark attributed to him by the janitor. Respondent testified that when he saw the three persons in the corridor, the teacher-in-charge and the school nurse were near the exit doors and the janitor was in the corridor in nearly a direct line with his classroom door. (Tr. III-14; R-1) Respondent testified that he was upset at the time and did utter "SOB," in a muttering fashion to himself. Respondent testified that he did not address the remark to anyone because no one was in his presence. Respondent explained that the janitor was walking through the corridor, the other two persons were already near the exit doors, and his classroom door was closed. Respondent testified that during this period of time, some of his pupils were at their desks and some were still standing at the windows. (Tr. III-12-15)

Respondent testified that when he left the classroom, he proceeded directly to the office. Respondent explained that he was upset because the former pupils had disturbed two or three of his morning classes already that day. Respondent testified that upon entering the office, he passed the secretary's desk to get to his mailbox. The teachers' mailboxes, it is observed, are located approximately three feet from the secretary's desk. (Tr. II-9) Respondent testified that he got his mail, and either placed his newspaper in the mailbox or retrieved a newspaper therefrom, verbalized a complaint about his pupils' behavior, and left the office. Respondent could not recall the precise words he used, nor could he recall the tone of voice he used. (Tr. III-15)

The secretary testified that when respondent appeared at the office the second time that day he was

> "***quite infuriated, he was holding a newspaper at the time which he just let go of and threw it***right across the front of me from the doorway to the mailboxes and it made a horrendous sound when it hit the mailboxes. *** [H]e was very very enraged.***"
>
> (Tr. II-7-8)

The secretary explained that respondent was uttering complaints about the pupils' behavior though she could not discern precisely what he was saying. The secretary testified that she said nothing to respondent and attempted to continue with her work. When respondent left the office, the secretary explained, he slammed the office door closed. The secretary testified that respondent's conduct at this time was such that "***I was scared.***" (Tr. II-8)

The principal testified that upon his return to school he met with respondent after school hours that day to discuss the events hereinbefore described. Thereafter, the principal prepared a memorandum in regard to respondent's conduct on March 15, 1977. (P-1) The principal met with respondent for a second time on the following day. During this second conference, both the principal and respondent signed the memorandum.

The principal testified he discussed with respondent his failure to control his pupils, that he uttered the obscenity, ante, which respondent denied, that he failed to control his emotions in the office and threw a newspaper, and that his conduct generated a climate of fear. The principal asserts in the memorandum that respondent's problem with his conduct "***lies in [the] lack of pupil control.***" (P-1)

The principal, by way of testimony, explained that respondent's pupils were loud and that they would not be attentive to respondent's instructions. Respondent would become upset and scream and yell at them. The principal testified that respondent would become so upset with his pupils that he would tear up their papers, threaten them with failure, and threaten them with physical harm. The pupils, the principal asserted, would become so unnerved in respondent's class that when they proceeded to their next class that teacher would have to spend time to calm them down. (Tr. I-21)

The principal testified respondent did agree during the conferences of March 15 and 16, 1977 that he had difficulty controlling his pupils. (Tr. I-19) The principal, while being subjected to cross-examination of his testimony that the major cause of the March 15, 1977 incident was respondent's lack of control, cited eight specific dates when respondent failed to control his class. The principal also testified that he based his conclusion that respondent's lack of pupil control and of his own self-control upon his biweekly observations of respondent's performance, albeit informal with no written evaluations. The principal did meet with respondent on several occasions to dis-

cuss ways to acquire pupil and self-control. (Tr. I-62) The principal also received complaints in regard to respondent's behavior from his assigned pupils, from other teachers, and from parents. (Tr. I-67-68)

The hearing examiner finds with respect to the events of March 15, 1977 that respondent did utter the obscenity, ante, with respect to his pupils, as the school janitor testified. Respondent's testimony that he simply muttered "SOB" to himself and that no one was present is not credible. The janitor had to be in close proximity to respondent in order to know that respondent said anything. The janitor's testimony is clear and convincing compared to respondent's testimony which is found in this instance to be evasive.

Next, the hearing examiner finds that respondent's conduct in the office was as the secretary explained. That is, respondent did appear in the office, in an agitated state described as "infuriated," threw a newspaper at the mailboxes, complained of his pupils, and slammed the office door upon his departure.

The hearing examiner will address the assertion that respondent failed to exercise control of his pupils at the conclusion of the discussion of all other charges. No singular finding is made with respect to respondent's control of his pupils, or lack thereof, on March 25, 1977 at this time.

CHARGE NO. TWO
Incident of May 9, 1977

Two incidents were to have occurred that day in which respondent was involved. First, the principal testified that he planned to formally observe respondent's teaching performance in an effort to assist him and went to his class at approximately 10:50 a.m. The principal testified that for an unspecified reason he left the classroom and returned at approximately 11:10 a.m. The principal testified that respondent became very upset, left the class, and in an abusive and insubordinate manner, told the principal to teach the class himself in a voice loud enough for the pupils to hear. (Tr. I-32, 34) H.S., a pupil in respondent's classroom at that time, testified that she saw respondent become upset and tell the principal to teach the class himself. H.S. testified that respondent then left the classroom. (Tr. II-100)

The principal explained that, when respondent left the classroom, he assigned seat work to the pupils and directed the teacher in the classroom across the corridor to supervise respondent's pupils as best he could. The principal wanted to locate respondent.

The principal testified he located respondent in the teachers' room, several hundred feet away from his classroom. Respondent told the principal that he "***was picking on him [and that the principal] had no right to observe him." (Tr. I-33)

The principal told respondent to compose himself, freshen up, and return to class. The principal returned to respondent's class and supervised the pupils until 11:40 a.m., when respondent returned. (Tr. I-34)

Secondly, during the afternoon, T.P., a pupil in respondent's class, told the principal that respondent had threatened him because he was supposed to have been making a commotion with his desk. The principal testified that T.P. told him that respondent said he would

> "***hit [T.P.] so hard that he wouldn't get up and [respondent] had indicated that he didn't care what had happened to him.***"
> (Tr. I-22-23)

The principal testified he confronted respondent in regard to T.P.'s allegation. The principal stated that respondent denied that such an incident occurred. (Tr. I-22-23)

Respondent testified with respect to the first of the two incidents which occurred on May 9, 1977 that he had sent several pupils to the office for disciplinary reasons during the first period that day. Respondent explained that when the principal came to his classroom at about 11:15 a.m. to observe him, the pupils who were to be in that class which was just beginning were late arriving from their preceding class. Respondent testified he told the principal that he would not teach those pupils under such circumstances. Respondent explains "under these circumstances" to be that the pupils were late arriving from their preceding class. (Tr. III-17)

Immediately thereafter, however, respondent testified that he left the classroom and told the principal to teach the class himself for this reason. The class of pupils the principal was to observe was the same class from the first period of the day from which respondent had sent several members to the office for disciplinary reasons. Respondent testified that under these circumstances he believed the principal was being unfair and that he, the principal, deliberately selected this class to observe because respondent had earlier referred some of its members to the office.

Respondent testified with respect to the second incident of May 9, 1977 in which he was involved with T.P. The hearing examiner recognizes that T.P. did not testify in the matter and that the only testimony in support of the incident was elicited from the principal on a hearsay basis. Respondent did not object to such testimony from the principal and, in fact, offered testimony by way of explanation of that incident.

Respondent explained that T.P. was sitting with his knees under his desk in such a fashion that, by raising his feet from the floor, he would cause the desk to be raised. Respondent testified that he told T.P. if he did not stop raising the desk from the floor he would go to him and insure that he, T.P., would

not do it again. In response to the question whether he threatened to hit T.P., respondent answered, "I may have, yes." (Tr. III-20)

The hearing examiner finds that respondent did in fact refuse to teach his assigned class on May 9, 1977, left the classroom and told the principal to teach the class. The hearing examiner also finds, in light of all the testimony and evidence adduced, that respondent threatened to physically hit T.P. on May 9, 1977.

The hearing examiner observes that the principal testified that a group of eighteen parents and pupils complained of respondent's school conduct to the Board at its meeting held on the evening of May 9, 1977. (Tr. I-36) The principal discussed the complaints with respondent on the following day in regard to his alleged tantrums, threats, and assaults upon pupils. (Tr. I-36) Respondent asked for and was granted the opportunity to talk with the Board's personnel committee in June 1977. Respondent testified that he told the committee he had difficulty with pupil control and that he was going to enroll in Rutger's University full time to study school administration. (Tr. III-42)

CHARGE NO. THREE
Incident of September 28, 1977

The principal testified that a parent-teacher meeting was conducted during the evening of September 28, 1977, which respondent attended. At the conclusion of the meeting, the principal was talking with two other teachers, all of whom were standing in proximity to the door of a classroom near the exit doors of the building. The principal testified that respondent came into the building through the exit doors in an angry manner complaining that his citizen band car radio antenna had been broken while his car was parked in the school's parking lot. The principal testified that respondent was yelling at him that he, the principal, was going to pay for the damage because of his failure to provide police protection in the parking lot.

The principal testified that respondent demanded from the principal the whereabouts of the Board President because he wanted to inform him he was going to bill the Board for the damage. The principal told respondent where in the building the Board President was but, instead of going to see him, respondent exited the building slamming the doors behind him. (Tr. 38-40) The principal went to the exit doors and told respondent that if he was still as angry in the morning, not to report to school.

The two teachers, who were conversing with the principal when the incident began, testified and corroborated the testimony of the principal with respect to what occurred. (Tr. II-36-37, 55-56)

The principal testified that respondent reported to school the following day. The principal and the Board President met with respondent at 8:30 a.m. and informed him that his temper

outbursts were not being taken lightly; that staff members were physically fearful of him; that the principal's secretary was physically fearful of him; that he had no control over his pupils by virtue of their throwing papers out the classroom windows, defacing the classroom floor and damaging desks and chairs.

Respondent's testimony with respect to the incident on the evening of September 28, 1977 is essentially the same as the principal's testimony and the corroborating testimony of the two teachers who were present. Respondent testified that when he discovered the damage to his CB antenna, he returned to the school and informed the principal he would not attend any more evening events because of the damage. Respondent explained that on another occasion during the spring of 1976, as he was parking his automobile in the school's parking lot, a pupil jumped on the hood. (Tr. III-21) Respondent testified that he chose not to speak to the Board President that evening, even though he demanded to know his whereabouts, because he was too upset. Respondent explained that while he was talking to the principal, his voice was louder than usual because he was upset. (Tr. III-23)

Respondent did not refute the occurrence of a meeting the following day with the principal and the Board President. Respondent did testify that he observed crayon and magic marker stains on his classroom floor but had no knowledge of who was responsible. Respondent also testified that some desks and chairs were broken in his classroom but had no knowledge of who caused the damage. Respondent testified that on two occasions he saw pupils throw papers out the windows. He directed the pupils to go outside and retrieve the papers. Respondent testified that following those two occurrences, no more paper was thrown out of windows. (Tr. III-25-26) Furthermore, respondent explained that another teacher also used the same classroom.

The hearing examiner finds that respondent's conduct on the evening of September 28, 1977 following the parent-teachers' meeting was as the principal testified. The hearing examiner also finds that the principal and the Board President did discuss with respondent the following day their concerns with his own personal conduct, in addition to the damage being done in his classroom.

The janitor testified in this regard that respondent's classroom is the classroom which required most repairs to desks, chairs, heating ventilators, window shades, and pencil sharpeners. (Tr. II-16-17, 22-27) In fact, the janitor testified that while walking through the corridor past respondent's classroom he observed pupils writing on their desks. The janitor testified he went into the classroom and reprimanded the pupils for that act. Respondent who was present, said nothing. (Tr. II-23) Respondent denied that the janitor ever entered his classroom to reprimand his pupils while he was present.

The principal testified that while another teacher does share the classroom with respondent, she has control of her

pupils and would not tolerate their engaging in such destructive activity. (Tr. I-42)

A teacher whose classroom is across the corridor from respondent's classroom testified that on several occasions respondent's class was utter chaos with pupils yelling, sitting on window sills, ventilators, pupils coming to his room because respondent told them to leave his class for disciplinary reasons, and, on one occasion, one pupil was pushing another pupil, seated on the teacher's chair, in and out of the classroom. (Tr. II-42-44) Another teacher, whose classroom is adjacent to respondent's classroom, testified that from time to time the noise emanating from respondent's class was so great he simply could not carry out his own instruction with his pupils. (Tr. II-58)

The hearing examiner will address the allegation of respondent's lack of pupil control at the conclusion of the recitation of the charges.

CHARGE NO. FOUR
Incidents of November 17-18, 1977

The principal testified that on November 18, 1977 the mother of W.G., a pupil assigned to respondent, appeared at his office to complain of an incident which had occurred on the prior day, November 17, 1977. The principal explained that she stated respondent closed the classroom door on her son's foot. Though W.G. remained in school thereafter, he complained to his mother when he arrived home that his foot hurt. His mother took W.G. to the hospital where it was diagnosed that her son was suffering from a broken toe.

The principal testified that he suggested to W.G.'s mother that she return for a conference in the afternoon when respondent had completed the teaching day. In the meantime, the principal explained, he told her he would look into the matter.

The principal testified that during respondent's preparation period that day, he attempted to inquire what had occurred the day before which resulted in W.G. suffering a broken toe. The principal testified that respondent was upset, became defensive, and threatened the principal and the Board with legal action. The principal stated that when he asked respondent to explain the threat, he refused to discuss the matter further. (Tr. I-44) W.G.'s mother did return in the afternoon for a conference and the principal testified that respondent explained that W.G.'s foot got caught in the door at the beginning of class when W.G. was trying to get out of the classroom. Respondent explained that at the beginning of the class period, he told all pupils in the class to take their seats. When he went to close the door, W.G. attempted to leave the room to speak with some pupils in the corridor. W.G.'s foot was hit by the door when respondent tried to close the door. (Tr. I-44)

Respondent testified that during his preparation period he explained to the principal what occurred on November 17, 1977

that resulted in W.G. receiving a broken toe. Respondent explained that all pupils were in the corridor and he directed them to enter the classroom to begin class. W.G. was the last pupil in and he was entering as the door was being closed. Respondent accidentally closed the door and hit W.G.'s foot. (Tr. III-27)

Respondent testified that when he was told he had to attend the conference with W.G.'s mother in the afternoon, he became upset because (1) he had already been questioned by principal about the incident, and (2) he felt that some legal action might be taken against him as the result of the incident. Respondent admits threatening the principal with legal action in this situation for, he explains, the damage done to his car and personal property. (Tr. III-28)

The hearing examiner finds that respondent's conduct on November 18, 1977 with respect to his conduct concerning W.G.'s broken toe on November 17, 1977 is as described by the testimony of the principal.

CHARGE NO. FIVE
Incident of March 3, 1978

The principal testified that pupils were dismissed from school at 12:30 p.m. on March 3, 1978 because parent-teacher conferences were scheduled for the afternoon. The principal explained that subsequent to the dismissal of the pupils that day, he was in his office conversing with another teacher. Respondent knocked on the office door, entered and demanded of the principal that two pupils, B.K. and M.G., be removed from his class. The principal testified that respondent explained that both boys referred to him as "porky" and chided him by uttering "oink-oink." The principal testified he informed respondent he would speak to the boys the next school day because they had already been dismissed from school for the day.

The principal testified respondent became angry and upset. Respondent said that other teachers were also having difficulty with the two pupils, which assertion was denied by the teacher with whom the principal was conversing when this incident began. The principal testified that respondent threatened him if he recorded the incident in his personnel file. Respondent stated to the principal that if the incident were recorded in his file, he would take care of him. Respondent slammed the door during his exit from the principal's office. (Tr. I-24-26)

Subsequent to respondent's departure from the office, the principal testified, the teacher with whom he was originally conversing related that pupils had told him that respondent had assaulted two pupils, M.G. and K.N., that same day. (Tr. I-28) The principal talked with the two pupils during the next school day who, upon direction from the principal, prepared individual reports (P-2, 6) in which they described what had occurred.

The pupils' statements (P-2, 6) and their testimony (Tr. II-76-98) establish that at separate times during March 3, 1978 they removed themselves from respondent's class. K.N. removed himself, without permission, to go to the lavatory. (P-6; Tr. II-78) M.G., according to his statement, was looking for a pen he allegedly lost near the inside of the classroom door. Respondent was annoyed with the class and directed M.G. to go to the office. (P-2) M.G.'s testimony differs from his statement in that he testified that he, too, left respondent's classroom to go to the lavatory without respondent's permission. (Tr. II-91-92)

K.N. testified that while he was returning to the classroom respondent grabbed him by the arms in the corridor, threw him against the corridor wall and began screaming at him. (Tr. II-78) M.G. testified that when he left respondent's classroom, to go either to the lavatory or to the office, he began walking away from the classroom. Respondent went into the corridor, called to M.G. to return, and, upon his return, grabbed him by the shoulders and spun him around against the wall. (P-2; Tr. II-92) Both the pupils testified that on other occasions, respondent sent them to the office for disciplinary action for classroom misdeeds. (Tr. II-81, 92)

Respondent testified with respect to his demand of the principal that M.G. and B.K. be removed from his class, that he did make such a demand in a voice louder than usual. Respondent testified that he did not recall threatening the principal but did recall saying to him, "I'll take care of you." Respondent denies slamming the office door. (Tr. III-29-30)

Respondent admits physically turning K.N. and M.G. around in the corridor so that he could speak to them face to face. (Tr. III-30-31)

The hearing examiner finds that respondent did on March 3, 1978, as alleged by the principal, enter the principal's office and demand the removal of M.G. and K.N., that he did tell the principal that if the incident were recorded or reported in his personnel file he would get the principal and that he slammed the door in his exit from the office.

In summary, the hearing examiner finds with respect to each of the five charges as follows:

CHARGE NO. ONE

1. Respondent did in fact utter to the janitor on March 15, 1977 the obscenity, as reported ante, with respect to his pupils.

2. Respondent, by his actions, caused the principal's secretary to become physically fearful of him that day.

CHARGE NO. TWO

1. Respondent did, in fact, refuse to teach a class for which he was responsible on May 9, 1977, left the classroom, and directed the principal to teach the class.

2. Respondent did, in fact, threaten T.P., a pupil assigned to his class, with physical harm.

CHARGE NO. THREE

1. Respondent did, in fact, institute a confrontation with the principal on the evening of September 28, 1977 with respect to his CB antenna.

CHARGE NO. FOUR

1. Respondent did, in fact, threaten the principal on November 18, 1977 in regard to meetings concerned with a broken toe suffered by M.G. in his classroom.

CHARGE NO. FIVE

1. Respondent did, in fact, demand the removal of two pupils from his classroom and threatened the principal "I'll get you" if the incident were recorded in his personnel file.

2. Respondent did, in fact, lay his hands upon the persons of K.N. and M.G.

The hearing examiner finds that respondent's conduct between March 15, 1977 through March 3, 1978 rises to the level of unbecoming conduct within the meaning of the court's ruling in Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. &A. 1944) wherein it was said:

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

The hearing examiner observes, with respect to the general assertion that respondent failed to control his pupils, that the Board's proofs included testimony from pupils, two teachers whose classrooms were located in close proximity to respondent's classroom, and the principal's testimony of his observations of respondent's pupils during his informal observations. There is ample evidence in the record to establish respondent was not competent to control his pupils.

In the hearing examiner's view, respondent, by his own conduct, has forfeited his right to the protection of continued employment with the Board and recommends that the Commissioner terminate respondent's employment forthwith.

This concludes the report of the hearing examiner.

* * * * *

The Commissioner has reviewed the record in the instant matter, including report of the hearing examiner and the exceptions thereto which have been filed by respondent. Such exceptions admit or agree that respondent did in fact refuse to teach a class on May 9, 1977 (Charge No. Two) and that he did also lay his hands upon two pupils on March 3, 1978. (Charge No. Five) Respondent avers, however, that even though the admittance with respect to Charge No. Two constitutes conduct unbecoming a teacher it does not, in the circumstances of the proofs, warrant discharge from his employment. He further avers that, with respect to Charge No. Five, "It is not improper for a teacher to lay his hands upon a student, so long as the force used is necessary." (Respondent's Exceptions, at p. 13) In respondent's view this latter action does not constitute unbecoming conduct in the absence of a specific showing that respondent used "unnecessary force." (Id., at p. 14) Except for these two admittances, or qualified admittances, respondent maintains that the proofs do not support the findings as set forth by the hearing examiner and that remaining charges should be dismissed.

The Commissioner does not agree with this latter contention and concurs instead with the findings of the hearing examiner. Such findings are, in substance, that respondent had over a period of time and on many occasions conducted himself in a manner unbecoming a teacher in the public schools. His threats and displays of anger against pupils and fellow school employees, the unauthorized and precipitous absence from his post of duty, the physical use of force against pupils, the intemperate use of language are not the actions or conduct to be expected from a professional teaching staff member entitled to the protection of tenure that the statutes otherwise afford. The Commissioner so holds. As the Commissioner has said In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, 1966 S.L.D. 77:

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

Accordingly, the Commissioner holds that respondent is dismissed from his position as a teaching staff member employed by the Board of Education of the Township of White as of the date of his suspension.

COMMISSIONER OF EDUCATION

October 15, 1979

Pending State Board of Education

PAUL METZGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Joel S. Selikoff (Steven R. Cohen, Esq., of Counsel)

For the Respondent, Barbour & Costa (John T. Barbour, Esq., of Counsel)

Petitioner, a tenured teaching staff member, challenges the action of the Board of Education of the Township of Willingboro, hereinafter "Board," effecting a reduction in force and the resultant reduction in his salary due to the Board's action transferring him from his position as coordinator of health and physical education to that of classroom teacher. He also lays claim to being tenured as a subject supervisor.

A plenary hearing was held at the office of the Burlington County Superintendent of Schools on June 26, 1979 by a hearing examiner appointed by the Commissioner of Education.

Petitioner was the sole witness to testify on his behalf. Subsequently, respondent entered a Motion for Summary Judgment to dismiss the Petition relative to the reduction of force by elimination of the position of coordinator based on the Board's statutory authority to do so due to budgetary restraints. The quality of petitioner's performance as coordinator was admittedly commendable.

Petitioner entered a Cross-Motion for Summary Judgment relative to his claim to a tenure status as a subject supervisor and subsequent placement on a preferred eligibility list for such position, as well as his claim to differential pay for insufficient notice of his transfer.

The relevant undisputed facts of the controverted matter are as follows:

Petitioner was employed in September 1972 as a teacher and was also assigned duties as department chairman of health and physical education. In September 1974, petitioner began his duties as coordinator of health and physical education. Petitioner was properly certified in all positions held.

Petitioner was notified by letter under date of February 15, 1978 that his transfer from coordinator to classroom teacher would be effective February 21, 1978. (J-1)

Relevant testimony by petitioner, undisputed through stipulation, indicated he performed all of the duties required of him by the adopted job description for the coordinator's position, which was admitted into evidence as P-1.

There being no dispute regarding the relevant material facts, the controverted matter is ripe for summary judgment by the Commissioner.

After careful review of the pleadings, evidence and testimony, the Commissioner determines that the Board, in the absence of bad faith, properly exercised its statutory and discretionary authority under N.J.S.A. 18A:28-9 to reduce its force through the elimination of the position of coordinator of health and physical education for economic reasons and the transfer of petitioner who held that position to his tenured classroom teaching position.

A review of petitioner's undisputed testimony, as well as the job description for the position of coordinator, clearly establishes that petitioner held the categorical position of subject supervisor in accordance with N.J.A.C. 6:3-1.10(k). Since petitioner held the supervisory position from September 1974 to February 21, 1978, and was properly certified, the Commissioner determines that petitioner is tenured as supervisor of health and physical education. The Commissioner hereby directs the Board to notify petitioner of his sole placement on a preferred eligibility list due to his seniority pursuant to N.J.S.A. 18A:28-9 et seq. The Commissioner is also constrained to advise the Board to replace the title of coordinator with supervisor in the event the position is reinstituted.

The Commissioner notices that petitioner's notification of his transfer was but six days prior to its effective date and that a considerable reduction in salary was associated with the transfer. The record is barren of any evidence or reasons why the Board chose to take this action on such short notice. Petitioner in his Cross-Motion has asked for an award of differential salary between his supervisor's and teacher's rates for a period of time considered to be reasonable, such as the 60 days' of notice required by teacher contracts. The Commissioner is constrained to point out that there is no statutory provision or regulation which requires a notice provision of thirty or sixty days when a transfer of a teaching staff member results from a reduction in force during the course of an academic year. The Commissioner is aware that a reduction in force may be required by specific circumstances during mid-year, although sound administration would usually dictate that such measures be effectuated at the close of one academic year in preparation for reorganization at the beginning of the subsequent academic year.

When such a permissible reduction in force is made during the course of an academic year, under circumstances which support the necessity for the action, and in the absence of bad faith or arbitrariness, the Commissioner holds that such action must stand and that no basis exists upon which petitioner could be awarded the differential in salary payments which he seeks. In the instant matter, petitioner has failed to carry the burden of proof that the Board's action was unwarranted, arbitrary or in bad faith. Accordingly, there is no further relief which may be afforded petitioner in this matter.

COMMISSIONER OF EDUCATION

October 23, 1979

THEODORE C. HAHULA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Gaccione, Pomaco, Patton & Beck
(Frank Pomaco, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Town of Belleville, hereinafter "Board," claims entitlement on the salary schedule to four years' credit for military service pursuant to N.J.S.A. 18A:29-11. The Board alleges that its action in allowing petitioner two years' credit for military service placement on the salary schedule was a legal and proper action pursuant to the negotiated agreement between the Board and the Belleville Education Association. Oral argument on petitioner's Motion for Summary Judgment was held in Trenton on June 27, 1979 before a representative appointed by the Commissioner of Education. The matter is presented directly to the Commissioner for adjudication based on the pleadings, memoranda of law and record as compiled.

The facts are not in dispute. Petitioner served in the United States Navy from September 1966 to July 1970. At the time of his employment by the Board on January 1, 1975 he was credited with two years' military service placing him on the third step of the salary guide. Petitioner claims entitlement to two additional years of military service credit on the salary guide citing Howard J. Whidden v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977 (1977 S.L.D. 1312). Petitioner, in claiming entitlement to back pay for military service, contends that the Board, in violation of N.J.S.A 18A:29-11, improperly relied on the dicta of the negotiated agreement between the Board and the Belleville Education Association. Petitioner avers that Whidden clearly establishes his entitlement to full military service credit for his four years of naval service.

The Board argues that it properly followed the explicit provisions of the contractual agreement between the Board and the Belleville Education Association wherein Article VIII provides

"Credit will be granted for 50% of the time spent in military service, but in no event to exceed two years." The Board argues further that in placing petitioner on the third step of the salary guide which allowed him two years' credit for military service it acted properly under N.J.S.A. 18A:29-9 which says in its entirety:

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

Finally the Board argues that petitioner should have utilized the grievance procedure contained in the contractual agreement prior to filing an appeal under N.J.A.C. 6:24-1.1 et seq.

The Commissioner cannot agree with the arguments of the Board. In Basil M. Castner v. Board of Education of the Township of Plumsted, Ocean County, 1979 S.L.D. ___ (decided June 11, 1979) wherein the board denied Castner's entitlement to back pay for military service the Commissioner said in pertinent part:

> "***[T]he Commissioner determines that the military service credit benefit bestowed upon staff members in the employ of a local board, by N.J.S.A. 18A:29-11, is the result of legislative fiat and not a contractual status. It is, accordingly, not subject to mutually established agreement between the Board and its staff members.
>
> "As was said in Whidden, supra:
>
> > '***The operative language of N.J.S.A. 18A:29-11, insofar as it relates to this appeal, is as follows: 'Every member who *** hereafter shall serve, in the active military or naval service in the United States *** shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time.***' The clear import of the section of the statute is that petitioner's starting salary should have been fixed by the local school district at the minimum step he would have attained had he been employed for the three years he served in the military forces. The legislative use of the word 'shall' ordinarily indicates that the

> statute is intended to have an imperative rather than a permissive effect; the intent of the legislature is to be gathered from the context in which the words appear. Harvey v. Essex County Board of Freeholders, 30 N.J. 381, 391-392 (1959). It is true, as the Commissioner observed, that N.J.S.A. 18A:29-9 authorizes a school district to place a newly employed teacher at an initial place on the salary schedule as may be agreed upon between the member and the employing board of education. Nothing in the language of that section, however, suggests that the legislature intended to authorize a waiver of or a departure from the requirement of N.J.S.A. 18A:29-11 that credit be given for military service. See Bd. of Ed. Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1973).***' (Slip Opinion, at pp. 3-4)

> "This is a logical conclusion because it must be borne in mind that another statutory benefit, the acquisition of tenure, has been conferred on staff members pursuant to statutory prescription. N.J.S.A. 18A:6-10 Such benefits have been previously defined by the courts as a legislative status rather than contractual and such rights may not be waived by staff members while they are employed in such positions. Greenway v. Board of Education of Camden, 129 N.J.L. 46 (Sup. Ct. 1942), aff'd 461 (E.&A. 1943); Lange v. Board of Education of the Borough of Audubon, 26 N.J. Super. 83 (App. Div. 1953)***" (1979 S.L.D. at ____)

The Commissioner finds the language of the court a clear and compelling directive in the instant matter, "Nothing in the language of that section [N.J.S.A. 18A:29-9], however, suggests that the legislature intended to authorize a waiver of or a departure from the requirement of N.J.S.A. 18A:29-11 that credit be given for military service." (Whidden, supra) The Commissioner finds and so holds that the Board's policy in regard to placement on the salary guide for years of military service credit is in conflict with the Court's interpretation of N.J.S.A. 18A:29-11 and is therefore ultra vires.

Accordingly, the Commissioner finds and determines that the Board did not properly allow petitioner his full military service credit and directs the Board to grant petitioner four years' military service credit and appropriate placement on its salary schedule with required back pay.

COMMISSIONER OF EDUCATION

October 29, 1979

Pending State Board of Education

IN THE MATTER OF THE TENURE HEARING OF HENRY P. KARSEN,	:	INITIAL DECISION
SCHOOL DISTRICT OF THE CITY OF CLIFTON, PASSAIC COUNTY	:	EDU. DKT. #334-10/78

APPEARANCES:

For the Petitioning Board of Education, Lordi and Imperial (Patrick English, Esq., of Counsel)

For the Respondent, Segreto & Segreto (James V. Segreto, Esq., of Counsel)

BEFORE THE HONORABLE ERIC G. ERRICKSON, A.L.J.

The Clifton Board of Education, hereinafter "Board," pursuant to N.J.S.A. 18A:6-10 et seq., on September 27, 1978, certified and thereafter filed before the Commissioner of Education ten charges of alleged unbecoming conduct against respondent, a tenured teaching staff member. (P 10) The Board President, who had preferred those charges, abstained from voting. Respondent denies the truth of those charges and avers that the procedures utilized by the Board in certifying the charges were violative of his due process rights and the statutory prescriptions required for such proceedings. Respondent also asserts that certain of the charges may only be characterized as complaints of inefficiency and that the statutory scheme for processing charges of inefficiency as set forth in N.J.S.A. 18A:6-11 were not followed.

I FIND and herewith set forth the lengthy procedural history of the matter in litigation:

The Board first suspended respondent without pay on August 31, 1977 and thereafter in September 1977 certified nine charges of alleged unbecoming conduct before the Commissioner. On October 12, 1977 the Board reinstated respondent with all lost salary. (P 112) On October 19, 1977 the Board, in closed session, voted to suspend respondent without pay and to certify charges against him before the Commissioner of Education. (P 114) When respondent filed Notice of Motion alleging that the charges and the documentation submitted in support thereof were lacking in specificity, oral argument was ordered. Thereafter, an Order of the Commissioner, dated January 31, 1978, directed the Board to "***set forth separately each charge with careful cross-referencing of documentation in support thereof***."

On May 17, 1978 the Honorable Judge Joseph J. Salerno, Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-7546-77, declared invalid the Board's certification of charges for failure to comply with requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. Therein, Judge Salerno stated, inter alia, that the "***Board was in violation of N.J.S.A. 10:4-12 by taking formal action against (respondent) in private executive session***." (C 1, at p. 5) The Board appealed Judge Salerno's opinion to the Appellate Division of the Superior Court which remanded the matter to Judge Salerno who, after supplementing the record, affirmed on March 30, 1979, that the Board's charges were invalid by reason on noncompliance with notice requirements set forth in the Open Public Meetings Act. (C 3, at pp. 1-5) Judge Salerno, therein, also made reference to a January 2, 1979 opinion issued in the interim period by the Honorable Judge Harvey Smith and authorized for publication in Cirangle v. Maywood Board of Education, 164 N.J. Super. 595 (Law Div. 1979) (C-2) wherein Judge Smith stated, inter alia, the following:

> "***The Legislature has manifested its intention to exclude the public even in the face of a demand for a public meeting by the affected tenured employee. (The tenured employee) will receive a public hearing on the merits before the Commissioner of Education.***" (C 2, at p. 6; C 3, at p. 10)

Judge Salerno also stated on March 30, 1979 that:

> "***(T)he Court is satisfied that the opinion of Judge Smith (in Cirangle) is eminently better reasoned and *** dispositive of the law of statutory construction in this area.***" (C 3, at p. 16)

The Board President, however, had in the interim again preferred charges and abstained from voting when the Board, on September 28, 1978, in consideration of Judge Salerno's earlier opinion of May 17, 1978, suspended respondent and certified in open public session the set of ten charges which are the basis of this tenure hearing. Respondent applied on April 17, 1979 for an order of the Commissioner setting aside those charges on grounds that they were certified in open public session contrary to N.J.S.A. 18A:6-11 which states that: "***(T)he consideration and actions of the board as to any charge shall not take place at a public meeting." That application was denied by the Commissioner in an Order dated May 30, 1979 wherein he stated:

> "***(T)he Board's action certifying the charges on September 28, 1978 was taken in good faith compliance with the Court's interpretation of N.J.S.A. 18A:6-11 and N.J.S.A. 10:4-6 et seq.; and
>
> "The Commissioner having determined that no harm or disadvantage has resulted to respondent from the certification of charges in public session since the substance of those charges was identical to the thrust of charges previously certified in 1977 in executive session and the subject of numerous legal proceedings not shielded from the public eye; and
>
> "The Commissioner having also determined that the setting aside of the Board's act of certifying charges on September 28, 1978 and any resultant delays are neither required by law within such factual context, nor in the best interests of the public***."

A tenure hearing was conducted on twenty-one days between March 1, 1979 and June 5, 1979. I FIND and set forth herewith those additional relevant facts which are not controverted and which, with the foregoing procedural recitation, reveal the contextual setting of the dispute:

Respondent, who had previously taught for seven years in another public school district and for one year in a parochial school, had been employed by the Board from 1972 to the time of his suspension as a physical education teacher. During this period he was head coach of wrestling from the 1972-73 school year through the 1975-76 school year and head coach of track during the 1976 and 1977 seasons.

During the period from 1972 through June 1976 classroom observations and evaluations of petitioner's classroom teaching performance by his supervisors, vice-principal, and principal may only be characterized as highly commendatory. They exhibit numerous references to his excellent classroom control, the attentiveness and respect of his pupils and his skills as a teacher of physical education. (R 5-9, 13; P 19-22; P 71-72) Those laudatory written evaluations are amply confirmed by the testimony of petitioner's supervisors and administrators at the hearing. (Tr. III 122-123; Tr. V 132; Tr. VI 43; Tr. IX 69; Tr. XIV 74, 78) Certain of respondent's supervisors were critical of his performance during 1976-77 as a result of incidents which are the subject of charges, post. (P 46; R 1-2)

During the spring of 1976 and the 1976-77 school year, a number of events occurred in petitioner's performance as both a coach and a teacher which resulted in a Board resolution, dated August 31, 1977, withholding respondent's salary increment for the 1977-78 school year, suspending him forthwith, and notifying him that tenure charges would henceforth be preferred against him. (R 20) Those charges which were ultimately re-certified in substantially the same form in 1978, ante, are here set forth seriatim together with my findings of fact:

> CHARGE NO. I: Failure to report to assigned duties (including unexcused absences from department meetings).

Respondent is charged with failing to report for graduation in June 1976, failing to report in timely fashion for "door duty" between classes on two occasions during February 1977, failing to attend a department meeting during that same month, and on occasion excusing his seventh period swimming class early.

I FIND that these sporadic and limited occurrences fall within the purviewof charges of inefficiency as contemplated by the Legislature in N.J.S.A. 18A:6-11. Accordingly, I ORDER that Charge No. 1 be and is DISMISSED on grounds that the Board did not follow the procedure set forth in the statute which requires that a ninety day period be allowed for correction of such inefficiencies prior to the certification of those charges before the Commissioner.

CHARGE NO. II: Failure to offer his students remedial assistance.

During 1976-77 a system of providing remedial assistance to pupils on certain days of the week between 2:15 and 2:55 p.m. was in effect. I FIND that during the 1976-77 school year other physical education teachers assigned from eight to 180 pupils to remedial assistance, whereas respondent did not make such an assignment to a single pupil. (P 6; Tr. I 70-71)

I ALSO FIND, however, that respondent did participate in a manner common to the male physical education teachers by giving remedial assistance one day a week to pupils of the teachers who could not instruct their own pupils because of coaching assignments or other conflicts. (Tr. XIX 88-91) I ALSO FIND that four of five of respondent's classes were swimming classes for which remedial assistance in swimming could not be given since the pool of the Clifton Boys Club, where swimming classes were conducted, was not available after 2:15 p.m. Respondent did provide opportunity for pupils to make up classes at the pool during study halls. Respondent's opportunity, however, to assign pupils who were frequently absent from his tennis, physical fitness and organized group activity classes was not subject to such limitations. (P 43)

In summation I FIND that the Board, within the above limitation of mitigating circumstances, has proven Charge NO. II to be true in limited degree.

CHARGE NO. III: Disregard of written administrative directives.

CHARGE NO. VI: Repeatedly terminating class before the end of class periods.

Limited and occasional instances are cited by the Board in support of these charges, including respondent's failure to turn in his plan book at the appointed time, to set forth his daily plans and emergency lesson plans in sufficient detail to satisfy his supervisor, and his alleged dismissal of his swimming classes from the bus prior to the passing bell for pupils in the high school. Having considered the limited and occasional nature of these complaints and the numerous expressions of satisfaction with respondent's plans by his coordinator (P 41), I FIND that these are charges of inefficiency for which the statutory prescription for certifying tenure charges has not been followed. N.J.S.A. 18A:6-11 Accordingly, with the exception of the incident involving unsupervised pupils in the weight room, considered in Charge No. V, post, I ORDER that Charges Nos. III and VI be and are DISMISSED.

CHARGE NO. IV: Unexcused tardiness at the commencement of scheduled classes.

The record is barren of the required quantum of proof that respondent was regularly or willfully tardy at the commencement of scheduled classes. Accordingly, for the same reasons expressed in connection with Charges Nos. I, III, and VI, ante, I FIND that Charge No. IV is a charge of inefficiency. Accordingly, I ORDER that Charge No. IV be and is DISMISSED.

CHARGE NO. V: Improper and incomplete plan book, class preparation, and utilization of class time.

In consideration of the numerous expressions of approval in writing by respondent's coordinator in respondent's plan book, I CONCLUDE that the Board has failed to prove that respondent's plan book was kept in an incomplete or unacceptable manner. In further consideration of respondent's reference on November 1 and 3, 1976 to "organized grab ass" as the activity of the day, I CONCLUDE and FIND that such reference, although clarified by a November 19 insert making reference to "organized group activities," was a crude and offensive attempt at humor which was an improper and unprofessional insert in a plan book which should reflect for the teacher, supervisor and substitutes the day-to-day implementation of the course of study. (Tr. XIX 113)

In consideration of the laudatory classroom observation reports and evaluations by respondent's supervisors, I am unable to conclude that respondent was habitually or regularly unprepared to conduct his classes.

I FIND, however, that on November 9, respondent was properly admonished by his supervisor for leaving approximately one half of his second period tennis class without any subject-related assignment in custody of another physical education teacher in the cafeteria while he took the remainder of the class to the tennis courts. While the record amply supports respondent's contention that such practice was not uncommon among male physical education teachers in the school during cool weather, it was not approved by his supervisors and is contrary to the thorough and efficient provisions and goals of the Public School Education Act of 1975 N.J.S.A. 18A:7A-1 et seq. (P 38).

On that same day, during his fifth period of physical education class, respondent was again admonished by his vice-principal for allowing his tennis pupils to sit socializing on the gymnasium floor with no instructional program in progress. (P 39; Tr. X 11-13) The vice-principal testified that, in response to her queries, respondent indicated he had already taught the pupils everything they needed to know. (Tr. X 12) Respondent testified, coversely, that he did teach a lesson on tennis rules and techniques that period to his class. (Tr. XIX 112) Having

reviewed the testimony, I FIND that respondent did teach such a class in tennis but that the responses he made to his supervisor who left the classroom without further observation were of such nature as to promote rather than assuage the acrimony which ensued as the result of this brief visit to his class.

On March 22, 1977 respondent was again admonished by the vice-principal for lack of instruction to the seventh period swimming class meeting in the cafeteria when she appeared at 1:40 p.m. Respondent had been notified earlier in the day that his classes could not use the pool at the Boys Club on that day. Respondent testified that he was merely holding his class in the cafeteria until he could check on the availability of a gymnasium and that he did, in fact, teach a class on swimming safety. I FIND that respondent did teach such a class but that, as the vice-principal charged, he did not begin instruction until fifteen minutes of the period had elapsed. I also find respondent had to meet his class at the place where they normally boarded the bus, send them to the cafeteria, and wait until clean-up activities from lunch were concluded before beginning instruction. In consideration of the brevity of the vice-principal's observation and the unusual circumstances, I can impute no fault to respondent for that fifteen minute delay. (P 68, 69, 70; Tr. X 23-26, 76; Tr. XIX 22-23)

I FIND respondent's action on March 8, 1977 was inappropriate wherein he allowed a portion of his class to go to a lower floor weight room which was unsupervised. (P 7, Tr. I 73) The record is barren of credible evidence in support of respondent's contention that another physical education teacher had, on that day or any other day agreed to supervise or did supervise respondent's pupils in the weight room while he conducted his own physical education class in the upstairs gymnasium. (Tr. III 52, 76) While the record supports the conclusion that such procedure had at times been utilized by teachers other than respondent, it is one which placed the teacher to whom such unsupervised pupils are assigned and the employing Board in jeopardy in the event of serious injury to an unsupervised pupil. Respondent and all physical education teachers had been so cautioned in writing. (P 8)

I ALSO FIND that respondent allowed swimming class pupils, who on occasion did not dress for swimming, to remain unsupervised by school personnel on the upper floor of the Boys Club when he was instructing his classes in swimming on the floor below. (P 64, 65, 69) I impute no fault to respondent, however, for complaints against him for failing to dismiss all pupils in his swimming classes from the pool at the same time. The myriad problems he faced wherein boys and girls had to alternate in using one shower facility and hair drying room were admirably managed.

CHARGE NO. VII: A lack of selfcontrol manifested by overt acts of violence and/or vulgarisms in the presence of students, parents, teachers and administrators.

Respondent is charged with unbecoming conduct at a varsity wrestling match with a rival school on February 10, 1976. Having considered the extensive documentary evidence and testimony of numerous witnesses I FIND that respondent, when ruled against by the official in charge, uttered profane, abusive and slanderous remarks which were audible to that official and which impugned his authority and competency. (P 29, 32, 34, 53) Those unsportsmanlike statements were contrary to the policies set forth in the Clifton Public Schools Handbook for Coaches. (P 55 at p. 2)

Respondent is also charged with willfully kicking the ankle of a female pupil who was sitting in the corridor of the gymnasium area near respondent's office. I FIND that respondent did forcibly shove aside with his foot the ankle and leg of the girl when she refused his request that she move. This angered the pupil who, with an oath, then threatened to make trouble for respondent. While there appears to be no sufficient reason or justification for respondent to have made any physical contact with the pupil, I am unable, in consideration of the position of approach of respondent and the position of the pupil's legs, to conclude that he, in fact, kicked or inflicted susbstantive bodily damage to her. (P 18, 23; Tr. III 141, 155; Tr. V 146-171, Tr. XIIA 58, 61)

The incident in which respondent admittedly and in anger broke a chair in his supervisor's office is treated, post, with Charge No. IX with which that action is closely interwoven.

CHARGE NO. VIII: Directing a student to deliver an unprofessional and vulgar message to a guidance counselor.

A pupil was reassigned on May 9, 1977 to respondent's seventh period swimming class. The guidance counselor who had made that assignment reported in writing to the vice-principal that the boy returned and advised her that respondent had told him: "I'm sick of this _____; tell her to pound salt; I'm really _____ off, I have too many in my class already." (Expletives deleted) (P 24) In consideration of the forthright, convincing testimony of the pupil and the consistent corroborative testimony and documentation originated by witnesses called by the Board concerning this incident, I consider respondent's denial thereof unconvincing. Accordingly, I FIND that respondent did make those statements to the pupil. While it proved to be true that respondent's swimming class was so large that the boy could not be accommodated, his comment to the pupil constituted unbecoming conduct. (P 35-37, Tr. IV 66-77; Tr. XIX 63)

CHARGE NO. IX: Being with a female student *** during school hours in an improper student-teacher relationship.

Herein, respondent was accused by a coordinator of lying on the grass near the tennis courts behind his van with his head in the lap of a senior girl during seventh period on June 13, 1977 of examination week. The coordinator made written report of her observation of this incident and the counseling session which she, the vice-principal and the school nurse held with the senior girl on June 14. Respondent admits lying on the grass next to the senior pupil but denies that his head was in her lap or that he had any improper relationship with her.

Having carefully reviewed the documentary evidence and the testimony of witnesses, I FIND a preponderance of credible evidence to support the charge that respondent was directly observed by the coordinator lying with his head in the girl's lap during a period in which he was scheduled to teach a tennis class for which no pupils had appeared. I FIND that this display of familiarity with a pupil was an unprofessional indiscretion which constitutes unbecoming conduct. I ALSO FIND that the record is devoid of further credible evidence on which to base a conclusion that respondent either prior thereto or thereafter was involved in an "affair" with that pupil or any other pupil. (P 1, 2, 51, a, b, 78; Tr. I 46-55; Tr. II 23-30; Tr. III 3-23; Tr. VII 8-17)

Respondent's wife testified about receiving a number of anonymous telephone calls on June 14, 1977 while her husband was at graduation. She testified that, when those callers alleged that respondent was having an affair with a pupil at the school, she was so disturbed that she became hysterical and that neither she nor respondent slept the entire night. It was following that night that respondent, uttering epithets and threats in a spate of anger against the unknown (but suspected) perpetrators of the calls, demolished the legs of a heavy and rugged tubular steel chair before his supervisor in the supervisor's office. (Tr. VII 142) In his report of the incident, the supervisor described respondent as "***out of control and incoherent.***" (P 76, 97; Tr. VIII 45)

CHARGE NO. X: A disregard in fulfilling his coaching obligations and responsibilities to the detriment of his students.

This charge is directed at respondent's performance as head track coach. Specifically he is charged with failing to report for 50 per cent of the practices and track meets, allowing morale of members of the team to deteriorate and failing to collect uniforms from team members at the close of the season.

Respondent admits that he attended only about 80 per cent of the practice sessions and meets. He also avers that when he was absent he was excused, ill, or had arranged coverage by his assistant.

Having reviewed the evidence pertaining to this charge, I FIND that the Board has failed to present a preponderance of credible evidence on which to base a conclusion that respondent was absent as charged from 50 per cent of the practice sessions. This finding is based on the inconclusive and poorly documented testimony of respondent's supervisor, who testified that he observed the track area on numerous occasions from his automobile. (Tr. VIII 146; Tr. XVII 120, 127) I am unable to credit this testimony since the supervisor himself admitted that one half the track area is not visible from an automobile. (Tr. XVII 130)

Further testimony establishes the fact that respondent as head coach of track was, at times, required to be at a second track located at the Junior High School where participants in certain events practiced. While the record is clear that respondent's supervisor was dissatisfied and asked him to resign at the end of the 1977 season, there is a dearth of documentary evidence or credible testimony that respondent was, during the season, ever confronted personally by his supervisor and directed to account for his whereabouts during practices or to be present at all sessions unless excused. (P 57; R 19)

Nor am I able to conclude from my review of the credible evidence that respondent did not discharge his duties of collecting track uniforms at the end of the 1977 season. The convincing testimony of a large number of pupils on the track team that they turned in their uniforms, that their morale was good and that they respected their coach causes me to conclude that the Board has failed to present a preponderance of credible evidence in support of its charge that respondent did not collect uniforms or was responsible for low team morale and/or dropouts during the track season.

In conclusion I FIND that the Board has failed to prove Charge No. X. Accordingly, I ORDER that Charge No. X be and is DIMISSED.

In summation, Charges Nos. I, III, IV and VI have been dismissed as charges of inefficiency. Charge No. X was dismissed for failure to present a preponderance of credible evidence in support of the Charge.

Charge No. II was to very limited degree proven in regard to respondent's failure to recommend even one pupil for remedial assistance from those of his physical education classes that could profit thereby.

Charge No. V was proven to the extent that respondent made one unprofessional and offensive entry in his plan book, failed on two occasions to make efficient use of class instructional time for all pupils, allowed certain pupils assigned to a class to use the weight room unsupervised contrary to school rules and allowed pupils to remain in an unsupervised area of the Boys Club during swimming classes. Charge No. VII was proven in that as a head coach, respondent made profane, vulgar and provocative remarks directed to a wrestling official and to the additional but limited degree that he made unnecessary and unwise physical contact with his foot with a pupil sitting in the gym corridor. Charge No. VIII was proven in that respondent directed a pupil to carry a vulgar and unprofessional message to a school counselor. Charge No. IX was proven only to the extent that respondent, in a single instance, was observed while on duty with his head in the lap of a female pupil, the aftermath of which resulted in numerous problems to his supervisors and to respondent when he released his wrath in an unprofessional outburst and demolished a chair in the office of his supervisor.

I CONCLUDE that those charges, which in part and in whole have been proven true, even when considered in the light of his prior excellent evaluations, constitute unprofessional conduct of sufficient magnitude and provocation to warrant dismissal from his tenured position.

Appropos is that which was stated by the Commissioner In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97:

> "***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully ***violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***" (at 98-99)

Similarly appropos is that which was previously articulated In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County, 1966 S.L.D. 77, aff'd State Board of Education 106, aff'd Docket No. A-515-66 New Jersey Superior Court, Appellate Division, December 1, 1976 (1967 S.L.D. 351):

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

Justification for the forfeiture of tenure is best shown by a series of sufficiently flagrant acts. Redcay v. State Board of Education, 130 N.J.L. 369 (1943) aff'd 131 N.J.L. 326 (E. & A. 1944)

In the instant matter, respondent was responsible for a series of displays of lack of restraint constituting unprofessional conduct. Absent a finding that the Board's procedures in certifying charges against respondent in 1978 were procedurally inappropriate, IT IS ORDERED that respondent be and is DISMISSED from his tenured position of employment. This decision does not become final until forty-five (45) days from the agency receipt of the order unless the agency head acts to affirm, modify, or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10

I HEREBY FILE with the designee of the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter together with the record of these proceedings.

September 4, 1979 — Eric G. Errickson

DATE — ERIC G. ERRICKSON, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY P. KARSEN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF CLIFTON, PASSAIC COUNTY.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law. He observes that numerous exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b). In its exceptions the Board agrees fully with the Judge's conclusion that respondent "was responsible for a series of displays of lack of restraint constituting unprofessional conduct" while questioning the Judge's findings in certain charges.

The Commissioner determines that such exceptions do not affect the Judge's decision that respondent should be dismissed.

Respondent argues in voluminous exceptions that the Judge's conclusion of the penalty against him is inexplicable and unconscionable. The Commissioner does not agree. He finds that the pivotal question to be determined in this matter is the fitness of respondent to continue as a teaching staff member.

In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, 1971 S.L.D. 566, aff'd State Board of Education 1973 S.L.D. 773, aff'd Docket No. A-1680-72 New Jersey Superior Court, Appellate Division, 773, the Commissioner held that a single incident of conduct unbecoming a teacher was sufficient grounds to cause her dismissal.

In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) it was held that:

> "***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a 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 may also be shown by many incidents.***"
>
> (130 N.J.L. at 371)

Moreover, the Commissioner has previously held In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302 in pertinent part that:

> "***[T]eachers of this State *** are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***" (at 321)

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

Accordingly, the Commissioner holds that respondent is dismissed from his position as a teaching staff member employed by the Board of Education of the City of Clifton as of September 28, 1978.

COMMISSIONER OF EDUCATION

October 31, 1979

IN RE:	)	INITIAL DECISION
	)	
ELAINE DIRICCO V.	)	O.A.L. DKT. # E.D.U. 255-7/78
THE TOWN OF WEST ORANGE,	)	
ESSEX COUNTY	)	

APPEARANCES:

Sanford R. Oxfeld, Esq. on behalf of the petitioner

Samuel A. Christiano, Esq. on behalf of the Board of Education of the Town of West Orange

BEFORE THE HONORABLE WARD R. YOUNG, A.L.J.:

Petitioner, a nurse/health teacher, alleges that the Board of Education of the Town of West Orange, hereinafter "Board", failed to renew her contract for an improper reason and violated her statutory rights.

The respondent Board denies the allegations.

A conference of counsel was held on September 21, 1978, at which time counsel for the parties agreed to submit a joint stipulation of facts, all essential documents, and briefs. The matter is now ripe for the summary decision agreed upon by the parties since the record is complete.

The undisputed facts as submitted by joint stipulation are as follows:

"... 1. Petitioner was first employed as a nurse/health teacher on a one-half (1/2) time basis by respondent in the 1975-76 school year. (A copy of petitioner's certification is attached herein as Appendix A).

2. During the 1976-77 school year, petitioner was again employed as a nurse/health teacher, except this time on a full time basis.

3. During the 1977-78 school year petitioner was again employed as a full-time nurse/health teacher.

4. By letter dated April 28, 1978, petitioner was notified that she would not be offered a contract for the 1978-79 school year. (A copy of said letter is attached hereto as Appendix B.)

5. Petitioner requested a statement of reasons and was advised, by letter dated May 19, 1978, that:

> The reason for the non-renewal of your contract is your attendance record while in the employ of the Board of Education.

(A copy of said letter is attached hereto as Appendix C).

6. Petitioner had a Donaldson Hearing on June 13, 1978 and by letter dated June 15, 1978 was advised that the Board had voted to affirm its previous decision. (A copy of said letter is attached hereto as Appendix D).

7. Petitioner's absence record is as follows:

(A) 1975-76, 6 absences.
(B) 1976-77, 12 absences.
(C) 1977-78, 8 absences.

(A copy of petitioner's record is attached hereto as Appendix E.)"

The petitioner contends that her statutory entitlement of ten (10) sick days annually as per N.J.S.A. 18A:30-2 et seq., was violated; that her employment from September 1975 to June 1978 entitled her to thirty (30) total sick days; and further that her absenteeism was less than that to which she was entitled, and therefore could not be excessive.

The respondent contends that petitioner's absentee record during her employment was excessive and detrimental to the educational program of her students. The respondent also avers that the Board was disturbed at the rising absenteeism of its faculty, and has challenged the absentee record of both tenured and non-tenured teachers. A further contention of the Board is that petitioner is not guaranteed any sick days per year, but is guaranteed to be paid up to ten (10) sick days per year.

The applicable statutes are reproduced here in pertinent part:

N.J.S.A. 18A:30-1:

> "Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury....."

N.J.S.A. 18A:30-2:

"All persons holding any .... employment in all local school districts ... who are steadily employed by the Board of Education ... shall be allowed sick leave with full pay for a minimum of ten (10) school days in any school year."

N.J.S.A. 18A:30-3:

"If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years."

N.J.S.A. 18A:30-4:

"In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave."

Petitioner supports her contention by reference to Edith E. Trautwein vs. Board of Education of the Borough of Bound Brook, Somerset County (decided April 28, 1978), wherein the Commissioner disallowed the withholding of an increment for excessive absenteeism and stated, inter alia:

"...There is no question that excessive absenteeism may constitute good cause for withholding a teacher's increment. The record shows quite clearly that the statutes mandate a minimum of ten (10) days for personal illness be allowed to all persons steadily employed in each school year and that during the 1975-76 school year petitioner was absent ten (10) days because of personal illness. N.J.S.A. 18A:30-2 She accumulated nine (9) days for personal illness prior to the Board's action withholding her increment. The Board's determination to count petitioner's absences from February 1975 through March 1976 cannot be supported by law or precedent. To allow the Board to arbitrarily select its own time frame in which to record employee absences would render moot that portion of the statute, ante, which allows employees ten (10) days for personal illness in each school year. ..."

and further stated:

"...Thus, the record clearly discloses that petitioner did not exceed her leave for personal illness entitle-

ment during the 1975-76 school year and that the Board erred by counting days missed in the 1974-75 school year as a basis for concluding that she exceeded her statutory entitlement. ..."

The State Board affirmed the Commissioner's decision in Trautwein, supra, and stated, inter alia:

"...Accordingly, we would base our decision on the proposition that while the petitioner's absences for the twelve (12) months or more preceding the Board's action of April 6, 1976 were unusually numerous and should be considered material, each one of them was legitimate and excused, in the case of petitioner's personal illness, by a certificate from her physician. In the light of this and other relevant circumstances, the absences were not so numerous as to justify the withholding of her increment for the ensuing school year. ..."

Respondent puts forth the position that the law applicable to the instant matter is found in Inez Nettles vs. Board of Education of the City of Bridgeton, Cumberland County, 1976 S.L.D. 555, wherein the Commissioner stated:

"...Petitioner, as a non-tenured teacher was in a probationary period of employment. The Board made its determination not to reemploy her for reasons other than her classroom performance. Boards of education are invested with broad discretionary powers. N.J.S.A. 18A:11-1 One of the most essential of these is the power to determine who shall be employed and reemployed to teach in the public schools in each successive year. That a board may consider elements of a teacher's performance other than classroom performance is made clear by the words of the New Jersey Supreme Court in Donaldson, supra, wherein it was stated that: ..."

and also stated:

"...Absent a showing of abuse of its discretionary powers, the Board's determination is entitled to a presumption of correctness. Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40 (App. Div. 1962). In such matters the Commissioner will not substitute his discretion for that of a local board of education. Nor does he find reason to do so in this instance. Accordingly, the determination of the Board is affirmed. The Petition of Appeal is found to be without merit and is dismissed."

(at page 560)

I quite agree with the respondent that N.J.S.A. 18A:30-2 was created to protect the income of teachers to a limited extent for legitimate absenteeism due to illness or injury, and I share the Board's concern for excessive absenteeism among teachers.

The Commissioner also stated in Nettles, supra, at page 560, that:

> "...It is true that a board may not act in ways which are arbitrary, unreasonable, capricious, or otherwise improper. Cullum v. North Bergen Board of Education, 15 N.J. 285 (1954) ...."

The record is barren in the instant matter of any documentation or contention that the absenteeism of petitioner was not for valid reasons. The prerogative of the Board as per N.J.S.A. 18A:30-4 was not exercised, nor did the total absenteeism of petitioner exceed her statutory entitlement.

I FIND, therefore, that the petitioner's record of absenteeism cannot be construed as excessive, and the Board's action in non-renewing her contract for employment for the reason stated was an abuse of their statutory authority and improper.

I CONCLUDE that the Board is ordered to reinstate petitioner to her position of nurse/health teacher, forthwith, together with full back pay, mitigated by any 1978-79 school year earnings.

This decision does not become final until forty-five (45) days from the agency receipt of the order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the entire record in these proceedings.

8 August 1979
DATE

Ward R. Young
WARD R. YOUNG, A.L.J.

ELAINE DI RICCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by respondent pursuant to the provisions of N.J.A.C. 6:24-1.17(b). The Board therein argues that it considered petitioner's sick leave absences excessive during her probationary periods of employment notwithstanding the fact that such absences did not exceed those to which she was entitled to accumulate pursuant to the provisions of N.J.S.A. 18A:30-1 et seq. The Board maintains that it afforded petitioner all of the essential elements of due process as a nontenured teaching staff member with respect to her nonreemployment, and that its determination in this matter lies within the discretionary authority vested solely in local boards of education pursuant to statutory prescription and applicable case law.

The Commissioner observes that the sole reason for the Board's non-retention of petitioner in the instant matter was because of what it considered excessive absenteeism during her probationary period of employment. The Commissioner is constrained to observe that such absences do not violate the intent of N.J.S.A. 18A:30-1 et seq. and, further, that the Board did not challenge the validity of such absences pursuant to the provisions of N.J.S.A. 18A:30-4. In fact, there is no evidence herein that would indicate that petitioner was formally notified by the Board, prior to the time it determined not to reemploy her, that her absenteeism was a factor affecting her performance and a source of concern in its consideration of continued employment. In this regard the Board, if it so chose, could have required that petitioner undergo a physical examination at any time pursuant to the provisions of N.J.S.A. 18A:16-2 et seq.

The Commissioner finds therefore that the arguments presented by the Board in its exceptions to the initial decision of this matter are without merit.

Accordingly, the Commissioner affirms the findings and determination as rendered in the initial decision and adopts them

as his own. The Board is hereby directed to reinstate petitioner to her position of nurse/health teacher, forthwith, together with full back salary mitigated by any earnings otherwise accrued during the 1978-79 and 1979-80 school years.

COMMISSIONER OF EDUCATION

November 15, 1979

Pending State Board

PETITION OF:	Charles Epps, Jr. v. Board of Education of the City of Jersey City, Hudson County	INITIAL DECISION DKT. NO. EDU 60-2/78

APPEARANCES:

For the Petitioner Charles Epps, Jr., Philip Feintuch, Esq.

For the Respondent Board of Education of the City of Jersey City, William A. Massa, Esq.

BEFORE THE HONORABLE DANIEL B. MC KEOWN, ALJ

Petitioner, employed by the Board of Education of the City of Jersey City, hereinafter "Board," in various teaching staff member assignments since September 1967 lays claim to a tenure status in the position of supervisor and, as such, asserts that the Board has failed to compensate him according to its supervisor's salary policy since 1972-73. Petitioner demands to be assigned to a recognized position of supervisor in the Board's employ and further demands the amount of $38,866 as compensation he alleges the Board has improperly withheld from him since 1972-73. The Board denies petitioner has acquired tenure as a supervisor in its employ and seeks dismissal of the Petition.

The matter was transferred to the Office of Administrative Law on July 2, 1979 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted in the matter on July 25, 1979 subsequent to which the parties filed letter memoranda in support of their respective positions. The record was closed and ready for disposition on August 13, 1979.

It is recognized that the parties had entered a proposed settlement on the record on May 13, 1979 subject to the approval of the Board. The proposed settlement was not ratified by the parties; consequently, the hearing into the merits was conducted on July 25, 1979.

Petitioner was first employed by the Board for the 1967-68 academic year as a classroom teacher. Petitioner continued in that position each academic year thereafter until November 8, 1972 when he was assigned by the Board to the position of coordinator of teacher aides, hereinafter "coordinator", in its Title One program. (C-1)

It is noticed that a Title One program is one of several federally supported education programs at the local school district level under the aegis of the Elementary-Secondary Education Act, P.L. 89-10. Personnel and supportive services acquired through the Title One program are available only to those pupils identified by local school authorities as being educationally deprived. In this case, the Board had its Title One program operating in seventeen of its thirty-three public schools and also operated the program in eleven nonpublic schools located within its municipal boundaries.

Though there is no written job description for coordinator in the record before me, petitioner testified that as coordinator he was responsible for approximately eight teachers and fifty to sixty teacher aides who had been assigned by the Board to the Title One program at the various locations. He explained that his duties in this regard included in-service training, teacher assignments, monitoring, the supervision and evaluation of the eight teachers and fifty to sixty teacher aides, and the submission of recommendations to the Title One director in regard to the continued employment of those persons.

A former Board member testified with respect to the eight teachers petitioner was to have supervised and evaluated that those persons, while fully certified, were employed as "teacher assistants" to assist the regular teacher in whose classrooms those pupils identified as being in need of Title One assistance were located.

Petitioner continued in the position of coordinator, a ten month position, until June 30, 1973. In the meantime, he was notified by letter dated June 21, 1973 that the Board determined to employ him two weeks in that summer as supervisor of teacher aides. (C-2)

Petitioner continued in the position of supervisor of teacher aides for the 1973-74 academic year though no enabling resolution adopted by the Board in this regard is part of the record. It is reasonable to infer petitioner's position of employment for 1973-74 because by letter dated July 2, 1974 petitioner was advised of the following resolution adopted by the Board and certified to a true and accurate copy of the Board's official minutes: (C-3)

"At a meeting of the Board of Education held July 1, 1974, the following resolution was adopted:

"'Be it resolved that the salary of the following named person assigned to Title I - ESEA 1965 be and it hereby is established as indicated below:

"NAME /PETITIONER/	POSITION	SALARY 6/30/74	SALARY 7/1/74
	Supervisor - Teacher Aides	$13,891.00	$14,842.00

Petitioner had to be employed as a supervisor for teacher aides on June 30, 1974 for the salary is shown as such and, more importantly, petitioner testified he was employed as a supervisor of teacher aides for 1973-74. (Tr. 10)

Petitioner testified that the change of title in his position from coordinator of teacher aides to supervisor of teacher aides caused no changes in his duties. He continued in his duties for the eight teachers and fifty to sixty teacher aides as hereinbefore described.

Petitioner was notified by letter dated July 3, 1974 that the Board determined to employ him again for two weeks in August 1974 in the position of supervisor of teacher aides in the Title One program. (C-4)

It is recognized that though the Board appointed petitioner to the position of supervisor of teacher aides, the Title One director testified it was he who created the job description for that position, and it was he who directed petitioner to supervise and evaluate teachers. (P-1A) (Tr. 45)

Though petitioner testified he continued in the position of supervisor of teacher aides for 1974-75, a certified true copy of a resolution adopted by the Board on August 9, 1974 states that the Board appointed him to the position of coordinator of support services for Title One for the 1974-75 academic year. (C-5) Thereafter, the Board adopted another resolution on May 14, 1975 confirming petitioner's salary in the position of coordinator of support services. (C-6)

Again, though the Board appointed petitioner to the position of coordinator of support services, the Title One director updated and promulgated the job description for that position which petitioner followed. (P-3)

Petitioner continued in the position of coordinator of support services through the 1974-75, 1975-76 and 1976-77 academic years, and continued to perform those duties performed as

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Again, though the Board appointed petitioner to the position of coordinator of support services, the Title One director updated and promulgated the job description for that position which petitioner followed. (P-3)

Petitioner continued in the position of coordinator of support services through the 1974-75, 1975-76 and 1976-77 academic years, and continued to perform those duties performed as

coordinator and as supervisor of teacher aides hereinbefore described. Petitioner did testify that as the coordinator of support services he was also responsible for nurses, physicians, and psychologists who provided those kinds of support services to the Title One pupils. (Tr. 11-14)

The Board, on October 12, 1977 adopted a resolution by which petitioner was reassigned

> "***from the temporary position as Coordinator of Supportive Services to the temporary position as Coordinator, Research and Development Title I ESEA *** /effective/ October 3, 1977***." (C-7)

Less than a month later, the Board adopted a resolution on November 9, 1977 by which petitioner was reassigned from the position of Coordinator, Research and Development to the position of Coordinator, Mathematics in the Title One program. (C-8)

Prior to the former resolution (C-7) being adopted, the assistant superintendent advised the Title One Director on September 27, 1977 that all supervisory functions were to be removed from Title One positions of coordinators. (P-7) The assistant superintendent iterated that directive to the Title One Director by memorandum dated October 20, 1977. (P-6) Finally, petitioner was advised of the deletion in his position of coordinator of mathematics of any supervisory or evaluative function he may have had by the Superintendent on November 23, 1977. (P-5)

Petitioner, in support of his assertion he performed supervisory duties for a requisite period of time to have acquired tenure, testified that though his recommendations on continued employment of staff were made to the Title One Director, the Board invariably followed his recommendations. Petitioner testified that between the period 1972 through 1977 when he avers he was performing supervisory duties, he was aware that another category of "supervisors" considered to be regularly employed - as opposed to assignment to a Title One project - existed in the Board's employ and that they were paid at higher levels than he. Finally, petitioner testified that the forms he used for evaluations and his staff recommendations for continued employment went to the Title One Director's office because "***the Board did not recognize the fact we were supervisors***." (Tr. 19)

I have considered the testimony of petitioner, two former Board members called on his behalf, the Title One Director, and the Deputy Superintendent of Schools.

I FIND THE FOLLOWING AS FACT:

1. Petitioner began his employment with the Board in September 1967 as a classroom teacher.

2. Petitioner was appointed to the position of coordinator of teacher aides in the Title One program.

3. Petitioner supervised and evaluated teacher assistants and teacher aides between 1972 and 1977.

4. Petitioner at all times material herein was in possession of a supervisor's certificate. (P-9)

5. The Board did not direct nor assign petitioner to supervise and/or evaluate teaching staff members as defined at N.J.S.A. 18A:1-1.

6. Such supervision and evaluation of teacher assistants was performed solely on the basis of direction petitioner received from the Title One Director.

DISCUSSION OF LAW

The principle applicable in this matter is as stated in Ahrensfeld v. State Board of Education, 126 N.J.L. 543 (1941) and in Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962):

> "***It is axiomatic that the right of tenure does not come into being until the precise conditions laid down in the statute are met***."

The power of the Board to appoint teaching staff members and prescribe rules for their employment is clearly stated in N.J.S.A. 18A:27-1, which provides:

> "No teaching staff member shall be appointed, except by a recorded roll call vote of the full membership of the board of education appointing him."

and in 18A:27-4, which states in relevant part:

> "Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment terms and tenure of employment *** of teaching staff members for the district***." (Emphasis added.)

In the instant matter, petitioner was assigned supervisory duties by the Title One Director, but there was no affirmative act of the Board to make petitioner a supervisor.

CONCLUSIONS OF LAW

Petitioner cannot be viewed as having acquired a tenure status as supervisor within the scope of his certificate as supervisor for two reasons:

1. The Board did not appoint him at any time to a position of supervisor for which a certificate as supervisor was necessary, and

2. Petitioner's employment responsibility of supervising and evaluating "teacher assistants", a title not recognized either in N.J.S.A. 18A, Education Law or in N.J.A.C. 6, Rules and Regulations of the State Board of Education, does not equate with supervision of teaching staff members as defined in N.J.S.A. 19A:1-1.

Finally, N.J.S.A. 18A:28-5 sets forth specific positions of employment to which a tenure status accrues in addition to positions, though not enunciated in the statute, which require a specific certificate issued by the State Board of Examiners. Petitioner's positions of coordinator of teacher aides, supervisor of teacher aides, or coordinator of support services is not a specific position set forth nor was a specific certificate for appointment to such positions required.

I FIND petitioner has failed to establish his claim, by a preponderance of credible evidence, that he has acquired a tenure status of employment as a supervisor in the Board's employ.

The Petition of Appeal is DISMISSED.

This decision does not become final until forty-five (45) days from agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

DATE

DANIEL B. MC KEOWN, ALJ

CHARLES EPPS, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b). He notes that a second submission by counsel for petitioner comprises an attempt to introduce allegedly newly discovered evidence, which the Commissioner will not allow.

Petitioner's exceptions contend, in main part, that petitioner was properly certified as a supervisor and his function as such was known by the Board. The Commissioner does not agree. Nowhere in the record is there a showing that the Board voted to appoint him at any time to a supervisory position for which a certificate to supervise was requisite nor did he hold a certifiable position.

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

The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

November 15, 1979

Pending State Board of Education

PETITION OF: Elia Gold v. Board of Education of the Borough of Hawthorne, Passaic County	)))	INITIAL DECISION DKT. NO. EDU 267-7/78

APPEARANCES:

For the Petitioner, Zazzali, Zazzali & Whipple (Albert Kroll, Esq., of Counsel)

For the Respondent, Jeffer, Walter, Tierney, De Korte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

BEFORE THE HONORABLE BRUCE CAMPBELL, ALJ

I. Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Borough of Hawthorne, hereinafter "Board," avers that she was denied a salary increment for the 1978-79 school year without just cause and in withholding said increment the Board acted improperly. She requests restoration of the increment. The Board avers that its action herein controverted was a legally proper exercise of its authority and discretion.

A hearing in this matter was conducted on December 4 and 5, 1978 at the Passaic County Administration Building, Paterson. Subsequent thereto, Briefs were filed by petitioner and the Board. Thereafter, the matter was transferred to the Office of Administrative Law on July 2, 1979 as a contested matter pursuant to N.J.S.A. 52:14F-1 et seq.

A recital of essential facts follows:

Petitioner is a school social worker who achieved tenure in that capacity upon the commencement of the 1976-77 school year. As a school social worker she is a part of each of the district's child study teams. Petitioner served in the 1976-77 school year and, with appropriate salary adjustment, in the 1977-78 school year. On April 25, 1978, the Board voted to withhold petitioner's salary increment for the 1978-79 school year and petitioner was timely notified of that action. Petitioner sought and was granted an appearance before the Board for the purpose of trying to convince the Board not to take the withholding action. The Board affirmed its earlier decision and the instant Petition of Appeal was filed with the Commissioner

on July 31, 1978. A conference of counsel was held on October 23, 1978 at the Department of Education Building, Trenton, at which time it was agreed that the sole issue, sub judice, was whether or not the Board had acted properly in withholding petitioner's increment. At that time petitioner's employment record and teacher credentials were stipulated.

This concludes the recital of facts.

At hearing, considerable testimony was adduced concerning petitioner's duties, her work load, her performance and her evaluations. In regard to the latter, six exhibits were admitted into evidence (P-1 through P-6). These documents are separate evaluations of petitioner, each made in March of 1978 and each made by the principal of one of the schools to which petitioner was assigned.

It is uncontroverted that the evaluations were, in the main, satisfactory. Central to the controverted issue are questions concerning petitioner's ability to schedule, execute and make written reports on visits to homes of high school pupils referred to the child study team of that school.

Petitioner testified that she is the only child study team member who serves every school in the district. She also testified that she attended a Board meeting in October of 1977 for the purpose of requesting that an additional social worker be hired for the district. (Tr. II - 23, 24.) At that time, an internal memorandum from the child study team chairman to the superintendent of schools under date of October 3, 1977 was introduced into evidence. (P-9) The subject of the memorandum is proposed staff needs of the child study team. All areas, including that of the school social worker, are covered and for each recommendations of additional personnel are made. Petitioner testified further to her assessment of demands upon and staffing needs of the high school child study team. (Tr. II- 29-32)

Testimony relevant to procedures used to log the work of the high school child study team also was adduced. (Tr. I-109; Tr. II- 34-42, 60-97)

II. At this point the hearer is constrained to speak to the matter of record keeping of the high school child study team. From the testimony, ante, it became clear that uncertainty at best and outright confusion at worst stemmed from the absence of a clear statement of case logging procedures and adherence thereto. Although such procedures are not an overriding factor in determining the narrow issue before us, the good of the children coming within the purview of the child study team compels that attention be called to the shortcomings of the system as portrayed to us in the testimony, ante.

It is hoped sincerely that the revelation of such shortcomings at hearing was sufficient to trigger a review and improvement of the system. If such amendatory actions have not taken place, it is appropriate that they now be undertaken and diligently and timely pursued.

III. The narrow issue before us is whether the Board did or did not act responsibly in withholding petitioner's salary increment for the 1978-79 school year. The questions of structure of child study teams and of how the Board chooses to apply its resources to achieve such structure are beyond the scope of the instant matter. It is established law that the schools

of each district are governed, organized and controlled by a local board of education. N.J.S.A. 18A:10-1, 11-1. That a board of education establishes a plan of organization different from one that would be the choice of one or more professional or nonprofessional staff members is no defense against a charge of failure satisfactorily to perform assigned duties. What must be determined is whether petitioner's performance in the 1977-78 school year satisfied the Board and, if not, whether the Board's dissatisfaction was properly grounded. The first consideration is established by the Board's action of withholding petitioner's salary increment for the 1978-79 school year. To establish the second consideration it is necessary to consider not only the evaluation of petitioner by qualified and authorized administrators but also the light shed upon such evaluation by relevant testimony at hearing.

Testimony of petitioner establishes that she entered or caused to have entered in the child study team log the date upon which she made home visits whether or not she had completed the written reports of those visits; that in some instances she could not recall when, if ever, a written report had been completed; and that in some instances as much as five months elapsed between completion of the home visit and completion of the written report of the visit. (Tr. II-64-106.)

Unrefuted testimony of the high school principal establishes that all members of the child study team on September 9, 1977 were instructed by him to update and keep current all open files; that he had an evaluation meeting with petitioner on April 4, 1978; that he told petitioner at the evaluation meeting that she still needed to prepare and update social case histories, such being essential to keeping child study team records current; and that he did not at that time specifically mention the possibility of a salary increment withholding. (Tr. I- 104-110.)

The controlling statute here is N.J.S.A. 18A:29-14 which, in pertinent part, reads as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a 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 an action to the commissioner***."

Based upon the foregoing and a thorough review of the record, I FIND:

1. Petitioner was aware on September 9, 1977, at the latest of the requirement to keep child study team records, including the social histories for which she alone was responsible, up to date.

2. Social histories of a number of pupils referred to the child study team during the 1977-78 school year were late or not submitted at all.

3. Petitioner was again made aware of the social history report requirements upon her in the April 4, 1978 evaluation meeting of petitioner and the high school principal.

4. Upon recommendation of its administrative staff, the Board voted on April 25, 1978 to withhold petitioner's salary increment for the 1978-79 school year pursuant to the provisions of N.J.S.A. 18A:29-14.

5. Petitioner was timely notified of the Board's action pursuant to the provisions of N.J.S.A. 18A:29-14.

6. Petitioner was granted an opportunity to meet with the Board for the purpose of attempting to persuade the Board to rescind the withholding action. The Board chose not to do so.

Based upon the foregoing, I CONCLUDE that petitioner has failed to show, by a preponderance of the credible evidence, her entitlement to the controverted salary increment.

Accordingly, the Petition IS DISMISSED.

This decision does not become final until forty-five (45) days from agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

21 SEPTEMBER 1979
DATE

Bruce Campbell
BRUCE CAMPBELL, ALJ

Receipt Acknowledged:

DATE

AGENCY HEAD

Mailed to Parties:

9/27/79
DATE

Ronald L Buck
OFFICE OF ADMINISTRATIVE LAW

ams

ELIA GOLD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and ad5pts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

November 16, 1979

PETITION OF: Robert Holden v. Board of Education of the Township of Hamilton, Mercer County) INITIAL DECISION

DKT. NO. EDU 270-8/78

APPEARANCES:

For the Petitioner Robert Holden, Greenberg & Mellk (Arnold Mellk, Esq., of Counsel)

For the Respondent Board of Education of the Township of Hamilton, Henry F. Gill, Esq.

BEFORE THE HONORABLE BRUCE CAMPBELL, ALJ

Petitioner Holden, a tenured teacher in the employ of the Board of Education of the Township of Hamilton, Mercer County, hereinafter "Board," contests the determination of the Board to withhold his salary increment and adjustment increment for the 1978-79 school year. He alleges that the action taken by the Board in this regard was in violation of N.J.S.A. 18A:29-14 and denied him his constitutional right to procedural due process.

The Board disagrees and asserts that petitioner has been accorded all rights due him and that its decision to withhold petitioner's salary incremen and adjustment increment for the 1978-79 school year was in all regards proper.

This matter was submitted to the Commissioner of Education for adjudication on the pleadings, exhibits, Briefs, a Motion for Summary Judgment by petitioner and transcript of oral argument on the Motion conducted on January 30, 1979 at the State Department of Education, Trenton. It subsequently was transmitted to the Office of Administrative Law on July 2, 1979, as a contested matter pursuant to N.J.S.A. 52:14F-1 et seq. The facts are as follows:

1. Petitioner is a teacher with a tenured status in the employ of the Board.

2. Petitioner was notified by his building principal on May 9, 1978, that neither a salary nor an adjustment increment would be recommended for him for the ensuing academic year because of poor teaching performance.

3. On June 17, 1978, respondent was informed by certified mail that the Board would meet on June 19, 1978 for the purpose of making decisions concerning the withholding of salary increments of certain teaching staff members, including petitioner. By that same communication, petitioner was advised that he had the right to request that any discussion by the Board of the actions affecting him be held in public session rather than private; that formal Board action would be taken at the Board's regular meeting of June 21, 1978; and that the motion concerning withholding would be presented in such a way that his name would not be made public.

4. On June 29, 1978, petitioner was informed by certified mail that the Board had moved at its meeting of June 21, 1978 to withhold his salary increment and adjustment increment for the 1978-79 school year. By that same communication, pursuant to the provisions of N.J.S.A. 18A:29-14, petitioner was apprised of ten reasons, all related to petitioner's performance as a teaching staff member, upon which the Board had based its decision.

This concludes the recital of facts.

Petitioner's Appeal does not attack any of the reasons cited by the Board as the basis for its action nor does the Appeal attempt to refute the documents the Board puts forth in substantiation of the reasons. Rather, it is the position of petitioner that "the failure of the Board to apprise him of the reasons presented for the withholding of his salary increment and adjustment prior to formal Board action and the commensurate failure of the Board to provide him with an opportunity to be heard with regard thereto prior to formal Board action deprived him of due process of law." (Emphases in text; Petitioner's Brief, at p. 3)

Petitioner's legal argument asserts that he has been denied a property interest as that term is defined in Board of Regents v. Roth, 408 U.S. 564 (1972), 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). He also avers it is an interest to which he has a legitimate claim of entitlement pursuant to N.J.S.A. 18A:29-14, which, in pertinent part, reads as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a 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.***"

Petitioner argues further that several other decisions, principally Nicoletta v. North Jersey District Water Supply Commission, 70 N.J. 145 (1978), buttress his claims.

Conversely, the Board argues that it clearly has the right to withhold an increment from a teaching staff member pursuant to N.J.S.A. 18A:29-14 for inefficiency or other good cause and that the granting or withholding of an increment does not involve a constitutionally protected property right.

Petitioner cites Roth, supra, and asserts that he had a property interest in his salary increment and adjustment increment for the 1978-79 school year as that interest is interpreted therein. Roth, supra, at 577; 92 S. Ct. at 2709. (Petitioner's Brief at p. 5.)

The Board argues against petitioner's assertion by citation of Quay et al. v. Board of Education of the Township of Haddon, Camden County, 1976 S.L.D. 118. Here the Commissioner of Education examines Roth, supra, as it applies to increments Petitioner Quay asserted Roth entitled him to as a constitutionally protected property right and finds the assertion improperly grounded. At 122 the decision states:

> "Petitioner's assertion that the Court's decision in Roth, supra, entitled him to the controverted salary increment as a constitutionally protected 'property right' is improperly grounded. In Roth the Court said:
>
> > '***Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of settlement to those benefits.***' (92 S. Ct. at 2709)
>
> "The applicable 'state law' herein (N.J.S.A. 18A:29-14) with relevance to petitioner's claim makes it clear that a salary increment must be earned and that it may be withheld." (Respondent's Brief at pp. 5-6.)

Petitioner also cites Nicoletta v. North Jersey District Water Supply Commission of the State of New Jersey, et al. 70 N.J. 145 (1978). At issue in Nicoletta, supra, was the termination of a vested employment right. I see nothing in Nicoletta that compels comparison with the instant matter.

I FIND the Commissioner's analysis, ante, reasonable, compelling and dispositive of the property right argument raised here. Cf. Stuart Williams v. Board of Education of the Township of Teaneck, Bergen County, 1977 S.L.D. 1008, aff'd State Board of Education 1978 S.L.D. _____ (decided February 1, 1978).

Next I must consider petitioner's due process argument. It is uncontroverted that petitioner was evaluated by appropriately certified personnel during the 1977-78 school year. Nor is it controverted that petitioner was informed by the Nottingham Middle School principal on May 9, 1978 that neither an increment nor salary adjustment would be recommended for him for the 1978-79

school year because of poor teaching performance. It is established law that it is reasonable for school boards to require favorable reports of a teacher's performance as a condition precedent to increases in salary, and to withhold increases in salary when said performance reports are less than favorable. Kopera v. West Orange Board of Education, 1958-59 S.L.D. 96, aff'd State Board of Education 98, remanded to Commissioner 60 N.J. Super. 288 (App. Div. 1960), decision on remand 1960-61 S.L.D. 57, aff'd Superior Court (Appellate Division) 1961-62 S.L.D. 223. The recital of facts, ante, shows no failure to comply with the provisions of N.J.S.A. 18A:29-14. In the absence of an established property right, I FIND no abuse of the Board's discretionary powers under law in the instant matter.

Based upon the foregoing and having thoroughly reviewed the record herein, I CONCLUDE that petitioner's prayer for a Judgment that he is entitled to the controverted salary increment and adjustment increment is without basis.

Accordingly, the Petition IS DISMISSED.

This decision does not become final until forty-five (45) days from agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

18 SEPTEMBER 1979
DATE

Bruce Campbell
BRUCE CAMPBELL, ALJ

ROBERT HOLDEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner argues that the Judge improperly relied on Quay, supra, because the decision reached in that matter is incorrect. The Commissioner does not agree for the reasons as stated in Quay.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

November 16, 1979

IN THE MATTER OF THE :

BOARD OF EDUCATION OF THE :

CITY OF TRENTON, MERCER : INITIAL DECISION

COUNTY. :

_____:

For the Petitioner, John J. Degnan, Attorney General
(Susan P. Gifis, Esq. and Alfred E. Ramey, Jr., Esq., Deputies Attorney General, of Counsel)

For the Respondent, Merlino, Rottkamp & Grillo
(Robert B. Rottkamp, Jr., Esq., of Counsel)

For the Intervenors, Education Law Center, Inc.
(Jacquelyn R. Rucker, Esq., of Counsel)

This matter was opened by the issuance of an Order to Show Cause by the Commissioner of Education on February 5, 1979, to the Board of Education of the City of Trenton, hereinafter "Board," requiring the Board and its Superintendent to show cause why the Commissioner should not exercise his broad supervisory powers to take appropriate action to insure that a thorough and efficient system of public schools be operated within the local district in accordance with the mandate of Article VIII, Section 7, Paragraph 1 of the New Jersey Constitution, as well as general and specific statutory requirements in Title 18A, Education.

Specifically, the Order alleges, inter alia, the failure of the Board to: (1) establish and maintain adequate programs in bilingual education for all pupils enrolled in the public schools who possess limited English-speaking ability; (2) provide adequate programs of special education, including facilities, for all handicapped or potentially handicapped pupils; (3) adopt and implement an appropriate affirmative action plan for the school district; (4) revise and implement an approved school budget for the 1978-79 school year in order to avoid a fiscal deficit at the close of the school year; (5) adopt and implement efficient administrative procedures for the care, management and operation of the public schools within its charge, and (6) employ and assign adequate, appropriately certified teaching staff members based upon the instructional needs of the district and each school within the district.

In addition, the Order asserts that the process of evaluation of the district, pursuant to the provisions of N.J.S.A. 18A:7A-10 and other relevant school laws, has resulted

in the identification of the Board's failure to: (a) provide opportunities for exceptionally gifted and talented pupils (N.J.A.C. 6:8-3.5); (b) ensure safe, adequate and suitable school facilities (N.J.A.C. 6:8-4.8); and (c) have approved, employ and assign qualified aides (N.J.A.C. 6:8-4.3 and 6:11-4.9).

Hearing in this matter was conducted on March 5, 6, 13, 15 and 21, 1979, by the Assistant Commissioner of Education, Division of Controversies and Disputes, at the request of the Commissioner and with the consent of the Director and Chief Judge of the Office of Administrative Law.

Prior to the first day of hearing, a Notice of Motion to Intervene with Brief was filed pursuant to N.J.A.C. 6:24-1.7 and R.4:33-1, 2 by the Puerto Rican Congress and Council of Puerto Rican Organizations, requesting leave to intervene in that portion of the proceedings relating to the Board's alleged failure to provide adequate programs in bilingual education to pupils enrolled in the district's various public schools who possess limited English-speaking abilities. The Puerto Rican Congress, a nonprofit organization with its principal office in Trenton, is an organization which includes in its membership Puerto Rican parents who are residents of the State of New Jersey and have children enrolled in the public schools of Trenton, as well as other school districts of the State. The Council of Puerto Rican Organizations is an association, with offices in Trenton, which serves as the representative body of twelve Trenton-based associations whose members include Puerto Rican parents who are residents of the City of Trenton and have children enrolled in the district's public schools. Both of these organizations have primary interests in furthering the improvement of educational programs and assurance of equal educational opportunities for all pupils with limited speaking abilities in English and particularly for Puerto Rican and other Spanish-speaking pupils. Oral argument was heard on the Motion to Intervene on the first day of hearing, March 5, 1979. Assurances were given by the proposed intervenors that no delay in the proceedings would be occasioned by their participation if such permission were granted. Clearly, the interests of the proposed intervenors in this instance overlap the interests of the State. They have, however, demonstrated in a timely manner a substantial and specific interest, the disposition of which in the instant matter could establish a precedent which could impede the assertion of such interests in a subsequent, separate proceeding. Also the principle of judicial economy supports the granting of the Motion, in order to avoid litigation of the identical issue in a separate petition of appeal to the Commissioner. For the foregoing reasons permission to intervene in the aforementioned specific issue of the proceedings was granted by the Assistant Commissioner. Yi et al. v. Burke et al., Docket No. A-540-76 Order allowing Intervention New Jersey Superior Court, Appellate Division, May 25, 1977, Stay dissolved July 12, 1977

Subsequent to the close of the hearing, the State, the respondent Board and the Intervenor filed Briefs. The Assistant Commissioner requested and received additional exhibits which consisted of minutes of the special meeting of the Trenton Board of Education held July 7, 1977 (P-56), and the minutes of the regular meetings held August 23, 1977 (P-57) and February 27, 1979 (P-58). Each of these exhibits contains discussion by the Board of its proposed affirmative action plan. The Assistant Commissioner also requested and received the bound volumes of the Board's official minute books covering the period of time encompassed by the record of these proceedings.

The State presented thirteen witnesses and a large number of documents were received and marked in evidence. At the conclusion of the presentation of the State's case, the respondent Board offered and argued a Motion to Dismiss and, in the alternative, a Motion for Summary Judgment in its favor. Both Motions will be considered, post. The Board did not present any witnesses nor offer any other evidence in its behalf.

The issues dealt with in these proceedings shall be considered seriatim in the order in which they were presented during the hearing. A recitation of the overall chronology of events is essential for an understanding of the case.

During 1977 the Department of Education received a series of informal complaints from citizens regarding the operation of several educational programs in the Trenton School District. More importantly, several bureaus and offices within the Department, which are charged with supervisory functions of specific types of educational programs offered by local school districts, reported to the Commissioner that there appeared to be serious deficiencies in the school district. The Mercer County Superintendent of Schools furnished similar information to the Commissioner. Accordingly, the Commissioner directed more intensive monitoring, investigation and review of the operation of the Trenton school system during the 1977 calendar year.

As the result of this review, the Department issued a report under date of January 31, 1978 (P-1) which specified numerous deficiencies in the operation of programs of special education for handicapped pupils, the local and State supported bilingual education program, the non-standard English compcnent of Title I of the federal Elementary and Secondary Education Act (E.S.E.A.), the E.S.E.A. Title VII Bilingual Education program, and the E.S.E.A. Title I program. This report also contained the results of an examination of the district's fiscal records and practices for the period July 1, 1977 through November 30, 1977. The findings of this fiscal review went beyond the issues of the district's special education, bilingual education and E.S.E.A. Title I programs. A major finding of the fiscal review was a

projected deficit of $670,542 by June 30, 1978, in the Board's current expense account, as the result of projected revenue shortages of $305,066 and projected overexpenditures totaling $365,477 (P-1).

The deficiencies specified in this report were of a serious nature, but are too numerous to duplicate here. It suffices to say that this report documented ample deficiencies to enable the Commissioner to take corrective action by requiring the Board to submit a remedial plan to correct deficiencies and comply with existing statutory requirements and regulations. N.J.S.A. 18A:7A-14

The Board submitted a response under date of February 10, 1978 to the Department's report of January 31, 1978 (P-1). A remedial plan was then submitted to the Commissioner on February 16, 1978. Both of these documents, the Board's response and remedial plan, were reviewed by the Commissioner and staff members of the Department of Education.

The Commissioner addressed a communication dated March 8, 1978 (P-59) to the Superintendent of Schools, with copies to all Board members, as well as the Mercer County Superintendent and the assistant county superintendent, enclosing a nineteen page document which was the Department's response as the result of the review of the Board's documents submitted on February 10 and 16, 1978. (P-60) The Commissioner's letter advised the district that its previous submissions were not totally adequate and further notified the district that he had appointed a special task force of Department and county office staff to monitor and assist the school district's efforts to complete and implement an acceptable remedial plan. Although the Commissioner's letter of March 8, 1978, and the Department's response of the same date were not offered in evidence, these documents are in the official files of both the Board and the Department and are well known to the parties. Accordingly, judicial notice is taken of both documents, the parties having been duly notified.

On March 24, 1978 the Board submitted to the Commissioner its required remedial plan with a letter of transmittal (P-2). The letter states that the remedial plan was developed by the district's administrative staff with the advice and assistance of the Commissioner's task force and was approved by the Board at a public meeting held at 8:00 p.m. on Wednesday, March 22, 1978. (P-2) This remedial plan is a forty-two page document which sets forth specific proposed actions to remedy reported deficiencies in the Board's special education, bilingual education and E.S.E.A. Title I programs, as well as proposed remedies for the 1977-78 budgetary problems. Attached are two addenda, one comprising lists of pupils with their scores on the

English language proficiency test and oral English rating sheet, and the other two consisting of a three page proposed long-range plan for the bilingual education program.

Although the Commissioner's task force was withdrawn from the district during October 1978, the district's activities were still the subject of continuous monitoring by staff from the Department and county office.

The subsequent monitoring and on-going evaluation process led the Commissioner to the conclusion that the Board had failed to effectuate fully the terms of the remedial plan in accordance with the planned time schedule, and to cure certain other long-standing deficiencies. Accordingly, the Commissioner issued the herein Order to Show Cause, which was returnable March 5, 1979. N.J.S.A. 18A:7A-14

SPECIAL EDUCATION PROGRAMS FOR HANDICAPPED CHILDREN

The Board's remedial plan (P-2) proposes actions to correct fourteen deficiencies, some of which are multiple, which were specified in the Department's report of January 31, 1978 (P-1). The Board's proposed measures for remediation are set forth in pages 1 through 18 of its plan (P-2). Both the State's list of deficiencies and the Board's proposed remedial action are too extensive to be duplicated herein. It suffices to say that a number of the deficiences were corrected and the remaining major deficiencies are those enumerated in the Show Cause Order. It is these three major deficiencies which shall be considered next.

One of the major deficiencies in special education concerns the elimination of the backlog of the number of pupils requiring review, classification and the determination of educational needs.

One of the State's witnesses was the director of the Bureau of Pupil Personnel Services, Branch of Special Education, Division of School Programs. This witness served as a member of the team for the Branch of Special Education and Pupil Personnel Services which visited the Trenton School District in May 1977 and prepared a comprehensive evaluation of the district's program of special education. (Tr. I-8)

In November 1977 he again visited the district to review and evaluate the district's response to the Department's report of the May 1977 evaluation. During March 1978 this witness was assigned to the Commissioner's task force, in which capacity he assisted the school officials in the Trenton district in the preparation of the remedial plan. Until the task force was withdrawn in October 1978, he assisted the district's personnel in the implementation of the remedial plan. During this period from March to October 1978, he spent an average of two to three days per week in the school district. (Tr. I-9) On

November 16, 1978 he visited certain schools in the district, and during February 1979 he again spent three days in the district. (Tr. I-9)

The director testified that the school district did not have properly operating resource rooms in its respective schools for handicapped children for whom such facilities were intended, even though he and a supervisor from the county superintendent's office had intervened and visited the five junior high and one senior high schools with a local school official in order to locate adequate classroom space. (Tr.I-23-25) He testified that he had advised the senior administrators, the director of special pupil services and the Board regarding inadequacies of classroom space for resource rooms. (Tr. I-50) At that time, the district had sixteen resource rooms, two in each of the five junior high schools and six in the senior high school. (Tr. I-44)

He further testified that he had a conference during his February visit with the district's director of special pupil services and a representative of each of the district's child study teams (CST). During this conference, the representatives from each CST filled out a form indicating the number of cases of individual pupils requiring a review and evaluation which were pending at that time. These nine forms (P-3) show that a total of 331 cases were pending before the CSTs. He defined this backlog as consisting of both new referrals to the CSTs, as well as required reevaluations of pupils who had been classified as handicapped three years earlier. State Board regulations require a reevaluation after three years for all pupils classified as handicapped. N.J.A.C. 6:28-1.6(p) The regulations also provide that each evaluation and classification, if so determined, must be completed within 60 days of the referral of the pupil to the CST. (N.J.A.C. 6:28-1.6(b); Tr. I-52) The witness also testified that this backlog of 331 cases did not include those classified handicapped pupils for whom an individual educational plan had not yet been developed. (Tr. I-51; N.J.A.C. 6:28-1.8)

In the judgment of the director, this backlog was considerably beyond what could be considered normal from the on-going daily referral of pupils for CST screening. (Tr. I-55) He also testified that during the past school year the CSTs processed only pupils referred as emergency cases and spent the year performing required reevaluations of previously classified handicapped pupils. (Tr. I-76) He testified that members of the district's department of special pupil services informed him that the backlog of 331 pupils represented the most serious cases and that less serious cases, which nevertheless would require CST services, were not even being referred by teaching staff members because of their awareness of the backlog of pupil cases. (Tr. I-64-65).

The director also provided extensive testimony in regard to the need for more personnel for the total program of special education in the Trenton district, as well as for more thorough supervision of the program. (Tr. I-27-37, 60-66, 70-71)

In summary, he testified that there was a continuing need to fill vacancies in the existing CSTs, which at the time of the hearing consisted of two vacancies for school psychologists and four for learning disabilities teacher-consultants (LDT-C). He testified that the district had 12 CSTs in operation and he believed that a thirteenth had been formed for the precise function of evaluating pupils who were referred because they were being reviewed by a committee of the Board which dealt with pupil discipline cases. He testified regarding a number of suggestions he had made to the district's personnel office and other administrators, including a memorandum to the Superintendent (P-5) for recruiting candidates for special education positions. He even drafted a suggested advertisement for the New York Times (P-4) for this purpose.

The director testified that he had recommended the employment of CSTs during the summer months, the paying of extra salary to CST personnel for extended hours of service and the contracting of personnel on a part of full-time basis in order to eliminate the backlog of pupil cases and to expedite the completion of individual educational plans for handicapped pupils.

The director also testified that in February 1979 he discussed with personnel from the district the adequacy of an allocation of approximately $800,000 in the proposed 1979-80 school budget for tuition payments for special education pupils placed in schools outside the district. From such discussions he concluded that such amount would be sufficient for the handicapped pupils who were in out-of-district schools at that time. It was his judgment that this proposed budgetary allocation would be inadequate if the completion of the backlog of cases resulted in an increase in the number of pupils classified and placed in programs outside the district. (Tr. I-38, 39)

The Department of Education conducts a program which awards grants to local school districts for assistance in the education of handicapped children. Funds from federal sources are allocated under Part B of P.L. 94-142, the Education of All Handicapped Children Act. Instructions and guidelines, with application forms, were distributed to all school districts in March 1978 for the preparation of grant applications for the 1978-79 school year. (P-52)

The guidelines advised districts to estimate the amount of their entitlement by multiplying the average of the number of handicapped children reported on October 1, 1977 and February 1, 1978 by the tentative amount per child of $100 (P-52). The Trenton district's October 1, 1977 report showed a total of 2069

handicapped children (P-53) and the February 1, 1978 report indicated a total of 2017 (P-54). The average of 2043 at $100 per child results in a tentative entitlement of $204,300. The Board's application, by contrast, requested a grant totaling $59,051.47 for the 1978-79 school year, thereby leaving a balance of $145,248.53 which could have been requested to meet critical special education needs in the Trenton public schools (P-55). According to the guidelines, this amount of $145,248.53 could be utilized for the identification and evaluation of handicapped children, the provision of educational services for first priority children, and the employment of additional personnel and in-service training in order to increase the level, intensity and quality of special education services. (P-52, at p. 15)

The Department of Education's coordinator of the grant program for funds under Part B, P.L. 94-142, testified in regard to the grant program, and the processing of the application submitted by the Trenton school district. (Tr. IV-161-178) The coordinator testified that the applications for Part B funds for 1978-79 were to be submitted by May 1, 1978, but the Board's application was received in his office in November 1978. (Tr. IV-166-167) The covering letter of one copy of this application, addressed to the supervisor of child study in the Mercer County Superintendent of School's office, is dated October 3, 1978. (P-55)

The coordinator testified that he had returned the application to the district for corrections and technical information, but that he did not question why this district or any district did not apply for the full amount of entitlement, because he would not usually have knowledge regarding the special education needs within the district. (Tr. IV-175-177)

The hearing examiner, having carefully reviewed all of the evidence addressed in regard to the alleged deficiencies in the Board's program of special education finds that:

1. The Board failed to provide adequate professional personnel and services for the timely identification, evaluation and classification of handicapped pupils, including required reevaluation of previously classified pupils, as required by statute and regulation. N.J.S.A. 18A:46-6 et seq.; N.J.A.C. 6:28-1.3(b), 1.5(a), 1.6(b) and 1.6(p)

2. The Board failed to develop and implement individual educational plans for all classified handicapped pupils. N.J.A.C. 6:28-1.8

3. The Board failed to provide adequate resource rooms and comprehensive programs for handicapped pupils who do not require placement in self-contained classes. N.J.A.C. 6:28-2.2(c)(1)(iii)

4. The Board failed during the 1978-79 school year to avail the school district of funds for special education purposes in the amount of $145,248.53, even though critical needs in this area had been continually evident, as shown by the Board's own remedial plan. (P-2, P-55)

5. Because of the significant backlog of pending cases within the district, teaching staff members were not referring potentially handicapped pupils to CSTs during the 1978-79 academic year.

6. There has been a lack of adequate supervision of the district's total program of special education, which is a causative factor in its failure to remedy all deficiencies in this particular program. The record does not support a conclusion that this state of affairs may be caused by the inefficiency or incompetency of one or more professional staff members. Rather, the problem appears to be the result of inadequate staffing and lack of proper organization. A complex program such as special education, which is subject to numerous detailed regulations, requires adequate numbers of experienced administrative and supervisory staff who have clear lines of authority and responsibility, as well as adequate budgetary resources for sufficient professional teaching staff members, materials of instruction, supplies, and adequate facilities.

It is clear from the record in the instant matter that the above findings constitute deficiencies of such severity that the Commissioner and State Board of Education will be required to order corrective action. N.J.S.A. 18A:7A-15, 16 Specific recommendations for such corrective action will be set forth at the conclusion of this report.

AFFIRMATIVE ACTION PLANS

Local boards of education in this State are required by statute and regulation to adopt affirmative action plans with regard to both school and classroom practices and employment and contract practices. N.J.S.A. 18A:36-20, N.J.S.A. 10:5-1 et seq., N.J.A.C. 6:4-1.3 et seq. The pertinent regulations were adopted on May 7 and became effective May 20, 1975.

One of the allegations in this case is that the Board has failed to adopt and implement an affirmative action plan, approved by the Department pursuant to N.J.A.C. 6:4-1.3 et seq. Four witnesses testified on behalf of the State: the Director of the Department's Office of Equal Educational Opportunity (OEEO), the coordinator responsible for reviewing the employment and contract practices portion of school district affirmative action plans for the OEEO, a consultant responsible for reviewing the school and classroom practices portion of affirmative action plans, and the school district's affirmative action officer.

A letter from the then acting superintendent to the Director of the OEEO, dated September 17, 1975 (P-43), requested an extension of time for the filing of the district's affirmative action plan for school and classroom practices, which was due, as the letter states, on September 17, 1975. A reply was sent to the acting superintendent by the Director of the OEEO, under date of September 26, 1975 (P-44), granting an extension for filing until October 20, 1975.

The Board approved an affirmative action plan for school and classroom practices on October 14, 1975, which was forwarded to the OEEO Director with a letter of transmittal dated October 17, 1975, signed by the acting superintendent and the then affirmative action officer. (P-45)

The acting superintendent also requested an extension of time for the filing of the district's affirmative action plan for employment and contract practices, which was to be filed by November 16, 1975. This request was contained in a letter addressed to the Director of the OEEO, with a copy sent to the Commissioner. (P-41) The requested extension was granted by the Director until January 5, 1976, in a letter dated December 10, 1975 from the Director to the acting superintendent. (P-40)

The Board approved an affirmative action plan for employment and contract practices on February 19, 1976, which was sent to the Director by the present Superintendent with a covering letter dated March 31, 1976 (P-42).

The Board's affirmative action plans for school and classroom practices, which it had approved on October 14, 1975, and for employment and contract practices (P-46), which it had approved on February 19, 1976 and submitted on March 31, 1976, were reviewed by the staff and Director of the OEEO.

Because both plans were deficient in certain aspects, neither was approved by the Department. A letter dated January 27, 1976, was sent to the then acting superintendent by the Director, advising the district that the OEEO had completed its review of the school and classroom practices plan. This letter (P-48) included a checklist which had various items marked denoting that insufficient information had been furnished. A similar letter, including a checklist, was sent to the present Superintendent by the Director, under date of June 3, 1976, in regard to the Board's employment and contract practices plan. (P-47)

The district's affirmative action officer testified that the process of revising the Board's two proposed plans, which had not been approved, was begun shortly after receipt of the two checklists from the Department (P-47, 48), which indicated required changes and modifications. According to the affirmative action officer, the necessary revisions were all completed in July 1977. (Tr. IV-95)

The revised plan for employment and contract practices was considered by the Board at a special meeting held July 7, 1977. The minutes disclose that at least one Board member urged rejection of the proposed plan on the grounds that it contained a quota or percentage plan for employment, which, according to this Board member, had been held to be illegal by the New Jersey Supreme Court. After considerable discussion of this proposed plan by the Board, a motion to approve it was defeated by a vote of six to two with one member absent. (P-56)

The affirmative action officer testified that he again revised the employment and contract practices plan following the July 7, 1977 special meeting, and the revised plan was considered by the Board at its regular meeting held August 23, 1977. At this meeting a motion was made to approve the affirmative action plan which was first submitted in December 1975, presented again in February 1976, revised and presented in June 1977, presented at the last meeting of the Board, and now re-presented with the exclusions of lines 11, 12 and 13 on page 5. This motion was seconded and discussed and then was defeated by a roll call vote of four ayes and four nays, with one Board member absent. (Tr. IV-96; P-57, at p. 27) The Board then approved a motion, by a five to one vote with one absention and with two members absent, to advise federal and State authorities that it was unable to agree on an affirmative action plan. (P-57, at pp. 27, 28)

The Board's affirmative action officer testified that he reported the results of the Board's August 23, 1977 meeting to the Director of the OEEO. (Tr. IV-109) Thereafter, the Superintendent addressed a communication dated September 16, 1977 to the Director. This letter is quoted in its entirety as follows:

> "It is with deep regret that I must report that I have been unable to pull my Board together for the purpose of supporting an Affirmative Action/Desegregation Plan.
>
> "We, at the school system, under my administration, have tried everything conceivable and perhaps at this juncture you and the Commissioner of Education, or his designee, should meet with the Trenton Board of Education since we are the only system which has not complied.
>
> "If there is anything we have left undone, I would be most happy to join with you in attempting that." (P-7)

The Board's affirmative action officer also wrote to the Director under date of October 21, 1977, in which he discussed the seriousness of the current status of the Board's affirmative action plan. In this letter he referred to a meeting with the Director during which she had indicated her intention to bring this matter to the attention of the Commissioner. He advised her that he would be unable to submit a written report to the Board, which it had requested, explaining the Board's status of noncompliance, until the Director informed him regarding the Department's position in this matter. (P-50)

Several witnesses testified that a meeting was held on December 8, 1977 at the request of the Commissioner between Department staff, members of the Trenton Board and staff members from the district. The Deputy Commissioner presided at this meeting, and the Director of the OEEO was present with several of her staff members, as was the Mercer County Superintendent of Schools. The Superintendent of the district, the affirmative action officer and Board members Lloyd, Potkay, and McLeod were present, as well as several other persons. At this meeting the representatives of the school district were told that an acceptable Board-approved affirmative action plan for both school and classroom practices and employment and contract practices would have to be submitted to the Department. (Tr. I-85, 86; III-67, 68; IV-99-110) The school district representatives were advised that the OEEO would work with them in the development of the plan, and a subsequent meeting was held on December 21, 1977 between the Board's affirmative action officer, the OEEO consultant and two other OEEO staff members to discuss the major components of the Board's plan and to arrange a process for approval of the Board's plan in stages after it was revised. (Tr. III-67, 68)

Subsequent to these two meetings, a letter was sent to the Board's affirmative action officer by the OEEO Director, dated January 24, 1978, which summarized the agreement reached between the Department and the Board at those meetings. (P-6; Tr. I-89, 90; III-69, 70; IV-100) The Board was required to submit a conditional or tentative plan by April 3, 1978, which was not done. (Tr. III-70)

The Board's affirmative action officer testified that he completed the required revisions in the affirmative action plan in May 1978, which he sent to each Board member with a copy of the Department's letter of January 24, 1978 (P-6) and a memorandum indicating that all of the instructions in the letter had been complied with. (Tr. IV-100, 104) He further testified that he twice asked the president of the Board to place the revised plan on the agenda of June and July Board meetings. (Tr. IV-101, 103) The proposed plan was not placed on a Board meeting agenda until February 27, 1979, at which meeting a motion

was made and carried by a vote of six to one with one abstention, to table the plan until the March meeting. The president advised the affirmative action officer that he was to furnish all Board members with copies of the affirmative action plans from all school districts in Mercer County. (P-58 at p. 16)

The OEEO consultant who worked with the school district testified that the timetable agreed to at the December 8 and 21 meetings was realistic and that none of the representatives from the district voiced any objection to that timetable which was set forth in the letter of January 24, 1978. (P-6; Tr. III-74, 75)

Testimony of the OEEO Director, and the other witnesses, makes clear that the Department had a great deal of contact with and provided substantial assistance to the Trenton school district in an effort to secure adequate Board-approved affirmative action plans. (Tr. I-84, 85) The Board's actions during this period of almost four years must be characterized as more than refractory or recalcitrant; it more accurately may be described as a cavalier attitude, insofar as the affirmative action requirements are concerned.

The hearing examiner finds that the Board indeed failed to adopt and implement an affirmative action plan, approved by the Department, pursuant to N.J.A.C. 6:4-1.3 et seq.

The hearing examiner is aware that on August 21, 1979, while this report was in preparation, the OEEO was able to approve affirmative action plans for school and classroom practices, as well as employment and contract practices, for the district. This information was furnished by letters addressed to the Superintendent from the OEEO Director dated August 21, 1979 (P-61, 62), of which judicial notice is hereby taken. Notwithstanding this fact, the implementation of both of these plans is of major concern to the Department, particularly in view of the district's past performance in regard to affirmative action plans.

The hearing examiner finds that this deficiency has been of such magnitude to warrant corrective action by the Commissioner and the State Board, specifically to insure a timely, efficient and complete implementation of both portions of the affirmative action plan. N.J.S.A. 18A:7A-15, 16

The hearing examiner will set forth recommendations for corrective action in this regard at the conclusion of this report.

SCHOOL FACILITIES

The Order to Show Cause in this case alleges failure on the part of the Board to ensure the provision of safe and suitable school facilities consistent with statutory and regulatory requirements.

The chief safety consultant of the Bureau of Facility Planning Services, Division of Field Services, testified in regard to inspections he had performed and reports he had prepared in 1976, 1977 and 1979, with respect to schoolhouses in the Trenton school district. This witness had participated in an inspection of six schoolhouses in 1976, each of which had previously been recommended for abandonment. The results of this inspection are set forth in detail in a report entitled "Plans for Renovating, Repairing or Abandoning Certain Schools in the City of Trenton" which is dated July 1976. (P-8) The six schools, with the dates of construction, are as follows:

1. William G. Cook School - 1890 (now Fleming Junior High School)

2. Franklin Elementary School - 1913

3. B.C. Gregory Elementary School - 1912

4. Harrison Elementary School - 1903

5. Jefferson Elementary School - 1905

6. Mott Elementary School - 1881

This 1976 report concludes that the six elementary schools evaluated therein, which at that time ranged in age from sixty-three to ninety-five years, did not meet the minimum health and safety standards of the Department and that the schools should be abandoned. The report also states that, if the Board cannot abandon the six schools, the code violations should be corrected immediately for the safety and welfare of all who use these facilities. (P-8, at pp. 33, 34)

On or about June 1977, the Superintendent requested that the Department approve the use of the Cook Elementary School to accommodate special education pupils. As a result of this request, the Deputy Commissioner directed staff members of the Bureau of Facility Planning Services to examine the school's facilities on June 14, 1977. In a letter dated June 21, 1977 (P-10, at pp. 2, 3) addressed to the then Mercer County Superintendent, the Deputy Commissioner listed 23 items of minimum health and safety measures which must be taken in order for this schoolhouse to be used even on a temporary basis. The Deputy Commissioner also stated in his letter that, in view of the extensive work needed to bring the Cook Elementary School up to minimum standards for the health and safety of pupils, it was highly questionable to continue the use of this schoolhouse for any purpose. (P-10, at p. 4; Tr. I-116-118)

The chief safety consultant visited a number of schools in the district on February 13, 14, and 15, 1979, while another member of the Bureau visited others. A total of eleven schools were inspected and a written report was submitted to the acting county superintendent dated February 20, 1979. (P-9; Tr. I-114) This report covered Central High School, Junior High Schools No. 1, 2, 3, 5, Fleming Junior High School, and the Franklin, Gregory, Harrison, Jefferson and Mott Elementary Schools. The chief safety consultant inspected the Fleming Junior High School (formerly Cook Elementary School), the Gregory and Jefferson Elementary Schools, Central High School, and Junior High Schools No. 1, 3, and 5. This witness had also made the inspection of the Cook Elementary School in June 1977, which was summarized in the Deputy Commissioner's letter of June 21, 1977. (P-10; Tr. I-116, 117) In his report of the February 1979 inspection of the Fleming Junior High School, he stated that 15 of the 23 deficiencies had been corrected, namely items No. 1, 2, 3, 5, 6, 9, 10, 11, 13, 15, 16, 18, 21, 22 and 23. He testified that there were still deficiencies in items 4, lack of wire glass; item 7, improper storage closets; item 8, lack of mechanical exhaust in the windowless lavatory rooms; item 12, combustible wood shelving in cabinets in corridors; item 14, emergency lighting in the auditorium not installed; item 17, lack of an access ramp for physically handicapped; item 19, exposed fluorescent lighting tubes; and item 20, improperly operating thermostatic heating controls (P-9). (Tr. I-125-127)

The July 1976 report (P-8) listed 25 health and safety violations for the Gregory Elementary School, including items 1B, 5B, 5C and 7 through 28 on pages 19 and 20. The chief safety consultant's report of February 20, 1979 (P-9) indicated that the lighting level had been raised to the required 50 footcandle minimum (item 1B, p. 17 of P-8) and that duplicating fluid was stored in a metal cabinet (item 27, p. 20 of P-8). He testified that the remaining violations remained uncorrected. (Tr. I-128, 129)

The Jefferson Elementary School was included in the July 1976 report, which indicated 26 health and safety deficiencies, including items 3G, 6, and 10 through 33 (P-8 at pp. 24-27). The report of the February 1979 inspection showed that the only corrections made were the removal of corridor obstructions (item 21, p. 27 of P-8) and the installation of temperature controls which did not appear to be functioning properly (item 3G, p. 24 of P-8). This witness testified that all of the remaining 24 deficiencies remained uncorrected. (Tr. I-129)

The chief safety consultant also testified regarding numerous deficiencies found at Junior High School No. 1 and Central High School (Tr. I-129-133), as well as regarding the two reports in general. (Tr. I-134-138)

The hearing examiner finds that the evidence of deficiencies as presented by the testimony of the chief safety consultant and the report of inspections (P-8, 9, 10) stands unrefuted. A comparison of the 1976 report and the 1979 report clearly shows that little was done to remove the health and safety deficiencies originally in the six elementary schools reported, with the exception of those items noted, ante, in regard to the former Cook School. The 1979 report discloses numerous health and safety deficiencies in Junior High Schools No. 1, 2, 3 and 5, as well as Central High School (P-9).

Having carefully examined all of the evidence, the hearing examiner finds that the Board has failed to provide safe and suitable school facilities in the six elementary schools hereinbefore described, as well as Junior High Schools No. 1, 2, 3 and 5, and Central High School.

In order to remedy the numerous deficiencies found to exist in health and safety provisions, an in-depth study will be required of the school district's maintenance and repair procedures, as well as the amount of funds budgeted for this purpose. Recommendations for corrective action by the Commissioner and the State Board will be set forth at the conclusion of this report. N.J.S.A. 18A:7A-15-16

BILINGUAL EDUCATION PROGRAM

The Order alleges that the Board has not satisfactorily established full programs of bilingual education in all schools which have enrolled pupils of limited English speaking ability, including the provision of adequate numbers of teaching staff as well as supplies and materials of instruction.

The director of the Bureau of Bilingual Education, Division of School Programs, testified that the Bilingual Education Act became effective in January 1975, and that local school districts were required to fully implement programs of bilingual education during the 1976-77 academic year. She described the types of activities which a school district must undertake in order to comply with the provisions of the Act and pertinent regulations. N.J.S.A. 18A:35-15 et seq.; N.J.A.C. 6:31-1.2(b) Such activities include taking a census of all pupils whose native language is not English and the screening of identified pupils to determine their degree of proficiency in the English language. This process is applied to all new pupils who enter the school district. When the eligible pupil population has been determined, the district must provide adequate classroom facilities, certified teaching staff members, materials of instruction, and appropriate programs of instruction. Parents of eligible pupils must be notified regarding this process and given opportunity to become involved. (Tr. II-3, 4)

A monitoring visit was made to the district in May 1977 and a letter was subsequently sent to the Superintendent under date of June 8, 1977 (P-11) by the director, setting forth the

Department's grave concerns regarding severe deficiencies in the operation of the bilingual program, including the use of State funds. This letter included a warning that the district would not receive State funds for bilingual education unless a full bilingual program was established for the 1977-78 school year. (P-11; Tr. II-5, 6)

At the direction of the Commissioner a State and county monitoring team again visited the district during November 1977. The results of this visit were detailed in the Department's report to the school district (P-1, ante) dated January 31, 1978. Numerous serious deficiencies are reported therein with respect to the local and State supported bilingual education program, the E.S.E.A. Title I Non-Standard English Component (NSE) and the E.S.E.A. Title VII Bilingual Education Program. (P-1, at pp. 4-6) The Title I and Title VII programs are designed to provide supplemental services and programs for eligible bilingual pupils. These programs are required to be in addition to, and not in place of, local and State bilingual programs. (Tr. II-7, 8)

The remedial plan submitted by the district, ante, listed each of the deficiencies and the proposed actions to correct them. (P-2, at pp. 19-30, Addenda 1 and 2) It is evident from the testimony of the director and a review of the reports of June 8, 1977 (P-11), January 31, 1978 (P-1), and the remedial plan of March 24, 1978 (P-2) that the district's screening and assessment process of pupils was inadequate in May 1977 and had not been corrected in November 1977. It is also clear that the district was not operating full bilingual programs in May or November 1977. (Tr. II-7)

The district's remedial plan proposed to furnish by May 1, 1978 the data on pupil identification and screening which had been due in October 1977. (P-2, at p. 19) The director testified that the Department did not receive this data and that the report which was to be filed by the district in October 1978 was also late. (Tr. II-8, 9) The director testified that the district had made some progress in regard to data collection (Tr. II-15, 16), the securing of testing and instructional equipment (Tr. II-16), the removal of English speaking pupils from bilingual programs and their replacement with pupils of limited English speaking ability (Tr. II-28, 29), and the organization of a parent advisory council (Tr. II-30). The director also testified that there remained nine teacher vacancies in bilingual education and, as a result, the district was not operating a full program for the 1978-79 academic year in the elementary schools. (Tr. II-10, 16)

This witness also testified that the district is not complying with federal regulations because both the E.S.E.A. Title I NSE program and the E.S.E.A. Title VII programs must be supplemental to a full bilingual program, which includes native

language instruction, and the district is not providing such a full program for all eligible bilingual pupils. (Tr. II-18, 19) On cross-examination, the director testified that she was aware that some bilingual teacher candidates had been interviewed by the district and had been offered employment, but because of the late notification of such employment they had secured teaching positions elsewhere. (Tr. II-24, 25)

A consultant employed in the Bureau of Bilingual Education testified that he was directed in January 1979 to review the Board's proposed budget for 1979-80 with respect to the adequacy of provisions for bilingual education. As part of this task he visited the district for a week to review the existing bilingual education program as well as the proposed 1979-80 program. This function was part of the monitoring process of the district's remedial plan for bilingual education. (Tr. II-33, 34) A report of this review was submitted to the acting county superintendent under date of February 16, 1979, by this consultant. (P-13)

The district had submitted the required annual needs assessment summary of bilingual pupils on November 20, 1978, which showed that, as of September 30, 1978, the district had 955 pupils with limited English speaking ability, of which 927 were Spanish speaking. (P-12)

The consultant encountered difficulty in ascertaining the actual number of Spanish speaking pupils that were receiving a bilingual education program. (Tr. II-34) He visited as many schools as possible to verify the actual number and he secured this information from seven schools. For the remaining schools which he could not visit, he utilized data from the central office of the district. In his report to the acting county superintendent he stated that 502 Spanish speaking pupils were participating in a bilingual program and 425 were not being appropriately served. He pointed out in this report that the needs assessment had not been updated since September 30, 1978, and therefore the total number of unserved pupils might not be entirely accurate. (P-13; Tr. II-35, 38) The consultant testified that although all of the pupils receive instruction in English as a second language, only 59 elementary school pupils were receiving a full bilingual program. (P-13; Tr. II-39) He testified that those pupils who were receiving instruction in either English as a second language (ESL) or bilingual programs, i.e. instruction in the Spanish language in regular classroom subjects, were being taken out of their regular classes for time periods totaling one to three hours, depending upon the number of teachers available. The bilingual instruction received by these pupils was in the basic skills areas of reading and mathematics (P-13; Tr. II-40) It is clear from the table contained in the consultant's report that 453 eligible pupils were receiving no bilingual education program and, of this number, 344 were elementary school pupils. (P-13) The Board's remedial plan had provided that at least all elementary school pupils would receive full bilingual programs during the 1978-79 academic year (P-2) but this goal obviously was not realized. (P-13; Tr. II-9-10)

The consultant testified, and stated in his report, that the problem of classroom space could be resolved if eligible pupils were grouped in regular classes instead of being taken out of their classes for bilingual or ESL instruction. For example, if a school contained three first grade classes from which ten, eight and seven pupils, respectively, were being taken out, these 25 pupils could be grouped in one class for bilingual and ESL instruction. This would obviate the need for an extra classroom to provide such instruction. This could even be done with a combined class of, for example, first and second grade pupils, since such a practice is permitted by the regulations. Also, pupils from several schools could be brought together in centers where they could be grouped into classes. (Tr. II-43, 44, 62, 63) This witness testified and reported that the space problem is created essentially by the school district's conception that the bilingual program is supplemental in nature and not a regular school program. (P-13; Tr. II-43)

The consultant testified that his examination of the Board's proposed 1979-80 school budget showed that no provision was being made for seven additional bilingual teachers, financed from local and State funds, as was set forth in the district's long range component of the remedial plan. (P-2; Tr. II-42) This circumstance, he testified, would result in the district failing to meet the needs of eligible pupils during the 1979-80 academic year. The proposed budget did include provision for the nine vacant positions which existed during the 1978-79 school year, but the failure to fill these vacant positions was clearly a factor in the district's lack of compliance with its 1978-79 remedial plan, which was limited to the bilingual education program in the elementary schools. (Tr. II-41, 42)

The consultant testified at some length regarding the availability of teacher applicants for bilingual education programs. In his judgment, the increase in the number of colleges offering training in bilingual and ESL programs and the increased availability of both provisional and emergency certification over the past two and one-half year period had significantly reduced the shortage of qualified teachers. (Tr. II-51, 52)

He testified that the district's recruiting efforts for such teachers were traditional, such as sending vacancy notices to institutions and organizations and advertising in newspapers. He further testified that, since the district's teacher vacancies have persisted over a period of years, the district's administrators should attempt to recruit bilingual and ESL teachers on site at college and universities where the candidates are receiving training. Another method he suggested would involve contacting state and national organizations which would have files of candidates, and also recruiting at their state and national conventions. He testified that the district must plan more vigorous methods of recruitment in order to meet its staffing requirements. (Tr. II-60-62)

The hearing examiner has reviewed all of the evidence in regard to the Board's bilingual education program and finds that the Board has failed to: (1) meet the limited requirements of the remedial plan for 1978-79; (2) plan adequate budgetary provisions for bilingual teaching staff members for the 1979-80 school year; and (3) provide adequate programs of bilingual education for eligible pupils.

These serious deficiencies clearly warrant corrective action by the Commissioner and the State Board of Education. N.J.S.A. 18A:7A-15, 16 Specific recommendations for such corrective action will be set forth at the conclusion of this report.

SUBMISSION OF REPORTS

The Order alleges that the Board failed to submit, in a timely manner, reports and documents as required by the school laws and pertinent regulations. The acting county superintendent, who had formerly been assistant county superintendent and the chairman of the Commissioner's task force, testified regarding this allegation.

Previous witnesses testified that affirmative action plans and revisions thereto had not been completed in a timely manner, even though the district had received extensions of deadlines for filing them. (Tr. III-70, 74-75; P-40, 42, 43, 45) Also, in the area of special education, the Board's application for federal funds under Part B of P.L. 94-142, ante, which was to be filed by May 1, 1978, was not received by the Department until November 1978, and then had to be returned to the district for corrections and the addition of technical information. (Tr. IV-166-167, 175-178; P-55) The district's reports of pupil needs assessment for bilingual education were submitted late and monthly updates were not completed. Nor did the district submit the overdue needs assessment report in May 1978, in accordance with the remedial plan. (Tr. II-8-9; P-2)

Testimony from the acting county superintendent established that the district submitted its annual financial report of the custodian of school moneys on November 9, 1978. This report was to be filed in the county superintendent's office on or before August 1, 1978. (Tr. II-72) The district's annual financial and statistical report of ratio information, which was also due on August 1, 1978, was not received in the county office until October 23, 1978. (Tr. II-71-73) The annual report and application for state financial aid for pupil transportation (A4d), which is necessary for the reimbursement of approved transportation expenditures by the Department to the district, was filed on September 14, 1978, but was due on August 1, 1978. N.J.S.A. 18A:58-7 (Tr. II-74)

The acting county superintendent testified that contracts for pupil transportation between local boards of education and transportation vendors must be approved by the county superintendent before the actual transportation services are begun on the first day of school. The district's transportation contracts for the 1978-79 academic year were not received in the county office until January 8, 1979, more than four months after the opening of school, although services under these contracts had been provided to the district beginning in September 1978. (Tr. II-75)

The district's report on aides appointed for the 1978-79 school year, which was due on September 30, 1978, was not filed until February 22, 1979. (Tr. II-76) A similar problem occurred in regard to the district's annual report of certificated staff employed which, although due on November 1, 1978, was not filed until January 4, 1979, and the annual report of non-certificated support services personnel, due November 15, 1978, which was filed January 4, 1979. (Tr. II-78-79)

Under cross-examination, the acting county superintendent testified that during her tenure as assistant county superintendent the district had been rather consistently late in submitting required reports. This covered a period of between three and four years. (Tr. III-6-7) She testified that it is the usual practice of the county office to make telephone calls to various offices in the Trenton district to inquire about late reports. Also, local districts are reminded regarding the filing of reports at monthly meetings of school administrators with the County Superintendent. (Tr. III-15-16) This witness further testified that from her experience in Mercer County, as well as other counties, she has found that school districts rather consistently submit required reports on time. (Tr. III-14)

The hearing examiner has carefully reviewed all of the evidence with regard to this allegation and finds that there has been a pattern of failure on the part of the district to submit required reports and documents in a timely manner in conformance with statutory provisions and regulations. Recommendations for corrective action for this situation will be considered at the conclusion of this report. N.J.S.A. 18A:7A-15, 16

EFFICIENT ADMINISTRATIVE PROCEDURES SUFFICIENCY OF 1978-79 SCHOOL BUDGET EMPLOYMENT OF TEACHING STAFF MEMBERS

The Order in this matter alleges that the district has failed to: (1) prepare, adopt and implement efficient administrative procedures pursuant to N.J.A.C. 6:8-4.7; (2) to fully document the sufficiency of each appropriation line item of the 1978-79 school budget, pursuant to N.J.A.C. 6:8-5.1; and (3) to employ teaching staff members based upon the needs of the schools and district, pursuant to N.J.A.C. 6:8-4.3 and defined under N.J.A.C. 6:8-1.1. These three areas are interdependent and will be examined together.

One clear example of inefficient management and administrative procedure was the Board's submission of an application for federal funds for special education purposes, whereby the Board failed to avail the district of $145,248.53, although critical needs have been consistently evident, as shown in the Board's remedial plan. This situation has been described, ante, and requires no further elaboration. (P-2, 55; Tr. I-29; Tr. IV-6-16)

This report has hereinbefore described the district's failure to find and allocate classroom space for the special education resource room program which was an element of the Board's remedial plan, until a member of the task force intervened directly with the district's school officials. (Tr. I-23-25; P-2) Previous mention has also been made with respect to the district's bilingual education program, particularly the inadequate procedures for collecting and centralizing data regarding pupil needs assessments and enrollments in the bilingual program. (Tr. II-15-17) The district also made no effort to effectuate the recommendation to organize the assignment of pupils enrolled in bilingual education programs in a manner which could have made more classrooms available for unserved, eligible pupils, ante. (Tr. II-43-46)

It was previously reported, ante, that the Department's report of January 31, 1978 to the district (P-1) contained a major finding, following a fiscal review, that there was a projected deficit of $670,542 by June 30, 1978, based upon anticipated revenue shortages and projected overexpenditures. The Board's audit report for the 1977-78 school year was filed on October 27, 1978, and shows that the current expense account contained a revenue balance of $83,223.02 as of June 30, 1978. This 1977-78 audit report also discloses that the Board was required to refund to the State a total of $418,034.87, comprised as follows:

$344,852.30	Current Expenses (unspecified)
9,955.93	E.S.E.A. 1977-78
3,816.20	E.S.E.A. 1976-77
59,410.44	Special Projects
$418,034.87	Total

The audit also shows a refund to the federal government in the total amount of $81,200.40, of which $36,030.40 is for E.S.E.A. 1977-78, $.21 for E.S.E.A. 1976-77, and $45,169.79 for special projects. (1977-78 Audit Report, Exhibit A-1) Judicial notice is taken of this 1977-78 audit report, which is on file in the Board's office, the County Superintendent's office and the Division of Finance and Regulatory Services of the Department.

The Board's proposed school budget for the 1978-79 fiscal year failed to secure voter approval at the annual school election and subsequently the amount to be raised by local taxation for current expenses was reduced by action of the City Council in the amount of $783,000. This occurred at approximately the time that the Board prepared and submitted its remedial plan. (P-2) The acting county superintendent, who chaired the task force, testified that the Board determined not to appeal this reduction of the 1978-79 school budget, although the remedial plan entailed considerable additional expenditures which had not been included in the originally proposed budget. As a result of this determination by the Board, the administration was faced with the problem of reallocating funds in order to prepare a revised, reduced 1978-79 school budget, while at the same time making provisions for the additional costs required by the implementation of the remedial plan. The task force assisted the district's administration in the preparation of a plan for reallocating the funds available in the 1978-79 school budget. (Tr. II-80, 93-94)

The proposed solution included a plan to reduce the district's staff of regular elementary school teachers by transferring a number of them to positions funded by compensatory education state aid, for which such teachers were properly certified. The moneys realized by such a reduction of elementary school teachers were to be utilized to meet requirements of the remedial plan. (Tr. II-80)

The minutes of the Board's regular meeting held April 27, 1978 (P-21) show that the Board took formal action to direct the Superintendent to notify affected personnel before April 30 of its determination to abolish certain positions effective June 30, 1978. The minutes state that the names of affected individuals were on a list on file in the Board Secretary's office and the personnel office. The hearing examiner notices that this formal motion was defective, because any formal action of a local board of education to abolish positions must list the exact title and number of positions which are being abolished. The names of those individuals who are affected need not appear in the minutes, because the reduction in force of tenured and nontenured teaching staff members must be performed in accordance with applicable statutes and regulations, and the determination of their seniority may be accomplished subsequent to the formal action abolishing the positions. N.J.S.A. 18A:28-9 et seq.; N.J.A.C. 6:3-1.10

At this same meeting of April 27, 1978, the Board also adopted a motion directing the Superintendent to notify affected personnel prior to April 30 of its determination to make certain transfers of personnel, effective June 30, 1978. This motion also stated that the list of those individuals to be transferred was on file in the Board Secretary's office and the personnel office. (P-21)

The hearing officer stated for the record that this motion to transfer was improper, since it did not list the names of the affected teaching staff members, nor the schools from which and to which they were being transferred. The applicable statute, N.J.S.A. 18A:25-1, which provides that no teaching staff member shall be transferred except by a recorded roll call majority vote of the full membership of the board of education by which he is employed, has been consistently construed to require that the formal action recorded in the minutes clearly show the names of those transferred as well as the schools to and from which they are being transferred. (Tr. II-88-89, 141-142)

The Board stipulated that one of the transfers made at the special meeting of April 27, 1978, involved the appointment of the district's Title I E.S.E.A. director to the position of director of compensatory education. The acting county superintendent testified that she believed this transfer was made by the Board without recommendation by the Superintendent, which was a violation of the Board's own policy. (Tr. II-84-85, 92; P-23) The acting county superintendent further testified that, in her judgment, this transfer was ill-advised, because a new plan for the district's 1978-79 compensatory education program had to be devised and a report was due to be filed with the Department by July 1, 1978. (Tr. II-83-85)

A summary of the Board's discussion in an executive session held on April 27, 1978, was sent to the Superintendent by the Board Secretary under date of April 28. (P-22) This memorandum lists 19 positions to be abolished, as well as five additional positions which were to become vacant by June 30, 1978. In addition, it includes the abolition of the extra-duty positions of sophomore football coaches at the high school. The memorandum also includes a list of thirteen individuals and the positions to which they are to be transferred, but does not show their respective existing positions. Also included are the names of six nontenured teaching staff members who were not being offered reemployment. The memorandum also states that 60 paraprofessionals, which is taken to correctly mean aides, were not to be reemployed. (P-22) As was previously stated, this procedure for abolishing positions and transferring teaching staff members is wholly improper. From the evidence in the record, it is not clear whether these personnel recommendations emanated from the Superintendent.

The acting county superintendent testified that the task force worked with the Board's finance committee to develop a revised 1978-79 school budget which would take into account the reduction made by the City Council and the additional costs required by the remedial plan. These recommendations were considered by the Board at a planning meeting held May 18, 1978, and were placed on the agenda of the regular meeting held May 25. (Tr. II-93; P-24-25) The recommendation included a resolution which referred to the City Council's reduction in the amount of $783,000, the cost of the remedial plan which was estimated as $325,000, and a request to the Commissioner for a reduction of

the previously approved $783,000 cap waiver to $468,000. Suggested budget reductions were listed in this document in the amount of $1,570,900. Also, additional budget reductions were added by the administration totaling $420,000, for a grand total of $1,990,900 in reductions. Since the required budget reductions totaled $1,621,000, the difference of $369,900 was suggested to be used for salary adjustments, three compensatory education secretaries and other unmet needs. (Tr. II-93-95; P-24)

The minutes of the regular meeting held May 25, 1978 (P-25) show that the recommended proposal for 1978-79 budget adjustments was presented by the Superintendent, discussed, and tabled by vote of six ayes, one nay and one abstention, with one member absent. Later, during the same meeting, at the request of the chairman of the finance committee, and with no objections voiced by any Board members, the proposed budget adjustments were withdrawn from the agenda.

During this May 25, 1978 meeting, the Superintendent voiced strong objection to personnel actions recommended by members of the Board. He objected to a previous Board action transferring a permanent vice-principal who is black from Junior High School No. 1 without a recommendation of the Superintendent. He also objected to the Board's current recommendation to make permanent the appointment of the acting principal of Junior High School No. 5, who is white, without his recommendation. He advised the Board that by making appointments which show racial preference, without recommendations from the Superintendent, the Board was treading on dangerous ground. A member of the Board also stated his firm opposition to the Board's personnel recommendations, which had not come from the Superintendent, and viewed this as a dangerous aspect of the Board's tendency to administer the school system. (P-25 at pp. 10-11) The Board's recommendations were then approved by a vote of six ayes and two nays, with one member absent.

At the regular meeting of the Board held June 29, 1978, the following letter to the Board president from the Assistant Commissioner in charge of the Division of Administration and Finance was read into the minutes:

> "This will verify our conversation of several days ago. You will recall that I indicated to you that we had not received an approved budget of the Board of Education of the City of Trenton. I cannot overemphasize the serious problem this lack of action on the part of your Board could have on the Trenton system.

> "Since the Department does not have a budget passed by the Board of Education and approved by the County Superintendent, we cannot place the Trenton figures into the computer for the calculation of State aid. Ultimately, this would result in Trenton not being notified of the State aid due for the 1979-80 school year. The lack of a decision on the part of the Board concerning their 1978-79 budget could also impact on the actual State aid to be paid in 1979-80.
>
> "In my opinion, unless the Board of Education adopts and approves a budget for 1978-79 prior to July 1, 1978, expenditures may not be made after that date. If this occurs I would have to advise the Commissioner to exercise his authority to assure a continuing program in the schools. Please inform me in writing after your meeting on Thursday, June 29, 1978, as to the budget approved on that date. If no action is taken, please forward a certification that the board of education did not adopt a budget prior to the end of the school year.
>
> "I cannot overemphasize the importance of the board of education fulfilling its statutory responsibilities under existing law.
>
> "It is also important to note that in your cap waiver, certain items were specifically approved as a condition of the waiver. The board of education is expected to fulfill those obligations in any budget that is finally considered by the board. Alterations of the dollar amount specifically approved would require a refiling of the waiver request and full statements indicating those goals and objectives which are being modified. The issue of time lines when the areas are finally implemented should also be addressed." (P-26 at p. 15)

The Board then unanimously approved a motion which included the resolution regarding the 1978-79 budget and cap waiver, ante, which was referred to as exhibit Q, as well as a two page document, called exhibit P in the minutes, listing budget increases totaling $728,000 and decreases totaling $1,621,000, resulting in a net decrease of $893,000, which was $110,000 more than the $783,000 reduction made by the City Council. (P-26) This action obviously did not provide for a 1978-79 school budget with balanced revenues and expenditures.

At the same meeting of June 29, 1978, the Board formally approved the submission of the annual report for July 1, 1978, the Basic Skills Summary, required by the Public School Education Act (N.J.S.A. 18A:7A-1 et seq.) but excluding information regarding compensatory education, which is an integral part of the basic skills program. (P-26) Immediately thereafter, the president directed that the compensatory education program for 1978-79, item C, be removed from the agenda. (P-26 at p. 5) Subsequently, a Board member made a motion to approve the compensatory education plan for 1978-79, attachment C, and the motion received a second. Another Board member then moved to table item C, and then both motions were withdrawn. (P-26 at p. 5) These unusual procedures of removing and tabling agenda items, which appear frequently throughout the minutes of the Board's meeting, will be discussed, post, as part of a review of the Board's minutes and procedures.

The Board's annual report of its Basic Skills Improvement Plan, which includes the compensatory education plan, was submitted to the Department on June 30, 1978, although the compensatory education part had not received Board approval as required by the Department. This document, signed by the Superintendent, included the following as part of the statement of assurances:

> "***I hereby certify that the information contained in this application is correct, documented and available for review, and, that the school district named below has authorized me as its representative to file this document which has been approved by the Board of Education for inclusion in the minutes of the meeting on June 29, 1978.
> (P-27 at p. 1)

The second part of this annual report of the Basic Skills Improvement Plan is devoted to information required to validate the district's receipt of state aid for compensatory education for pupils who have not attained minimum levels of achievement in basic skills.

The minutes of the meeting held July 11, 1978 show that the compensatory education plan was on the agenda and received first a motion for approval, which was seconded, and then a motion to table, which was also seconded. The motion to table the compensatory education plan was passed by a vote of five ayes and three nays, with one member absent. This procedure and action were objected to by a Board member and the president ruled that there would be no further discussion on the matter. (P-28 at p. 4) At the same meeting, the Superintendent and Board president each read to the Board portions of a letter dated July 10, 1978, from the Assistant Commissioner, Division of Administration and Finance, to the Board president, which stated, inter alia,

that the Department had not received the Board's 1978-79 applications for state aid for a bilingual education program and a compensatory education program. The Board was also reminded of its duty and responsibility to maintain a balanced budget at all times during the school year. This letter appears in the bound volume of the Board's minutes for July 11, 1978, but is not attached to the exhibit in evidence. (P-28 at pp. 2-3)

During the July 11, 1978 special meeting, the related matter of reallocation of the Board's 1978-79 budget was recommended by the Superintendent. This proposal was part of the plan to transfer existing elementary teachers to compensatory education positions, ante, as part of the remedial plan. The recommendation, exhibit A, called for the reduction of various elementary, junior and senior high school positions in the gross amount of $250,000, together with unspecified reductions in maintenance of $100,000. The details of the proposed reduction of 26 elementary positions and staffing changes in five junior high schools appear in the bound volume of the minute book as exhibit B, which is not a part of P-28 in evidence. The motion on reallocation was moved and seconded and a substitute motion to approve the recommendations, excluding the elementary positions, was also moved and seconded. The substitute motion was defeated, and the original motion was passed by a vote of four ayes and three nays with one abstention, the abstaining vote being considered a vote in favor of the motion. (P-28)

The acting county superintendent testified that this action by the Board on July 11, 1978 provided only for a blanket reduction with proposed unspecified transfers of teachers for the compensatory education program. In her judgment, this showed the absence of a bona fide plan for teacher transfers for the compensatory education program. (Tr. II-107-111)

The minutes of the regular meeting held July 27, 1978 indicate that the 1978-79 compensatory education plan was approved by a unanimous roll call vote of the eight Board members who were present. (P-29) The Board eliminated the position of evaluation specialist for compensatory education effective July 28, 1978, for the reason that the position could not be funded from compensatory education state aid. The affected individual was transferred to a position of mathematics teacher at Junior High School No. 3. (Tr. II-115; P-29-30) At the same meeting, five teachers who had been in positions funded under both Title I E.S.E.A. and compensatory education programs were transferred to positions totally funded by Title I. One other teacher was transferred from a compensatory education position to a regular teaching position. (P-29-30)

The acting county superintendent wrote a memorandum to the Superintendent under date of July 24, 1978, in which she expressed concerns regarding inadequacies in the district's bilingual and compensatory education plans and the plan for child

study teams. (P-33) The Superintendent responded in a written memorandum dated July 28, 1978, stating in summary, that the acting county superintendent and members of the task force were well aware of the reasons for the problems in completing the required implementation of the programs in bilingual education, special education and compensatory education. (P-34)

At the regular meeting of the Board held August 31, 1978, the Superintendent presented, inter alia, numerous recommendations regarding the appointment of teaching staff members to regular positions, the special education program, the bilingual program and the compensatory education program. He also presented recommendations for assignments of teachers returning from leaves of absence, transfers of regular teachers, transfers of teachers to the compensatory education program, and for abolishment of 28 elementary school classes and two junior high school classes. (P-31-32)

The minutes of the August 31, 1978 meeting (P-31) disclose that the Board tabled recommendations for the appointment of four of eight elementary teachers and for three of seven secondary teachers. No reasons were given for this action. The Board approved the Superintendent's recommendations for the appointment of 17 teachers for special education and ten teachers for the bilingual education program, but tabled one recommendation for the appointment of a teacher of English as a second language (ESL). The Board also tabled action on the recommendations of the Superintendent for the appointment of a coordinator for compensatory education communication skills and a coordinator of compensatory education computation skills, as well as for seven teachers of compensatory education and the reassignment of a school psychologist to the position of coordinator of child study team services. Again, no reason was provided for such action. The Superintendent's recommendation for the abolishing of 28 elementary and two junior high school classes was also tabled (P-32, item L; P-31) with no reason given, as well as the recommendation to transfer 38 teaching staff members to the compensatory education program. (P-32, item M; P-31) The Superintendent also recommended the voluntary transfer of 21 teaching staff members, including one guidance counselor and one nurse, and the Board voted to table action on nine of these transfers. (P-32, item N; P-31) The Board also voted to table a recommendation by the Superintendent for the transfer of a special education teacher from a class for trainable, mentally retarded pupils to a class for emotionally disturbed pupils. (P-32, item P; P-31) A recommendation for the creation of four new positions, one nurse, one art, and two special education, educable and neurologically impaired, was also tabled by the Board. (P-32, item U; P-31) A further recommendation by the Superintendent to change the title of a Title I resource teacher to that of compensatory education teacher was also tabled by Board action. (P-32, item V; P-31) The recommended transfer and promotion of a junior secretary to senior secretary in the compensatory education program was also tabled. (P-32, item E1; P-31) The Board also acted to approve the Superintendent's

recommendation to reemploy 50 aides who had previously been given notices of termination, ante. (P-32 at pp. 33-34; P-31) Numerous recommendations of the Superintendent for appointments for the district's food service program were first moved and seconded for approval, then moved and seconded to be tabled, which later motion was then adopted. (P-32 at p. 35; P-31)

The Board's August 31, 1978 meeting was continued to Friday, September 1, 1978, at 2:13 p.m. At this time several of the items previously tabled by the Board were approved. (P-31 at pp. 18-19) Following an executive session for the discussion of personnel matters, the Board acted to approve most, but not all, of the previously tabled recommendations for appointment. It did approve the transfer of elementary teachers to the compensatory education program. (P-31 at pp. 20-21) The previously tabled item regarding the abolition of 28 elementary school classes was not acted upon and does not appear in this portion of the Board's minutes. (P-31) During this continued meeting a Board member recommended that a named teacher be appointed as department chairman of health and physical education. The minutes show the Superintendent's comment that it would be more fitting and proper for him to recommend the named individual to temporarily fill the position until it could be properly advertised, screened and a candidate selected for recommendation. (P-31 at p. 22) It is also noteworthy that previously tabled recommendations for the appointment of coordinators for compensatory education communication skills and computation skills were not acted upon at the continued meeting on September 1, 1978.

The acting county superintendent testified that the proposal for staffing the compensatory education program as described, ante, had never been thoroughly detailed to facilitate its implementation. This was partly due to the fact that the adoption of the compensatory education plan by the Board was delayed for an inordinate length of time. Delay in adoption of the plan caused corresponding delays in action on transferring teaching staff members into the compensatory education program. The reduction of regular elementary classes, which was required to free teachers for the compensatory education program, had not been completely accomplished by September 1, 1978, which was just prior to the opening of schools for the academic year. A new director had been appointed, but two essential appointments for coordinators, ante, had not been approved by the Board. In the judgment of the acting county superintendent, this state of affairs caused great concern among school principals and teachers, who were uncertain at this late date regarding their staffing assignments. This witness also testified that pupil enrollments for the various classes were still not completed at this late time, because of uncertainty regarding the proposed abolishment of numerous classes. (Tr. II-125-126)

The minutes of the regular meeting held September 28, 1978, show that the Superintendent made numerous recommendations regarding the appointment and transfer of teaching staff members. (P-35) The bound volume of the Board's minutes contains the complete separate listing of such recommendations, which are referred to in the actual minutes only by capital letters and numbers. It is necessary to read both documents together in order to ascertain exactly which recommendations the Board acted upon. As was the case in previous meetings, ante, the Board voted to table action on numerous recommendations by the Superintendent. (P-35) The Board did approve the appointment of two teachers of special education, one school psychologist, three compensatory education teachers and teachers of bilingual education. (P-35) The Superintendent's recommendations for the appointment of a coordinator of compensatory education communication skills and a coordinator of computation skills were both defeated by respective votes of four ayes and four nays, with one member absent. These two recommendations had been previously made at the August 31, 1978 meeting and the continued meeting on September 1, 1978. (P-31; P-35 at pp. 7-8) Nine recommendations for appointments to secondary education teaching positions were presented by the Superintendent, and two of these were tabled by the Board. These two individuals were a black male and a black female, identified as such by a code for race and sex which appears on the list of recommendations by the Superintendent that are in evidence and which appear in the bound volumes of the Board's minute books. This practice will be discussed, post. The Superintendent's recommendations for transfers of personnel, many of which included compensatory education teachers, were also tabled by the Board. (P-35 at p. 9)

At this meeting of September 28, 1978, various Board members had placed upon the agenda their own personnel recommendations which included the appointment of three compensatory education teachers, the transfer of an individual to be acting administrative assistant at Junior High School No. 3, the appointment of a school nurse, the transfer of the Gregory School principal to the position of principal at the Harrison School, the transfer of the Fleming School principal to the principalship of the Gregory School, the placement of the industrial arts coordinator in the position of acting principal of the Fleming School, the appointment of a staff member as acting coordinator of industrial arts, the transfer of the Robeson School principal to the principalship of the Grant School, the transfer of the high school administrative assistant to the acting principal of the Robeson School, the transfer of a guidance counselor in Junior High School No. 4 to the position of acting administrative assistant at the High School, and the promotion of the administrative assistant from the Grant School to be acting principal of the Columbus School. The Board also listed recommendations for screening of applicants for a transportation coordinator and a director of bilingual education, the readvertising of the positions of commissary manager and assistant manager, and the advertising and screening of the position of department chairman of health and physical education. The above recommendations appear

as exhibit S appended to the Board's minutes of the September 28, 1978 meeting (P-35) and are included in somewhat different form in the bound minute book on green sheets, following the Superintendent's recommendations on teaching staff members. The green sheets in the official minute book list the names of individual Board members who made the aforementioned recommendations.

The September 28, 1978 minutes show that the Board's personnel recommendations (P-35, Exhibit S) were first tabled (P-35 at p. 10), but were brought up again under new business later during the meeting. A second motion to table action on these recommendations was defeated. The Superintendent stated that he recommended that the entire document (Exhibit S) be tabled because none of the recommendations had come from him or his staff. (P-35 at p. 22) Board members Lawrence and Odom requested that the minutes show that they had not been responsible for these recommendations. The motion to approve the recommendations was then defeated by a vote of two ayes, four nays, with two abstentions and one member absent. (P-35 at p. 23)

The Board held a special meeting on October 6, 1978, for the purpose of considering personnel matters, the restoration of classes, and recommendations for the appointment of the two compensatory education coordinators for communication skills and computation skills, as well as transfers of teaching staff members. Also on the agenda were recommendations to continue two acting elementary principals and a recommendation regarding a combined position of hearing officer/attendance officer. The agenda for this meeting is contained in the bound volume of the Board's minutes. The minutes in evidence (P-39) disclose that the Board's counsel had rendered a legal opinion that the previous Board action of July 11, 1978 (P-28) had, in effect, approved the "collapsing" of 28 classes in the district's schools. As previously stated, this had been part of the plan for budget reductions and for staffing of the compensatory education program.

A motion was made and seconded to eliminate all combined grade classes in the elementary schools. The Superintendent informed the Board that this action would require an expenditure of approximately $250,000 and would require 22 classrooms in order to separate the existing 42 to 44 combined elementary classes. The Board adopted the motion by a vote of five ayes, two nays, with one abstention and one member absent.

By this single action the Board abrogated the extensive efforts which had been expended over many months to effect budgetary economies and, in turn, enable the implementation of the compensatory education plan for 1978-79.

No further action was taken by the Board on the remaining agenda items of the October 6, 1978 special meeting.

At the regular meeting of the Board held October 24, 1978, the Superintendent again presented numerous recommendations regarding teaching staff members. (P-36-37) He recommended the appointment of three elementary teachers, of which two were approved and one was tabled. He also recommended the appointment of four secondary education teachers, two of which were approved. The remaining two recommendations, one a black male social studies teacher and the other a black female mathematics teacher, were tabled. The identification of the sex and race of each recommended individual appears in code form on the list of the Superintendent's recommendations. (P-37) The Superintendent's recommendations for the appointment of seven special education and three bilingual education teachers were approved by a six to two vote with one member absent. The Superintendent recommended the voluntary transfer of 28 teachers, including eight compensatory education teachers, and this was tabled by a vote of five ayes and two nays, with two members absent.

The recommendations for the appointment of the two coordinators of communication skills and computation skills for the compensatory education program were defeated by identical votes of five to three, with one member absent.. These were the same candidates whom the Superintendent had recommended at previous meetings, ante. The Superintendent's recommendation for the appointment of a coordinator of pupil transportation was defeated, and a motion was then made by Board member Potkay recommending the appointment of another staff member to be coordinator of pupil transportation. Board member Odom made the following comment for the record:

> "Am I to understand---what we are doing now the world should see and take careful note. Am I to understand that we have now reached the point where we can capriciously, at a board meeting, nominate anybody that we desire for office from this Board without any regard to recommendations coming from administration? Is that to be our procedure in the future? Not even on the agenda, is that to be our procedure? If so, then I want this put into the record, that that is to be the procedure in the future." (P-36 at p. 10)

Following the defeat of a substitute motion, the recommendation by Board member Potkay was approved by a vote of five to one, with two abstentions and one member absent.

The Superintendent's recommendation for the appointment of an administrative assistant for Junior High School No. 3 was tabled by the Board. The Superintendent then made the following statement:

> "Mr. President for the record. The Superintendent has a question to ask. We have procedures for search and selection. We use hundreds of hours of valuable time of administrators. This is a time used at the sacrifice to our students because they are not being instructed nor are our teachers being supervised or coordinated with or assisted at the time these persons are going through this very lengthy, arduous process of search, selection and recommendation. The Superintendent and the administrative staff want to know does the Board intend to abandon this procedure since they have elected to select whoever they wish without the input of administration, without it being on the agenda, they just reach in and pick whoever they wish and place them in positions. I just think it is rather ludicrous for administration to go through this process. Now I'm not speaking for the Superintendent. The Superintendent is not involved in the process. The administrators whom you pay dearly and handsomely have hundreds of hours of experience and education to do this job. I'm saying why are we wasting, why is the Board wasting this money when it just reaches in and does as it has just done? I'd like an answer to this question." (P-36 at p. 11)

A recommendation by the Superintendent for the appointment of a commissary manager for the food services department was defeated by a vote of five to two, with one abstention and one member absent. (P-36 at p. 13)

The Superintendent's recommendations for the appointment of an interim assistant superintendent for support services and an acting assistant superintendent for curriculum, when that administrator is absent more than one working day, were both defeated by the Board. Also, his recommendation for the appointment of an administrative assistant at Junior High School No. 3 was defeated by Board action. Two recommendations by the Superintendent for the continuation of the acting principals of the Grant and Columbus schools were approved, but his recommendation for the appointment of an acting director of guidance was defeated, and the Board then approved Board member Potkay's recommendation for the appointment of another staff member to that position. (P-36 at p. 18)

The Superintendent's recommendation for the appointment of an acting administrative assistant for the Grant School was defeated by the Board, as was his recommendation for the transfer of the principal of the Washington School to the principal of the Harrison School. Board member Gennello's own motion to transfer

the principal of the Gregory School to be principal of the Harrison School was then approved by a five to one vote with two abstentions, and one member absent. Board member Lawrence stated his opposition to such action which he characterized as willy-nilly, arbitrary and capricious.

The Superintendent's recommendation to transfer the coordinator of industrial arts to the position of acting principal of the Fleming school was not acted upon and, instead, Board member Potkay's motion to transfer this individual was seconded and discussed by the Board. Board member Lawrence made the following comment for the record:

> "I just finished talking to the employee that you are recommending for that position. He just now finished saying that he did not want that position. This is a case of what I am saying. You're in effect as a board administering the district without checking with the employee." (P-36 at p. 22)

Board member Gennello then made a substitute motion to transfer the principal of the Fleming school to be acting principal of the Gregory school, which was defeated by a vote of three ayes, two nays, with two abstentions and two members absent. The original motion to transfer the coordinator to be acting principal of the Gregory school was then approved by six affirmative votes with one abstention and two members absent.

The Board also took action on eleven personnel recommendations made by individual Board members. One of these recommendations, regarding the director of pupil transportation, had previously been adopted by the Board, ante. Another Board recommendation directed that the two coordinator positions for communication skills and computation skills in the compensatory education program be readvertised and applicants rescreened. (P-37, Addendum) One of the Board's own recommendations, for the appointment of two candidates as compensatory education teachers, was defeated by a vote of three ayes, one nay and one abstention, of the five members who remained at the meeting. The same recommendation, which was one among ten made by Board members, was also defeated in two separate respective votes during the Board's November 16, 1978 regular meeting, as is shown by the bound volume of the Board's official minutes.

The minutes of the Board's regular meeting of December 13, 1978 (P-38) disclose that recommendations by the Superintendent for the appointment of two assistant superintendents were defeated by the Board. The Superintendent's recommendation for the appointment of a coordinator of compensatory education computation skills was defeated by a vote of two ayes and five nays, with two members absent. This same recommendation had failed to receive approval at several previous meetings, ante. Board member Potkay then moved the appointment of another

staff member for this position, and this was seconded and approved by a vote of five ayes and one nay, with three members absent at this time. The Superintendent's recommendation for the appointment of a coordinator of compensatory education communication skills was again defeated by a vote of one aye and five nays, with three members absent. Immediately thereafter Board member Potkay moved to change the job description for this position by eliminating the requirement for a master's degree, and to readvertize the position. This motion was adopted by an identical vote. (P-38 at pp. 7-9)

At this December 13, 1978 meeting, the Superintendent also made recommendations regarding the abolishment of combined classes and the creation of additional teaching positions. (P-38) The bound volume of the Board's minutes includes Exhibit I, which consists of the Superintendent's instructional and program recommendations. On the list of recommendations under instruction there appears an item U, "Abolishment of Combined Classes." Under the item is a recommendation to abolish a total of 24 combined classes in eleven named schools. Board member Potkay is quoted in the minutes as stating that this item should not be acted upon by the Board because it is unnecessary since the Board had previously given direction in this regard. She stated that the Board should ask administration to report how it has complied with the Board's instruction to separate combined classes utilizing existing staff and facilities. The minutes also show her comment that the administration had presented the Board with information, but an opportunity had not been granted to administration during a conference to discuss the material given to the Board. These comments were followed by a presentation by the Superintendent, assistant superintendent and director of elementary education. The minutes record that no action was taken by the Board regarding item U, the abolishment of classes. (P-38 at pp. 11, 12)

The Superintendent also recommended the approval of item V, the creation of teaching positions. This recommendation requests that a total of 17 elementary positions be created in 13 elementary schools effective January 2, 1979, in order to meet the Board's mandate to abolish all combined classes. Five of the requested positions in three schools are due to excess pupil enrollments. The minutes of the December 13, 1978 meeting state that there was considerable discussion regarding this recommendation, after which the motion was unanimously defeated by roll call vote. (P-38 at p. 12) The Superintendent's instructional recommendations, Exhibit I in the bound volume of Board minutes, also states under the recommendation for creating new teaching positions, item V, "See no combined classes report." A search of the bound volume of the Board's minutes discloses that this report was not included in the documents which comprise the record of the December 13, 1978 meeting.

After the recommendation for creating new teaching positions was defeated, the minutes show the following comment by the Superintendent:

> "Mr. President and members of the Board, the Superintendent and his administrative staff need some direction from the Board as to what now does the Board want the administration to do concerning no combined classes. Your vote on item 'V' that was unanimous, that defeated the hiring of 18 or more additional teachers, means that if we keep the pupil-teacher ratio of 30 to 1 then the order for no combined classes cannot possibly go into effect. Now the Superintendent asks do you want to put the order into effect to break the pupil-teacher ratio? We are looking for direction. That's for the record: precisely for the record. We have to know what to do."
> (P-38 at p. 13)

The minutes only state that the Superintendent's comment was followed by a short further discussion on this matter by Board members Lawrence, Potkay, the Board president and the Superintendent. (P-38 at p. 13) The Superintendent's above quoted remark obviously refers to a policy of the Board limiting the enrollment of elementary school classes to 30 pupils.

At this juncture, notice must be taken of litigation which had ensued between the Trenton Education Association, hereinafter "Association," and the Board, in regard to the combining of elementary classes and the transfer of teachers. In the case of Trenton Education Association v. Jean F. Emmons et al., 1979 S.L.D. ____ (decided May 17, 1979), the Association contested the abolishment of a first grade class in the Washington School and the transfer of the assigned teacher to another school, as well as the combining of a second and third grade class at the Harrison School. These actions took place on September 27 and 29, 1978, respectively. The Board's action to eliminate all combined or cross-grade classes took place at the special meeting held October 6, 1978, ante. (P-39) The Commissioner's decision in this matter, dated May 17, 1979, declared the two aforementioned actions null and void. It is significant that the Board did not file an Answer to the Petition of Appeal in the above matter and, at its meeting held December 13, 1978, it formally acted to instruct its counsel not to participate in any further proceedings in the case. (P-38 at p. 25) (See attachment 8 in bound copy of Board minutes of December 13, 1978.)

In an earlier related case, also entitled Trenton Education Association v. Board of Education of the City of Trenton et al., Docket No. 62-2/78, filed February 8, 1978, the Association challenged the Board's action, effective December 8, 1977, eliminating 30 or more teaching staff positions, the combining of elementary classes and the transferring of teachers. The Board has participated in the case and a report of the hearing, entitled an initial decision, has been released to the parties. Neither of the parties has filed exceptions or objections to the report and a decision will be rendered by the Commissioner. One of the principal findings in the report is that cross-grade level or combined classes have for many years been common in the Trenton schools.

At the Board's December 13, 1978 meeting, it adopted a motion regarding personnel policy, which reads as follows:

> "When recommending any person for employment or promotion to any position whether funded by the Board, the government, or other program, the Superintendent of Schools shall bring the names of the three highest ranked candidates from the Screening Committee to the Board. Final determination for employment or promotion is at the discretion of the Board." (Exhibit V, Bound Volume of December 13, 1978 Minutes; P-38 at p. 25)

These minutes state that, prior to the vote, the Board's counsel advised the Board that it was not necessary to read the policy changes publicly. (P-38 at pp. 25-26)

The Board's policy in regard to the powers and duties of the Superintendent of Schools provides, inter alia, that he shall "***recommend to the Board all appointments, assignments, transfers, suspensions and dismissals***." (P-23)

The Board's policy regarding the operation of committees provides that "***the functions of the committees shall be fact-finding, deliberative, and advisory.***" (P-51)

An in-depth study of various functions in the Trenton School District was performed by the Mercer County Chamber of Commerce in July 1976 and a detailed written report was issued in January 1977 (P-49) and discussed with the Board at a meeting held February 16, 1977. (Tr. IV-21) The chairman of the study committee which produced this report testified regarding various aspects of the committee's findings and recommendations, including the district's personnel practices and the use of data processing procedures. The chairman testified that at the time of the study, personnel procedures were placing the Board in the position of acting as both administrator and policy maker, which the committee believed to be an unusual kind of activity for the Board to be involved in in a school district like Trenton. (Tr. IV-34) He further testified that the primary responsibility

of the Board should be policy making and seeing that the school system is well run, but not running the system itself. (Tr. IV-36)

The committee's report stated the concern that the personnel screening function is a work duplication and, as carried out by the Board's personnel committee, creates a dysfunction which may endanger the district's receipt of public monies, which presupposes non-discriminatory hiring, promotions and assignments. (P-49 at p. 47) The report's first recommendation regarding personnel practices is that a review be made of Board committees, their need, responsibility, administration, redundancy, effectiveness and their performance in accordance with recognized legal requirements. (P-49 at p. 48) The report found the personnel office understaffed and devoting virtually all of its time to one task, the preparation of agendas for Board meetings. The report points out that the Board meets twice each month, as does its personnel committee, and therefore the personnel office must prepare four different agendas each month, approximately one each week. The testimony of the chairman, as well as the report, shows that between 275 to 300 copies of agenda are prepared for these purposes. (P-49 at pp. 48-52; Tr. IV-34-36) As a result of this one major activity, characterized as "overpowering" by the chairman, eleven separate responsibilities of the personnel office were not being performed. (P-49 at p. 50; Tr. IV-35) The chairman testified that the practical effect of these circumstances was that the district did not really have a bona fide personnel office, and duties normally within the scope of function of a personnel office had to be performed by other offices in the school district, which he terms a dysfunctional arrangement. (Tr. IV-38) It is clear from the testimony of the chairman, as well as the report, that the district did not have a centralized personnel function. (P-49 at p. 50; Tr. IV-35-38)

The report recommended that the Board only consider personnel matters once a month, as opposed to twice a month. The report also recommended that the Board's personnel committee meet only once a month, thereby reducing the preparation of agendas from four to two. (P-49 at p. 53; Tr. IV-37)

The director of personnel for the district testified that his office was still preparing four agendas each month and, further, that this workload had increased because the entire folder for each applicant for any position, even a secretary or an aide, must be prepared for each Board member. (Tr. IV-115-116) The Chamber of Commerce report recommended that the practice of preparing a folder with the documents of all candidates for each Board member be eliminated. (P-49 at pp. 65, 66) The director testified that his office was still understaffed and could not adequately handle all of its assigned responsibilities. He explained that he often receives between 25 and 40 telephone calls each day which require responses and that additional duties, such as the unemployment compensation program, had been assigned to the office. (Tr. IV-117, 136) The director testified

that personnel requirements for special programs such as bilingual teachers, LDTC's or special education are given immediate priority. (Tr. IV-137-138)

The director testified that the Board's involvement in personnel appointments had increased rather than decreased since the Chamber of Commerce report was presented in January 1977. Since that report was issued, he testified the Board has become involved in recruiting, screening and recommending of candidates, including the nominating and appointing of its own candidates for positions, even though the Board's policy regarding committees states that "***the function of the committees shall be fact-finding, deliberative and advisory.***" (P-51; Tr. IV-122, 124, 126)

The director also testified regarding the Board's policy change which required that three candidates be presented by the Superintendent for each position (P-38), ante. He stated that he was aware of the Board policy which states that employees who will be affected by a policy change will be consulted before such proposed action is taken, but he was not consulted before the aforementioned personnel policy was adopted. (Tr. IV-126)

The director testified that three names had been presented to the Board, in accordance with its new policy, for the position of manager of the food services program. The Board then requested three additional names of candidates for this position, and finally appointed as acting food service manager the candidate who had been ranked seventh in the screening process. (Tr. IV-127-128)

The director also testified that the process of re-screening and repeated recommending of candidates results in a great deal of time being lost and hence is very costly. (Tr. IV-130) For example, the appointment of a coordinator of compensatory education which has been described previously in detail, required over 100 man hours. (Tr. IV-130) He stated that in at least three rescreenings for the positions of coordinators of compensatory education communication skills and computation skills the same two candidates were in each instance ranked first. He testified that he was forced to interview a candidate who was not qualified in accordance with the requirements of the job description and he suffered personal abuse because he did not comply with the wishes of one Board member. (Tr. IV-128-129)

The director testified that the district had not done any on-site recruitment of candidates since February 1973. At the time when the district was developing a comprehensive bilingual education program, several years ago, he had advised the Board's personnel committee of the importance of on-site recruiting at colleges and universities and had also explained the difficulties involved in recruiting black candidates. He pointed out the importance of establishing good relationships

through such recruiting and emphasized that such candidates could not be given promises of employment which were not fulfilled. (Tr. IV-119-121)

The director also testified regarding the effect of the abolishment of the position of director of research, evaluation and development upon the district's efforts to improve the centralization of personnel information through data processing. The Chamber of Commerce report had detailed nine major recommendations regarding the improvement of data processing systems (P-49 at pp. 23-34; Tr. IV-28-33), as well as the need for a centralized personnel record system. (P-49 at pp. 60-61) According to the director, he and the former director of research and evaluation had worked for a year on the development of a process for placing all personnel information for each professional staff member on one form which could be computerized, thus making a major step toward the centralizing of personnel information, which would have resulted in the saving of a great deal of time. (Tr. IV-144) The abolishment of the position of director of research and evaluation resulted in the abandonment of this project. (Tr. IV-144)

The district's systems analyst, testifying in regard to the school district's data processing operation, stated that the majority of time is spent on payroll and budget related functions. In this respect, the data processing operation had not changed since the Chamber of Commerce report was issued in January 1977. He testified that a capital inventory control system had been started, but was discontinued because of budgetary restraints. (Tr. IV-74, 75)

In regard to personnel matters, the chairman of the Chamber of Commerce team testified that the report recommended that all illegal questions be eliminated from the district's application forms. (P-49 at p. 64; Tr. IV-46) At the time of the hearing in this matter, testimony from the district's director of affirmative action disclosed that proscribed questions still appeared on application forms used by the district, but that he was in the process of revising such forms for compliance with statutory requirements and existing rules. (Tr. IV-88-94)

The hearing examiner has reported in detail the testimony and documentary evidence adduced with respect to the three allegations concerning: (1) efficient administrative procedures; (2) the 1978-79 school budget; and (3) the employment of teaching staff members. Having carefully reviewed and scrutizined all of the evidence, he finds that:

1. The Board has failed to prepare, adopt and implement efficient administrative policies and procedures pursuant to N.J.A.C. 6:8-4.7.

a. The Board has inordinately interfered with and impeded the adoption of programs and plans including, but not limited to, areas such as compensatory education and affirmative action, to the degree that the operation of the public schools was in obvious disarray for at least six months of the 1978-79 school year, in spite of the fact that the Board was required by law to implement the remedial plan approved by the Commissioner.

b. The evidence in the record, particularly the minutes of the meetings of the Board, shows a pattern of actions which can only be described as devisive, which results in a disunity that is clearly inimical to the interests of the school district.

c. The pattern of the Board's actions over the period covered by the record in this matter shows an almost consistent disregard for recommendations from the district's administrative and supervisory staff as well as officials of the Department of Education.

d. The Board does not operate as a unified public corporation and agency of the State, duly created and empowered by the Legislature to serve the best interests of the pupils, their parents and the community at large. Instead, the Board operates as a diverse group of individuals of whom some appear to be regularly attempting to directly administer the varied affairs of the school district. Such a state of affairs is clearly contrary to sound educational policy.

e. The Board's minutes which comprise the permanent record of all official actions, and which must be retained in perpetuity, are kept in a manner which conceals, confuses and obfuscates the actual record of the transaction of business. Although nothing in the record supports a conclusion that this is by intention or design, the end result is not acceptable. The bound volumes of the Board's minutes for a typical meeting contain a document of several pages, which is the agenda, listing matters to be considered that are referred to as exhibits with alphabetical designations. Another document is entitled Board action, and a number of these have been referred to as items of evidence in this report. This document makes reference to motions and roll call votes of matters identified by alphabetical and numerical designations. For example, this portion of the minutes may record a motion and vote to approve item K-5, teacher disciplinarian, page 10, attachment C, or to approve item Y, recruiting (bilingual program) attachment D, which was defeated (P-29 at p. 8). It is necessary to pursue each such motion, locate the exhibit and attachment, find the correct page, and read the language of the recommendation in order to determine the actual transaction of business. This is made all the more difficult because specific items are often tabled during one portion of the meeting and then acted upon

later during the same meeting. The confusion resulting from these circumstances was evident during testimony in the course of the hearing, which resulted in the hearing examiner's request for the submission of bound volumes of the Board's minutes. (Tr. II-141-144) Citizens attending a public meeting of the Board would have to be given copies of the agenda and copies of most exhibits and attachments, which in many instances are both numerous and voluminous, in order to even attempt to follow and understand the actions being taken by the Board.

2. The Board clearly failed to document the sufficiency of each appropriation line item of the 1978-79 school budget. The record is abundantly clear that many months of preparation and planning were utilized by staff members in order to reallocate the reduced budget and make available funds necessary for the implementation of the remedial plan. By one action the Board vitiated these extensive efforts and, as late as December 1978, half way through the school year, the Board was exacerbating the problem by insisting upon the dissolution of cross-grade level classes while refusing to approve the creation of teaching positions needed to accomplish such an end.

3. The Board failed to follow proper procedures for employing teaching staff members based upon the needs of the various schools and the district as a whole, pursuant to N.J.A.C. 6:8-4.3 as defined by N.J.A.C. 6:8-1.1.

a. The record in the instant matter is replete with substantive evidence of gross mismanagement by the Board in the employment, transfer and promotion of personnel, including both professional teaching staff members and noncertificated support services personnel.

b. A review of the substantial evidence leads to the logical conclusion that some members of the Board operate as though their primary responsibility were to serve as patrons for individuals for whom they seek employment, transfer or promotion. In some instances Board members exercise initiative to transfer or promote teaching staff members with no record showing that any consideration was given to the desires of affected individuals or the recommendations of the district's administrative and supervisory staff. At the same time, there exists a consistent pattern of thwarting of administrative recommendations concerning personnel by the device of regularly tabling such recommendations by Board action and/or voting to defeat specific recommendations, without any reasons for such actions being recorded in the official minutes of the Board's proceedings.

c. The Board's recently adopted policy requiring that administrative recommendations for the appointment of personnel consist of three candidates for each position, ante, is inappropriate, inefficient and educationally unsound. Also, the Board has perpetuated the illegal and improper practice of having all individual recommendations regarding both certificated

teaching staff members and noncertificated support services personnel identified by race and sex on the Superintendent's instructional report, which is presented to the Board and then incorporated into the bound volumes of the Board's official minutes. See P-30, P-37 and bound volumes as follows: April 27, 1978, Exhibit I, Instructional, pp. 142-160; May 25, 1978, Exhibit H, Instructional, pp. 180-196; July 27, 1978, Exhibit F, Instructional, pp. 160-188 (P-30); August 31, 1978, Exhibit C, Instructional, pp. 150-188 (note: P-32 in evidence is the same document without the code references for sex and race); September 28, 1978, Exhibit H, Instructional, pp. 70-86; October 19, 1978, Exhibit I, Instructional, pp. 46-73; October 24, 1978, Exhibit A, Instructional, pp. 25-48 (P-37); November 16, 1978, Exhibit I, Instructional, pp. 60-79; December 13, 1978, Exhibit I, Instructional, pp. 73-96.

It is clear that a preponderance of credible evidence supports the findings hereinbefore set forth in this portion of the report and, further, that such findings show deficiencies of a magnitude and severity that action of the Commissioner and the State Board are required to institute and order a plan of corrective action.

Before setting forth recommendations for corrective action, the hearing examiner must first address the Motions to Dismiss and Summary Judgment presented by the Board and argued on the last day of hearing and in the Board's Brief. (Tr. V-3-27) At the conclusion of such argument the hearing examiner stated that sufficient evidence had been presented to warrant his submission of a report of factual findings on the allegations set forth in the Order to Show Cause. The Board presented no evidence on its behalf either through witnesses or in documentary form. The Board relied, instead, through cross-examination and summation, on the thesis that the State has the responsibility to see to it that local school districts fulfill their respective duties in every instance and, should the State through the Department or county office fail to do this, the district should be absolved of any responsibility or fault for such failure to comply. The argument is also made that the Department did not present a prima facie case to justify the ordering of corrective action or, in the alternative, if the evidence is accepted, the whole of such evidence does not justify the remedy of a special agent and the removal of the local authority of the school district.

The Board was not required to present evidence on its behalf in the instant matter and, in fact, chose not to do so. The record, as it stands, clearly shows that the weight of credible evidence supports the findings herein detailed, which prove the truth of the allegations. It must be pointed out that two allegations contained in the Order, dealing with educational programs for gifted and talented pupils and the employment of aides, were not addressed in the hearing and are accordingly dismissed.

For the reasons stated, the hearing examiner recommends that the Commissioner dismiss the Board's Motions to Dismiss and for Summary Judgment.

The law applicable to the instant matter is clear and may be briefly summarized. The provisions of the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., and related statutes require that the Commissioner annually assess the operation of local school districts and schools for the purpose of determining the thoroughness and efficiency of their performance. N.J.S.A. 18A:7A-10, 11 He may also inquire into and ascertain the thoroughness and efficiency of operation of any school district or school grades by such means as he shall deem proper. N.J.S.A. 18A:4-24

If the Commissioner determines from the results of the evaluations conducted and reports submitted that the district shall develop a remedial plan for the correction of deficiencies, such a plan, when approved by him, must be implemented in a timely and effective manner, which must be assured by the Commissioner. N.J.S.A. 18A:7A-14; N.J.A.C. 6:8-7.2(a)

If, following a plenary hearing, the Commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes, to order in-service training programs for teaching staff members and other school personnel, or both. If he determines that such corrective actions are insufficient, the Commissioner will recommend a plan of remedial and corrective action for adoption by the State Board. N.J.S.A. 18A:7A-15; N.J.A.C. 6:8-7.2(b), (c) and 7.3. Should the local board fail or refuse to comply with an administrative order issued pursuant to N.J.S.A. 18A:7A-15, the State Board shall apply to the Superior Court for an order directing the local school board to comply. N.J.S.A. 18A:7A-16 Failure on the part of the members of a local board to comply with such an order of the Court would, of course, constitute grounds for seeking individual citations of contempt of court against those board members.

The authority and responsibility of the Commissioner to insure the provision of a thorough and efficient system of public schools has been addressed in detail in previous decisions of the courts of this state and need not be repeated here. See Robinson v. Cahill, 62 N.J. 473 (1973) and 69 N.J. 449 (1976); Jenkins v. Morris Twp. Board of Education, 58 N.J. 483 (1971), Elizabeth Board of Education v. Elizabeth City Council, 55 N.J. 501 (1970); East Brunswick Twp. Board of Education v. East Brunswick Twp. Council, 48 N.J. 94 (1966); and Booker v. Plainfield Board of Education, 45 N.J. 161 (1965).

The hearing examiner will next set forth a recommendation for corrective action. It must first be stated that the deficiencies hereinbefore described are of such a nature and

magnitude that a plan limited to effectuating budgetary changes and in-service training for the Trenton School District's personnel would be singularly insufficient. The plan must be substantially broader and provide for an on-going system of close supervision and monitoring.

The plan for corrective action shall include, but not be limited to the following elements:

A. General Supervision

1. The Commissioner shall appoint and assign a monitor general to full time service within the district as a general supervisor of all activities conducted by the school district. The monitor general shall report directly to the Commissioner concerning the total operation of the school district for the 1979-80 and 1980-81 school years.

2. The school district shall assume the cost for the services of the monitor general and two assistants, as well as for secretarial support services, to a maximum of $125,000 per year.

3. The Commissioner shall, as he deems necessary, direct that personnel from the Department and county offices visit the school district to make a thorough inspection of any aspect of the operation of a school or schools, including the operation of various educational programs and the general administration and management of the district. Written reports of such monitoring visits shall be furnished to the Commissioner.

4. The Commissioner shall, as he deems necessary, require the Board to engage the services of an independent auditor, who shall be a certified school accountant, to perform audit functions of one or more of the special programs operated by the Board, the payroll account or general current expense or capital outlay accounts, in order to determine the status of revenues and expenditures and cash receipts and disbursements of the school district's annual budget.

5. The Commissioner shall order the transfer of moneys among the line items of the school district's budget whenever he deems such action necessary for the conduct of a thorough and efficient program of education. In the event that the Commissioner may determine the need for additional fiscal resources for such purpose, he shall certify to the Mercer County Board of Taxation that such additional amount be raised for current expenses or capital outlay by local taxation.

6. No action shall be taken by the Board which would result in increased costs to the school district until the monitor general and the county superintendent have been assured that the necessary budgetary resources are available and have so signified their respective approvals.

B. In-Service Training

1. The Commissioner shall direct the county superintendent to plan and have conducted an in-service training program for the members of the Board in regard to the roles, responsibilities and duties of a local board of education.

2. The Commissioner shall also direct the county superintendent to plan and have conducted appropriate in-service training programs for the district's administrative and supervisory staff and for other teaching staff members, as he shall deem necessary.

C. Affirmative Action Plans

1. The Commissioner shall direct the monitor general and county superintendent to monitor the district's efforts and achievements in implementing the district's affirmative action plans. The district shall be required to submit summary progress reports on a monthly basis regarding such implementation.

D. Special Education

1. The Commissioner shall direct the monitor general and county superintendent to require a thorough review by district and/or Department personnel of the district's progress in complying with all statutes and rules governing the conduct of the program of special education.

2. The monitor general and county superintendent shall be empowered to direct the district's personnel to take all steps necessary to operate a thorough and efficient program of special education.

a. These activities shall include, but not be limited to: completion of the screening, evaluation and classification, where necessary, of all pupils requiring special education services, completion of all reevaluations of previously classified special education pupils, completion of individual educational plans for all classified pupils, placement of all pupils in the most suitable special education program, and the creation of sufficient staff positions to provide adequate special education services. Recommendations regarding budgetary requirements shall be made to the Commissioner as described, ante.

b. Monthly progress reports shall be submitted by district personnel regarding the progress made to comply with all special education laws and rules.

E. Bilingual Education

1. The Commissioner shall direct the monitor general and county superintendent to require a thorough review by district and/or Department personnel of the district's progress in complying with all statutes and rules governing the conduct of the program of bilingual education.

2. The monitor general and county superintendent shall be empowered to direct the district's personnel to take all steps necessary to operate a thorough and efficient program of bilingual education.

a. These activities shall include, but not be limited to: the screening of all eligible pupils, the planning and organizing of adequate numbers and sizes of bilingual classes, the securing of adequate classroom locations for bilingual education and the creation of sufficient staff positions to provide adequate bilingual education services. Recommendations for budgetary requirements shall be made to the Commissioner as previously described.

b. Monthly summary progress reports shall be prepared by district personnel regarding the progress made to comply with all applicable laws and rules.

F. Compensatory Education

1. The Commissioner shall direct the monitor general and county superintendent to require a thorough review by district and/or Department personnel of the district's progress in complying with all laws and rules governing the compensatory education program.

2. The monitor general and county superintendent shall be empowered to direct the district's personnel to take all steps necessary to insure compliance with all requirements for the operation of a program of compensatory education.

a. These activities shall include, but not be limited to, the planning, organization and implementation of an efficient and effective program, the creation of sufficient staff positions to adequately meet the needs of the pupils to be served, and the provision of appropriate supplies and materials of instruction. Supervision shall be provided to insure the appropriate and total utilization of state aid funds for this program.

b. Monthly summary reports shall be prepared by district personnel regarding the progress made to comply with all pertinent laws and regulations.

G. School Facilities

1. The Commissioner shall direct the monitor general and county superintendent to require district personnel to prepare a comprehensive plan for the provision of needed school facilities, as well as a long-range plan for adequately maintaining and refurbishing all existing schoolhouses. This maintenance plan shall include a detailed schedule of budgetary requirements for no less than a five year period, with annual goals and timelines for completion.

a. The monitor general and county superintendent, with the assistance of Department personnel, shall survey all existing school facilities to determine both emergency needs and those minor items which may be corrected forthwith.

b. Recommendations for necessary budgetary allocations shall be made to the Commissioner, ante.

c. Progress reports shall be prepared in summary form by district personnel regarding the planning for and maintaining of all school facilities.

H. Personnel Functions

1. The Commissioner shall direct the monitor general and county superintendent to require district personnel to formulate adequate plans for the staffing of all educational programs in the district. Such plans shall provide for the establishment of required positions and shall include professional methods of advertising positions, recruiting of candidates, thorough screening and interviewing of candidates, and preparation of recommendations for appointments. Transfers of personnel, where applicable and necessary for the implementation of educational programs, shall also be recommended in such planning.

2. The monitor general and county superintendent shall review all personnel staffing recommendations and signify in writing that such recommendations are necessary, have been adequately processed and are supported by budgetary appropriations.

3. Such personnel recommendations shall be presented to the Board for formal approval. The Board shall not be permitted to table such recommendations, but shall conduct a recorded roll call vote upon them as required by law. If any Board member wishes to oppose such recommendations, he/she shall state such objection which shall be recorded in the minutes of the meeting. No recommendation of personnel shall be identified by any code designating sex and/or race.

a. No recommendations for the appointment, transfer or promotion of certificated support service personnel shall be made by members of the Board.

b. The Commissioner shall declare null and void the Board's policy requiring the recommendation of three candidates for each position of employment.

c. The Board shall consider personnel matters only once each month as a committee of the whole.

d. The Board's personnel committee shall be dissolved and shall cease to function.

4. In the event that the Board shall fail to approve properly presented personnel recommendations, without good and sufficient reason in the judgment of the Commissioner, he shall take appropriate action to secure compliance with this provision of the corrective action plan.

5. The monitor general and county superintendent shall, with the assistance of Department personnel, review all titles of employment and determine the certification requirements of all unrecognized titles of certificated teaching staff members pursuant to N.J.A.C. 6:11-3.6, and shall take all necessary steps to insure compliance with applicable regulations.

I. Board Operations

1. In order to develop a harmonious and unified working relationship and to insure that all Board members be knowledgeable regarding all facets of the Board's operations, the Commissioner shall order that the Board function only as a committee of the whole. All committees of the Board shall be dissolved and cease to function. The Board shall meet and conduct business as a committee of the whole for all regular meetings, any necessary special meetings, and for a monthly planning meeting if so desired.

2. The format and method of keeping the minutes of Board meetings, including the permanent bound volumes, shall be changed in accordance with instructions which shall be issued separately from this plan.

J. Annual Report

1. The Commissioner shall require that the district include in its annual report a summary of its progress in meeting the requirements of the corrective action plan.

K. The Commissioner shall submit periodic reports to the State Board regarding the district's compliance with the corrective action plan, including annual summary reports for the 1979-80 and 1980-81 school years. The Commissioner shall also submit, at the request of the State Board, any additional information or interim reports required by the Board.

Since the above plan for corrective action goes beyond budgetary changes and in-service training programs, it is recommended that the Commissioner submit such plan to the State Board for its adoption pursuant to N.J.S.A. 18A:7A-15.

This concludes the report, findings and recommendations of the hearing examiner. In accordance with the provisions of N.J.S.A. 52:14B-10, this report does not become final until 45 days from receipt thereof by the Commissioner, unless he shall act to affirm, modify or reverse during the 45 day period.

* * * *

The Commissioner has reviewed the entire record in the instant matter, including the initial decision and the exceptions thereto filed by the Board in accordance with N.J.A.C. 6:24-1.17(b).

The Board alleges in its exceptions that the finding that the district operated a Title VII E.S.E.A. bilingual program in violation of federal regulations is inaccurate. The consultant's report to the acting county superintendent (P-13) clearly shows that the district paid the salaries of some bilingual content area teachers with funds from the Title VII E.S.E.A. program, which is a violation of federal regulations. The summary report (P-13) also indicates that of a total of 955 pupils eligible for the bilingual program, only 502 were being served, leaving a balance of 453 of which 344 were elementary pupils. If the number of pupils receiving only partial services were subtracted from the 502 pupils served, the total number of pupils receiving no program or an inadequate program is even greater than 453. Actually, of the 502 pupils served, only 270 were receiving an adequate program of bilingual education and 232 were receiving partial services (P-13).

The Board states that it was not aware of the existence of the report (P-13) until the time of the hearing. This is of no moment, because this report essentially represents a compilation of pupil statistics from the district's own records, and a summary of the district's efforts to implement the bilingual program. All of this information was known by district personnel prior to the hearing.

The Board also takes exception to the finding regarding the Board's efforts to adopt a revised 1978-79 school budget with balanced revenues and expenditures. The Board did receive a cap waiver in the amount of $783,000, which included $630,000 for textbooks and supplies, $53,000 for in-service training and $100,000 for bilingual education. The Board's resolution, Exhibit Q, adopted on June 29, 1978 inaccurately states that the governing body's review of the defeated budget resulted in a budget decrease in an amount equal to the budget cap increase. The actual reduction made by the governing body was $893,000 as stated in the exceptions, but this amount was $110,000 greater than the approved cap waiver. The hearing officer relied upon the resolution, Exhibit Q, which was not correct.

In its exceptions the Board defends its method of recording its formal minutes on the grounds that this form has been used for decades, and that a researcher can find the actions taken by the Board by perusing the various documents and exhibits which are included in the minute books. The Commissioner agrees with the finding that the method utilized by the Board does conceal, confuse and obfuscate the actual record of the transaction of business.

Having considered the record in its entirety, it is clear that a preponderance of credible evidence supports the findings of the hearing examiner which are set forth in the initial decision. Indeed, the evidence submitted by the State in this matter was totally unrefuted by the Trenton Board of Education. The Commissioner, therefore, denies the Board's Motions to Dismiss and for Summary Judgment for the reasons set forth in the initial decision. He further adopts, as his own, the findings of the hearing examiner which may be summarized as follows:

SPECIAL EDUCATION PROGRAMS FOR HANDICAPPED CHILDREN

1. The Board failed to provide adequate professional personnel and services for the timely identification, evaluation and classification of handicapped pupils, including required reevaluation of previously classified pupils, as required by statute and regulation. N.J.S.A. 18A:46-6 et seq.; N.J.A.C. 6:28-1.3(b), 1.5(a), 1.6(b) and 1.6(p)

2. The Board failed to develop and implement individual educational plans for all classified handicapped pupils. N.J.A.C. 6:28-1.8

3. The Board failed to provide adequate resource rooms and comprehensive programs for handicapped pupils who do not require placement in self-contained classes. N.J.A.C. 6:28-2.2(c)(1)(iii)

4. The Board failed during the 1978-79 school year to avail the school district of funds for special education purposes in the amount of $145,248.53, even though critical needs in this area had been continually evident, as shown by the Board's own remedial plan. (P-2, P-55)

5. Because of the significant backlog of pending cases within the district, teaching staff members were not referring potentially handicapped pupils to CSTs during the 1978-79 academic year.

6. There has been a lack of adequate supervision of the district's total program of special education, which is a causative factor in its failure to remedy all deficiencies in this particular program.

AFFIRMATIVE ACTION PLANS

The Board failed to adopt and implement an affirmative action plan, approved by the Department, pursuant to N.J.A.C. 6:4-1.3 et seq.

SCHOOL FACILITIES

The Board has failed to provide safe and suitable school facilities in the six elementary schools hereinbefore described, as well as Junior High Schools No. 1, 2, 3 and 5, and Central High School.

In order to remedy the numerous deficiencies found to exist in health and safety provisions, an in-depth study will be required of the school district's maintenance and repair procedures, as well as the amount of funds budgeted for this purpose.

BILINGUAL EDUCATION PROGRAM

The Board's bilingual education program has failed to: (1) meet the limited requirements of the remedial plan for 1978-79; (2) plan adequate budgetary provisions for bilingual teaching staff members for the 1979-80 school year; and (3) provide adequate programs of bilingual education for eligible pupils.

SUBMISSION OF REPORTS

There has been a pattern of failure on the part of the district to submit required reports and documents in a timely manner in conformance with statutory provisions and regulations.

EFFICIENT ADMINISTRATIVE PROCEDURES
SUFFICIENCY OF 1978-79 SCHOOL BUDGET
EMPLOYMENT OF TEACHING STAFF MEMBERS

With regard to the (1) efficient administrative procedures; (2) the 1978-79 school budget; and (3) the employment of teaching staff members:

1. The Board has failed to prepare, adopt and implement efficient administrative policies and procedures pursuant to N.J.A.C. 6:8-4.7.

a. The Board has inordinately interfered with and impeded the adoption of programs and plans including, but not limited to, areas such as compensatory education and affirmative action, to the degree that the operation of the public schools was in obvious disarray for at least six months of the 1978-79 school year, in spite of the fact that the Board was required by law to implement the remedial plan approved by the Commissioner.

b. The evidence in the record, particularly the minutes of the meetings of the Board, shows a pattern of actions which can only be described as devisive, which results in a disunity that is clearly inimical to the interests of the school district.

c. The pattern of the Board's actions over the period covered by the record in this matter shows an almost consistent disregard for recommendations from the district's administrative and supervisory staff as well as officials of the Department of Education.

d. The Board does not operate as a unified public corporation and agency of the State, duly created and empowered by the Legislature to serve the best interests of the pupils, their parents and the community at large. Instead, the Board operates as a diverse group of individuals of whom some appear to be regularly attempting to directly administer the varied affairs of the school district. Such a state of affairs is clearly contrary to sound educational policy.

e. The Board's minutes which comprise the permanent record of all official actions, and which must be retained in perpetuity, are kept in a manner which conceals, confuses and obfuscates the actual record of the transaction of business.

2. The Board failed to document the sufficiency of each appropriation line item of the 1978-79 school budget. The record is abundantly clear that many months of preparation and planning were utilized by staff members in order to reallocate the reduced budget and make available funds necessary for the implementation of the remedial plan. By one action the Board vitiated these extensive efforts and, as late as December 1978, half way through the school year, the Board was exacerbating the problem by insisting upon the dissolution of cross-grade level classes, while refusing to approve the creation of teaching positions needed to accomplish such an end.

3. The Board failed to follow proper procedures for employing teaching staff members based upon the needs of the various schools and the district as a whole, pursuant to N.J.A.C. 6:8-4.3 as defined by N.J.A.C. 6:8-1.1.

a. The record in the instant matter is replete with substantive evidence of gross mismanagement by the Board in the employment, transfer and promotion of personnel, including both professional teaching staff members and noncertificated support services personnel.

b. Some members of the Board operate as though their primary responsibility were to serve as patrons for individuals for whom they seek employment, transfer or promotion. Board members have exercised initiative to transfer or promote teaching staff members with no record showing that any consideration was given to the desires of affected individuals or the recommendations of the district's administrative and supervisory staff. There exists a consistent pattern of thwarting of administrative recommendations concerning personnel by the device of regularly tabling such recommendations by Board action and/or voting to defeat specific recommendations.

c. The Board's recently adopted policy requiring that administrative recommendations for the appointment of personnel consist of three candidates for each position, ante, is inappropriate, inefficient and educationally unsound. Also, the Board has perpetuated the illegal and improper practice of having all individual recommendations regarding both certificated teaching staff members and noncertificated support services personnel identified by race and sex on the Superintendent's instructional report, which is presented to the Board and then incorporated into the bound volumes of the Board's official minutes. The aforementioned deficiencies are of such magnitude and severity as to require the Commissioner and the State Board of Education to institute and order a plan of corrective action.

The recommended plan for corrective action contained in the initial decision is entirely suitable, given the breadth of the deficiencies and problems which require attention. A maximum of latitude of discretion is properly envisioned in the plan, since a broad range of educational programs, functions and services must be improved. The monitor general shall report directly to the Commissioner and shall provide general supervision, as determined by the Commissioner, of all activities conducted by the school district. The role of the county superintendent as the representative of the Commissioner for the implementation of N.J.S.A. 18A:7A-1 et seq., Public School Education Act of 1975, and other pertinent statutes, is well known by this Board and all other local boards of education. This role will not be changed by the corrective action plan. The county superintendent shall cooperate with, and assist, the monitor general as described in the proposed plan. The Commissioner additionally determines that the school district shall assume costs for the services set forth in the corrective action plan in the amount of $85,000 per year, instead of the $125,000 recommended in the initial decision.

The Commissioner is well aware of the historic policy and statutory plan in this State which vests in local boards of education discretionary authority for the government and management of the public schools (N.J.S.A. 18A:11-1). This investiture inculcates the principles of home rule into the operation of local school districts by elected and/or appointed citizens who serve on local boards of education.

The role and responsibility of the State in the operation of the public schools has been explained by the Supreme Court on several occasions. In Robinson v. Cahill, (Robinson I) 62 N.J. 473 (1973) the Court discussed the intention of the 1875 amendment to Art. IV, Section 7, para. 6 of the Constitution of 1844 which added the provision that:

> "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years." (62 N.J. at 508)

This provision is found in almost identical language in the Constitution of 1947, Art. VIII, Section IV, paragraph 1.

The Court stated that:

> "We can be sure the amendment was intended to embody the principle of the 1871 statute that public education for children shall be free. It is plain that the ultimate responsibility for a thorough and efficient education was imposed upon the State. This has never been doubted.[9] ***"

In Robinson v. Cahill, 69 N.J. 449 (1976), (Robinson V) the Supreme Court reviewed and construed the provisions of the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq. The Court pointed out that the Act provided a rather elaborate monitoring arrangement with responsibilities shared by State and local authorities (N.J.S.A. 18A:7A-8 to 12). The Court also described the importance of the statutes which provide for corrective action by the Commissioner and the State Board as follows:

> "***Crucial to the success of the legislative plan, as well as to the argument that the statute is facially constitutional, are three particular sections of the Act: N.J.S.A. 18A: 7A-14, 15 and 16. These provisions allocate to the Commissioner of Education and to the State Board of Education a two-fold continuing responsibility: first, to maintain a constant awareness of what elements at any

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9 "So in construing the statutes relating to the responsibilities of the State Commissioner of Education, we have repeatedly held it to be his affirmative obligation to see to it that the statutory objectives are met, and this on the premise that the Constitution having placed the responsibility on the State, the statutes should be read to mean that the State Commissioner shall see to it that the school districts abide by the mandate in their discharge of the delegated responsibility.***" (62 N.J. at 508, 509)

particular time find place in a thorough and efficient system of education, as this concept evolves through the inevitably changing forms that it will take in the years to come; second, to insure that there be ever present, sufficiently competent and dedicated personnel, adequately equipped, to guarantee functional implementation, so that over the years and throughout the State each pupil shall be offered an equal opportunity to receive an education of such excellence as will meet the constitutional standard.

"Pursuant to this allocation of responsibility, the Commissioner is required to review the results of the monitoring and evaluation system mentioned above. Upon detecting an inadequacy he must direct the local board of education to prepare forthwith a plan designed to correct and remedy the failure that has been identified. Such plan will be submitted to him for approval. If approved, the plan will be implemented 'in a timely and effective manner.' N.J.S.A. 18A:7A-14. Should the proposal not be approved, the Commissioner is directed to order the local board to show cause why there should not be a plenary hearing held before him to determine whether or not corrective action is necessary. If such a hearing is held, and the Commissioner decides that in fact such action is needed, he is then authorized 'to order necessary budget changes within the school district,' or 'in-service training programs for teachers and other school personnel, or both.' N.J.S.A. 18A:7A-15. If these steps in turn prove insufficient, the Commissioner may then formally bring the matter to the attention of the State Board in order that it may take further action. The statutory power and obligation of the Board upon such an occasion is stated thus:

> '***The State board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any other provision of law to the

> contrary, shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State board determines to be appropriate.***' [N.J.S.A. 18A:7A-15]

Should the local board fail or refuse to comply with such an administrative order, then the State Board shall apply to the Superior Court by action in lieu of prerogative writ for an order directing such compliance.

> "What we have said may be summarized. The Constitution imposes upon the Legislature the obligation to '...provide for the maintenance and support of a thorough and efficient system of free public schools...' The imposition of this duty of course carries with it such power as may be needed to fulfill the obligation. The statutory language quoted and discussed above constitutes a delegation of this power to the State Commissioner of Education as well as to the State Board of Education to see that the constitutional mandate is met. They have, for this purpose, been made legislative agents. They have received a vast grant of power and upon them has been placed a great and ongoing responsibility.***"
>
> 69 N.J. at 459-461

Thus, it may be seen that the corrective action plan set forth in this matter is in accord with the intendment of the statutes, N.J.S.A. 18A:7A-14, 15, 16, as interpreted by the Supreme Court.

For the reasons hereinbefore stated, the Commissioner hereby adopts the recommended plan for corrective action as his own. The Commissioner will recommend to the State Board that it adopt the corrective action plan, ante, in accordance with N.J.S.A. 18A:7A-15.

COMMISSIONER OF EDUCATION

November 7, 1979

IN THE MATTER OF THE	:	
BOARD OF EDUCATION OF THE	:	STATE BOARD OF EDUCATION
CITY OF TRENTON, MERCER	:	ADMINISTRATIVE ORDER
COUNTY.	:	
	:	

Decided by the Commissioner of Education November 7, 1979

For the Petitioner, John J. Degnan, Attorney General (Susan P. Gifis, Esq. and Alfred E. Ramey, Jr., Esq., Deputies Attorney General, of Counsel)

For the Respondent, Merlino, Rottkamp & Grillo (Robert B. Rottkamp, Jr., Esq., of Counsel)

For the Intervenors, Education Law Center, Inc. (Jacquelyn R. Rucker, Esq., of Counsel)

The Commissioner of Education, after a plenary hearing, having found that the Board of Education of the City of Trenton has failed to provide a thorough and efficient education in its school system in respect to numerous matters including special education programs for handicapped children, affirmative action plans, school facilities, the bilingual education program, submission of reports, employment of teaching staff members and efficient administrative procedures, and having therefore determined that it is necessary to take corrective action pursuant to the Public School Education Act of 1975; and the Commissioner having further determined that corrective action which could be ordered by him on his own authority would be insufficient, because of the magnitude and severity of the deficiencies, and having therefore recommended that the State Board of Education take appropriate action pursuant to N.J.S.A. 18A:7A-15; and the Commissioner having developed and recommended to the State Board a plan of remedial action as more fully set forth in his decision rendered in this matter on November 7, 1979, which among other things calls for the Commissioner, through a monitor general, to supervise all activities of the School District for the school years 1979-80 and 1980-81; and the State Board having determined, on review and consideration of the Commissioner's decision, that the School District is not providing a thorough and efficient education; now, therefore, on this 8th day of November, 1979, it is

ORDERED by the State Board of Education, pursuant to the authority granted by N.J.S.A. 18A:7A-15, that the aforesaid remedial plan recommended by the Commissioner be put into effect forthwith and be carried out in all respects, and that the Board of Education of the City of Trenton comply with all provisions of said remedial plan and with all directives issued pursuant to

said plan by the Commissioner, the monitor general or any other authorized representatives of the Commissioner; and be it

FURTHER ORDERED that the Commissioner recommend to the State Board of Education such additions or amendments to the remedial plan as the Commissioner may deem advisable from time to time during his supervision of the Trenton School District as herein provided; and be it

FURTHER ORDERED that the School District of the City of Trenton continue under the direct supervision of the Commissioner and his authorized representatives until further order of the State Board of Education.

COMMISSIONER OF EDUCATION

November 8, 1979

Pending New Jersey Superior Court

PETITION OF:	Herbert Hannemann v. Board of Education of the Township of Willingboro, Burlington County.	INITIAL DECISION DKT. NO. EDU 327-9/78

APPEARANCES:

For the Petitioner, Joel S. Selikoff, Esq.

For the Respondent, Barbour & Costa (John T. Barbour, Esq., of Counsel)

BEFORE THE HONORABLE BRUCE CAMPBELL, ALJ

Petitioner requests an Order of the Commissioner of Education directing the Willingboro Board of Education, hereinafter "Board," to reinstate him immediately in the position of teacher of vocational education (carpentry) at the Willingboro High School.

Conversely, the Board avers, inter alia, that petitioner has failed to state an actionable claim.

The matter is before the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Prior to plenary hearing, petitioner moves for Summary Judgment.

The instant petition arises from the following set of uncontroverted facts:

Petitioner was hired by Board effective September 1, 1975, to teach vocational education courses in carpentry in the 1975-76 school year. He was employed similarly for the 1976-77 and 1977-78 school years. At all times in question, petitioner held the following permanent New Jersey teacher certificates:

DESCRIPTION	ISSUED
Secondary School Teacher of English	May 1964
Secondary School Teacher of Industrial Arts	October 1966
Secondary School Teacher of Mathematics	May 1964
Secondary School Teacher of Science	May 1964

Petitioner also holds a regular New Jersey teacher certificate, issued October 1975, as a teacher of carpentry. By letter of April 25, 1978, Board, through its secretary, informed petitioner that his contract of employment as a teacher of vocational education (carpentry) would be terminated effective June 30, 1978 for reasons of economy and efficiency. Petitioner subsequently was hired by Board as a teacher of mathematics for the 1978-79 school year and so served.

The pleadings in this matter raise two questions of law: (1) was or was not the nonrenewal of petitioner's contract a proper exercise by Board of its legally invested powers and (2) did or did not petitioner have a right to employment as a vocational education (carpentry) teacher rather than as a mathematics teacher.

The first issue is beyond contemplation in view of petitioner's acceptance of a fourth consecutive contract to teach and his acquisition of tenure as a teaching staff member upon service of the first day under said contract. N.J.S.A. 18A:28-5.

The second issue pales upon consideration of the uncontroverted facts. Although a nonrenewal of petitioner's contract was contemplated and he was so advised, petitioner was in fact rehired within the scope of his certifications. His service was uninterrupted. What is of moment, therefore, is the timing of the events hereinbefore recited. When petitioner accepted the fourth consecutive contract, he had not yet gained tenure status. No seniority attaches to nontenure personnel. His service under the fourth contract as a teacher of mathematics is no more than a transfer within the scope of certifications held. It is established law that boards of education may assign teaching staff members, within the scope of their teaching certifications, as the boards deem necessary. Ava Salowe et al. v. Board of Education of the Borough of Highland Park et al. 1977 S.L.D. 832. That faculty selection is a board prerogative was emphasized by the Court in Porcelli et al. v. Titus et al., 108 N.J. Super. 301 (App. Div. 1969), cert. den. 55 N.J. 310 (1970) as follows:

> "***We endorse the principle as did the court in Kemp v. Beasley, 389 F. 2d 168, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'***." (at 312).

Based upon the foregoing, I FIND:

1. The question of nonrenewal here is moot.

2. While he served in a nontenure status, no rights of seniority attached to petitioner.

3. His assignment as a teacher of mathematics was effected prior to this attainment of tenure.

4. Petitioner is duly certificated to teach secondary school mathematics.

Based upon the foregoing, and a thorough review of the record in this matter, I CONCLUDE:

1. There is no question of nonrenewal before this tribunal.

2. Under the circumstances, ante, petitioner has no claim of right to an assignment as teacher of vocational education (carpentry).

3. Board's assignment of petitioner as teacher of secondary school mathematics was, in all respects, a correct and proper exercise of its legally invested powers.

4. Petitioner's prayer for an Order of the Commissioner directing Board to reinstate him in the position of teacher of vocational education (carpentry) is without merit.

5. Therefore, there is no justiciable matter before us.

Accordingly, the PETITION IS DISMISSED.

This decision cannot be effected prior to the effective date of this order which is forty-five (45) days from the date of State agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the designee of the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

11 OCTOBER 1979
DATE

Bruce Campbell
BRUCE CAMPBELL, ALJ

HERBERT HANNEMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed that petitioner's exceptions are grounded on the assertion that the administrative law judge's factual findings and conclusions of law in his initial decision completely ignore the question of whether the Board's action in making application for emergency certification for another employee to serve as a teacher of carpentry for the 1978-79 school year was ultra vires, inasmuch as petitioner was denied assignment to such position during that school year while possessing standard certification as a teacher of carpentry.

Petitioner argues that the record of this matter factually supports his contention that the Board's actions in this regard constitute an abuse of its discretionary authority and violate the applicable provisions of N.J.A.C. 6:11-4.4 pertaining to the request for and issuance of emergency certificates. These regulations read as follows:

> "(a) An emergency certificate is a substandard one-year certificate issued only in fields of teacher shortage as certified annually by the Commissioner of Education.
>
> "(b) It is issued only on application of a public school district, submitted after August 1, in which the local board of education declares its inability to locate a suitable certificated teacher.
>
> "(c) A current list of fields designated for emergency certification is available from the Bureau of Teacher Education and Academic Credentials or the county superintendent of schools."

In his Petition of Appeal petitioner alleges that the Board employed another person as a teacher of carpentry for the 1978-79 academic year, who possessed only emergency certification

while he, on the other hand, possessed standard certification in that field and was available for assignment to said position. (Petition of Appeal, para. 4) The Board admits as fact petitioner's specific allegation in its Answer to the pleadings. (Board's Answer, para. 4)

The initial decision in this matter omits a pertinent relevant fact. During the 1977-78 academic year, the Board had in its employ two teachers of carpentry, one of whom was petitioner. As was previously stated, petitioner held a standard certificate as a teacher of carpentry. He also possessed certificates as a secondary school teacher of English, industrial arts, mathematics and science. The other teacher of carpentry held only an emergency certificate for that position. The Board abolished one of the positions of teacher of carpentry for the 1978-79 academic year for reasons of efficiency and economy. The letter to petitioner from the Board Secretary under date of April 25, 1978 stated that the Board's reasons were based upon the "economic situation and enrollment projections" within the school district. This same letter of April 25, 1978 advised petitioner that the Board would terminate his contract effective June 30, 1978. The Board subsequently reappointed petitioner for the 1978-79 academic year and assigned him to a position of teacher of mathematics. As a result of this action by the Board, petitioner remained in continuous employment in the district. Thus the factual situation developed whereby petitioner continued in his employment with the Board as a teacher of mathematics although he was available for the assignment as a teacher of carpentry since he was the holder of the required standard certificate.

The record of this matter further reveals that the Board, in its response to interrogatories propounded by petitioner, has provided copies of accompanying documentation which established that the Board obtained permission upon request to the State Board of Examiners, through the office of the County Superintendent, to have an emergency certificate issued to a person it employed as a teacher of carpentry as of January 1, 1976. This emergency certificate was renewed for the same person each year at the Board's request up to and through the 1978-79 school year. (Attached copies of documents in response to Interrogatory #3)

The facts are clear that the need to employ a person with an emergency certificate as a teacher of carpentry for the 1978-79 academic year did not exist since petitioner was fully certified and available for assignment to such position at that time.

In the Commissioner's judgment, the Board's action in requesting approval for the issuance of an emergency certificate for a teacher of carpentry for the 1978-79 academic year contravenes the intent of the pertinent regulations, N.J.A.C. 6:11-4.4. These rules permit the issuance of an emergency certi-

ficate in a designated field of teacher shortage only on the condition that

> "***the local board of education declares its inability to locate a suitable certified teacher." (N.J.A.C. 6:11-4.4(b))

The Commissioner therefore finds the Board's action herein to be ultra vires and it is hereby set aside.

The Commissioner, for the reasons expressed herein, grants petitioner's request for relief and directs the Board to reassign petitioner forthwith to his former position of employment as a teacher of carpentry.

COMMISSIONER OF EDUCATION

November 26, 1979

Pending State Board of Education

HAMILTON TOWNSHIP SUPPLEMENTAL TEACHERS ASSOCIATION ET AL. V. BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY	:	INITIAL DECISION EDU. DKT. # 199-5/78

APPEARANCES:

For the Petitioners, Greenberg & Mellk
(Arnold M. Mellk, Esq., of Counsel)

For the Respondent, Henry F. Gill, Esq.

BEFORE THE HONORABLE ERIC G. ERRICKSON, A.L.J.

Petitioners, who have been employed for varying periods of time as supplemental teachers by the Hamilton Township Board of Education, claim entitlement to tenure and other benefits. The Board, conversely, asserts that petitioners do not serve in positions in which they can gain tenure and that they have been provided with all salary and emoluments to which they are entitled.

Petitioners' Motion for Summary Judgment was denied by an Order of the Commissioner of Education dated December 22, 1978. The basis for that denial was that a hearing was required to establish the essential relevant facts concerning the duties which petitioners were required to perform to fulfill the terms of their employment. Thereafter, a plenary hearing was conducted on January 24 and 25, 1979 at the Kisthardt Elementary School, Hamilton Township. Post hearing briefing was completed on July 23, 1979. The matter was transferred as a contested case to the Office of Administrative Law on July 2, 1979.

Having carefully reviewed the pleadings, the testimony elicited from witnesses and the documentary evidence entered at the hearing, I FIND the following to be the essential, relevant facts necessary to a determination of the dispute:

1. Petitioners are all employed by the Board as "supplemental instructors";

2. Petitioners, who are required by the Board and the laws of the State to hold certificates to teach issued by the State Board of Examiners, are individually certified as "teacher of the handicapped" or "elementary teacher", N.J.S.A. 18A:27-2;

3. Petitioners, with one exception, teach classes of from one to four pupils in periods one-half hour in length. The single exception was a teacher at the high school who taught pupils during periods coinciding with the scheduled classes for all pupils;

4. All pupils taught by petitioners are selected by the Child Study Team as educationally handicapped and in need of supplemental instruction in one or more of the basic skills. An individualized educational plan (IEP) which is furnished by the learning disabilities teacher consultant (LDTC) for each pupil, specifies those areas of pupil weakness and the broad approaches to remedial instruction. The supplemental instructor then breaks those into short range goals in daily and weekly lesson plans. Over 300 pupils received such instruction during 1979. (R-1 b);

5. With the single exception of the high school supplemental teacher who is assigned a schedule of rostered classes, the supplemental teachers arrange with the regular teachers to whom their pupils are assigned the times a pupil receives supplemental instruction. At the end of each year, they administer year-end tests the results of which became input for future IEP's;

6. The high school supplemental teacher at the high school assigns and records report card grades in the same manner as other high school teachers. Other supplemental teachers do not assign report card grades but prepare quarterly progress reports on each pupil for the LDTC as well as an insert on pupil progress which is sent home with pupils' report cards (P-6);

7. With the exception of the high school supplemental teacher who stands hall duty while classes pass, petitioners are not required to attend faculty meetings and have no playground, lunchroom, homeroom or bus loading supervisory duties;

8. Petitioners have daily schedules which in multiples of one-half hour do not exceed five hours. These daily schedules are subject to fluctuation as pupils are added to or withdrawn from supplemental instruction by the Child Study Team. It is rare, however, that during a school year a supplemental teacher's daily schedule is shortened (P-1, 2, 4, 5);

9. The Board authorizes appointments and reappointments of supplemental instructors to serve and be paid at an hourly rate. After such authorization and advisement by the Board's Director of Personnel of the Board's action, they signify in writing their availability to serve on an "as needed" basis and are thereafter notified of their specific hourly schedule. (R-2, 2(a)) While the form of contract differs in major respects from those entered into by the Board and regular classroom teachers, the offer and acceptance of employment for consideration nevertheless constitutes a contract;

10. Supervision of supplemental instructors in a formal sense of classroom observation, written evaluations and conferences with supervisors has been sporadic. Some supplemental instructors had never been supervised utilizing these procedures. Others had, on occasion, received benefit of such supervision (P-7, a,b; P-9);

11. Supplemental teachers have not been enrolled in the Teacher Pension Annuity Fund (Tr. II 55-56);

12. Supplemental teachers give input when consideration is given to removing a pupil from supplemental instruction, but the ultimate decision is one which rests with the Child Study Team (Tr. I 31-32);

13. In most instances, except for long term absences, no substitutes are provided for absent supplemental instructors;

14. Supplemental instructors, with one exception, report for work approximately one week after school begins in September and work until approximately one week before school ends in June. The supplemental teacher at the high school works the full academic year;

15. Supplemental instructors receive entitlement to ten sick days with pay per year but are not paid for any holidays.

The Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., mandates, as does the New Jersey Constitution, that educational programs shall be thorough and efficient. The Supreme Court of New Jersey in Robinson v. Cahill, 69 N.J. 133 (1975); 1975 S.L.D. 1122 expressed "***approval of the ongoing

efforts of the Department of Education to establish the components of a thorough and efficient system of education by formulation of standards, goals and guidelines by which the school districts and the Department may in collaboration improve the quality of the educational opportunity offered all school children.***" (1975 S.L.D. 1126)

The Legislature in N.J.S.A. 18A:7A-5 mandated that:

"A thorough and efficient system of free public schools shall include the following major elements, which shall serve as guidelines for the achievement of the legislative goal and the implementation of this act: ***

"e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;

"f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;

"g. Qualified instructional and other personnel; ***" (Emphasis supplied.)

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

"The Legislature hereby finds and determines that the welfare of the State requires that present and future generations of school age children be assured opportunity to develop to the fullest their intellectual capacities. It is the intent of this Legislature to insure that the State shall furnish on an equal basis auxiliary services to all pupils in the State in both public and nonpublic schools." (Emphasis supplied.)

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

"The State board, after consultation with the commissioner and review by the Joint Committee on the Public Schools shall (a) establish goals and standards which shall be applicable to all public schools in the State, including uniform Statewide standards of pupil proficiency in basic communications and computational skills at appropriate points in the educational careers of the pupils of the State, which standards of proficiency shall be

reasonably related to those levels of proficiency ultimately necessary as part of the preparations of individuals to function politically, economically and socially in a democratic society, and which shall be consistent with the goals and guidelines established pursuant to sections 4 and 5 of this act, and (b) make rules concerning procedures for the establishment of particular educational goals, objectives and standards by local boards of education." (Emphasis supplied.)

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

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

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

"***

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

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

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

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

"***

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

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

"***

> "(b) Supplemental instruction shall be instruction provided educationally handicapped pupils which is given in addition to the regular instructional program of such pupils. It shall meet the following criteria:
>
> "1. Supplemental instruction for the educationally handicapped pupils shall be provided in a school or other facility operated and controlled by the local school district;
>
> "2. Supplemental instruction shall be considered part of the planned curriculum for the educationally handicapped pupil for whom it has been prescribed by a basic child study team, or a speech correctionist and described in the pupil's individualized education program;
>
> "3. Supplemental instruction for the educationally handicapped pupil may be given individually or in small groups, not to exceed three pupils;
>
> "4. Supplemental instruction shall be provided in physical facilities conducive to learning;
>
> "5. The teachers providing supplemental instruction shall be appropriately certified for the subject or level in which instruction is given." (Emphasis supplied.)

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

Petitioners assert that they meet the statutory requirements for tenure as set forth in N.J.S.A. 18A:28-5 which provides, in pertinent part, that:

> "The services of all teaching staff members including all teachers, *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> > "(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> >
> > "(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> >
> > "(C) the equivalent of more than three academic years within a period of any four consecutive academic years; ***"

Respondent, conversely, argues that petitioners are barred from receiving tenure because they are paid on an hourly basis, are not issued the same contracts as regular classroom teachers, are not paid for holidays, are not enrolled in the Teacher Pension Fund, are not assigned to instruct classes as large as regular classroom instructors, are not employed for the entire school day and year, and are not assigned responsibility for supervision of homerooms, lunchrooms, playgrounds, bus loading and corridors. That assertion is in error.

Petitioners are regularly employed albeit for less than a complete school day or year. By their function of instructing pupils as certificated teachers in essential programs they meet the definition of "teaching staff member" as set forth in N.J.S.A. 18A:1-1 which provides that:

> "***'Teaching staff member' means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse."

It is true that fewer pupils are assigned to petitioners for supplemental instruction in a given period than are assigned to a regular classroom teacher. This fact alone, however, no more bars a supplemental teacher from acquisition of tenure than does the fact that behind-the-wheel driver education instructors or guidance counselors typically render services on a one-to-one basis. Respondent's argument that petitioners do not perform numerous duties such as playground and cafeteria monitoring must also fail, since numerous other tenured school employees such as child study team members, nurses, librarians and guidance personnel are typically free from such assigned duties.

Nor are petitioners barred from acquisition of tenure by reason of being paid on an hourly basis as opposed to a yearly contractual salary. In Margaret M. Wall v. Board of Education of Jersey City, 1938 S.L.D. 618 (1930), aff'd 119 N.J.L. 308 (Sup. Ct. 1938) the State Board of Education stated, with reference to the tenure statute, that:

> "***The statute is silent as to the rate or method of statement. It simply requires 'employment' for the period stated. *** That she was paid at a per diem rate instead of by the month or by the year does not change the fact that she had regular, continuous employment.***" (at p. 621)

In recognition of petitioners' regular, continous employment in the matter herein controverted, I reach the same conclusion: petitioners' hourly rate of compensation acts as no bar to acquisition of tenure. See also in this regard Joseph Capella, et al. v. Board of Education of the Camden County Vocational and Technical Schools, 1975 S.L.D. 178, aff'd State Board of Education 1975 S.L.D. 186, aff'd New Jersey Superior Court 1975 S.L.D. 1129 (App. Div.)

N.J.S.A. 18A:28-5 provides that teaching staff members in positions requiring that they hold certificates issued by the State Board of Examiners attain tenured status when they have served for a continuous period in excess of three academic years or for the equivalent of more than three academic years within any period of any four academic years.

The statute is noticably silent concerning such aspects of employment as method of payment, extra duties, numbers of pupils in classes, payment for holidays or enrollment in TPAF. As was said by the Court in Canfield v. Board of Education of the Borough of Pine Hill, 97 N.J. Super. 483, 490 (App. Div. 1967); reversed 51 N.J. 400 (1968):

> "***tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure***." (at p. 490)

It was likewise stated by the Commissioner in Cornelius T. McGlynn v. Board of Education of the Township of Lumberton, 1972 S.L.D. 28 that:

> "***where service of a teaching staff member has been rendered for the complete period required by statute a tenure status is accrued at the precise moment when the requisite period has expired. From that time forward, in the Commissioner's view, the teaching staff member has tenure.***" (at p. 33)

Respondent is also in error wherein he relies on the decisions in Biancardi v. Waldwick Board of Education, 139 N.J. Super. 175 (App. Div. 1976) aff'd 73 N.J. 37 (1977); Joan Driscoll v. Board of Education of the City of Clifton, 165 N.J. Super. 241 (App. Div. 1977) aff'd 79 N.J. 126 (1979); and the State Board of Education decision in Point Pleasant Beach Teachers Association, et al. v. Board of Education of the Borough of Point Pleasant Beach, 1979 S.L.D. _____ (decided State Board January 10, 1979).

Driscoll, supra and Biancardi, supra are clearly distinguishble from the instant matter since both cases were brought by teachers who were determined by the Court to have been hired by their boards for controverted periods as substitutes. Such is clearly not the case herein. Point Pleasant Beach, supra, now on appeal before the Appellate Division of the Superior Court, is also clearly distinguishable since the Title I teachers in that dispute taught in programs funded by an annual federal grant for a program not mandated by New Jersey law. By contrast, petitioners herein teach in a mandated program and the funding of their salaries is not subject to vagaries of federal funding.

For all those reasons hereinbefore set forth I CONCLUDE that any petitioner who has served the requisite periods of employment concurrent with the opening and closing of school pursuant to N.J.S.A. 18A:28-5(b) has attained tenured status.

Any teacher whose service regularly began as did that of the supplemental teacher of the high school at the opening of the academic year in September and concluded at the end of the academic year in June has acquired or will in the future acquire a tenured status after three such consecutive years of service together with employment on the first day of the fourth consecutive academic year.

It remains, however, to determine the provision which applied to the factual context of the service of the majority of petitioners whose service began one week later and ended one week earlier than the limits of the academic year. The Commissioner, in applicable decisional law in Lillian A. McGovern v. Board of Education of the Borough of Elmwood Park, Bergen County, 1978 S.L.D. (decided November 16, 1978), when faced with a contention that the length of an academic year could vary by employment categories, stated:

> "***The principle applicable hereto is most succintly stated in Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941) and again in Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962):
>
> > "***It is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met.***" (126 N.J.L. at 544)
>
> "*** N.J.S.A. 18A:1-1 defines academic year as
>
> > "***the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation***."
>
> "The Commissioner observes that in the aforementioned statute the phrase 'the time school opens' refers to the opening of the general school program in the entire school district and does not permit an assumption that a program which is conducted at some later date within the regular academic year has its own academic year for the purpose of accrual of tenure. Petitioner did not serve the requisite three consecutive academic years, together with employment at the beginning of the next succeeding academic year, consequently her claim to tenure rights within the district is in error. Further, during her employment

> in the three consecutive academic years 1973-74 1974-75 and 1975-76, petitioner was employed by the Board for a period of twenty and one-half months, less than the requisite amount to acquire tenure. N.J.S.A. 18A:28-5(c)***" (at p.)

The Commissioner's holding in McGovern, supra, is controlling in the instant matter. I CONCLUDE, therefore, that those supplemental teachers whose work year embraced less than the entire academic year for all pupils could achieve tenured status only through N.J.S.A. 18A:28-5(c). Thus, any teacher who began employment for three years one week later than the beginning of those academic years and ceased working one week earlier than the end of those academic years could only attain tenured status after working those three years plus six weeks and one day of employment in the fourth academic year.

I CONCLUDE further that, since petitioners herein worked in positions requiring that they teach subject matter at the elementary school level for less than a full day, their tenure and seniority rights are those of part-time elementary teachers. DeSimone v. Board of Education of the Borough of Fairview, 1966 S.L.D. 43; Ellen Sue Oxfeld v. Board of Education of the Township of South Orange-Maplewood, 1975 S.L.D. 574

Having arrived at the foregoing conclusions, I ORDER the Board to compute the service time of petitioners to determine who among its supplemental teaching staff members are tenured and how much seniority time has been accrued by each tenured supplemental teacher. By doing so, the Board will have a basis for comparison, in any possible reduction-in-force with which it may be faced. This will provide a basis for decisions which will give full force and effect to petitioners' legal rights under the tenure statutes and the rules of the State Board of Education. This decision cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify, or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10

I HEREBY FILE with the designee of the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

September 24, 1979 — Eric G. Errickson
DATE — ERIC G. ERRICKSON, A.L.J.

HAMILTON TOWNSHIP SUPPLEMENTAL TEACHERS ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

In its exceptions the Board argues that these supplemental positions are temporary and on an "as needed" basis because there is no guarantee that there will be a fixed number of pupils for these programs from year to year. The Commissioner does not agree and finds such reasoning to be of a specious nature. There is no guarantee afforded any board of education of the number of pupils to be in any grade or curriculum offering in any school in any year. The Commissioner finds that when programs are mandated by the Legislature (N.J.S.A. 18A:7A-5 and 6) and in rules promulgated by the State Board of Education (N.J.A.C. 6:8-2.1 and 6:28-3.2(b)), be there only one pupil in need of that educational opportunity, it must be offered by a board of education and the teacher(s) involved are entitled to the full protection of the tenure law. N.J.S.A. 18A:28-1 et seq.

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

COMMISSIONER OF EDUCATION

November 30, 1979

Pending State Board of Education

RALPH BOGUSZEWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Wittman, Anzalone, Bernstein & Dunn (Walter T. Wittman, Esq., of Counsel)

Petitioner, a nontenured music teacher in the employ of the Board of Education of the Borough of Woodcliff Lake, hereinafter "Board," for the school year 1975-76 protests his dismissal without recompense sixty days prior to the end of the school year. The Board contends that its action in dismissing petitioner was legal and proper and argues that petitioner is not entitled to the salary requested because his dismissal was for good cause.

The precise issue in this matter centers on the propriety of the Board's action in resolving to dismiss petitioner sixty days prior to the end of the school year without hearing or recompense and petitioner's claim of entitlement to sixty days' salary because of the alleged violation of the existing contractual terms between petitioner and the Board.

A hearing was held June 8, 1977 in the office of the Bergen County Superintendent of Schools, Wood-Ridge, before a hearing examiner appointed by the Commissioner of Education. Exhibits were received in evidence and Briefs were subsequently filed. The report of the hearing examiner follows:

The undisputed facts show that petitioner was absent on days in which pupils were in attendance during the following months of the school year 1975-76 for the reason of illness unless otherwise indicated:

September	2	
October	12	
November	1	(Personal)
December	--	
January	7	
February	4	(3 - Death)

March	6
April	3
May	7 (1 - Death)
	37 (Sick)
	4 (Death)
	1 (Personal)
	(R-2)

The Board's policy for paid leave of absence includes provisions for fifteen days accumulated leave for personal illness, three personal days, and seven days for absence because of bereavement, without salary deduction. Petitioner accordingly was absent twenty-two days for personal illness in excess of those allowed for remuneration.

Petitioner received notice from the Board under date of April 27, 1976 that his contract would not be renewed for the 1976-77 school year. (R-5) The Superintendent of Schools met with petitioner on May 12, 1976 concerning his absentee record, during which meeting the Superintendent asked for verification of petitioner's claim of absenteeism because of attacks of vertigo. (R-8) Petitioner subsequently submitted notes from his family physician showing examinations and treatment for vertigo. (R-9-10)

Petitioner, when questioned about the impact of absenteeism on the continuity of the music program for pupils, testified, "The more I'm absent, the more it would affect the children.***" (Tr. 36)

Under date of May 19, 1976, petitioner received notice of his immediate discharge for good cause as determined by the Board at its regular meeting held May 18, 1976. (P-2) Petitioner received no further remuneration from the Board but protested that he is eligible for sixty days' salary as indicated in his contract of employment with the Board. (P-1)

The Board denies petitioner's entitlement to sixty days' pay and argues that petitioner's dismissal was for good cause as cited under N.J.S.A. 18A:6-30.1 which reads:

> "When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract but it shall be optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract."

The Board contends that petitioner abrogated the contract, not by poor performance, but by nonperformance. (Board's Brief, at p. 11)

The hearing examiner does not agree. Firstly, he finds that the Board errs in relying on the "good cause" phrase in N.J.S.A. 18A:6-30.1. Petitioner has not appealed his dismissal by the Board. Petitioner "prays for an order directing the respondent to pay him through June 30, 1976***." (Petition of Appeal, at p. 2) There is nothing in the record to show that petitioner was notified prior to the Board's resolution of May 18, 1976, that his contract was going to be terminated (Tr. 123), nor is there evidence to show that petitioner's illness was not the cause of his absences from duty. (Tr. 124)

Petitioner's employment contract (P-1) expressly provided

> "***that this contract may at any time be terminated by either party giving to the other sixty days' notice in writing of intention to terminate the same.***"

Termination, which is equally available to both employee and employer in the instant matter, must follow the precise language of petitioner's contract. The sixty-day notice provision is intended to protect both parties. Certainly the Board would not countenance a teacher who is perhaps offered a better paying position elsewhere to give sixty days' notice on a prescribed date and then disappear for the next sixty days thereby rendering no service to the children of the district with resulting disruption and detriment to the educational process. The Board would certainly expect the teacher to be on duty for the sixty days to better enable the Board to find an adequate replacement for the teacher while protecting the educative process for the children. Similarly, the sixty-day notice provision is intended to protect the teacher, to enable him to seek gainful employment elsewhere. The option of a shorter period of time is one that can be exercised only by mutual agreement of a board of education and the employee involved. In Canfield v. Board of Education of the Borough of Pine Hill, 1966 S.L.D. 152, aff'd State Board of Education April 5, 1967, aff'd 97 N.J. Super. 483 (App. Div. 1967), rev. 51 N.J. 400 (1968), the Supreme Court adopted the reasoning expressed in the dissenting opinion of Judge Gaulkin of the Appellate Division, holding as follows:

> "***I see no reason why the result should be different when the contract contains a cancellation clause but the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose the board had simply discharged plaintiff and not even offered her the 60 days' pay? It seems to me that she would be entitled to the 60 days' pay***." (at 492)

The hearing examiner recommends that the Commissioner affirm petitioner's eligibility to full remuneration from the period of May 19, 1976 to the end of the contractual period, June 30, 1976 and direct the Board to reimburse petitioner accordingly.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter controverted herein, including the report of the hearing examiner, and observes that exceptions have been filed by the Board pursuant to N.J.A.C. 6:24-1.17(b).

The Commissioner observes that the Board's exceptions deal mainly with its allegation that petitioner was dismissed for good cause for breach of contract by "***out-and-out nonperformance *** [as] the result of illness***." (Board's Exceptions, at p. 3)

The record is clear that during the school year 1975-76 petitioner was absent from his duties by reason of personal illness for a total of thirty-seven days. Petitioner, by Board policy, was not remunerated for the twenty-two days for personal illness in excess of the provision for fifteen days accumulated leave for that purpose.

Petitioner's claim of absenteeism because of attacks of vertigo was substantiated at the request of the Superintendent by the submission of statements from petitioner's family physician showing examination and treatment for vertigo. This fact stands on the record unrefuted by the Board.

The Commissioner knows of no statute or rule that forbids absences on the part of employees of a local board of education for the reason of verified illness. Such a verified illness does not constitute abrogation or nonperformance of the contract but may be a proper cause for consideration of termination of the employee's contract. Such employment contract must be terminated in accordance with its terms. A board of education may terminate the services of the teacher when it gives notice but it may not terminate the employment until the expiration of the period of notice provided in the employment contract. Canfield v. Board of Education of Pine Hill Borough, 1966 S.L.D. 152, aff'd State Board of Education April 5, 1967, aff'd 97 N.J. Super. 483 (App. Div. 1967) [1967 S.L.D. 345], rev'd 51 N.J. 400 (1968) [1968 S.L.D. 255] Accordingly, the Commissioner finds that the dismissal of petitioner in the instant matter was not for good cause by reason of abrogation of contract as alleged by

the Board. The Commissioner directs the Board to reimburse petitioner the full remuneration due him as though employed by the Board during the period of May 19 to June 30, 1976. It is so ordered.

COMMISSIONER OF EDUCATION

November 30, 1979

Pending State Board

ROSE MARIE KOVAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DENVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Friedman and Greb (Eugene M. Friedman, Esq., of Counsel)

For the Respondent, Rowe, McMahon, McKeon & Curtin (Thomas R. Curtin, Esq., of Counsel)

Petitioner, a nontenured teacher in the employ of the Board of Education of the Township of Denville, hereinafter "Board," alleges that the termination of her services by the Board was improper. She avers that the action of the Board was arbitrary, capricious and based upon improper reasons. The Board contends that its action was legal and a proper exercise of its discretionary authority. Petitioner pleads that the Commissioner of Education direct the Board to pay her salary for the remainder of the school year and provide her with a letter stating that her non-reemployment was not based on her lack of teaching ability.

A hearing to determine the facts in the controverted matter was conducted September 20, 1977 in the office of the Superintendent of Schools of Somerset County by a hearing examiner appointed by the Commissioner. Briefs were subsequently filed. The report of the hearing examiner is as follows:

Petitioner, a graduate of the Denville School system, had taught briefly in the system in 1965 while holding an emergency certificate, then taught elsewhere for four years. In September 1974 she was employed by the Board as an art teacher and on March 1, 1976 the Board sent petitioner a letter advising her of the termination of her services as a nontenured art teacher stating the reasons for her termination. (P-1)

The reasons expressed therein are, in substance, as follows:

1. Petitioner failed to comply with the administration's requirements relating to the keeping of adequate weekly and daily lesson plans.

2. Petitioner failed to comply with administrative directives regarding the prompt discharge of her morning supervisory duties.

3. Petitioner's performance in the instructional area was found to be below acceptable standards and art periods were shortened without permission.

4. Christmas program covers prepared by petitioner's classes were found to be unacceptable.

5. Petitioner failed to display a personal attitude and temperament conducive to a proper atmosphere in a teaching situation. She made use of a room for teaching art in violation of administration's directive.

6. Petitioner disrupted the orderly removal of children from school buses at the close of a school day.

7. Petitioner used the office of one of the administrators without permission for personal reasons and during the unauthorized visit littered the administrator's desk.

8. Petitioner used profane and vulgar language during telephone conversations with two members of the administrative staff.

9. Petitioner was late for classes without explanation on several occasions and the principal had to speak to her about this.

An informal appearance was granted petitioner on March 8, 1976 and following that appearance the Board reaffirmed its determination to terminate petitioner's services and further accorded her thirty days' salary as specified in her contract. (R-1)

When questioned concerning the adequacy of her lesson plans, petitioner testified that by inadvertance she had her plan book with her on two occasions when she was ill. (Tr. 23) She stated further she knew plans were important but denied the Board's contention that her plans were not adequate. (Tr. 26, 86-87) When asked if she had properly discharged her morning supervisory duties, petitioner initially testified that she remembered two occasions on which she had missed bus duty. On cross-examination she denied missing her duty. (Tr. 27-28, 87)

When asked whether she had shortened class periods without permission, petitioner explained that on one occasion she asked for a five minute break because she had taught three classes in a row. (Tr. 35) She testified that a second time occurred because of her extreme nervous tension occasioned by a forthcoming meeting with administrators in regard to her pending termination. (Tr. 36-37) On cross-examination petitioner refuted her testimony by stating that the Board's allegations were false. (Tr. 88) Petitioner testified further that on two occasions during the school year 1974-75 her principal observed her for purposes of evaluation but she denied being evaluated during the

school year 1975-76. (Tr. 45) Petitioner denied knowledge of a handwritten document addressed to her from her principal and allegedly signed by her. (Tr. 47-48) Her principal testified that she had observed petitioner in October 1975 and had presented petitioner with a copy of a handwritten informal evaluation in narrative form which petitioner signed. (Tr. 118-119)

The hearing examiner finds that petitioner's credibility suffered in this conflicting testimony. This finding is based on the forthright testimony of the principal which contrasted sharply with the testimony of petitioner which was frequently inconsistent. (Tr. 88)

Petitioner testified that she considered the Christmas program cover produced by the children in her art classes as being representative of the children's work. (Tr. 50-54) She alleged that the principal's judgment in deciding that they did not represent the best work of the children was highly subjective in nature and she denied any wrong doing. (Petitioner's Brief, at p. 5)

Petitioner testified that her use of an unfinished room in the new building was an expediency to avoid conflict with the schedule of another teacher. Petitioner admitted she had no permission to use the room, but she denied that her use of the room presented any danger to pupils. (Tr. 57-58) Petitioner admitted on cross-examination that she had been told not to use the room. (Tr. 98)

Petitioner admitted to parking her car in an area designated for school buses but testified she did it under the impression that all buses had departed and she wanted to expedite the unloading of boxes of supplies from her car as it was raining heavily. (Tr. 58-59) Petitioner admitted to using a paper clip holder in an office as an ashtray but testified she felt there were extenuating circumstances to her action because she was nervous and upset. (Tr. 60-61)

When asked if she had used profane or vulgar language petitioner testified to using a common colloquialism during the heat of discussion (Tr. 62) but denied being insubordinate by refusing to go to her class. (Tr. 48)

Petitioner, admitted to being late on several occasions and also to having been absent on two occasions without giving sufficient notice to the administration. (Tr. 94-95)

The hearing examiner observed ample indications shown by petitioner during her period of testimony of extreme nervous tension and credits this, in part, to the personal problems which petitioner faced. The hearing examiner has examined the testimony, documents and Briefs as submitted. He will consider the reasons seriatim given by the Board to petitioner for her

termination of service and will, accordingly, make recommendations to the Commissioner.

The hearing examiner observes that on direct testimony petitioner admitted to the substance of the Board's contention that she failed to keep adequate lesson plans, had missed bus duty and shortened her art period without permission. On cross-examination she refuted her prior testimony by sweeping denials of the Board's contentions. The hearing examiner finds that the record reflects sufficient evidence to sustain the credibility of these areas of deficiency offered by the Board to petitioner as reasons for her dismissal.

The hearing examiner agrees with petitioner's argument of the subjectivity of judgment used in determining the artistic merit of the Christmas program covers made by the pupils in her art classes and declines to substitute his own. He finds petitioner's use of a bus loading zone for the parking of her car to have occurred with mitigating circumstances.

The hearing examiner finds the Board's contentions that petitioner littered an administrator's desk and used vulgar language to be true in fact. He finds the Board's further criticism concerning petitioner's performance to be true in fact and warranted. Petitioner defied administrator's directive not to use a room in the unfinished wing of the school and the fact that no pupil injury occurred is a fortuitous circumstance. Petitioner admitted to being late on several occasions and absent twice without giving proper notice to administration. The hearing examiner finds the aforementioned actions on the part of petitioner to be serious in nature and properly considered by the Board in measuring the quality of petitioner's teaching performance.

There is ample proof within the record to support a conclusion that the reasons by the Board are factually based rather than arbitrary, capricious and improper as charged by petitioner. Absent such a finding the Commissioner will not direct that the Board's determination be subjected to further review. As was said in Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7, aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948):

> "***[I]t is not the function of the Commissioner***to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.***" (1939-49 S.L.D. at 13)

The Supreme Court of New Jersey in Mary Donaldson v. Board of Education of the City of North Wildwood, 65 N.J. 256 (1974) quoted with approval George C. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, 1968 S.L.D. 7, dis. State Board 11, aff'd New Jersey Superior Court,

Appellate Division, 1969 S.L.D. 202 that "*** a bare allegation is insufficient to establish grounds for action.***" (at 10) (Emphasis supplied.)

In consideration of the findings of fact hereinbefore set forth and the entire body of testimony and documentary evidence herein, the hearing examiner recommends that the instant Petition of Appeal is without merit and should be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner, petitioner's exceptions and respondent's concurrence filed thereto pursuant to N.J.A.C. 6:24-1.17(b).

The Commissioner regrets petitioner's contention that undue delay in reporting this matter has prevented her from attaining a teaching position. He determines that such contention is unproven in the record and in no way affects the findings and conclusions of the report. (Petitioner's Exceptions, Preliminary Statement)

Petitioner attempts to excuse any complaint made against her by the Board by stating she "***was passing through an extremely difficult situation in her personal life***" and contends that the hearing examiner did not give fair recognition to this fact. (Petitioner's Exceptions, at p. 3) The Commissioner does not agree. He regrets the emotional strain placed on teachers by problems encountered in their personal lives but cannot accept such an excuse as license for any deficiency in the discharge of professional responsibilities. Further, the Commissioner finds that petitioner's allegation that the hearing examiner did not give fair recognition to this fact (Petitioner's Exceptions, at p. 3) is contradicted by the report in which it is noted by the hearing examiner that petitioner's extreme nervous tension during her testimony could be credited in part to the personal problem which she faced.

Petitioner argues that her credibility has been unfairly questioned. (Petitioner's Exceptions, at p. 4) The Commissioner does not agree. Section (b) of P1 states in its entirety:

> "You have failed to comply with the Administration regarding the prompt discharge of your morning supervision duties."

When questioned regarding her answer to this charge, petitioner testified, "There was one time when, through my own fault, I missed the schedule" (Tr. 27) and "There was another time when I did completely forget about it***." (Tr. 28) On cross-examination petitioner testified as follows:

> Q. "With respect to paragraph 'B' do you allege that the allegations in paragraph 'B' are untrue?
>
> A. "Yes." (Tr. 87)

The Commissioner finds such ambivalence to be a proper test in determining petitioner's credibility.

The Commissioner observes that petitioner was advised by the Board, by letter, of the reason for her termination, was subsequently granted an informal appearance before the Board after which it reaffirmed its determination to terminate her services and accorded her thirty days' salary as specified in her contract. The Commissioner finds that petitioner was accorded all the requisite elements of due process as enunciated in previous decisions. See Iris Sachs v. Board of Education of East Windsor Regional School District et al., 1976 S.L.D. 170, aff'd State Board 175, aff'd Superior Court, Appellate Division, 1977 S.L.D. 1306.

For the reasons previously stated, the report of the hearing examiner is affirmed by the Commissioner and the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 3, 1979

RITA SPIEWAK, PEGGY DABINETT, PATRICIA O'REILLY AND THE RUTHERFORD EDUCATION ASSOCIATION V. BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY	:	INITIAL DECISION EDU DKT #6-1/77

APPEARANCES:

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

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

BEFORE THE HONORABLE AUGUST E. THOMAS, A.L.J.

Petitioners, Supplemental, or Title I teachers, employed by the Board of Education of the Borough of Rutherford (Board), pray for a determination holding that they are entitled to the emoluments and benefits of regular classroom teachers and a tenure status where appropriate. The Board asserts that petitioners cannot earn tenure in their respective positions and that they have been provided with all the salary and emoluments to which they are entitled.

Hearings were held on September 7, 1977, and April 24 and 25, 1978 in the Office of the County Superintendent of Schools, Wood-Ridge. Several documents were admitted as evidence and Briefs were filed subsequent to the hearing. Thereafter, this matter was transferred to the Office of Administrative Law, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The salient facts are not disputed and are set forth as follows:

1. Spiewak and Dabinett are employed by the Board as supplemental teachers. They teach pupils selected by the Child Study Team (CST) who have been identified as educationally handicapped and in need of supplemental instruction in one or more of the basic skills. (Spiewak taught one year under contract as a regular teacher.)

2. O'Reilly is employed as a "Title One" teacher, a federally funded program for selected handicapped pupils.

3. Instruction by all three teachers is usually conducted on a one-to-one basis; nevertheless, small groups are occasionally assigned to each teacher.

4. All three teachers hold appropriate certificates issued by the State Board of Examiners. (N.J.S.A. 18A:26-2)

5. Spiewak and Dabinett have been employed for several years beginning generally the Monday following the week that school opens and terminating the Friday before the week in which school ends in June. O'Reilly has been employed for full academic years since 1972.

6. All three teachers have been employed on an hourly basis and have taught between five and six hours per day. A regular teacher's day is somewhat longer but contains approximately five or six hours of instructional time. (Tr. III 85-97)

7. None of the petitioners engaged in the ancillary activities that are required of most teachers, such as: homeroom, extra-curricular activities, faculty meetings, in-service training, playground supervision, cafeteria supervision. Neither did they start at the beginning of the regular school day, nor did they remain to the end. Lesson plans were not required for substitute teachers. (O'Reilly was required to keep a plan book and she began work on the day school opened.)

8. The Board minutes show that O'Reilly was employed to work annually on an hourly basis. (P-13-17) The record shows that the other petitioners also agreed to accept employment on an hourly basis. (Tr. I 6-11; II 88-93)

Based on the foregoing listing of facts, the issue succinctly stated is: are petitioners entitled to regular teacher status, e.g., tenure, pension, placement on the salary scale, hospitalization, etc?

Conversely, may the Board hire teachers, as it did herein, to perform those services and duties required by law?

The Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., mandates, as does the New Jersey Constitution, that educational programs shall be thorough and efficient. The Supreme Court of New Jersey in Robinson v. Cahill, 69 N.J. 133 (1975); 1975 S.L.D. 112 expressed "***approval of the ongoing efforts of the Department of Education to establish the components of a thorough and efficient system of education by formulation of standards, goals, and guidelines by which the school districts and the Department may in collaboration improve the quality of the educational opportunity offered all school children.***" (1975 S.L.D. 1126)

The Legislature in N.J.S.A. 18A:7A-5 mandated that:

> "A thorough and efficient system of free public school shall include the following major elements ***
>
> "e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs ***." (Emphasis added.)

Petitioners believe they are eligible for tenure pursuant to N.J.S.A. 18A:28-5 which provides tenure after employment for:

> "(C) the equivalent of more than three academic years within a period of any four consecutive academic years;***"

Respondent argues that petitioners are barred from receiving tenure because they do not serve the same as regular teachers.

Petitioners are "Teaching staff member(s)" as defined in N.J.S.A. 18A:1-1 and they are regularly employed albeit for less than a full school day or year. It is also apparent that they serve fewer pupils than are served by most regular teachers. Nevertheless, other school services are provided on a one-to-one basis, such as, guidance, nursing service, behind the wheel driver training and those services rendered by members of a district's child study team. Further, it is generally acknowledged that such teachers and other specialists, not named, do not generally perform the extra duties which are required of regular teachers.

Petitioners are not barred from acquisition of tenure by reason of being paid on an hourly basis as opposed to a yearly contractual salary. In Margaret M. Wall v. Board of Education of Jersey City, 1938 S.L.D. 318 (1930), aff'd 119 N.J.L. 308 (Sup. Ct. 1938) the State Board of Education stated, with reference to tenure that:

> "***The statute is silent as to the rate or method of statement. It simply requires 'employment' for the period stated. *** That she was paid at a per diem rate instead of by the month or by the year does not change the fact that she had regular, continuous employment.***" (at p. 621)

In recognition of petitioners' regular, continuous employment, the same conclusion must be reached: petitioners' hourly rate of compensation does not bar the acquisition of tenure. See Joseph Capella, et al. v. Board of Education of the Camden County Vocational and Technical Schools, 1975 S.L.D. 178, aff'd State Board of Education 1975 S.L.D. 186, aff'd New Jersey Superior Court 1975 S.L.D. 1129 (App. Div.)

N.J.S.A. 18A:28-5(C) provides that teaching staff members attain a tenure status when they have served for a continuous period for the equivalent of more than three academic years within any period of any four academic years. The statute does not address such aspects of employment as method of payment, extra duties, numbers of pupils in classes, payment for holidays, or enrollment in the Teachers Pension and Annuity Fund. As was said by the Court in Canfield v. Board of Education of the Borough of Pine Hill, 97 N.J. Super. 483, 490 (App. Div. 1967); reversed 51 N.J. 400 (1968):

> "***tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure***." (at p. 490)

The Commissioner stated in Cornelius T. McGlynn v. Board of Education of the Township of Lumberton, 1972 S.L.D. 28 that:

> "***where service of a teaching staff member has been rendered for the complete period required by statute a tenure status is accrued at the precise moment when the requisite period has expired. From that time forward, in the Commissioner's view, the teaching staff member has tenure.***" (at p. 33)

Therefore, I FIND and CONCLUDE, that petitioners are teaching staff members regularly employed on an hourly basis and as such are entitled to a tenure status, as hourly or part-time employees whenever the precise conditions set forth in the statute are met. (N.J.S.A. 18A:28-5(c))

Although the teaching year for petitioners in some cases was shortened at the beginning and the end of each year, equivalency time as set forth in N.J.S.A. 28-5(C) may be easily computed. Petitioners' time in service will equal that of regular teachers, when they serve the same number of days served by regular teachers in three consecutive academic years. An additional day must be served to acquire tenure; however, the record reveals that each teacher has met this minimum requirement.

The Commissioner stated in Lillian A. McGovern v. Board of Education of the Borough of Elmwood Park, Bergen County, 1978 S.L.D. _____ (decided November 16, 1978), when faced with a contention that the length of an academic year could vary by employment categories, that:

> "***The principle applicable hereto is most succinctly stated in Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941) and again in Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962):
>
> > "***It is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met.***" (126 N.J.L. at 544)
>
> "*** N.J.S.A. 18A:1-1 defines academic year as
>
> > "***the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation***."

I FIND further, that petitioners are entitled only to the salary and emoluments offered by the Board which they accepted at the time of their employment and modified thereafter by Board resolutions, and to sick leave which is statutorily mandated for all "steadily employed" persons. (N.J.S.A. 18A:30-2)

The Board is directed to compensate petitioners for sick leave used by each of them at the agreed upon rate when the leave was taken, and to give them credit for their accumulated unused days.

There being no other relief to which petitioners are entitled, the Petition of Appeal for all other purposes than hereinbefore rectified, is DISMISSED.

This decision cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify, or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10

I HEREBY FILE with the designee of the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

Oct. 26, 1979
DATE

August E. Thomas
AUGUST E. THOMAS, A.L.J.

RITA SPIEWAK, PEGGY DABINETT, PATRICIA O'REILLY AND THE RUTHERFORD EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	

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

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

Petitioners take exception to the initial decision wherein they are denied equal salary and benefits pro rata identical to other teachers in the employ of the Board, citing Ruth Nearier et al. v. Board of Education of Passaic, 1975 S.L.D. 604 and the principles of equity.

The Commissioner agrees. Judge August Thomas finds that petitioners are teaching staff members regularly employed although for less than a full school day or year. The Commissioner observes that in Point Pleasant Beach Teachers Association et al. v. Dr. James Callam and the Board of Education of the Borough of Point Pleasant Beach, State Board of Education decision January 10, 1979 it is noted:

> "We do not hold that under no circumstances can teachers paid from Title I funds accrue tenure while being so compensated. For example, tenure would accrue to a teacher employed as a regular staff member for the required statutory period, even though during a part or all of this probationary time the teacher was assigned to a Title I program."
> (at p. 7)

Petitioners meet such requirements. The Commissioner finds that their services entitled each of them to the emoluments and benefits afforded all other teaching staff members employed by the Board although on a pro rata basis. Woodbridge Township Federation of Teachers, Local 822 v. Board of Education of the Township of Woodbridge, 1974 S.L.D. 1201, at 1206

Accordingly, the Commissioner directs the Board to retroactively afford petitioners pro rata all the emoluments and benefits due them as regularly employed teaching staff members. The Commissioner notes that the annual sick leave benefit may not be prorated.

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

COMMISSIONER OF EDUCATION

December 18, 1979

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST.
NEWARK, NEW JERSEY 07102
(201) 648-6186

RITA M. SLATTERY Petitioner, vs THE BOARD OF EDUCATION OF BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, Respondent,	INITIAL DECISION O.A.L. DKT. NO. E.D.U. 1909-79

APPEARANCES:

For the Petitioner:
Stephen E. Klausner, Esq.

For the Respondent:
John P. Gross, Esq. for
Daniel C. Soriano, Jr., Esq.

BEFORE THE HONORABLE WARD R. YOUNG, A.L.J.

Petitioner, a tenured teaching staff member employed by respondent Board of Education, hereinafter "Board", having been granted a maternity leave of absence from September 1, 1978 through June 30, 1979, alleges that the Board's denial of her requested temporary disability leave during a portion of that time was violative of the New Jersey Statutes.

The Board denies the alleged statutory violations. It avers that the petition should be dismissed due to untimely filing as required by N.J.A.C. 6:24-1.2, and further avers that no tenured teaching staff member on leave of absence is eligible for temporary disability leave, including a tenured teaching staff member on a voluntarily requested maternity leave of absence.

The Board also contends that the petition should be dismissed due to the fact that petitioner was on leave of absence when she made application to utilize her accumulated sick leave and that said application was made sixteen (16) days after she gave birth to twin boys.

A prehearing conference was held at the Office of Administrative Law on August 20, 1979 at which time a joint agreement was made to submit the matter for Summary Decision. Both parties submitted briefs.

The relevant facts are as follows:

Petitioner requested a maternity leave of absence on May 5, 1978 for the period from September 1, 1978 through June 30, 1979. On May 24, 1978 the Board granted her request.

On October 13, 1978 petitioner sent a letter to "Members of the Board" requesting to be placed on temporary disability leave due to birth of twin boys on September 27, 1978. The period of leave requested is reproduced from her letter in pertinent part:

> "... commencing on this date, October 13, 1978 through November 10th, 1978. In addition, I was medically disabled before the birth, dating from September 5 through September 27, 1978. I am requesting compensation for these periods...."

Petitioner also stated in that letter that "... Proof of such disability, as well as proof of the births can be obtained by contacting Dr. John Skowronski, located at 507 Westfield Avenue, Westfield, New Jersey...."

It is noted that the petitioner did not request temporary disability leave or use of sick days for the period of Septmber 27, 1978 (the date she gave birth) through October 12, 1978.

In the Petition of Appeal, paragraph number five (5) it states:

> "On or about October 13, 1978, petitioner requested that she be granted temporary disability leave for the period September 5, 1978 to November 27, 1978."

The Answer of Respondent states in paragraph five (5):

> "It admits the allegations of paragraph five (5) except that Petitioner requested temporary disability leave for the period September 5 to November 10, 1978."

The New Jersey Statutes that petitioner alleges the Board violated are N.J.S.A. 18A:6-6, 18A:29-2, 18A:30-1, 18A:30-2 and 10:5-12(a).

The denial of petitioner's requested disability leave was from the Assistant Superintendent for Administration and Personnel, and is represented in the Answer as the formal response of Respondent. It is noted that the record is barren of any discussion or action on the request by the Board.

This completes the report of relevant facts, and the questionable period from September 27 through October 12 for possible use of sick leave days will first be briefly addressed. It is inconceivable that petitioner omitted the questionable period for disability leave intentionally, since this period begins on the day she gave birth to twins. Even the Board failed to detect the omission when filing its Answer. I CONCLUDE, therefore, that the temporary disability leave for which use of sick leave days are requested is for the period from September 5, 1978 through November 10, 1978

Relative to the untimeliness of petitioner's application for use of accumulated sick days and the filing of her petition, it is hereby determined that petitioner is not barred by the equitable defense of laches from advancing the instant claim. As was stated in Howard J. Whidden, Jr. v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977 (1977 S.L.D. 1312):

> "... the determination ... is grounded in the nature of the claim and in a judgment that the Board has not been prejudiced, ... (See William Gleason v. Board of Education of the City of Bayonne, 1958 S.L.D. 158 at 359)..."

The Board confirmed its realization that there is dicta in Adrinne Logandro v. Board of Education of the Township of Cinnaminson, 1979 S.L.D. -- (decided August 6, 1979) which appears to state that a teacher on leave of absence without pay is still entitled to other emoluments of employment, including sick leave and medical coverages. The Board vigorously argues, however, that this dicta is not supported by the Commissioner's decision in John Mountain v. Board of Education of the Township of Fairview, 1972 S.L.D. 526, aff'd State Board of Education 1973 S.L.D. 777, as asserted by the petitioner in Logandro, supra. (Respondents Brief)

A review of Logandro, supra makes it abundantly clear that the reference to Mountain, supra was for the sole purpose of citing the Commissioner as having stated that a teacher on leave of absence is still an employee of the Board.

Assuming, arguendo, that the respondent Board is correct in its interpretation of Mountain, supra, which is not conceded here, the Commissioner undisputably has the prerogative to decide controverted matters contrary to previous decisions. See In the Matter of the Tenure Hearing of Robert A. Kiamie, School District of North Haledon, 1979 S.L.D. -- (decided September 7, 1979). Mountain, supra was decided approximately six (6) years prior to Logandro, supra.

Respondent Board buttressed its arguments in its Brief by lengthy reference to a decision of the Appellate Division of the Supreme Court of New York which stated that "... It should be noted further that sick leave is not applicable during a period of unpaid leave ...."

With due respect to the Board, Court, and Justice Larkin (who spoke for a three judge panel in that case), the Court's decision in New York is not controlling nor persuasive here in light of Court decisions in New Jersey.

The Commissioner clearly indicated the controlling common law in New Jersey in Delores Shokey v. Board of Education of the Township of Cinnaminson, 1978 S.L.D. -- (decided November 29, 1978), aff'd State Board of Education, April 4, 1979:

> "... he (the Commissioner) has thoroughly researched the controverted matter and observes that the courts of this State have determined that the use of sick leave benefits for pregnancy related disability is stare decisis. Indeed, in the matter of Castellano v. Linden Board of Education, 158 N.J. Super. 350 (App. Div. 1978), the court said:
>
> "***We are convinced that to deprive a pregnant employee of sick leave benefits for an absence occasioned by childbirth does indeed constitute discrimination on account of sex. We must "be mindful of the clear and positive policy of our State against discrimination as embodied in N.J. Const., Art. I, par. 5.' Levitt & Sons, Inc. v. Div. Against Discrimination, etc., 31 N.J. 514,

514 (1960). "Effectuation of that mandate calls for liberal interpretation of any legislative enactment designed to implement it." Id.

'The Board's concept that pregnancy is not an illness or injury in the usual sense of those words and thus must be excluded from sick leave benefits is far too restrictive and literal and not in accord with the clearly enunciated policy of this State against discrimination on account of sex. Sick leave benefits are intended to alleviate economic losses resulting from inability to work because of disability. This salutary purpose would not be furthered by excluding pregnancy-related absences merely because the condition may not be an illness by strict definition. In this regard, it is worthy of comment that the Temporary Disability Benefits Law, N.J.S.A. 43:21-29, as amended by L. 1961, c.43, in providing compensation for disability resulting from accident or sickness not compensable under the Worker's Compensation Law, deems pregnancy to be a sickness during the four weeks immediately preceding the expected birth of child and the four weeks immediately following the termination of pregnancy." See N.J. Bell Tel. Co. v. Board of Review, 78 N.J. Super. 144 (App. Div. 1963), aff'd 41 N.J. 64 (1963).***"
(at 361-362)

The Commissioner observes that the Court in the matter of Castellano, supra, upheld his determination in the matter of Cinnaminson, supra, when it stated:

"***It is also significant that the Comissioner of Education has refused to give to N.J.S.A. 18A:30-1 the narrow interpretation urged by the Board, taking the position that there is no impediment against construing the statute in favor of a tenured teacher who sought, but was denied, sick leave benefits during a period of absence for maternity reasons. (Cinnaminson, cited ante) While an appellate tribunal is in no way bound by an agency's interpretation of a statute, Service Armament Co. v. Hyland, 70 N.J. 550, 561 (1976), the

> Commissioner's construction of this statute coincides with our own view thereof.***"
> (at 362)

The Commissioner also stated in Logandro, supra that:

> "... the Congress of the United States has amended Title VII of the Civil Rights Act which concurs with the Commissioner in Cinnaminson, supra. Pregnancy-related disabilities may no longer be distinguished from non-pregnancy-related disabilities...."

In the instant matter, the record is barren of any indication that the Board exercised its right to request and/or require a physician's certification of disablement as per N.J.S.A. 18A:30-4. I must therefore presume that petitioner's alleged disablement from September 5, 1978 through November 10, 1978 is undisputed. I SO FIND.

I FIND that petitioner is entitled to the use of her accumulated sick days during the period of her pregnancy-related disability from September 5, 1978 through November 10, 1978.

I CONCLUDE, therefore, that the Board is hereby directed to compensate petitioner, forthwith, for the days school was in session during that period to the extent of her accumulated sick days.

This decision cannot be effected prior to forty-five (45) days from the date of agency receipt of same, unless the agency head acts to affirm, modify, or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

16 October 1979
DATE

Ward R. Young
WARD R. YOUNG

RITA M. SLATTERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner notes that petitioner filed a letter on November 20, 1979 concurring with the initial decision.

The Board in its exceptions asks the Commissioner for a comparison and clarification of the initial decision with Logandro, supra, wherein the Board claims that the Judge has "***recognized rights of a pregnant teacher which exceed those heretofore enjoyed by other disabled teachers." (Exceptions, at p. 5)

The Commissioner observes that in Logandro it was determined that petitioner "***be allowed the use of her accumulated sick days during the period of her pregnancy-related disability***" 1979 S.L.D. at ____ The Commissioner finds the decision of the Judge in the present matter indistinguishable from the decision in Logandro.

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

Accordingly, the Commissioner directs the Board to compensate petitioner for the days of her pregnancy-related disability to the extent of her sick leave entitlement.

COMMISSIONER OF EDUCATION

December 20, 1979

Pending State Board of Education

"T.J.", PARENT AND NATURAL GUARDIAN OF "J.J." V. BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY AND WILLIAM FAUNCE, PRINCIPAL AND JACK EISENSTEIN, SUPERINTENDENT, ATLANTIC COUNTY.

INITIAL DECISION

DKT. NO. EDU 240-7/78

APPEARANCES:

For Petitioner, Cape-Atlantic Legal Services (J. Paul Mohair, Esq., of Counsel)

For Respondent, Jeffrey L. Gold, Esq.

BEFORE THE HONORABLE BRUCE CAMPBELL, ALJ

Petitioner alleges that the Board of Education of Atlantic City, hereinafter "Board," illegally and improperly expelled "J.J." from the Atlantic City public schools and further alleges that Board's Child Study Team failed to classify "J.J." as handicapped so that he may be provided an appropriate program of education.

Conversely, Board avers that the expulsion of "J.J." was legal and proper in all respects. Board also states that its Child Study Team made two (2) evaluations of the subject pupil, neither of which resulted in classification and the petition, therefore, fails to state a claim for which relief may be granted.

The parties filed Cross-Motions for Summary Judgment on the pleadings and Briefs in support of their respective positions. The matter was transferred to the Office of Administrative Law on July 2, 1979, as a contested matter pursuant to N.J.S.A. 52:14F-1 et seq.

The relevant facts are as follows:

"J.J." entered Atlantic City High School in the fall of 1976. Over the subsequent two (2) months he was the subject of frequent disciplinary referra

to the school administration. A local Child Study Team evaluation of "J.J." was initiated in November of 1976. The team concluded that a classification of "J.J." was not called for.

In March of 1978, he was involved in a classroom disturbance. Although there is disagreement as to the facts of that incident, it is stipulated that "J.J." did strike a teacher therein. Subsequent to the incident, a second referral of "J.J." to the Child Study Team was made. The team affirmed its determination that classification was not required.

An expulsion hearing was noticed for May 8, 1978 and was postponed until June 6, 1978 at petitioner's request. When "J.J." failed to appear on that date, the hearing was reset for June 12, 1978. The hearing was conducted on June 12, 1978 and petitioner was noticed by letter of June 14, 1978 of Board's action to expel "J.J." from the Atlantic City public schools.

During the period October 1978 - January 1979, "J.J." was evaluated by staff of a private special education school. The private evaluators found him to be socially maladjusted and in need of a structured learning situation. At some point within the latter half of 1978 "J.J." enrolled in an evening Vocational School course through the Work Incentive Program.

"J.J." is employed nights and his employment does not conflict with his vocational education course. There is nothing of record to indicate he has had any disciplinary problems in the vocational education course.

This concludes the recitation of relevant facts.

Here, conflicting evaluations are present. It is noticed that Board's Child Study Team, which solely has the power to make the initial classification of the subject pupil, did not deem that the facts warranted doing so. It is also noticed that the staff of a private school reached a different conclusion. Recognizing the qualifications of the private school personnel, they must be considered expert as is the local Child Study Team. Hence the conflict.

In order to provide clear resolution here, I FIND AND CONCLUDE that the classification of "J.J." shall be remanded to the Commissioner for determination by the Chief Classification Officer, Bureau of Special Education. I do not retain jurisdiction over this question.

There remains the matter of the expulsion of "J.J.". A careful review of the record in this matter reveals no procedural error and I SO FIND. I CONCLUDE, therefore, that the action of the Atlantic City Board of Education in respect to the expulsion was a proper exercise of its lawful authority. Accordingly, that action is AFFIRMED.

This decision cannot be effected prior to the effective date of this order which is forty-five (45) days from the date of State agency receipt of this order unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the designee of the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

25 OCTOBER 1979
DATE

Bruce Campbell
BRUCE CAMPBELL, ALJ

"T.J.", parent and natural guardian of "J.J.",	:	
PETITIONER,	:	
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY AND WILLIAM FAUNCE, PRINCIPAL AND JACK EISENSTEIN, SUPERINTENDENT, ATLANTIC COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

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

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

Petitioner takes exception to Judge Campbell's decision that no procedural error occurred. The Commissioner finds no merit in petitioner's argument and agrees that the action of the Board in its expulsion proceedings against "J.J." was proper. The Commissioner observes that Judge Campbell, recognizing the conflicting findings of two expert agencies, has remanded the matter for final determination to the Chief Classification Officer, Bureau of Special Education. The Commissioner agrees.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. He directs that this matter move forward for final determination as expeditiously as possible and retains jurisdiction pending final determination in this matter.

COMMISSIONER OF EDUCATION

December 20, 1979

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF ROBERT A. KIAMIE, SCHOOL DISTRICT OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY	)))))	INITIAL DECISION OAL DKT. NO. EDU 798-79 AGENCY DKT NO. 33-2/79A

APPEARANCES:

For Dr. Kiamie:
Carl J. Kerbowski, Esquire
James V. Segreto, Esquire

For the Board:
Morton R. Covitz, Esquire

WITNESSES:

Frank Fischer, Borough Clerk
Lucille B. Debiak, Deputy Borough Clerk
Joseph A. Perconti, Board Member
Joseph Sasso, Board Member
Robert Fousse, Council President
Robert A. Kiamie, Superintendent of Schools
John J. McLaughlin, Board Secretary
Paul J. Ortenzio, Principal
Christine Van Wingerden, Secretary to Board Secretary
Joseph A. Medici, Board President

EVIDENTIARY DOCUMENTS:

P-1: Undated memo to all residents re February meetings of the Board.
P-2: February 6, 1979 memo to all residents re February meetings of the Board.
P-3: Notice of February meetings of the Board received by Mr. Perconti (same as P-1).
P-8: Notice of February meetings of the Board received on January 31 by Dr. Kiamie (same as P-1).
P-9: Minutes of January 20, 1976 regular Board meeting (page 79, resolution 155).

EVIDENTIARY DOCUMENTS, Continued:

P-10: Minutes of March 16, 1976 Board meeting (page 117, resolution 173)
P-11: Minutes of April 4, 1977 reorganization meeting of the Board (page 4, resolution 142)
P-12: March 29, 1979 affidavit of John J. McLaughlin, Jr.
P-13: April 2, 1979 affidavit of John J. McLaughlin, Jr.
P-14: April 5, 1979 affidavit of John J. McLaughlin, Jr.

R-1: February 6, 1979 memo to all residents re February meetings of the Board (same as P-2)
R-2: February 6, 1979 memo to all residents re February meetings of the Board (without specificity of purpose for February 9 special meeting)

C-1: Minutes of February 20, 1978 reorganization meeting of the Board (page 97, first resolution)
C-2: Minutes of February 9, 1979 special meeting of the Board
C-3: Minutes of February 9, 1979 private meeting of the Board (SEALED)

IDENTIFICATION DOCUMENTS:

P-4: P-1 with Mr. Sasso's name plus notice of January 31, 1979 meeting
P-5: Envelope in which P-4 was received
P-6: January 31, 1979 letter from Mr. Sasso to Mr. McLaughlin (not admitted as evidentiary)
P-7: January 31, 1979 notice of emergency meeting received by Dr. Kiamie

R-3 Affidavit of Mr. Perconti

BEFORE THE HONORABLE WARD R. YOUNG, A.L.J.:

The Board of Education of the Borough of North Haledon, hereinafter "Board", certified tenure charges against its Superintendent of Schools at a private meeting of the Board on February 9, 1979. The Superintendent was also suspended without pay. The charges and the Board's resolution were filed with the Commissioner of Education on February 15, 1979.

An answer on behalf of the Superintendent was filed with the Commissioner on February 22, 1979.

The matter was transferred, on April 5, 1979, to the Office of Administrative Law, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The Superintendent instituted an action in the Superior Court, Law Division, to have the actions of the Board at its February 9 private meeting declared null and void due to alleged violations of the Open Public Meetings Act. The matter was heard on April 6 and dismissed without prejudice with notice to exhaust administrative remedies with the Commissioner of Education.

A notice of motion for summary judgment was filed with the Commissioner on behalf of the Superintendent on April 30, 1979. Oral argument was held on May 30. The motion was denied on June 8 "as it would be inappropriate and presumptuous for the Commissioner to self-impose a jurisdictional authority not intended by the legislature".

The matter was appealed to the Superior Court, Appellate Division.

On August 29, prior to the matter being heard by the Appellate Court, the Commissioner requested the Office of Administrative Law to submit the case file to him for his review, which was done by Order on August 31, 1979.

The Commissioner reversed the June 8 decision on September 7, 1979, and remanded the matter to the Office of Administrative Law.

Hearings were held at the Office of Administrative Law on September 25 and October 15 on the Superintendent's allegations of Open Public Meetings Act violations by the Board.

Due to the issues to be determined and the action filed in this instant matter, the Superintendent is the petitioner. The Board is the respondent.

Petitioner alleges statutory violations by the Board and specifically cites N.J.S.A. 10:4-7, 10:4-8(d), 10:4-10 and 10:4-12(b)

The petitioner alleges that the Board violated N.J.S.A. 10:4-8(d) by failing to post adequate notice. He alleges that the notice posted did not state the purpose of the meeting nor did it state that action may be taken at said meeting. He further alleges that revised notice(s) designed to correct said deficiencies were not posted at the one public place designated for same.

The petitioner also alleges that the Board violated N.J.S.A. 10:4-12 (b) (8) by inviting one (1) member of the public to be present during the private session.

The petitioner prays that the Commissioner so hold and declare the Board's actions in its private meeting on February 9, 1979 null and void.

The respondent Board avers that it acted properly in implementing the spirit and intent of the law.

The following represents the relevant facts as I perceive them after a careful and thorough review of the entire record in these proceedings:

Forty-four (44) tenure charges against the Superintendent of Schools were filed with the Board of Education and served on the Superintendent on January 25, 1979. Complainants are forty-one (41) persons, presumed to be residents, who certified "... to the truthfulness of at least one or more of the foregoing individual charges by our own personal knowledge".

The Board certified the aforesaid charges at a special meeting held on February 9, 1979. Notice to the residents of that special meeting, as well as two (2) other meetings, was posted on the bulletin board in the Municipal Building at least forty-eight (48) hours preceding the meeting. That notice, P-1 in evidence, was undated, but indicated the time and location of said meeting, but did not indicate any purpose, either generally or particularly.

Two (2) Board members and the Superintendent testified that they received copies of that notice, with the latter having received his on January 31, 1979. (See P-3 and P-8, same as P-1).

A revised notice was prepared, and it was dated February 6. The revision, in addition to the date of notice, was a three (3) line notation indicating action to be taken in an unrelated matter at one (1) of the other two (2) meetings on the notice (R-2).

Another revised notice was prepared under date of February 6. It differed from R-2 in that the notation referred to in that notice is now a two (2) line notation, and under "special meeting" scheduled for February 9 is inserted "For action on charges received on 1/29/79". (P-2, R-1).

The posting of P-1 on the Municipal Building bulletin board is undisputed. The posting of notice P-2, R-1 and the location of same represents the heart of the controversy and alleged violation of the Open Public Meetings Act.

The relevant controverted testimony concerning the serving and posting of P-2, R-1 will now be reported.

The person who held the position of Borough Clerk at the time of the controversy in late January and early February (1979) testified that he was not aware of any notice, other than P-1, that was given to him or his staff to post on the bulletin board. (TR I-2 He did testify, however, that the Board secretary showed him a revised notice after P-1 was posted, but did not leave or file same with him, nor did he ever see it posted. (Tr I-24-26). A Board employee usually posted the Board's notices and would advise the clerk or a staff member that it was being done. (Tr I-32,33).

The Deputy Borough Clerk also testified. She keeps the bulletin board updated (Tr I-43), and files every posted notice when it becomes outdated. (Tr I-46,47). She further testified that a student was a part-time staff member (Tr I-47), who could have taken a notice from the board, but if so it would have been in the file. (Tr I-53). She searched the files and found only P-1 (Tr I-54, 55).

Two (2) Board members testified that the original notice was the only notice they ever received. (Tr I-66, 80,88). They also testified that they knew of no other posting place than the Municipal Building bulletin board. (Tr I-126,143). They further stated it was their belief that they were to receive copies of all notices posted. (Tr I-139,140,145).

The Council President testified that he saw P-1 posted but no other. (Tr I-101).

The Superintendent testified that the original notice was the only one he received. (Tr I-150). He also stated that he had told the Board Secretary that posting was to be done at the Municipal Building and further cited the Board minutes in which that designation would be found. (Tr I-154,155). He also stated he was not aware of any notice other than the original P-1 until after his suspension. (Tr I-155). He personally inspected the bulletin board on February 7, 8 and 9 and saw only the unrevised notice P-1. (Tr I-158).

The Superintendent also testified that the resolution passed by the Board on February 9 prior to the closed meeting was his first awareness of the Board's anticipated action against him (Tr I-160,161).

The Board Secretary testified that he had no knowledge of any Board policy relative to posting of meeting notices (Tr II-1 He spoke with a principal, now acting Superintendent, concerning th posting of notices and decided on posting at two (2) school locatio (Tr II-15,16). He did not speak to the Superintendent (Tr II-16).

The Secretary did not feel it necessary to consult the Board, as he was of the opinion that the authority and responsibility for posting was granted to him by N.J.S.A. Title 18A [with no specific statute cited] (Tr II-17).

On cross-examination, the Secretary stated that he had previously testified in another hearing before another Judge that the Municipal Building and no other place was the official posting location (Tr II-29).

He further testified that he never posted or saw any of the three (3) notices of the February 9 meeting posted on the Municipal Building bulletin board (Tr II-43). He did state that on February 6 he filed a notice with a young lady in the Borough Clerk's office (Tr II-48,49).

The Secretary stated that early in his employment he researched the by-laws and policy manual and found nothing relative to posting of notices, but was aware that the customary location was the Municipal Building (Tr II-95). Sometime later, he learned of a Board resolution which designated the Municipal Building as the location for posting notices (Tr II-96). He further testified that he does not feel bound by that Board resolution that the Municipal Building is the only location that is the official posting place for Board notices (Tr II-97).

The Board President testified that he was not aware of any official place of posting prior to this controverted matter, but read a statement before each meeting stating that the notice was posted at the Municipal Building (Tr II-144-145).

There is considerable other conflicting testimony relative to posting process, preparation and service of the meeting notices in dispute which is quantitative only and would not, in my opinion, provide brighter illumination and will not be reported.

Attention now turns to evidentiary documents.

P-9 represents the minutes of the regular meeting of the Board on January 20, 1976. Resolution #155 was adopted and states:

> "Resolved that adequate notice of meetings ... shall be posted at the Municipal Building bulletin board".

P-10 represents the minutes of the Board's March 16, 1976 meeting. Resolution #173 was adopted and states, in pertinent part:

> "Resolved that the Board adopt the rules and regulations and by-laws and approve the acts of the previous Board. ..."

P-11 represents the minutes of the Board's organization meeting on April 4, 1977. Resolution #142 was adopted and states:

> "Resolved that the Board adopt the rules and regulations and by-laws and approve the acts of the previous Board".

C-1 represents the minutes of the Board's organization meeting of February 20, 1978. The following resolution was adopted:

> "Resolved that the Board adopt the rules and regulations and by-laws and approve the acts of the previous Board".

C-2 represents the minutes of the Board's special meeting on February 9, 1979. The following is an excerpt in pertinent part:

> " ... President Medici read the following statement:
>
> The New Jersey Open Public Meeting Law was enacted ... . In accordance with the provisions of the Act, the Board has caused notice of this meeting to be published by having the date, time and place thereof posted in the Municipal Building ...".

After a careful review and analysis of my copious notes taken at the hearings, the transcripts of record and the evidentiary documents, together with a thorough assessment of the preponderance of credible testimony, I FIND the following to be the relevant facts:

1. The only officially designated posting location for meeting notices is the bulletin board of the Municipal Building. It was specifically designated by Board adoption on February 9, 1979 and reaffirmed by resolution of successive Boards. I am constrained to state that the legislature did not clothe the Board Secretary with discretionary authority to establish policy in this regard. The authority intended in N.J.S.A. 18A:17-7 is ministerial.

Generally, rules and regulations adopted by a local board of education die with the annual reorganization meeting of the board unless expressly or impliedly adopted anew by the next board. Rall v. Board of Education of the City of Bayonne, 104 N.J. Super. 236, 249 A.2d 616, reversed on other grounds 54 N.J. 373, 255 A.2d 255 (1969).

2. P-1, the first notice, was properly posted and served but did not meet the statutory adequacy requirements. N.J.S.A. 10:4-8 states in pertinent part:

> "...d. 'Adequate notice' means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) ... and (3) filed with the clerk of the municipality ... ." (emphasis added).

3. R-2, the first revision and second notice, was not posted or properly served, nor was it adequate.

4. P-2 (R-1), the second revision and third notice, was not posted or filed in accordance with N.J.S.A. 10:4-8(d).

N.J.S.A. 10:4-10 states in pertinent part:

> "At the commencement of every meeting of a public body the person presiding shall announce publicly, ..., an accurate statement to the effect:
>
> a. that adequate notice of the meeting has been provided, specifying the time, place, and manner in which such notice was provided;..." (emphasis added)

The petitioner also alleges that the Board violated the Open Public Meetings Law by inviting one (1) public member to sit in at its February 9 private session while excluding the remainder of the general public.

C-3 represents the minutes of the closed meeting. It is undisputed that the Board invited the attorney who represented the forty-one (41) complainants to join with them in special closed session to hear the responses of the Superintendent to the forty-four (44) charges against him. It is also undisputed that the attorney was asked to leave the meeting at all other times.

There may be many cogent reasons why the Board may invite a non-member to a closed session in order to have information or issues clarified for it prior to deliberations and action in the fulfillment of its statutory responsibilities.

In the instant matter, clarification of any of the forty-four (44) charges filed by complainants for the edification of the Board would appear to be sufficient and understandable reason for extending an invitation to the complainants' attorney to assist the Board in this regard. However, such does not seem to be the case here. The minutes of the meeting clearly establish the fact that the invitee was present to hear the responses of the Superintendent which should be limited to the ears of members and their legal counse I so hold, and FIND that the Board abused the discretionary authorit granted to it by N.J.S.A. 10:4-12(b)(8).

There was considerable testimony relative to the service of the revised final notice to the Superintendent. I do not feel compelled to make a determination of the preponderance of credible evidence here,as an adjudication of that concomitant issue is not essential to a fair disposition of this matter. All parties are referred, however, to N.J.S.A. 18A:17-20, which states:

> "The superintendent of schools ... shall have a seat on the board ... of education employing him ..."

Counsel for the parties submitted a brief and letters of memoranda to support their contentions. Several cases were cited to support their contentions, and as can be expected, conflicts in interpretation were evident. I do not feel compelled to address each and every citation and point.

The thrust of argument on behalf of the respondent Board initially is in support of the posting of adequate notice due to failure of the petitioner to bring forth substantial evidence to the contrary. Secondly, the respondent cites case law to indicate a liberality as to collateral issues and a strict compliance requirement as to the actual notice of the meeting. Further, the Board argues that it is not statutorily prohibited from posting in more than one public place, and that the invitation for the presence of the attorney for the forty-one (41) complainants was not violative o the Open Public Meetings Law.

There is no disagreement here with the Board's contention that there may be more than one designated posting location. The respondent Board, however, made no such designation. To suggest that the decision of the Secretary and subsequent posting in school houses not so designated by the Board may meet the requirements of N.J.S.A. 10:4-8(d) would dilute the discretionary authority granted by the legislature to the Board only.

In John J. Polillo v. Adelaide Deane, et al, 74 N.J. 562, 379 A.2d 211 (1977), the court stated:

> "...lack of wrongful intent cannot excuse noncompliance with the [Open Public Meetings] Act. ..." (at p.577)

and further stated:

> "...that strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred. ..." (at p. 578)

After careful review of the entire record in these proceedings, I CONCLUDE that the respondent Board is held to have violated the Open Public Meetings Act, and therefore DECLARE the action of said Board at its closed session on February 9, 1979 to be null and void.

It is noted that additional tenure charges were certified by the Board and filed with the Commissioner on August 3, 1979. Violations of the Open Public Meetings Act were also alleged in that instance. Due to the pendency of the alleged violations in the certification of the initial set of tenure charges, no prehearing conference was held on the supplemental charges. However, it is certain that the original petition would have been amended to include the supplemental charges to avoid bifurcation of the controverted matter, and the case file now is inclusive of both sets of charges. It is made abundantly clear that the alleged violations related to the second set of charges have not been adjudicated.

I HEREBY ORDER the reinstatement of Dr. Robert A. Kiamie as Superintendent of Schools forthwith, and further, that he be compensated for the salary withheld for the first one hundred twenty (120) days of his suspension.

This decision cannot be effected prior to forty-five (45) days from the agency receipt of same, unless the agency head acts to affirm, modify or reverse before the expiration of that period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the entire record in this proceeding.

2 November 1979
DATE

WARD R. YOUNG, A.L.J.

ROBERT A. KIAMIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner excepts to the finding by Judge Ward R. Young, ALJ, that the resolution passed by the Board at a public session substantially complied with N.J.S.A. 10:4-13. Respondent Board's reply exceptions refute those of petitioner and argue that the court's decision should be sustained. The Commissioner cannot agree.

The Commissioner finds the argument of petitioner persuasive as it addresses the applicability of N.J.S.A. 10:4-6 et seq. (Open Public Meetings Act) Certainly that law applies to the Board; the question raised and to be decided herein is whether or not substantial compliance with the spirit of the law is sufficient. The Supreme Court of New Jersey has said otherwise in Polillo v. Deane, 74 N.J. 562 (1977) wherein was stated:

> "***Defendants would allow a charter commission or any other governmental agency to disregard the dictates of the law whenever there would be 'substantial compliance.' Rather than providing a new exception to the rule, we believe that defendants' suggestion would swallow the rule. Accordingly we reject this argument completely and hold that strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred.***" (Emphasis supplied.) (at 578)

Judge Young's finding in relation to this states:

> "4) The resolution passed by the Board at public session substantially complied with N.J.S.A. 10:4-13." (at p. 6)

The Commissioner herewith sets down N.J.S.A. 10:4-13 in full:

> "No public body shall exclude the public from any meeting to discuss any matter described in subsection 7.b.***until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> a. Stating the general nature of the subject to be discussed; and b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public."

Nothing in the record indicates strict adherence to this statute; the Commissioner cannot accept Judge Young's determination of substantial compliance by the Board as being sufficient.

Having determined that the Board's action of November 2, 1979 was in violation of the Open Public Meetings Act, the Commissioner does not deem it necessary to address any further legal arguments advanced. Accordingly, the action of the Board at its meeting of November 2, 1979 is set aside. Nothing in this decision precludes the Board from making a proper certification of charges in the future as part of its discretionary authority. The Commissioner is constrained to express his concern that this matter be resolved in an expeditious manner.

COMMISSIONER OF EDUCATION

December 24, 1979

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

PATRICIA MARKOT	)	INITIAL DECISION
V.	)	OAL DKT. NO. EDU 2412-79
THE BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE	)	

APPEARANCES:

Arnold M. Mellk, Esq. for Petitioner,
Patricia Markot

Reginald F. Hopkinson, Esq. for Respondent,
Board of Education of the Borough of Hawthorne

BEFORE THE HONORABLE ROBERT P. GLICKMAN, A.L.J.:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. This matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On September 4, 1979, a prehearing conference was held at which time the issues were identified as follows:

1. Was respondent-Board's failure to re-employ and/or was respondent Board's termination of the petitioner-teacher's contract arbitrary, capricious and/or unreasonable?

2. Did respondent-Board fail to comply with N.J.S.A. 18A:27-3.1, 18A:27-3.2, 18A:27-4, 18A:27-10 and N.J.A.C. 6:3.1.19 in not re-employing petitioner and/or terminating petitioner's contract and if so, what is the effect of same?

This matter was heard before the Court on October 25, 1979 at the Office of Administrative Law, 185 Washington St., Newark, N.J. During the course of the hearing the following exhibits were marked into evidence which shall be enumerated hereinafter:

1. J-1, lesson plan of Patricia Markot for school year 1978/79.
2. P-1A, worksheet on To Kill a Mockingbird Chapters 2 through 7.
3. P-1B, worksheet on To Kill a Mockingbird Chapters 8 through 13.
4. P-1C, worksheet on To Kill a Mockingbird Chapters 14 through 19.
5. P-1D, worksheet on To Kill a Mockingbird Chapters 20 through 26.
6. P-1E, worksheet on To Kill a Mockingbird Chapters 27 through 31.
7. P-2, List of students in Patricia Markot's fourth period class.
8. P-3, teacher appraisal of Patricia Markot dated February 13, 1979.
9. P-4, letter dated February 14, 1979 from Dr. Robert Hausner to Miss Patricia Markot.
10. P-5, observation worksheet of Patricia Markot dated March 24, 1976.
11. P-6, observation worksheet of Patricia Markot dated (unreadable 29,76).
12. P-7, teacher appraisal of Patricia Markot dated May 28, 1976.
13. P-8, teacher appraisal of Patricia Markot dated November 23, 1976.
14. P-9, teacher appraisal of Patricia Markot dated January 13, 1977.
15. P-10, teacher appraisal of Patricia Markot dated March 2, 1977.
16. P-11, teacher appraisal of Patricia Markot dated November 30, 1977.
17. P-12, teacher appraisal of Patricia Markot dated February 10, 1978.
18. P-13, teacher appraisal of Patricia Markot dated March 14, 1978.
19. P-14, teacher appraisal of Patricia Markot dated November 21, 1978.
20. P-15, teacher appraisal of Patricia Markot dated January 8, 1979.
21. P-16, letter dated February 15, 1979 from John B. Ingemi to Patricia Markot.
22. P-17, resolution of the Board of Education of the Borough of Hawthorne dated February 26, 1979.
23. P-18, statement of reasons for termination of contract of Patricia Markot.
24. R-1, Course of Study of English 1972 Hawthorne High School.
25. R-2, teacher appraisal of Patricia Market dated April 18, 1977.

Patricia Markot testified that on February 5, 1979 during her fourth period English class she was involved in teaching a lesson dealing with To Kill a Mockingbird. Some time during her class, Dr. Hausner, the new Principal of Hawthorne High School, entered her classroom for the purpose of observing her. Although, the petitioner does not remember the exact time that Dr. Hausner entered her classroom, it is not disputed that he was there from 11:15 A.M. to 11:35 A.M. (See P-3)which was not for the full duration of her class period. Petitioner indicated that she was involved in following her lesson plan on this date which had been approved by her English Department head, Mr. Krueger, and also the former Principal of the High School, Mr. Pavlin. (See J-1). According to Miss Markot, in order to understand her lesson plan for February 5, 1979, one would have to look at that date which refers back to October 23, 1978 in her lesson plan book. However, on October 23, 1978 of her lesson plan book there is a notation "teacher institute" and so one would have to go on to the next date, October 24, 1978 in order to be apprised of what petitioner was teaching on February 5, 1979. Miss Markot indicates that she had originally wanted to teach this lesson in October, 1978 but the books involved with the course, namely, To Kill a Mockingbird had not been delivered to the school and were not available for use by the students. The books in question became available in February,1979 when she in fact began teaching from them.

On February 5, 1979, petitioner was involved in silent reading with her class. She testified that the students were engaged in silent reading of To Kill a Mockingbird and while doing so were also working on the questions in worksheets. (See P-1A through E). The purpose of the worksheets was to assist the students in their understanding of the book. Miss Markot agreed that while Dr. Hausner was observing her class on February 5, 1979, nothing took place other than the students reading their book and working on the worksheets. However, after Dr. Hausner left her classroom,four students came up to her desk to discuss the worksheets with her. While Dr. Hausner was in the classroom on February 5, 1979, Miss Markot introduced him to the class as the new Principal. She also showed Dr. Hausner her worksheets and tests, but had no other conversation with him at that time. Dr. Hausner left before the end of the class. The class period was 42 minutes long and Dr. Hausner was there for 20 minutes of that period.

On February 6, 1979 while petitioner was teaching the same class as the day before, Dr. Hausner came in to observe her from 11:30 A.M. to 11:50 A.M. (See P-3). Miss Markot was again following her lesson plan and continuing with the previous day's work. Dr. Hausner spoke to Miss Markot and indicated to her that this was not teaching. He said that all that the students were doing was silent reading. Petitioner indicated to Dr.Hausner that she did not understand what the problem was. Dr. Hausner stated that this was not the place to discuss the problem and that he would have his secretary send her a note so that a meeting could be set up between them. On February 6, 1979, Dr. Hausner was in the class for 20 minutes. Again, the class period was 42 minutes long. Miss Markot in continuing the work from the previous day, again was utilizing silent reading and the worksheets.

The petitioner next met with Dr. Hausner on February 8, 1979 in his office. Dr. Hausner indicated that he did not feel that it was necessary for the students to be engaged in silent reading. He indicated to petitioner how she should teach the class. Dr. Hausner indicated that one could start the class off with a quote on the board such as "All poor people are liars". This would encourage discussion at the outset of the class. Dr. Hausner indicated to Miss Markot that she should not use silent reading in her class and she testified that after that date she did not use silent reading again. Petitioner testified that silent reading was an acceptable method in the English Department used by English teachers at Hawthorne High School. She indicated that the "Course of Study English" (See R-1) indicated that this was a method that could be used. She testified that the "Course of Study" provided teachers with guidelines and was not mandatory.

On February 14, 1979 petitioner, Dr. Hausner, and Mr. Livatino met for a conference. At that time petitioner received an evaluation (See P-3) and a typed letter from Dr. Hausner (See P-4). Miss Markot responded to the letter and evaluation. (See P-3). At the conference, Mr. Livatino commented that petitioner was foolish to go against the Principal so close to tenure.

On February 20, 1979 petitioner appeared at the Board of Education Executive Session for the purpose of ascertaining the reasons why she was not to be given a new contract of employment. Dr. Hausner basically stated to the Board at that meeting what was set forth in his letter of February 14, 1979. (See P-4). According to Miss Markot she explained to the Board how she had used worksheets along with the silent reading on February 5 and 6, 1979. Subsequent to the Board meeting, petitioner received the Board resolution (P-17), and a document setting forth the reasons for the termination of her contract. (See P-18).

The petitioner maintained that silent reading was an acceptable method of teaching, that this method was set forth in the Hawthorne High School "Course of Study English 1972" (R-1) and that furthermore in her lesson plan it was indicated that she would be utilizing this method and that her lesson plan had been approved both by the head of the English Department and also the former Principal. (See J-1, October 31, 1978 notation). Additionally, the notation in petitioner's lesson plan book with regard to the study of To Kill a Mockingbird reveals the following: "student will be made aware of a literary form - the novel (compared to shorter work - the short story - to be done in future) a knowledge of background of author will make student more aware of southern writer and attitude toward prejudice in the South". Also, on the far right hand side of the page after the seventh column where there is a heading 'notes' is the signature of Mr. Krueger and below that the date 9/18/78.

Additionally, petitioner testified that Dr. Hausner criticized her for having on her blackboard writing dealing with the Shakespeare play, Romeo and Juliet. Dr. Hausner told Miss Markot that she should not have this on the board. Miss Markot during rebuttal testimony explained that material was put on the blackboard dealing with Shakespeare's play by a teacher who had a class

before her class and again after her class. That teacher requested Miss Markot to do her a favor and leave the material on the board, which Miss Markot did. Also, Miss Markot testified that Dr. Hausner never asked her for the student worksheets at any time. Miss Markot explained that in most instances the students would keep the worksheets after she marked them.

After the completion of the testimony of petitioner, Patricia Markot, the petitioner rested. Immediately thereafter, the petitioner's attorney moved for the entry of a judgment in petitioner's favor. Respondent's attorney moved for the dismissal of the petition. After hearing oral argument on each of these motions, the Court denied each motion.

Dr. Robert Hausner, the Principal of Hawthorne High School testified on behalf of respondent. Prior to his taking a position as Principal of Hawthorne High School on February 1, 1979, Dr. Hausner was associated with Herbert H. Lehman High School in Bronx, New York. He had observed and evaluated people while associated with the school in New York. Also, prior thereto, he had taught English both at the Junior High School level and at the High School level. In addition thereto, Dr. Hausner had taken courses associated with observing and evaluating classroom teachers.

On February 5, 1979, Dr. Hausner indicated that he entered petitioner's classroom in order to observe her fourth period English 102 class. He stated that he entered Miss Markot's classroom at approximately 11:15 A.M. and immediately saw on the blackboard a copious outline of Shakespeare's play Romeo and Juliet. He thought that he was going to listen to a discussion with regard to Romeo and Juliet. There were eight students in petitioner's class on this date. He observed that the class was involved in silent reading. Miss Markot remained seated while the students were reading in such a fashion. Dr. Hausner asked the petitioner if the students would be engaged in any other work during the period and Miss Markot told him no. She indicated that the students would be silently reading until the end of the period. It was easily observable that there was no pupil to pupil interaction or pupil to teacher interaction while Dr. Hausner was there. Also, Dr. Hausner observed nothing on the student's desks other than the bookwhich they were reading. He did not observe any worksheets in front of the students. Miss Markot said to Dr. Hausner that the students were catching up with their reading because of the shortage of books. Dr. Hausner indicated that he would return at a later time and wanted to see her teach literature.

On February 6, 1979 Dr. Hausner returned during petitioner's fourth period English class. At this time, he returned in the middle of the class, namely, approximately 11:30 A.M. On this date there were eleven students in the class and they were all engaged in silent reading. Miss Markot was also engaged in reading and had in front of her a yellow marking pen which she was using to underline parts of the novel. There was no verbal interaction between the petitioner and her students, between students and students,nor was there any other work going on in the class other than the students reading their novels. Dr. Hausner never saw any worksheets in front of any of the students. Dr. Hausner

explained that after being in the classroom for a short time, Miss Markot looked up from her reading and saw him there. She walked briskly to the rear of the room and explained that the students were engaged in silent reading. Dr. Hausner indicated to petitioner that she was not teaching the students by having them read silently and that he would discuss this with her at a later time as it was inappropriate to discuss it then.

Dr. Hausner admitted that he did not observe Miss Markot for a full period on either February 5, 1979 or February 6, 1979. However, all other teachers whom he observed, he said, he observed for a full period. He indicated that it would be an insult to his intelligence as an evaluator to spend a full period in class merely to watch children reading silently. He was able to ascertain from petitioner that she was not going to do anything else on February 5, 1979 other than to have the students read silently. So therefore, Dr. Hausner saw no reason for him to remain in the classroom any longer. Additionally, on February 6, 1979, it was apparent that petitioner was engaged in the exact same activity with her students on that date as she engaged in on February 5, 1979.

During his post observation conference with petitioner on February 8, 1979, Miss Markot opened the conversation by indicating to him her belief that the concept of silent reading was a valid one for high school students. Petitioner also indicated to Dr. Hausner that her class had a wide range of youngsters in it; although, Dr. Hausner checked this statement with the guidance staff and found out that her youngsters were properly grouped for her class and were average students. Dr. Hausner indicated to petitioner that she should change her method of teaching and suggested ways to motivate her class. According to Dr. Hausner, petitioner said, "what the hell do you know, you have only been here less than one week."

On February 14, 1979, there was an evaluation conference. During the conference, petitioner, Dr. Hausner and Mr. Livatino were present. It was indicated that the petitioner said that she was engaged in silent reading with her class for the entire period on February 5, 1979, February 6, 1979 and February 7, 1979.

Dr. Hausner testified that petitioner's plan book (J-1) was not satisfactory. In looking at the lesson plan for February 5, 1979, one would then be referred to October 23, 1978. Once one looked at October 23, 1978 it was apparent that that day was designated "teacher institute". The reader of the lesson plan would then have to look at October 24, 1978 in order to ascertain what petitioner did on February 5, 1979. Also, on the far right hand side of the lesson plan book was the department chairman's name under the date September 18, 1978. Additionally, based on Dr. Hausner's observation in class, what took place on February 5, 1979 and February 6, 1979 was not set forth in her plan book of October 24, 1978, October 25, 1978, October 26, 1978 or October 27, 1978. In other words, what was done in class in no way related to Miss Markot's lesson plan book.

Dr. Hausner also explained to petitioner during their post observation conference that it was most unwise to have information on the blackboard relating to Shakespeare's Romeo and Juliet. This would serve to confuse the students and would preclude petitioner from using the blackboard if she so desired. Admittedly, petitioner indicated that she left the material on the blackboard in order to comply with the desires of another teacher.

Dr. Hausner indicated to petitioner that he was recommending that she not be given tenure. He indicated that his reasons for such a recommendation were based on his two separate observations of her on February 5, 1979 and February 6, 1979 at which times he saw no evidence of any teaching activity other than the silent reading of To Kill a Mockingbird by her students. He felt that her defense of the concept of silent reading being a worthwhile student activity was in conflict with sound educational methods. Additionally, it appeared to Dr. Hausner that Miss Markot was not receptive to implementing his suggestions with regard to classroom teaching. He felt that her teaching was a disservice to the Board and that the silent reading could be done at home or in a study hall rather than during a classroom period. Furthermore, he felt that the information set forth in petitioner's lesson plan of October 24, 1978 was not implemented in any way on February 5, 1979 or February 6, 1979.

Mr. Joseph Livatino, the Vice Principal of Hawthorne High School, testified that he was present at a conference between Miss Markot and Dr. Hausner on February 14, 1979. He remembers that Miss Markot said that her class was engaged in silent reading for three consecutive days. The first time that Mr. Livatino heard anything about petitioner's worksheets was at the Board of Education meeting. Mr. Livatino told petitioner that she should heed the advice of her principal when he is trying to help. Mr. Livatino got the impression from petitioner that her attitude was one of 'I'm going to do what I want to do'. Additionally, he indicated that it was not standard procedure, as far as he was concerned, for the Principal to sign a teacher's plan book.

According to P-18 the reasons for the termination of petitioner's contract were as follows:

> "The Board of Education has determined pursuant to the recommendation of the administration,including the Superintendent of Schools and the Principal of the Hawthorne High School, that the methodology of teaching of Patricia Markot, which included extensive implementation of silent reading, under the circumstances was not compatible with the best educational interests of the school district. In addition, the Board in considering the manner in which Patricia Markot implemented lesson plans, to be a further unacceptable practice. The Board further concluded that subsequent to Patricia Markot's conference with the Principal and Vice-Principal with respect to these items that the recommendation of the administration to sever employment and not grant tenure was to the best interest of the school district".

It should be noted that the Court has carefully reviewed and studied all of the exhibits with regard to either classroom observation,worksheets or teacher appraisal sheets which have heretofore been marked in evidence and other than two indications on R-2 and P-15 which relate to needs improvement with

regard to room appearance, the other exhibits indicate that petitioner is professionally competent and there is no indication that improvement is needed. Of course, the teacher appraisal of February 13, 1979, which has been marked P-3 in evidence, has twelve check marks in areas which need improvement. This teacher appraisal is in contrast to nine other teacher appraisals which are in evidence, and which indicate that petitioner is professionally competent except for the ones heretofore mentioned which indicate that she needs improvement with regard to room appearance.

Finally, according to the prehearing order of September 4, 1979, the following stipulations were made which this Court has considered:

1. Petitioner was first employed in respondent's school district in 1976.

2. Petitioner was re-employed each year thereafter until March, 1979.

3. Petitioner would have achieved the status of tenure on March 8, 1979.

4. By letter dated February 14, 1979, the Superintendent of respondent and petitioner's Principal notified petitioner that they were not recommending re-employment and the granting of tenure to her.

5. On February 20, 1979 the respondent Board passed a resolution to terminate petitioner's employment as of February 26, 1979.

6. On February 20, 1979 petitioner appeared before the respondent Board in closed session requesting that the statement of reasons for her termination and/or non-re-employment not be made public.

7. Subsequent to February 27, 1979 the respondent Board sent and petitioner received a copy of the Board resolution of February 20, 1979 and a copy of the statement of reasons for her termination and/or non-re-employment.

According to petitioner, the respondent failed to comply with certain New Jersey statutes and with the New Jersey Administrative Code which shall be set forth hereinafter.

N.J.S.A. 18A:27-3.1 states "Every Board of Education in this State shall cause each non-tenured teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. Said evaluations are to take place before April 30 each year. The evaluations may cover that period between April 30 of one year and April 30 of the succeeding y

excepting in the case of the first year of employment where the three evaluations must have been completed prior to April 30. The number of required observations and evaluations may be reduced propotionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to re-employment, identify any deficiencies, extend assistance for their correction and improve professional competence."

N.J.S.A. 18A: 27-3.2 states:"Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such non-employment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request."

N.J.S.A.18A:27-4 states: "Each Board of Education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

N.J.S.A.18A-27-10 states: "On or before April 30 in each year, every Board of Education in this State shall give to each non-tenured teaching staff member continuously employed by it since the preceeding September 30 either,

a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the Board of Education, or,

b. A written notice that such employment will not be offered.

N.J.A.C. 6:3-1.19 states *inter alia* the following:

a. "For the purpose of this section the term "observation" shall be construed to mean a visitation to a classroom by a member of the administrative and supervisory staff of the local school district, who holds an appropriate certificate for the supervision of instruction, for the purpose of observing a non-tenured teaching staff member's performance of the instructional process:

1. Each of the three observations required by law shall be conducted for a minimum duration of one class period in a secondary school and in an elementary school for the duration of one complete subject lesson.

b. The term "evaluation" shall be construed to mean a written evaluation prepared by the administrative/supervisory staff member who visits the classroom for the purpose of observing a teaching staff member's performance of the instructional process.

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

d. Each policy for the supervision of instruction shall include, in addition to those observations and evaluations hereinbefore described, a written evaluation of the nontenured teaching staff member's total performance as an employee of the local board of education.

e. Each of the three observations required by law shall be followed within a reasonable period of time, but in no instance more than 15 days, by a conference between the administrative/supervisory staff member who has made the observation and written evaluation, and the nontenured teaching staff member. Both parties to such a conference will sign the written evaluation report and retain a copy for his/her records. The nontenured teaching staff member shall have the right to submit his or her written disclaimer of such evaluation within ten days following the conference, and such disclaimer shall be attached to each party's copy of the evaluation report.

f. The purpose of this procedure for the observation and evaluation of nontenured teaching staff members shall be to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding re-employment, and improve the quality of instruction received by the pupils served by the public schools." eff. January 16, 1976.

In reviewing the various teacher appraisal forms in evidence, it becomes apparent how much time was spent in the classroom during each observation:

1. February 5, 1979 -20 minutes (P-3)
2. February 6, 1979 -20 minutes (P-3)
3. November 12, 1976 -20 minutes (P-8)
4. January 4, 1977 -25 minutes (P-9)
5. March 2, 1977 -20 minutes (P-10)
6. November 22,1977 -25 minutes (P-11)
7. January 19,1978 -10 minutes (P-12)
8. February 3, 1978 -30 minutes (P-12)
9. March 7, 1978 -30 minutes (P-13)
10. November 13,1978 -15 minutes (P-14)
11. November 14, 1978 -25 minutes (P-14)
12. January 8,1979 -20 minutes (P-15)
13. April 18, 1977 -Time not recorded (R-2)

This tribunal requested post-hearing briefs which were to be submitted by November 8, 1979, the date on which the hearing was deemed to be concluded. (See Proposed Uniform Administrative Rules of Practice 19:65-16.1).

Based upon a careful consideration of the aforegoing, including a careful review and study of the pleadings, the exhibits, the applicable law, and a careful assessment of the credibility and demeanor of the witnesses, this tribunal FINDS:

1. Petitioner, Patricia Markot, was first employed by respondent in 1976, and was re-employed each year thereafter until her termination effective February 26, 1979.

2. N.J.A.C.6:3-1.19(a)1.states,"Each of the three observations required by law shall be conducted for a minimum duration of one class period in a secondary school, and in an elementary school for the duration of one complete subject lesson." This section of the New Jersey Administrative Code became effective on January 16, 1976.

3. Between November 12, 1976 and February 6, 1979, according to those exhibits admitted into evidence, petitioner was observed on 13 occasions. The time period of each class was 42 minutes and the time period of each observation was as follows:

A.	November 12, 1976	-	20 minutes
B.	January 4, 1977		25 minutes
C.	March 2, 1977		20 minutes
D.	April 18, 1977		Time period not recorded
E.	November 22, 1977		25 minutes
F.	January 19, 1978		10 minutes
G.	February 3, 1978		30 minutes
H.	March 7, 1978		30 minutes
I.	November 13, 1978		15 minutes
J.	November 14, 1978		25 minutes
K.	January 8, 1979		20 minutes
L.	February 5, 1979		20 minutes
M.	February 6, 1979		20 minutes

4. Since the effective date of N.J.A.C. 6:3-1.19, the respondent has failed during any observation of petitioner to comply with it.

5. During observations of petitioner on April 18, 1977, (R-2) and January 8, 1979 (P-15) it was indicated that petitioner needed improvement with regard to her room appearance. All other observations indicated that petitioner was professionally competent.

6. On the teacher evaluation (P-3) setting forth Dr. Hausner's observations on February 5, 1979 and February 6, 1979 the form indicated that petitioner needed improvement in twelve areas.

7. On February 5, 1979 while petitioner was teaching her fourth period English class, Dr. Hausner came into observe her between 11:15 A.M. and 11:35 A.M. During that period of time, petitioner and her class were engaged in silent reading of the novel, To Kill a Mockingbird.

8. In addition to silent reading on February 5, 1979, petitioner and her students were involved in working on questions and worksheets. (See P-1A through P-1E). After Dr. Hausner left petitioner's classroom, four students came up to her desk to discuss the worksheets with her.

9. On February 6, 1979 Dr. Hausner observed petitioner while teaching her fourth period English class between 11:30 A.M. to 11:50 A.M. The class was again engaged in silent reading and working on the worksheets.

10. Petitioner's plan book (J-1) indicated that silent reading would be used with reference to the study of To Kill a Mockingbird. Additionally, petitioner's plan book was approved by her department chairman and principal.

11. On February 14, 1979 petitioner while at a meeting with Dr. Hausner received an evaluation of February 5, 1979 and February 6, 1979 (P-3).

12. Subsequent to February 14, 1979, petitioner received a letter from John D. Ingemi notifying her that he was recommending to the Board of Education that they act to terminate her contract as a teaching staff member effective as of March 1, 1979. (See P-16).

13. On February 20, 1979 petitioner appeared at a Board of Education executive session for the purpose of ascertaining the reasons why she was not to be given a new contract of employment.

14. Subsequent to February 20, 1979 petitioner received a statement of the reasons for termination of her contract which reads as follows: "the Board of Education has determined pursuant to the recommendation of the administration, including the Superintendent of Schools and the Principal of the Hawthorne High School, that the methodology of teaching of Patricia Markot, which included extensive implementation of silent reading, under the circumstances was not compatible with the best educational interest of the school district. In addition, the Board, in considering the manner in which Patricia Markot implemented lesson plans, to be a further unacceptable practice. The Board further concluded that subsequent to Patricia Markot's conference with the Principal and Vice Principal with respect to these items that the recommendation of the administration to sever employment and not grant tenure was to the best interest of the school district."

15. After February 8, 1979 petitioner stopped using silent reading in her classes as a method of teaching.

16. The Course of Study - English - for Hawthorne High School (R-1) suggests silent reading as a method for teaching literature.

17. Dr. Hausner's observations of petitioner on February 5, 1979 for 20 minutes and on February 6, 1979 for 20 minutes were in non compliance with N.J.A.C. 6:3-1.19(a) 1.

18. The reasons given to petitioner for the termination of her contract (P-18) arise from Dr. Hausner's evaluation of her on February 5, 1979 and February 6, 1979 only.

19. No other reasons are given to petitioner for the termination of her contract other than those that arise from the observations on February 5,1979 and February 6, 1979.

20. This tribunal, based on its observations, FINDS that petitioner was an honest, forthright and credible witness.

The narrow issue which this tribunal must consider is whether the respondent's non compliance with N.J.A.C. 6:3-1.19 renders its determination not to re-employ petitioner an arbitrary, capricious, and unreasonable act without basis in fact which may only be remedied by her reinstatement.

In the leading case of Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236,(1974) the Court at 241 said, "The Board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a Board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted." This tribunal certainly agrees with the aforementioned language in Donaldson, supra. However, in the instant case, there is no indication that the respondent relied on any other reasons to deny petitioner tenure other than those set forth in the statement of reasons. (P-18). For instance, we do not have as a reason that the Board felt an obligation to seek out, to serve in the Hawthorne schools, the most outstanding professionals. Nor, do we have any of the "many unrelated but nonetheless equally valid reasons" suggested by Donaldson, supra. The reasons which serve as the basis for not granting tenure arise from the two deficient evaluations by Dr. Hausner on February 5, 1979 and February 6, 1979. These evaluations must be considered in light of her prior outstanding evaluations. The Board's failure to properly and adequately and legally evaluate her performance on February 5, 1979 and February 6, 1979 in accordance with the legal requirements of N.J.A.C.6:3-1.19 renders any action by the Board based upon them as being arbitrary, capricious, and unreasonable. See Winona D. Bendon v. Bd of Ed of the Borough of Keansburg, Monmouth County, 1978 S.L.D. 181; Lewis A. Foleno v. the Bd.of Ed.of the Township of Bedminister, Somerset County, 1978 S.L.D. 23.

It is clear that a Board of Education's discretionary authority is not unlimited. It may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. Cullum v. Bd.of Education of Tp.of North Bergen 15 N.J. 285 (1954); George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District,1968 S.L.D. 7, dismissed State Board of Education 11, Aff'd N.J. Super. Ct. App. Div. 1969 S. L. D. 202. In the instant case, the Board's failure to fully evaluate petitioner's performance in accordance with legal requirements required by N.J.A.C. 6:3-1.19 in light of it prior outstanding evaluations of her, renders its determination not to re-employ her an arbitrary, capricious and unreasonable act without basis in fact.

Additionally, it seems unreasonable and arbitrary to criticize petitioner for utilizing silent reading in her February 5, 1979 and February 6, 1979 English class when her lesson plan was approved by her department chairman and principal and, additionally, when the English Course of Study suggests silent reading as a method to be used for the teaching of literature. This tribunal also notes with interest that prior to February 5, 1979, petitioner received evaluations of being professionally competent in her teacher appraisals. On February 5, 1979 and on February 6, 1979 she received an appraisal which reflected that she needed improvement in 12 general areas. Certainly, this raises a question in the mind of the undersigned as to whether or not the purpose of the observation and evaluation procedure was being accomplished, namely, to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding re-employment, and improve the quality of instruction received by the pupils served by the public schools. (See N.J.A.C. 6:3-1.19F).

In Bendon, supra, the Commissioner determined that the "Board" had failed to comply with N.J.A.C. 6:3-1.19 in not making the required prescribed evaluations. The Commissioner therein restored petitioner to her prior position. Although this tribunal recognizes that in Bendon, supra, there was no formal evaluation of the petitioner, it conceptually sees no difference between no formal evaluation, and a "hurry up" "half-observation" by the evaluator for only a portion of the class period. In fact, in the instant case, while Dr. Hausner was not present in petitioner's classroom on February 5, 1979 or February 6, 1979, certain events took place, such as students discussing questions from their worksheets, which might have positively affected Dr. Hausner's evaluation of petitioner. Dr. Hausner's absence from the classroom made this observation impossible. This "half-observation" which violates N.J.A.C. 6:3-1.19 is not only unfair to petitioner but also to any Board of Education because it requires a Board to make an important determination without all of the facts.

With regard to the issues dealing with the alleged non-compliance with N.J.S.A.18A:27-3.1, 18A:27-3.2, 18A:27-4 and 18A:27-10, this tribunal FINDS that these issues are without merit.

This tribunal CONCLUDES that the respondent's non-compliance with N.J.A.C. 6:3-1.19 render its determination not to re-employ petitioner as an arbitrary, capricious and unreasonable act which may be only remedied by her reinstatement. Accordingly, it is hereby ORDERED that petitioner be reinstated to the position of English Teacher in the School District of Hawthorne at the salary she would have received had she not been terminated. It is further DIRECTED that the Board pay to petitioner all lost salary and other emoluments for the period from February 26, 1979, the date of her termination to the date of her reinstatement, mitigated by any earnings she may have received from alternate employment during that period.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 2412-79

I HEREBY FILE with the Commissioner of Education my Initial Decision in this matter and the record in these proceedings.

11/9/79
DATE

ROBERT P. GLICKMAN, A.L.J.

PATRICIA MARKOT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Initially the Commissioner will consider the Board's request for oral argument in this matter as set forth in its letter of December 15, 1979. The Commissioner has carefully examined the initial decision, its record and subsequent submissions and finds no basis for granting oral argument in this matter. The request is accordingly denied.

The Board takes exception to the degree of importance accorded by Judge Robert P. Glickman to the blank worksheets entered in the record (P-1A to P-1E) by petitioner as evidence of classroom activity. The Board contests his determination that petitioner was a credible witness, pointing to her testimony of a book shortage when, in reality, there was an ample supply of books for all pupils. Additionally the Board contests the finding that petitioner's planbook was properly maintained and implemented.

The Board argues that petitioner's performance on February 5 and 6, 1979 was properly observed and evaluated by the principal as a period of silent reading wherein teacher and pupils sat and read a novel as a practice in silent reading. The Board disputes petitioner's reliance on the Course of Study in English as a suggestion for the teacher to use silent reading as a method of teaching.

The Board denies the applicability of the cases cited in the initial decision as examples of the Commissioner's intervention to grant tenure to a teacher.

The Board argues the merit of Judge Glickman's determination that the visit of the principal to petitioner's classroom on February 5 and 6, 1979 constituted a "half-observation." Finally the Board argues that it properly exercised its discretionary right to deny tenure.

The record of these proceedings reveals that petitioner would have acquired a tenure status prior to the conclusion of the 1978-79 academic year. The Commissioner further notices that petitioner was observed and evaluated by the high school administrators on four separate occasions during the 1978-79 academic year as a nontenured teacher in an effort to comply with the applicable provisions of N.J.A.C. 6:3-1.19.

The aforementioned observations occurred as follows:

Date		Duration
November 13, 1978	-	15 minutes
November 14, 1978	-	25 minutes
January 8, 1979	-	20 minutes
February 5, 1979	-	20 minutes
February 6, 1979	-	20 minutes

Formal written evaluations of petitioner's teaching performance with respect to the first three observation dates above were prepared by the vice-principal and the former high school principal respectively.

It is apparent that petitioner relies on the formal evaluation reports (P-3, 14, 15) with respect to those favorable observations of her teaching performance conducted on November 13 and 14, 1978 and January 8, 1979, as well as her formal evaluation reports of the previous school years to establish the fact that she was rated as a professionally competent teacher. Thus, it is the unfavorable formal evaluation report dated February 13, 1979 (P-3) with respect to the observations of her teaching performance conducted by the new high school principal on February 5 and 6, 1979, which petitioner regards as procedurally defective pursuant to the provisions of N.J.A.C. 6:3-1.19.

The Commissioner does not condone the fact that the Board's administrators failed to comply with the minimal provisions of N.J.A.C. 6:3-1.19. Such procedural defect, however, in the Commissioner's judgment although not fatal to the instant proceedings has needlessly raised an issue with respect to the validity of petitioner's evaluations.

The single remaining issue for the Commissioner's determination herein is whether or not petitioner's extensive use of the silent reading technique with her pupils in her fourth period class on February 5 and 6, 1979 in teaching a unit of English Literature pertaining to the novel was a method of instruction sanctioned by the Board.

The Commissioner has carefully reviewed the Board's approved Course of Study in English (R-2, English I-Unit V) pertaining to the study of the novel and finds and determines that silent classroom reading is not an approved activity sanctioned by the Board.

Moveover, the Commissioner also reviewed the record of the testimony of petitioner, the new high school principal and the vice-principal, adduced at the time this matter was heard by Judge Glickman.

The Commissioner finds that the record of this matter establishes that the philosophical differences which existed between petitioner and the new principal, together with the lack of evidence that silent reading was a Board-approved teaching method, is sufficient on that basis alone to uphold the Board's determination to terminate her employment. The Commissioner so holds.

Accordingly, Judge Glickman's initial decision in this matter is set aside. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 28, 1979

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST.
NEWARK, NEW JERSEY 07102
(201) 648-6186

HOWARD H. KESTIN
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF THE TENURE HEARING OF BLANCHE SHEETS, SCHOOL DISTRICT OF THE TOWNSHIP OF COLTS NECK, MONMOUTH COUNTY

INITIAL DECISION

O.A.L. DKT. NO. E.D.U. 301-8/7

APPEARANCES:

For the Petitioner:
James J. Ross, Esq.
John C. Carton, Esq.
Dr. Roy J. Unger, Superintendent
William J. Morris, Principal
Donald N. Gill, M.D.
For the Respondent:
Peter S. Falvo, Esq.
Blanche Sheets, Respondent

EVIDENTIARY DOCUMENTS

P-1: Unger (superintendent) to Board memo of 6/29/78
P-2: Sheets (petitioner) to "Gentlemen" of 4/5/74
P-3: Unger to Sheets of 4/16/74
P-4: Sheets to Board of 9/2/76
P-5: Unger to Sheets of 9/10/76
P-6: Sheets to Board of 9/16/76
P-7: Sheets to Board of 9/27/76
P-8: Principal to Superintendent 11/9/77 memo (Sheets 77-78 attendance)
P-9: Sheets to Colts Neck "system" of 1/3/78
P-10: Dr. Gill to "To whom it may concern" of 3/18/78 (advising leave until 4/6/78) of 3/18/78
P-11: Sheets leave request of 3/18/78
P-12: Unger to Sheets of 3/30/78 (4/3/78-6/30/78 leave approval)
P-13: Unger to Sheets of 4/3/78 (78-79 staff appointment)
P-14: Unger to Sheets letter of 5/23/78
P-15: Principal to Sheets memo 11/9/77 (re absenteeism
P-16: 77-78 Sheets absenteeism
P-17: Sheets to Principal of 3/21/78 (re leave)
P-18: 3/23/78 Board minutes (3/16 meeting postponed due to weather)

P-19: Sheets cumulative attendance record with 1/16 letter attached (inaccuracies)

R-2: Dr. Minerve letter to Board of 2/22/79
R-3: Dr. Gill "To whom it may concern" of 6/8/78
R-4: Dr. Gill "To whom it may concern" of 6/23/78

IDENTIFICATION DOCUMENT:

R-1: Principal to Sheets of 7/22/77

BEFORE THE HONORABLE WARD R. YOUNG, A.L.J.:

The Board of Education of the Township of Colts Neck, hereinafter "Board", certified a single charge of incapacity to fulfill the routine responsibilities of a teacher due to excessive absenteeism against Blanche Sheets, a tenured teacher. The Board avers that such charge, if proven true in fact, is of sufficient gravity to warrant dismissal of the respondent.

The respondent denies the charge that she is incapable of fulfilling the responsibilities of her teaching position.

Hearings in this matter were conducted on February 20 and 23, 1979 at the Hall of Records in Freehold, and a briefing schedule was agreed upon at the conclusion of the hearings. A request was received on June 20, 1979 to reopen the matter after the Board appointed new legal counsel. The respondent did not object, and a third day of hearing was held on September 5, also at the Hall of Records in Freehold.

The relevant uncontroverted facts begin with a history of respondent's employment and absenteeism in Colts Neck. She was initially employed on September 1, 1967. Her attendance record up to the 1973-74 school year indicates only that she used all sick leave days to which she was entitled each year. Whether she was absent more than ten (10) days annually during her first seven (7) years in the district is conjecture. (P-19)

The controverted matter is an outgrowth of respondent's absenteeism from 1973-1978, and that record, P-1 in evidence, is reproduced here in pertinent part:

YEAR	SICK LEAVE	PERSONAL BUSINESS	FAMILY ILLNESS	TOTAL ABSENCE	PERCENT OF 180 DAYS
1973-74	32 days (22 w/o.p.)	3 days	4 days	39 days	21.6%
1974-75	Full year leave of absence - medical reasons				
1975-76	32.5 days (20.5 w/o.p.)	3.5 days (.5w/o.p.)	8 days	44 days	24.4%
1976-77	Full year leave of absence - medical reasons				
1977-78	25 days* (15 w/o.p.)	2.5 days	1 day	40 day rate	22.2% rate
Staff					
Ave. 77-78 (52 classrm. teachers)	6.14 days	1.97 days	.96 day	9.07 days	5.0%

* Was granted leave of absence for medical reasons, commencing April 3, 1978, for remainder of year.

Under date of April 5, 1974, respondent requested a leave of absence for the 1974-75 school year" ...due to poor health and a need for rest and time to recuperate ...." (P-2) Her request was granted. (p-3)

Respondent again requested leave of absence under date of September 2, 1976, for the period from September 7, 1976 through September 21, 1976 "... due to need of time for recovery from surgery. ..." (P-4) The Board approved. (P-5) An extension of leave until September 27, 1976 was then requested for additional recovery time. (P-6) On September 27, 1976 respondent requested that leave be granted for the remainder of the 1976-77 school year "..due to surgery and complications following. ..." (P-7)

Respondent returned to work for the 1977-78 school year with no improvement in her attendance record. (P-1)

Under date of January 3, 1978, respondent submitted a letter of resignation "...effective 30 days from this date or at the end of the marking period if possible..."(P-9) The Superintendent asked respondent to retract it as indicated in a subsequent letter to her from him under date of May 23, 1978. (P-14) (TrI-43)

Respondent was under the care of Donald N. Gill, M.D., who wrote a memorandum dated March 18, 1978 advising that "...she should take a leave of absence until April 6, 1978 because of health reasons. (P-10) The respondent then, on March 21, submitted a request for leave of absence due to illness until April 6, and on March 22 requested a leave for the remainder of the 1977-78 school year. (P-11, P-17) It was approved unanimously by the Board. (P-12; P-18, p.6)

The Superintendent sent a letter to respondent under date of May 23, 1978 in which he requested "...with the unanimous concurrence of the Board, that you now submit your resignation as a teacher in Colts Neck "...based on our firm belief that you are not physically strong enough to withstand the vigorous physical and mental demands of teaching. ..."(P-14)

The Superintendent had sent a previous memorandum to respondent, under date of April 3, 1978, informing her of her appointment by the Board to a staff position for the 1978-79 school year. A hand-printed notation at the bottom of the memorandum states:

> "Please be advised that your appointment for 1978-79 is conditional-depending upon your ability to fulfill the physical requirements of the position to which assigned. This provision was made in consideration of your present leave of absence having been granted for medical reasons." (P-13)

P-18 represents the minutes of the second regular monthly meeting of the Board on March 23, 1978, which states in pertinent part that "... It was moved by ... and approved by unanimous roll call vote that the Board extend continuing tenure status to (seventy-three (73) teachers including respondent) ..." The respondent's name (and one other) was asterisked and the notation in the official minutes stated:

> "*Conditional upon ability to fulfil physical requirement of position for which being recommended. In each case, teacher will be required to submit evidence of readiness to return to work and assume full responsibility for position." (P-18, at p. 4,5)

Under date of June 8, 1978 Dr. Gill submitted the following:

> "This is to certify that Blanch Sheets is a medical patient in this office and that she has been advised she should continue to remain out of work on total disability for the remainder of the school year.
>
> We are optimistic that she will be able to return to full time employment at the start of school in September."
>
> (R-3)

Under date of June 23, 1978 Dr. Gill submitted the following:

> "Mrs. Blanche Sheets is a patient in this office under our care, who has had recent good improvement in her health problems. We remain optimistic that she can handle a full teaching load and the pressures therefrom, in September."
>
> (R-4)

A medical officer from the Naval Weapons Station Earle in Colts Neck sent the following to the Board under date of February 22, 1979:

> "Mrs. Sheets has been under my care since July 1978. Initially she had multiple problems, the significant one being an allergy to the medicine previously prescribed for her. Since that time Mrs. Sheets has made significent progress and had total resolution of some of her medical problems.
>
> Let it be known that at this time I find Mrs. Sheets able to resume teaching and capable of carrying on the full complement of duties demanded of her in the classroom.
>
> (R-2)

The Board took its action to certify the tenure charge on August 17, 1978 and filed same with the Commissioner of Education on August 21, 1978.

Relevant testimony educed at the hearings now follows.

The qualitativeness of respondent's teaching ability is unquestioned. The Superintendent of Schools testified "...that Mrs. Sheets' teaching methods and teaching ability are at least average, if not above average. ..." (TrI-20) He also stated that he received a note from the principal under date of September 27, 1976 in which the letter stated that "Mrs. Sheets is a valuable staff member, and I believe that a leave of absence as opposed to her resignation would be to the best interest of our school and our students...." (TrI-24) The evaluations of respondent's teaching were stipulated as being positive. (TrI-25,26)

The Superintendent testified that he first became aware of the concern over respondent's absences during the 1977-78 school year upon receipt of a memo from the principal under date of November 9, 1977. (See P-8). The Superintendent conferred with the principal and board secretary on December 1, 1977 to review and discuss respondent's absenteeism, and any possible action resulting therefrom. (TrI-40) It was decided to do nothing but wait, observe and reassess. (TrI-40)

The principal hand-delivered a letter from Mrs. Sheets on January 3, 1978 to the Superintendent, which was addressed to the Board, in which the respondent submitted her resignation. (P-9) (TrI-41,42) The Superintendent conferred with the principal and respondent on that date and "... I handed her [respondent] the letter and asked her not to submit it. I felt that the basis for her having submitted the letter was inappropriate, that is, parental pressure...." (TrI-43)

The Superintendent testified relative to his request by letter that the respondent resign due to parental complaints and his deep concern that her absenteeism has a deleterious effect on the children. (P-14; TrI-54) It was his observation "... that she was not physically strong enough to withstand the demands of teaching." (TrI-63)

The Superintendent was asked by the hearing officer for the rationale for the gaps of time between P-13 (notification of reappointment by Board on March 16, 1978) and P-14 (May 23 request for respondent's resignation. He testified that respondent's absenteeism was a continuing concern; that her reappointment was routine and taken with care not to violate respondent's due process rights; that they tried not to treat respondent in an atypical way; and further that a position had not yet been taken to effect a resignation. (TrI-87)

The Superintendent testified on recall that the leave requested by respondent from April 3, 1978 to June 30, 1978 was granted and he advised her of same by letter under date of March 30, 1978. (P-12, TrII-13) He further stated that he advised the respondent of her continuing employment for the 1978-79 school year by letter under date of April 3, 1978 "on the conditional basis." (P-13, TrII-14)

The respondent testified that she has been under treatment constantly and since August of 1978 was ready, willing and able to resume her teaching duties (TrII-26) Dr. Minerve so stated in a letter to the Board under date of February 22, 1979 (R-2), which superceded Dr. Gill's memos of optimism (R-3, R-4) as well as the petition in this matter which was filed on August 18, 1978.

It is noted that the letter from Dr. Minerve was dated two days following the first day of hearing in this matter and one day prior to the second day of hearing.

Dr. Gill testified on the third day of hearing. He just saw the respondent as a patient on a consultation basis on August 28, 1976 shortly after she had undergone orthopedic surgery. (TrIII-6). He saw the patient a "couple of times" and did not see her again until October 17, 1977 on an office visit. (TrIII-7) She had a cough problem and "several other problems we alluded to in this record for which she had been placed on therapy by other physicians, or another physician." He also stated that she had a "history of essential hypertension ... a history of some allergy problems... a history of having had pulmonary infections." (TrIII-8) The doctor further testified relative to her office visit on March 18, 1978 when "she was quite upset, apparently having problems with some of the parents of the children that she teaches." (TrIII-20) He stated that her health problems "warranted putting in for retirement," and indicated those problems were "recurrent attacks of the bronchitis" and "the attacks of anxiety and depression". (TrIII-26) The Doctor testified extensively concerning the respondent's chronic anxiety and depression and expressed his view that continued absenteeism "could continue to be a problem." (Tr III 47,48) His concluding relevant testimony was "that the blood pressure itself would not be a factor in her ability to perform her duties. I felt that the recurrent attacks of bronchitis and the anxiety and depression were." (TrIII-58)

The concern relative to the respondent's absenteeism and its effect on the continuity of the educational process for the children in her classroom was directed at the principal in lengthy direct and cross-examination. It was the principal's

testimony that one or more substitutes are not as effective as the regular teacher, and that there were more pupil disciplinary problems in the absence of the regular teacher, but it was difficult to support his contention through the analysis of standardized tests. (TrI-99-113)

It was stipulated that the Board did not question the legitimacy of the respondent's absences. (TrI-108,109)

Three (3) documents in evidence refer to the effect of respondent 's absenteeism. The respondent referred to "criticism from parents" in her letter. (P-9) In respondent's letter under date of March 22, 1978 she indicated that the Superintendent called her "and expressed his concern about continuity in the classroom." (P-11) The Superintendent requested the respondent to resign in a letter under date of May 23, 1978, which states in pertinent part:

> "We believed also that parental complaints should not alone be a basis for accepting your resignation. Such an acceptance should arise from conviction that teaching services to the children... could nct consistently be performed on a level reasonably acceptable.
>
> Our deep concern has been, as has yours, what is or will be the effect upon the children. ..." (P-14)

In requesting a leave of absence in a letter under date of April 5, 1974, the respondent stated in pertinent part:

> "...I regret that this request for leave is necessary, but feel that it is for the best for myself and for the young people to whom I am responsible." (P-2)

This concludes the relevant testimony.

The continued employment of a tenured teaching staff member will first be addressed. Tenure of a teacher is a status which is statutory and not contractual. See Kopera v. Board of Education of Town of West Orange, Essex County, 60 N.J. Super 288, 158 A.2d 842 (1960); Greenway v. Board of Education of City of Camden, 129 N.J.L. 46, 28A.2d 99 (1942), 145 A.L.R. 404, affirmed 129 N.J.L. 461, 29 A2d 890; Downs v. Board of Education of Hoboken Dist., 13 N.J. Misc. 583, 181 A. 688 (1935). The legislature has not seen fit to grant local boards of education the statutory authority to extend the statutory entitlement of continued employment for tenured teaching staff members with conditions attached. This is presumed since a search of the

statutes to find such authority was in vain.

I FIND that the action of the Board at its March 23, 1978 meeting in extending the tenured status of seventy-three (73) teachers was an unnecessary exercise, and the conditions placed on two (2) tenured teaching staff members in that resolution was an abuse of their discretionary authority.

The heart of the controversy in the instant matter focuses on the alleged incapacity of the respondent to perform her duties as a teaching staff member.

The Commissioner's dicta In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County, 1977 S.L.D. 403, is relevant to the instant matter, wherein he stated:

> "Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained even by extra effort, when the regular teacher returns to the classroom. ...The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process. ..."

The respondent's statutory entitlement to absence from duty because of personal disability due to illness is undisputed. N.J.S.A. 18A:30-1, et seq.

The point at which absenteeism is judged to be chronic falls within the prerogative and discretionary authority of the Board subject to a determination by the Commissioner of Education in accordance with N.J.S.A. 18A:6-9, which states that:

> "The Commissioner shall have jurisdiction to hear and determine, ..., all controversies and disputes arising under the school laws, ..., or under the rules of the state board or of the Commissioner."

I FIND that the respondent's reliance on the medical statements (R-3, R-4) to support her contention that she was able to return to fulfill her responsibilities as a full time teaching staff member to be without merit. Optimism cannot be construed as a high degree of certainty. I ALSO FIND that the medical statement from another physician (R-2) relative to respondent's fitness to teach full time, which was dated over six (6) months after the charge of incapacity was certified and one (1) day prior to the second day of hearing in this matter, was ill-timed and an unacceptable substitute for R-3 and R-4 to support a dismissal of the charge.

I CONCLUDE, therefore, that the petitioner shall be and is hereby dismissed as a teaching staff member, forthwith.

This decision cannot become effective until forty-five (45) days from the date of agency receipt, unless the agency head acts to affirm, modify or reverse prior to the expiration of that period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the entire record in these proceedings.

9 November 1979
DATE

Ward R. Young
WARD R. YOUNG, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF BLANCHE SHEETS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF COLTS NECK,	:	
MONMOUTH COUNTY.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by Judge Ward R. Young and the exceptions filed thereto by respondent.

Respondent's exception to the initial decision is grounded on the Board's failure to bear its burden of proof that she was incapable of performing her teaching duties as of the commencement of the 1978-79 school year. Respondent maintains that she did provide the Board with competent medical information which indicated that she would be able to resume her teaching duties at the beginning of the 1978-79 school year.

Respondent relies on a prior ruling of the Commissioner in support of her position that the Board's burden to prove the charge of incapacity against her was not met. In the Matter of the Tenure Hearing of Nancy Bacon, School District of Clementon, Camden County, 1978 S.L.D. ____ (decided October 12, 1978)

The Commissioner, in relying on Bacon, supra, disagrees with the conclusions reached by Judge Young in this matter. This determination is based on the fact that respondent's prior record of absenteeism which had Board approval is not the issue herein. The Board is restrained from using such periods of absence which it approved as the sole reason for its certification of the tenure charge of incapacity against her.

The issue herein is whether respondent was in fact capable of resuming her teaching duties at the commencement of the 1978-79 school year. The Commissioner is constrained to observe that the only competent medical evidence in this regard which was available to the Board at the time it certified its charge of incapacity against respondent was that it could reasonably expect her to be able to resume her teaching duties.

The record of this matter further reveals that at no time after the certification of the tenure charge against respondent did the Board obtain or produce such medical evidence on its own behalf pursuant to the provisions of N.J.S.A. 18A:16-2 et seq.

In the Commissioner's judgment the action of the Board in certifying the tenure charge against respondent is fatally defective for the reason stated.

Accordingly, the initial decision of Judge Young is hereby set aside and the tenure charge against respondent is dismissed.

The Board is directed to reinstate respondent to her teaching position forthwith with all back pay and other emoluments due her.

COMMISSIONER OF EDUCATION

December 31, 1979

Pending State Board of Education

SUBJECT INDEX TO COMMISSIONER'S DECISIONS - 1979

JAMES ACKERMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, August 24, 1978

For the Petitioner-Appellant, Saul R. Alexander, Esq.

For the Respondent-Appellee, Rowe, McMahon, McKeon & Curtin (Thomas R. Curtin, Esq., of Counsel)

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

February 7, 1979

BETTY BABICZ, :

PETITIONER-APPELLANT, :

V. :

STATE BOARD OF EXAMINERS, :

RESPONDENT-APPELLEE. :

_____:

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 11, 1978

For the Petitioner-Appellant, Samuel Magnes, Esq.

For the Respondent-Appellee, John J. Degnan, Attorney General (Susan P. Gifis, Deputy Attorney General, of Counsel)

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

Jack Slated opposed.

April 4, 1979

BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,

PETITIONER-APPELLANT,

V.

LAURIE SILVER,

RESPONDENT-APPELLEE.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 17, 1976

For the Petitioner-Appellant, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

For the Respondent-Appellee, Joel S. Selikoff, Esq., of Counsel)

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

David Brandt opposed.

April 4, 1979

DEAL EDUCATION ASSOCIATION, KATHLEEN CHOKOV and SANDRA LAYTON,	:	
PETITIONERS-APPELLANTS,	:	SUPERIOR COURT OF NEW JERSEY
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 11, 1977

Decided by the State Board of Education, July 6, 1978

Argued March 5, 1979 -- Decided March 19, 1979

Before Judges Allcorn and Seidman

On appeal from New Jersey State Board of Education

Peter S. Falvo, Jr., argued the cause for the appellants (Morgan & Falvo, attorneys)

Michael B. Kirschner argued the cause for the respondent (Mirne, Nowels, Tumen, Magee, Kirschner & Graham, attorneys)

A statement in lieu of brief was filed on behalf of the New Jersey State Board of Education

PER CURIAM

The determination of the State Board of Education of December 7, 1977 is affirmed essentially for the reasons set forth therein.

Affirmed.

DOMINICK DI NUNZIO, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, : DECISION

RESPONDENT-APPELLEE. :

_____:

Decided by the Commissioner of Education, November 9, 1978

For the Petitioner-Appellant, Darnell and Scott (Emerson L. Darnell, Esq., of Counsel)

For the Respondent-Appellee, Sever and Hardt (Ernest N. Sever, Esq., of Counsel)

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

February 7, 1979

JOAN DRISCOLL,	:	
PLAINTIFF-APPELLANT,	:	
V.	:	SUPREME COURT OF
BOARD OF EDUCATION OF THE CITY OF CLIFTON,	:	NEW JERSEY
DEFENDANT-RESPONDENT.	:	
	:	

Argued January 9, 1979 -- Decided February 6, 1979

On appeal from the Superior Court, Appellate Division whose opinion is reported at 165 N.J. Super. 241 (1977).

Mr. Theodore M. Simon argued the cause for appellant (Messrs. Goldberg and Simon, attorneys; Mr. Sheldon Pincus on the brief.

Mr. Patrick C. English argued the cause for respondent (Messrs. Lordi, Imperial & Dines, attorneys; Mr. Aaron Dines of counsel).

PER CURIAM

The judgment is affirmed substantially for the reasons expressed in the majority opinion of the Appellate Division, reported at 165 N.J. Super. 241 (1977).

JOAN DRISCOLL,)

PLAINTIFF-APPELLANT,)

V.)

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,)

DEFENDANT-RESPONDENT.)

_____)

PASHMAN, J., concurring.

I concur in the affirmance of the Appellate Division. N.J.S.A. 18A:27-4 empowers local boards of education to make rules governing the terms, tenure, and salaries of teaching staff members. Pursuant to its rules, defendant Clifton Board of Education paid plaintiff $23 per day for the services she had rendered as a substitute teacher.

Plaintiff was informed at the start of her employment that she would be compensated merely as a substitute. This remained the expectation of the parties throughout the performance of her duties. The fact that she ultimately worked for the entire school year cannot alone allow her to retroactively recover the salary and emoluments due a full-time teacher. Any holding to the contrary would involve this Court in highly speculative line-drawing problems as to when and under what circumstances a substitute's status would convert to that of a full-time teacher.

Although the "law" supports the position of the Board of Education, I feel constrained to note the unfairness of that law as applied to the facts of this case. It is undisputed that Ms. Driscoll spent an entire school year with the same elementary class. In her role as teacher she led classes, prepared daily lesson plans, attended PTA and staff meetings, and organized assemblies and special tutoring sessions. In short, she fully performed all the duties of a regular full-time teaching staff member. However, as compensation for her services, she received a per diem salary which amount to less than 50% of the wages for a year's service required to be paid to "full-time" teachers. See N.J.S.A. 18A:29-1 et seq. Moreover, unlike her "full-time" colleagues, she was not compensated for sick days, holidays, and conference days. Nor was she the recipient of medical and pension benefits.

Given the present state of the law, however, no judicial remedy can be accorded plaintiff for the manner in which she was treated. Although unfair, the Board's actions were not so arbitrary as to deny plaintiff substantive due process or

equal protection of the law. Redress for the grievances voiced by Ms. Driscoll and others similarly situated must therefore be sought from local boards of education or the State Legislature. The facts of this case should vividly demonstrate to those bodies the compelling need to differentiate, at least as to compensation, between short-term and long-term substitutes who perform duties commensurate with those of a full-time teacher.

Chief Justice Hughes joins in this opinion.

(79 N.J. 126 (1979))

FRANCES DULLEA,

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY, : APPELLATE DIVISION

RESPONDENT-RESPONDENT, :

AND :

NEW JERSEY STATE BOARD OF EDUCATION, :

RESPONDENT. :

Decided by the Commissioner of Education
June 27, 1978

Decided by the State Board of Education
November 8, 1978

Argued November 5, 1979--Decided November 21, 1979

Before Judges Bischoff, Botter and Dwyer.

On appeal from New Jersey State Board of Education.

Gerald M. Goldberg argued the cause for appellant (Goldberg & Simon, attorneys; Sheldon H. Pincus, on the brief)

Irving C. Evers argued the cause for respondent Northvale Board of Education (Parisi, Evers & Greenfield, attorneys).

John J. Degnan, Attorney General, attorney for respondent New Jersey State Board of Education, filed a a statement in lieu of brief (Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM.

The State Board of Education upheld a decision of the Northvale Board of Education to withhold and deny appellant a salary increment for the 1974-1975 school year based upon two unsatisfactory evaluations of appellant's classroom performance made in writing in February 1974 and April 1974. On April 24, 1974 the superintendent of schools notified appellant in writing that he would recommend the withholding of appellant's salary increment because of the unsatisfactory evaluations by the school principal and recommendations of others. The notice also advised

appellant that the recommendations of the principal were not followed, the deficiencies were not corrected, and recommendations made by the superintendent of schools were also not followed. Appellant was advised of the right to appeal to the Northvale Board of Education and to a hearing before the Board to give appellant the opportunity to dispute the withholding of her salary increment.

A hearing was held by the Northvale Board of Education after which it resolved to accept the recommendation of the superintendent of schools. An appeal was taken to the New Jersey Commissioner of Education who affirmed the action of the local board. On appeal to the State Board of Education the Commissioner's decision was affirmed. This appeal followed.

N.J.S.A. 18A:29-14 authorizes a board of education to withhold for inefficiency or other good cause a teacher's employment increment or adjustment increment for any year. It also authorizes an appeal from such action to the State Commissioner of Education.

On this appeal appellant contends that the provisions of Article XIII of the governing negotiated collective bargaining agreement were not strictly complied with because appellant had not been given advance notice that the deficiencies might result in a recommendation for withholding of salary increment unless such deficiencies were corrected forthwith. We note, however, that this contention was not made at the hearing before the Northvale Board of Education where it should have been first advanced.

Appellant had received written notice of specific deficiencies and recommendations for remedying those deficiencies. She had also received notice of the superintendent's proposal to recommend denial of a salary increment. Thus, there was substantial compliance with the terms of Article XIII. Moreover, appellant has not demonstrated that she was prejudiced in any way by the alleged lack of proper notice. She did not contend before the local board of education that she was deprived of an opportunity to remedy the alleged deficiencies. Instead, she argued that her performance was not deficient. In these circumstances, appellant has in effect waived any technical noncompliance with the notice requirements contained in the collective bargaining agreement.

No sufficient basis having been demonstrated for reversing the decision below, that decision is:

Affirmed.

VIRGINIA EUELL,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education August 11, 1978

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

For the Respondent-Appellant, McLaughlin & Cooper
(James J. McLaughlin, Esq., of Counsel)

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

David S. Brandt and P. Paul Ricci were opposed in this matter.

November 8, 1979

Pending N.J. Superior Court

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING,

PETITIONER-RESPONDENT,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EWING,

RESPONDENT-APPELLANT.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education March 16, 1977

Decided by the State Board of Education August 2, 1978

Argued March 26, 1979 -- Decided April 5, 1979

Before Judges Fritz, Bischoff and Morgan.

On appeal from New Jersey State Board of Education.

Mr. Charles P. Allen, Jr. argued the cause for appellant (Messrs. Dietrich, Allen & St. John, attorneys).

Mr. John Abbotts argued the cause for respondent (Messrs. Abbotts and Abbotts, attorneys).

Mr. John J. Degnan, Attorney General of New Jersey, filed a Statement in lieu of Brief on behalf of New Jersey State Board of Education (Ms. Susan P. Gifis, Deputy Attorney General, of counsel and on the Statement).

PER CURIAM

The final decision of the New Jersey State Board of Education is affirmed substantially for the reasons stated in the opinion of the Commissioner of Education dated March 16, 1977. The Township's contention, made for the first time before us, that the Commissioner lacked jurisdiction of the controversy for failure of the Board to take a timely appeal, is clearly without merit. R. 2:11-3(e)(1) (E).

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	
PETITIONER-APPELLEE,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
HAROLD F. SCHMIDT,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 19, 1978

Decided by the State Board of Education, March 7, 1979

For the Petitioner-Appellee, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

For the Respondent-Appellant, Harold F. Schmidt, Pro Se

In this case a Board member disputed the legality of charging a $25.00 fee for eighth grade pupils who attend a voluntary outdoor educational program for two and one-half days. A majority of the pupils participate in this program, but those who choose for any reason not to participate are required to attend school. The Board of Education bears the cost of transportation, equipment, supplies and consultant fees, as well as salaries and expenses of teachers and nurses who participate in the program. The $25.00 fee is charged for the use of camp facilities, all meals and two nights' lodging.

The Commissioner held that the program did not violate the constitutional requirement that public education be free, and that the Board could therefore continue to operate it as previously. He found no showing that participation or lack thereof had any effect on a pupil's grades or requirements for graduation, or that those who did not participate were not provided with suitable instructional opportunities while some of their classmates were away from school. On these and similar grounds he distinguished the instant case from Willett v. Board of Education of Freehold Regional High School District, 1966 S.L.D. 202.

We believe that the Commissioner's decision was correct and should be affirmed, but we would add one qualification. N.J.A.C. 6:4-1.5 provides:

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

The record shows that the outdoor program here involved is definitely an "educational program or activity" within the meaning of the above-quoted regulations, even though it is a purely voluntary alternative to attendance in regular school classes. See also N.J.A.C. 6:4-1.2. Thus the State Board regulation requires that no sutudent be denied access to that program on account of economic status.

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

June 6, 1979

ERNEST E. GILBERT,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT OF NEW JERSEY
NEW JERSEY STATE BOARD OF EXAMINERS, BUREAU OF TEACHER CERTIFICATION AND ACADEMIC CREDENTIALS, DIVISION OF FIELD SERVICES,	:	APPELLATE DIVISION
RESPONDENT.	:	

Decided by the Commissioner of Education August 9, 1977

Decided by the State Board of Education December 7, 1977

Submitted January 2, 1979 -- Decided January 31, 1979

Before Judges Bischoff and Morgan

On appeal from New Jersey State Board of Education

Mr. Dennis J. Quinn, attorney for appellant

Mr. John J. Degnan, Attorney General of New Jersey, attorney for respondent (Ms. Erminie Conley, Deputy Attorney General of counsel; Mr. Mark Schorr, Deputy Attorney General, on the brief).

PER CURIAM

The final decision of the State Board of Education is affirmed substantially for the reasons given in its opinion of December 7, 1977.

IN THE MATTER OF THE TENURE HEARING OF JOHN GISH, SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, March 3, 1977 and September 14, 1978

For the Complainant-Appellant, Winne, Banta, Rizzi & Harrington (Joseph A. Rizzi, Esq., of Counsel)

For the Respondent-Appellee, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

This is a tenure case in which the respondent has been charged with a number of instances of conduct demonstrating his unfitness to be a teacher. The charges originally included one for insubordination on the ground that respondent had refused to comply with a directive of the local Board that he undergo a psychiatric examination pursuant to N.J.S.A. 18A:16-2.

From the moving papers and briefs of the parties herein, it appears that sometime before the charges were filed, the Board sought a psychiatric examination on the ground of evidence of deviation from normal mental health. The request was resisted by respondent; but after extensive litigation over the issue, respondent finally agreed to a psychiatric examination, but by a doctor of his own choosing who had not been approved in advance by the Board. The examination was then conducted by a Dr. Mann and a report based upon Dr. Mann's examination was rendered by a Dr. Stanley R. Kern.

At a subsequent conference of counsel in the tenure proceeding, the charge of insubordination for failure to submit to the psychiatric examination was withdrawn by stipulation of the parties.

Thereafter the Board sought an order from the Commissioner directing respondent to submit to another examination, on the ground that such additional examination was required because the mental condition of respondent was a key issue in the controversy over respondent's fitness to teach. The Commissioner denied the Board's request on that point, but granted the Board's further application that a copy of Dr. Mann's report be submitted to the

Board and to the Commissioner. It is from that portion of the Commissioner's order denying the request for the second examination that the present appeal was taken.

The State Board believes that the Commissioner erred in denying the Board's request for another examination. In our view, elemental fairness requires that the Board be allowed to obtain a medical opinion from an expert of its own choosing where, as here, the mental health of the respondent is a key issue in the determination of charges against him. This view also conforms with R. 4:19 of the Rules Governing the Courts of New Jersey, which in effect provides that in an action where the mental condition of a party is in controversy, the tribunal may order him to submit to a mental examination by a qualified expert in the field. The second examination in this case is sought not under N.J.S.A. 18A:16-2, but rather under the general principles of due process just referred to.

Accordingly, the State Board directs that the Commissioner's order be affirmed insofar as it grants to the Board of Education the right to examine the report of Dr. Mann. As to the other portion of his order, the State Board further directs that the same be reversed and that the Commissioner be directed to order the respondent to submit to another psychiatric examination by a psychiatrist selected by the Board.

Mr. Wolfenbarger and Ms. Wilson opposed.

February 7, 1979

JULIA R. GIVEN,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT,	:	APPELLATE DIVISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, January 30, 1978

Decided by the State Board of Education, June 7, 1978

Submitted May 8, 1979 -- Decided May 18, 1979

Before Judges Halpern, Ard and Antell

On appeal from the State Board of Education

Messrs. McLaughlin & Cooper, attorneys for petitioner-appellant (Mr. William F. Hartigan, Jr., on the brief)

Mr. Henry G.P. Coates, attorney for respondent-appellee

Mr. John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief for the State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement)

PER CURIAM

On August 27, 1974 petitioner, then a tenured clerical employee under N.J.S.A. 18A:17-2(b), was appointed to a secretarial position with respondent at an increase of salary. She held this position until June 8, 1976 when she was reassigned as a clerical worker.

On September 1, 1976 petitioner appealed to the Commissioner of Education for an order declaring that she was a tenured secretary and therefore not subject to reassignment as a clerical worker. By agreement the matter was submitted to the Commissioner on the pleadings, affidavits and briefs and on January 30, 1978 the Commissioner dismissed the petition pursuant to respondent's motion. the Commissioner's action was affirmed by the State Board of Education on June 7, 1978.

Petitioner's right to relief is governed by the following provision of N.J.S.A. 18A:17-2(b):

> "b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
>
> 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and
>
> "c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary, shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.***"

On this appeal petitioner argues essentially that she acquired tenure as a secretarial employee at the time of her appointment to that position for the reason that she had previously obtained tenured status in her clerical position, and for the further reason that the duties of the two positions were essentially the same.

We have carefully examined the record and are satisfied that the findings and conclusions made with respect to the foregoing contentions could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole and with due regard to the agency's expertise. R. 2:11-3(e)(1)(D); In re Suspension of Heller, 73 N.J. 292, 309 (1977); Close v. Kordulak Bros., 44 N.J. 589, 599

(1965). As to these issues we affirm substantially for the reasons given by the Commissioner of Education in his formal written opinion of January 30, 1978.

Petitioner's argument that the reassignment to clerical duties was invalid for the reason that she was not given the ten days notice provided for in the Board's agreement with the Central Administration Clerical Association is misplaced. The Board's agreement with the Association contains a grievance procedure under Article 4, and whatever relief to which petitioner is entitled under the agreement must be pursued in the manner therein provided.

Petitioner's further contentions that the matter should be remanded to the Commissioner for a full hearing based upon the contents of her affidavit filed after the filing of the Commissioner's decision of January 30, 1978 and that she "should have been permitted to respond to the report of the State Board's legal committee" are clearly without merit. R. 2:11-3(e)(1)(E).

Affirmed.

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

PETITIONERS-APPELLANTS,

V.

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

RESPONDENT-APPELLEE,

AND

EDUCATION LAW CENTER, INC.,

INTERVENOR.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 23, 1977 and October 25, 1978

For the Petitioners-Appellants, Ralph Neibart, Esq.

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

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

The decision of the Commissioner of Education is affirmed.

February 7, 1979

"H.D." AND "M.D.", on behalf of "H.D.",	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLEE,	:	
AND,	:	
EDUCATION LAW CENTER, INC.,	:	
INTERVENOR.	:	

Decided by the Commissioner of Education, June 23, 1977 and October 25, 1978

Decided by the State Board of Education, November 9, 1977, May 3, 1978 and February 7, 1979

For the Petitioners-Appellants, Ralph Neibart, Esq.

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

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

The Commissioner's decision is affirmed. However, it should be noted that the Hearing Examiner in this type of classification proceeding may not attach a presumption of correctness to the school district classification, but must conduct a thorough and independent de novo review of the classification.

We are satisfied that in the instant appeal the petitioner was accorded the full benefits of an independent and de novo review.

May 2, 1979

WILLIAM S. HUMEN, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE CITY: APPELLATE DIVISION
OF BAYONNE, HUDSON COUNTY,

RESPONDENT-RESPONDENT. :

_____:

Decided by the Commissioner of Education, July 5, 1977

Decided by the State Board of Education, October 12, 1977

Submitted February 13, 1979 -- Decided February 21, 1979

Before Judges Fritz and Morgan.

On appeal from New Jersey State Board of Education.

Messrs. Guarini & Guarini, attorneys for appellant (Mr. Peter L. Humen, on the brief).

Mr. John V. Gill, attorney for respondent.

Mr. John J. Degnan, Attorney General of New Jersey, attorney for New Jersey State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement) filed a statement in lieu of brief.

PER CURIAM

This appeal is from a decision of the State Board of Education denying appellant's request for oral argument before it and affirming the decision of the Commissioner of Education. After appellant had been afforded a plenary hearing, the Commissioner held, adversely to appellant's position, that while the superintendent's transfer of appellant to the same job in the same school system but with a different study team had been ultra vires, the action of the Board of Education shortly thereafter, effecting the same result, was within its authority and completely proper, appellant having no right to assignment to a particular study team.

We are wholly satisfied that the findings of fact necessary to substantiate these conclusions might reasonably have been reached on sufficient credible evidence in the record. Mayflower

Securities v. Bureau of Securities, 64 N.J. 85 (1973). We are confident that the application of the law by the Commissioner was sound. Nor do we find any merit in appellant's procedural complaints. In this respect, we note that appellant was afforded a plenary hearing covering two days and over three hundred pages of transcript. His insistence on perfection in the record and an ongoing forum for the memorialization of events as they continue to occur far exceeds the requirements of due process. His complaint of a violation of the "right to equal protection" arrives without citation of authority and dependent on inference.

The issues raised are clearly without merit. R. 2:11-3(E)(2).

The findings of the Commissioner of "no reason for his intervention in this matter" causes us to pause and think, now probably irrelevantly and certainly rhetorically (at least for the moment), on that described by Justice Clifford as the difficult exercise of "[r]ecognizing the difference between what should come to the courts and what should be dealt with by other institutions." Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 632 (1977) (Clifford J. concurring).

Affirmed.

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID EARL HUMPHREYS,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF PENNSVILLE, SALEM COUNTY.	:	

Decided by the Commissioner of Education, August 11, 1978

For the Petitioner-Appellee, John D. Jordan, Esq.

For the Respondent-Appellant, Joel S. Selikoff, Esq.

This is the case of a teacher who pleaded guilty to a criminal charge of possession of a controlled dangerous substance, i.e. marijuana in an amount greater than 25 grams and hashish in an amount greater than 5 grams (N.J.S.A. 24:21-20a4). On his guilty plea Respondent was sentenced to the Salem County Jail for six months, 30 days to serve and balance suspended, one year probation, and fine of $200. When the Board of Education learned of the arrest and the charges, it suspended Respondent and forwarded tenure charges to the Commissioner pursuant to N.J.S.A. 18A:6-10 et seq. After the guilty plea and sentence the Commissioner proceeded without affording a hearing to the Respondent, and he ordered Respondent dismissed on two grounds: (1) that his guilty plea, conviction and sentence were in themselves sufficient proof of conduct unbecoming a teacher, and (2) that Respondent automatically forfeited his position as teacher by virtue of N.J.S.A. 2A:135-9. The latter statute provides that any person holding an appointive position under any political agency of the State who pleads guilty to the commission of "a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea."

We believe that the Commissioner erred in not granting Respondent a hearing, whether under the Tenure Employees Hearing Act or under the essentials of due process, before rendering his decision of dismissal.

The commission of a high misdemeanor such as here may well be sufficient ground in itself for dismissal. The Commissioner was certainly correct in voicing concern over the violation of criminal laws by teachers, who have a duty to mold the minds of their pupils both by teaching and by example. The offense

> "Accordingly, we reverse and remand for a plenary hearing, consistent with the foregoing, at which petitioner shall be permitted to offer proof relating to the circumstances involved in the crime which he has admitted. The ultimate determination should contain detailed findings of fact upon which its conclusions of law are bottomed."

So here, we conclude that the Commissioner erred in deciding the issue of unbecoming conduct as a matter of law and without making his own findings of fact concerning the circumstances surrounding the offense.

The same need for findings of fact and an opportunity to be heard applies to determination of the effect of N.J.S.A. 2A:135-9 on the instant case. Only by considering all the relevant circumstances surrounding Respondent's offense can a tribunal justly determine whether Respondent's conduct touched the administration of his position or involved moral turpitude. The latter term in particular poses considerable difficulties. In State Board of Medical Examiners v. Weiner, 68 N.J. Super. 468 (App. Div. 1961), where the State Board sought to suspend Respondent's license to practice medicine pending the outcome of a manslaughter indictment against him, the Court dealt at length with the problem of what is a "crime involving moral turpitude". Noting "the elasticity of the phrase and its necessarily adaptive character", the Court concluded (68 N.J. Super. at p. 488):

> "What this inquiry suggests is that in a wide range of crimes, including manslaughter, the fact of moral turpitude may not necessarily be ascertainable from either the indictment or the record of conviction, but may have to be sought in the details of the manner in which the particular defendant perpetrated the offense."

Likewise, in United States ex rel. Iorio v. Day, 34 F.2d 920 (2 Cir. 1929), Judge Hand recognized that "moral turpitude cannot be exactly defined by a rule to fit all cases. It may be or may not be said to exist, depending on the facts, conditions and circumstances."

For further extensive discussion of the meaning of "moral turpitude", see 58 C.J.S., pages 1200 et seq. The author there indicates among other things that "violations of State and Federal narcotic laws are generally regarded as offenses involving moral turpitude, but the contrary view has also been recognized" (citing cases). In the Weiner case, the Appellate Division also noted that the unlawful sale of liquor had been held not to involve moral turpitude (68 N.J. Super. at p. 485).

committed by Respondent here may also require the forfeiture of his position by virtue of N.J.S.A. 2A:135-9. Respondent's guilty plea and conviction, without more, clearly constitute a prima facie case against him.

We do conclude, however, that Respondent is entitled to be heard before the Commissioner imposes such sanctions. He should have the opportunity to speak in his defense, to explain the circumstances of the crime and to present factual or legal argument in mitigation of the penalty which may be imposed. It seems to us that fairness and due process require such an opportunity to be heard, as does also the express language of N.J.S.A. 18A:6-16 and related sections.

This case bears a close resemblance to Gauli v. Trustees Police and Firemen's Ret. Syst., 143 N.J. Super. 480 (App. Div. 1976), where a public employee appealed from a ruling of the State Division of Pensions denying him pension benefits because of his plea of guilty to a high misdemeanor, i.e. unlawful possession of a weapon. In reversing the administrative determination, the Appellate Division said (143 N.J. Super. at pages 482-484):

> "Generally, condemnation of the inculpatory act sufficient to warrant disenfranchisement of pension rights is found in cases where the conduct touches the administration of the employee's office or position (Hozer and Fromm, both supra) or where the conduct is said to involve moral turpitude (Ballurio v. Castellini, 29 N.J. Super. 383 (App. Div. 1954)). In the matter before us the crime did not involve the employee's position. The inquiry then becomes whether the crime involved moral turpitude.
>
> "The hearing officer below decided, as a matter of law, without reference to the facts surrounding the offense and, as a matter of fact, deeming it not 'necessary to make formal findings of fact,' that petitioner's 'plea of guilty to a charge categorized as a high misdemeanor *** forfeited his entitlement to said pension.' We believe that such a plea does not in and of itself admit to moral turpitude or less than 'honorable service,' nor mandate the forfeiture of a pension. Despite the confession of illegal activity, the circumstances of that activity should be viewed to determine if they are of such nature as to imply dishonorable service and invoke the extreme sanction. ...

We repeat that the Commissioner or the Courts, after reviewing the circumstances of Respondent's offense, may well decide that it involved moral turpitude or materially affected the administration of his position. We submit that as a matter of educational policy, a tenure teacher as in the circumstances of the respondent in this case, has a right to be heard on these matters before such a judgment resulting in the forfeiture of his position is pronounced.

For the foregoing reasons the State Board of Education directs that request for oral argument be denied and that the Commissioner's decision be reversed and that the cause be remanded to him for a plenary hearing.

Attorney exceptions are noted.

May 2, 1979

"J.B." and "B.B." as guardians and natural parents of "P.B." and "J.B.",

Petitioners-Appellants,

V.

BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education October 27, 1977

Decided by the State Board of Education July 6, 1978

Argued December 3, 1979 -- Decided December 18, 1979

Before Judges Seidman, Michels and Devine

On appeal from determination of State Board of Education.

Mr. Richard J. Donahue argued the cause for appellants.

Mr. Edward J. Leadem argued the cause for amicus curiae New Jersey Catholic Conference.

Mr. Harold N. Springstead argued the cause for respondent (Messrs. Aronsohn, Kahn & Springstead, attorneys; Mr. Springstead on the brief).

Ms. Mary Ann Burgess, Deputy Attorney General, argued the causes for New Jersey State Board of Education (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel; Ms. Burgess on the brief).

PER CURIAM

J.B. and B.B. filed a petition with the State Commissioner of Education requesting that their daughter be exempted from attending the sex education portion of a course entitled "Family Living" given at the Dumont High School, which all seniors are required to take. Petitioners, who are Roman Catholic, maintained that the mandatory nature of the course with respect to certain subjects which they deemed repugnant to their religious beliefs infringed upon the free exercise of their

religion. They contended that they were teaching their children sex education at home in accordance with the dictates of the Roman Catholic Church. The petition was amended later to include petitioners' other children as parties.

Following a hearing, the Commissioner rejected the contentions asserted by petitioners and dismissed their petition. He declared that the institution of the course was within the broad discretion of the local board of education and that petitioners had not established that serious constitutional questions were involved as they had not claimed "that irreparable harm would result as a consequence of their children's participation in the program." The State Board of Education affirmed the Commissioner's decision. This appeal followed.

For reasons that follow, we deem the appeal to be moot. We have been advised by the Attorney General that following its affirmance of the Commissioner's decision, the State Board of Education appointed a committee to restudy its policy on sex education in the school system of the State. In August 1979 the committee submitted a report to the State Board recommending, among other things, that while the study of family life should be required, regulations should be promulgated for an excusal policy from sections of the curriculum on parental grounds of conscience. The State Board accepted the report and, we were told at oral argument, implementing regulations have been drafted and are being considered by the Board. Approval at an early date is anticipated.

It is also to be noted that a bill is pending in the State Legislature to permit the excusal of public school students from those portions of instruction in family life which may be "in conflict with his conscience, or sincerely held moral or religious beliefs." The bill has passed the Senate and, we are told, has recently been favorably reported out by the Assembly Committee on Law, Public Safety and Defense.

During the pendency of these proceedings, the Commissioner issued an order excusing petitioners' eldest daughter from attending the Family Life course. We modified the order so as to excuse her only from that portion of the course which conflicted with her religious beliefs. When the Commissioner ultimately decided the matter, he stayed his decision with respect to petitioners' second daughter pending a final determination by the State Board. Both daughters have since been graduated from the high school in question. The local board's attorney advised us at oral argument that petitioners' third child, a son, is being excused this school term from the disputed segments of the course on the basis of the order previously entered by the Commissioner, as modified by this court. Although the order will technically expire upon the conclusion of this appeal, we would expect the local board to continue to abide by it pending the adoption of the regulations referred to above; otherwise, petitioners are at liberty to move before us to reopen this appeal and seek appro-

priate relief. Finally, since petitioners' youngest child is now in the eighth grade, he will not be involved with the course for several years.

While we recognize that meritorious issues of substantial public interest are raised which ordinarily would require us to decide the cause, cf. State v. Perricone, 37 N.J. 463, 469 (1962); and see Bd. of Ed. E. Brunswick Tp. v. Tp. Council, 48 N.J. 94, 109 (1966), we think that in the circumstances here present the public interest would be better served by allowing the State Board to proceed with its promulgation of rules and regulations designed to establish a uniform, State-wide excusal policy in the case of conscientious objectors. Additionally, the pending bill in the Legislature, intended to accomplish the same purpose, seems to be moving toward final passage.

Although the Attorney General suggests that our judgment in this matter should be "reasonably withheld" until the Legislature or the State Board "has had the opportunity to definitely resolve the issue herein and thus prevent the unnecessary adjudication of constitutional issues," a final disposition of this appeal on the ground of mootness is preferable. If, for any reason, the proposed regulations are not adopted or the pending bill passed, or if upon their promulgation or passage anyone is of the view that his or her free exercise of religion is still infringed in any way, judicial review will be available in an appropriate proceeding.

The appeal is dismissed. No costs.

IN THE MATTER OF THE TENURE HEARING OF LILLIAN H. LEVINE, SCHOOL DISTRICT OF THE CITY OF PATERSON	:	
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Petitioner-Appellant,	:	
V.	:	
LILLIAN H. LEVINE,	:	
Respondent-Respondent.	:	

Decided by the Commissioner of Education October 27, 1977

Decided by the State Board of Education January 11, 1978

Submitted: January 17, 1979 - Decided: February 5, 1979

Before Judges Lynch and Horn.

On appeal from the Decision of the Commissioner of Education of the State of New Jersey.

Mr. Herman W. Steinberg, attorney for appellant (Mr. Robert P. Swartz, on the brief).

Mr. John P. Degnan, Attorney General, attorney for State Board of Education (Mr. Mark Schorr, Deputy Attorney General, of counsel and on the brief).

Mr. Saul R. Alexander, attorney for respondent.

PER CURIAM

The decision of the State Board of Education affirming the decision of the Commissioner of Education in dismissing the charges of inefficiency against Lillian H. Levine is hereby affirmed substantially for the reasons stated by the Commissioner in his decision of October 27, 1977.

HERBERT LEVITT AND THE ELIZABETH EDUCATION ASSOCIATION, PETITIONERS-APPELLEES,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, RESPONDENT-APPELLANT.	:	DECISION

Decided by the Commissioner of Education, July 10, 1978.

For the Petitioners-Appellees, Goldberg & Simon (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent-Appellant, Murray, Granello & Kenney (Robert Emmet Murray, Esq., of Counsel)

This controversy arose out of a strike by the individual Petitioner and others against the Board of Education of Elizabeth. Petitioners were absent from their assigned posts on the Friday preceding and the Tuesday following Columbus Day, which fell on Monday, October 13, 1975. A deduction from salary was made by the Board not only for October 10 and October 14, but also for Columbus Day, even though it was listed on the school calendar as a date on which school would not be in session.

The Commissioner granted the Petitioners' prayer for relief by directing the Board to reimburse them for the day's pay withheld on October 13th. The Commissioner based his decision on N.J.S.A. 18A:25-3, which exempts teachers from having to perform duties on a public holiday, and which further provides that "no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day***."

The State Board directs that the Commissioner's decision be affirmed as to the result, but on a different ground. We think that section 18A:25-3 did not apply here because October 13, 1975 was listed on the school calendar of the Elizabeth District as a date on which school would not be in session. The governing principle here is that there is no authority in a board of education to deduct salary for any day that is not a "school day".

Teaching staff members are employed on the basis of either a calendar year or an academic year, the latter beginning September 1 and ending the following June 30. The salary is fixed at a yearly rate, but is paid in equal semimonthly or monthly installments, as determined by the board of education. N.J.S.A. 18A:27-6 Thus the staff member is paid by the year and in equal installments over the contract period, rather than by the day.

On the other hand, it is well settled that except for authorized sick leave and similar excused absences with pay, the board must deduct a day's salary (reckoned as 1/200th of annual salary) for any day on which the staff member failed to render services in accordance with his employment contract. A board of education has no authority to remunerate employees in such a case because "such a payment would constitute a gift of public monies for services not rendered." Goldman v. Board of Education of Bergenfield, 1973 S.L.D. 441, 446, affirmed by State Board 1974 S.L.D. 1391, affirmed by Appellate Division 1974 S.L.D. 1391, cert. denied 67 N.J. 99 (1975). It was further held in the Goldman case that in order to make up for days lost by strikes, the board could extend the school calendar by adding school days up to June 30 without restoring to the striking teachers the compensation which had previously been deducted for days of absence without leave. The ground for such a holding was that the "employees have been formally employed by contract for the period of time up to and including June 30." (1973 S.L.D. at 448)

We deplore the illegal strike engaged in by the Elizabeth Education Association in 1975. However, we have no alternative but to hold that the Board of Education had no authority to deduct from the pay of the strikers except for days when they were obligated to be performing duties in school.

For the foregoing reasons, the State Board directs that the Commissioner's order herein be sustained.

March 7, 1979

IN THE MATTER OF THE TENURE HEARING OF STEPHEN LEVITT, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
COMPLAINANT-RESPONDENT,	:	
V.	:	SUPERIOR COURT OF NEW JERSEY
STEPHEN LEVITT,	:	APPELLATE DIVISION
DEFENDANT-APPELLANT.	:	

Decided by the Commissioner of Education September 6, 1977

Decided by the State Board of Education February 1, 1978

Argued: March 20, 1979 - Decided: April 9, 1979

Before Judges Lynch, Crane and Horn.

On appeal from the State Board of Education.

Mr. Nathan Reibel argued the cause for appellant (Messrs. Reibel & Isaac, attorneys).

Mr. Cecil J. Banks, General Counsel for the Newark Board of Education, argued the cause for respondent (Ms. Lois N. Kauder, Associate Counsel, on the brief).

PER CURIAM

We affirm the decision of the State Board of Education, essentially for the reasons expressed in the determination of the Commissioner of Education. We find there was sufficient credible evidence to support the findings on which the sanction was imposed. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973).

We have considered very carefully appellant's arguments as to the extent of the penalty. We have concluded that under all the circumstances and in deference to the Commissioner's and the State Board's expertise it should not be disturbed. Teachers are employed in a sensitive area. Adler v. Board of Education, 342 U.S. 485 (1952). Appellant's conduct destroyed the ability of both the principal and the department chairman, targets of his behavior, to cooperate in their common endeavors to teach children of an impressionable age. Morrison v. State Board of Education, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (Sup. Ct. 1969).

It is to be noted that the Commissioner in determining the appropriate penalty to be imposed for unbecoming conduct of a school teacher is enjoined to "take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967). Unfortunately, appellant's behavior in the instant case, unlike that of the teacher in Fulcomer, was premeditated and consisted of a series of telephone calls which, regardless of whether they may be characterized as abusive or threatening, were serious in their consequences to the recipients and their families.

AFFIRMED.

CAROL MOREMEN AND THE MIDDLETOWN TOWNSHIP ADMINISTRATORS ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner, January 11, 1977 and November 9, 1978

Decided by the State Board, June 1, 1977

For the Petitioner-Appellants, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent-Appellee, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

The State Board affirms the decision of the Commissioner of Education.

August 8, 1979

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT-APPELLANT,	:	
V.	:	SUPERIOR COURT
JAMES MARTIN,	:	APPELLATE DIVISION
PETITIONER-RESPONDENT.	:	

Decided by the Commissioner of Education July 29, 1977.

Decided by the State Board of Education January 11, 1978.

Submitted March 5, 1979 - Decided March 13, 1979.

Before Judges Conford and King.

On appeal from the State Board of Education.

Messrs. Scafuro & Gianni, attorneys for appellant (Mr. Albert O. Scafuro on the brief).

Messrs. Goldberg & Simon, attorneys for respondent (Mr. Theodore M. Simon and Mr. Louis P. Bucceri on the brief).

Mr. John J. Degnan, Attorney General of New Jersey, attorney for respondent New Jersey State Board of Education, filed Statement in lieu of Brief (Mr. Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the Statement).

PER CURIAM

The appellant school district appeals from an order of the State Board of Education affirming a determination of the Commissioner of Education setting aside the action of the appellant board in denying a salary increment to the petitioner school teacher for the school year 1975-1976.

The board of education had resolved to deny petitioner's increment at a private session of the board held March 22, 1975. On March 31, 1975 the Superintendent of the school district informed petitioner of this action explaining that it was taken because his "teaching has not been up to the standards expected at Northern Highlands Regional High School." The record

discloses that detailed and extensive explanations had previously been given to the petitioner as to his teaching shortcomings by his department chairman.

On August 11, 1975 the school board reaffirmed its earlier decision, this time by recorded roll call vote at a public meeting. However no additional notification of the reason for the action was accorded the petitioner.

The Commissioner of Education set aside the school board's action for failure of strict compliance with N.J.S.A. 18A:29-14 which requires a "recorded roll call majority vote of the full membership of the board of education" for a withholding of an increment and the giving of written notice of the action and the reasons therefor to the person concerned within ten days.

We conclude that the Commissioner's determination was hyper-technical and that the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the action, whether before or after the public roll call vote. We regard the intent of the statutory requirement of notice within ten days as being to assure that the individual is apprised of the reasons for the action no later than ten days after the official action. Under all the attendant circumstances, the notice of reasons in March suffices.

Reversed.

PARSIPPANY-TROY HILLS BOARD OF EDUCATION, :

PETITIONER-RESPONDENT, : SUPERIOR COURT

V. : APPELLATE DIVISION

PARSIPPANY-TROY HILLS EDUCATION ASSOCIATION, :

RESPONDENT-APPELLANT. :

_____ :

Decided by the Commissioner of Education October 5, 1977.

Decided by the State Board of Education March 1, 1978.

Argued January 23, 1979-Decided February 5, 1979.

Before Judges Lora, Michels and Larner.

On appeal from the New Jersey State Board of Education.

Mr. Gerald M. Goldberg argued the cause for appellant (Messrs. Goldberg & Simon, attorneys; Mr. Louis P. Bucceri, on the brief).

Mr. Malachi J. Kenney argued the cause for respondent (Messrs. Murray, Granello and Kenney, attorneys).

Mr. John J. Degnan, Attorney General of New Jersey, submitted a statement in lieu of brief on behalf of the New Jersey State Board of Education (Mr. Alfred E. Ramey, Jr., of counsel and on the statement).

PER CURIAM

Appellant Parsippany-Troy Hills Education Association (Association) appeals from a decision of the State Board of Education (State Board) which affirmed a decision of the Commissioner of Education for the reasons expressed by Commissioner Burke in his written decision of October 5, 1977. Commissioner Burke held, in part, that respondent Parsippany-Troy Hills Board of Education (Board) and "all boards of education" had authority to assign teachers to classroom and non-classroom duties, including lunchtime supervision, subject, however, to certain rules of the State Board and pertinent statutes, such as that which guarantees a duty-free half-hour lunch. He also held that such authority could not be nullified or voided by

agreements emanating from collective negotiations, unauthorized actions of administrative agents or arbitration awards.

The matter before the Commissioner involved a dispute between the Association and the Board which arose out of the Board's revision of its plan for scheduling and assigning elementary school teachers to lunchroom and playground supervisory duties. The Board changed the prior practice followed for several years pursuant to which teachers were assigned on a rotating basis to "on-call" lunchroom and playground supervisory duties. However, the actual supervision of the students during these non-classroom periods was done by aides who had been hired specifically for this purpose. The teachers who were assigned the duty were permitted to be "on-call" at other locations so long as they were available if and when needed. Under the revised plan implemented by the Board, teachers assigned to such supervisory duty were required to physically be present in the lunchroom or on the playground, instead of simply being "on-call" as they had been in the past.

The Association filed a grievance, alleging that the implementation of the revised noontime supervision plan violated the terms of the collective bargaining agreement between the parties. The Association pursued the grievance procedure established by the collective bargaining agreement and eventually submitted the grievance to binding arbitration before the American Arbitration Association. While the grievance proceeding was pending, the Board filed a petition with the Commissioner, seeking a declaratory judgment that (1) its statutory authority to appoint employees and assign duties to them during the course of the regular school day could not be, and was not abrogated by the collective bargaining agreement, and (2) it was not bound by any actions of the principals of the various schools in the district with respect to the noontime supervision plan. The Association sought dismissal of the petition on the ground that the Commissioner lacked jurisdiction over the matter, contending, in part, that enforcement of the collective bargaining agreement between the parties was a matter for resolution by binding arbitration.

While this matter was pending before the Commissioner, an arbitration award was entered in favor of the Association. The arbitrator found that the grievance was arbitrable insofar as certain of the elementary schools in the district were concerned and sustained the grievances, holding that the Board had increased existing duties by assigning teachers to noontime supervisory duty in violation of the collective bargaining agreement. The arbitrator directed that the question of noontime supervisory duties be resolved by negotiation, and that pending resolution of the issue each elementary school revert to the practice previously followed with respect to such duty. However,

the arbitrator retained jurisdiction for the purpose of setting a monetary award for teachers in these schools in the event that, pending resolution of the issue, the Board did not restore the prior practice in each of the schools involved. The Association and the Board accepted the arbitration award, thereafter implementing its terms. The matter was resolved without the arbitrator invoking his jurisdiction or either party applying to the court for confirmation or vacation of the award. In short, the dispute between the parties had ended.

At oral argument counsel for the Association conceded that the subject matter of the dispute before the Commissioner was the same as that contained in the grievance adjudicated by the arbitrator. Since the arbitrator's award was in favor of the Association and amicably accepted and implemented by both parties, it is perfectly clear that there is no longer a continuing controversy. Accordingly, this appeal is moot and should be dismissed. See Oxfeld v. New Jersey State Board of Education, 68 N.J. 301 (1975); Sente v. Mayor and Mun. Coun. Clifton, 66 N.J. 204 (1974).

While a moot appeal may be decided when the public interest in the issue presented is so great as to compel a definitive resolution of it, Busik v. Levine, 63 N.J. 351, 364 (1973), appeal dismissed 414 U.S. 1106, 94 S.Ct. 831, 38 L.Ed. 2d 733 (1973); Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17, 22 (1973); Dunn v. Mayor & Coun. & Clerk of Laurel Springs, 163 N.J. Super. 32, 34 (App. Div. 1978); DeRose v. Byrne, 139 N.J. Super. 132, 134 (App. Div. 1976), we are satisfied that we should not do so here. In the first place, the decision of the Commissioner, despite its ostensibly broad scope to include "all boards of education," is binding only on the parties. See N.J.S.A. 52:14B-8 and N.J.A.C. 6:24-2.1. Moreover, there is a substantial body of law dealing with the jurisdictional issues raised by this appeal, see, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1 (1978); State v. State Supervisory Employees Association, 78 N.J. 54 (1978); Tp. of W. Windsor v. Public Employment Rel. Comm., 78 N.J. 98 (1978); Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), and there is no sound reasons for us to expand upon it by way of an advisory opinion.

Accordingly, the appeal is dismissed as moot.

POINT PLEASANT BEACH TEACHERS ASSOCIATION, RUTH O'NEIL, ELAINE HENNESSY AND MARJORIE WATSON,

PETITIONERS-APPELLANTS,

V.

DR. JAMES CALLAM AND BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,

RESPONDENTS-APPELLEES.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 9, 1977

For the Petitioners-Appellants, Anton and Ward (Martin B. Anton, Esq., of Counsel)

For the Respondents-Appellees, Berry, Summerill, Piscal, Kagan & Privetera (Seymour J. Kagan, Esq., of Counsel)

For the New Jersey Education Association, Amicus Curiae, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the New Jersey School Boards Association, Amicus Curiae, Christine D. Weger, Esq.

The Commissioner has held in this case that certain teachers hired by the respondent Board of Education for its Title I Supplemental Elementary Program obtained tenure as teaching staff members pursuant to N.J.S.A. 18A:28-5(a); that the Board of Education subsequently abolished its Title I program pursuant to its statutory authority; and that the individual Petitioners are entitled to part-time tenure status and seniority within the scope of their certification.

For the reasons hereinafter stated, the State Board believes that the individual Petitioners did not obtain tenure as teaching staff members, and therefore they have no tenure or seniority rights in the respondent School District.

The central question is whether or not any of the Petitioners in this case enjoyed the status of "teaching staff member" within the meaning of the tenure statute. It is estab-

lished law that where a teacher has knowingly agreed to and accepted temporary employment in the District, such employment does not make the employee a teaching staff member, and therefore service during the period of such employment does not count toward the accrual of tenure. Biancardi v. Waldwick Board of Education, 139 N.J. Super. 175 (App. Div. 1976), affirmed 73 N.J. 37, more fully discussed hereinafter; Schulz v. State Board of Education, 132 N.J.L. 345 (E. & A. 1945). The determinative factor, then, is the nature of the employment voluntarily agreed to by the teacher--whether or not it is "temporary" as contrasted with "regular".

The fact that Petitioners were paid from Federal funds under ESEA Title I does not of itself resolve the issue. Several factors bear upon the outcome of this inquiry, and the combined factors in this case lead us to the conclusion that the positions held by the individual Petitioners under the Title I program fall within the category of temporary and irregular.

Examination of the job description reveals that the position is to be funded with Title I funds; Title I employees in this position shall provide direct services to Title I participants only; the title of the position is "supplementary teacher"; the compensation is to be paid at an hourly rate of $7.50 and each position is part-time. The responsibilities of each position are to review the pre-testing and post-testing programs of project participants; to provide small group instruction to participants emphasizing identified areas of weakness and to consult with each participant's classroom teacher and parents with respect to schedules, special needs and progress. The position has no responsibilities other than the Title I program.

The agenda for the Board meeting of October 14, 1975 contained a motion appointing each of the individual petitioners as "Title I teaching personnel, effective October 1, 1975, on an hourly basis, as needed for the 1975-76 school year". Another motion in the same agenda appointed another Title I supplementary teacher effective October 15, 1975. All the positions except for the Petitioner O'Neil were for less than six hours per day for the 1975-76 school year.

The record further indicates that Petitioners did not enjoy the fringe benefits of regular teaching staff members; they were ruled by the Teachers' Pension and Annuity Fund to be ineligible for participation in the fund; and they did not participate in regular teachers' duties such as homeroom or playground, nor were they afforded a duty-free lunch period. There is no contention that the Board of Education at any time acted in bad faith or with an intention to evade the tenure laws when it made the foregoing Title I appointments.

The record shows that each of the individual Petitioners possessed the elementary certificate required for the respective positions in the Title I program. Furthermore, as the Hearing Examiner noted, Petitioners' duties included execution of weekly lesson plans, scheduling pupils to be served, ordering supplies and materials, arranging and conducting parent conferences, maintaining individual progress folders for each pupil, reporting individual pupil progress to the homeroom teachers, and attending staff conferences as required by the school administration. Many of these duties, however, are also performed by substitute teachers. Yet it is well settled that substitutes when hired in good faith as such do not accrue time toward tenure when serving as substitutes. Biancardi v. Waldwick Board of Education, supra; Schulz v. State Board of Education, supra.

In Biancardi, the Commissioner had held that time served as a substitute teacher for some two months in the spring of 1970 counted toward accrual of later tenure. The Commissioner found that the Petitioner had performed in all respects the work of a regular teacher for the two-month period in question, and that accordingly such service satisfied the purpose of the probationary period required before tenure is achieved. While the majority of the State Board of Education affirmed that determination, the minority filed a dissenting opinion; and the views expressed in the dissent were specifically approved by the Appellate Division when it reversed the State Board's decision and held that since the teacher "knew she was taking a temporary appointment", time served thereunder could not be counted toward tenure. Both the State Board dissenters and the Appellate Division followed the earlier decision of the Court of Errors and Appeals in Schulz, which held that time served as a substitute teacher is not to be counted toward tenure "for the reason that such substitutes are not 'teaching staff members' within the meaning of the tenure statute, now N.J.S.A. 18A:28-5." (139 N.J. Super. at p. 177) The Court further expressed its agreement with the State Board dissenters' view that "to ascribe permanency to respondent's employment from April to June 1970 would effectively negate and contravene the local board of education's statutory authority to hire respondent as a substitute teacher."

The key principle expressed both in the State Board dissent and in the Appellate Division decision was that where the employee knew and understood her employment to be temporary and there was no evidence that the board used a temporary appointment as a device to avoid tenure entitlements, tenure would not accrue during the period of such temporary employment.

The State Board believes that the same principle controls here. Each of the individual Petitioners was given a job description as earlier described, calling for services "on an hourly basis, as needed", at an hourly rate of pay in a part-time

position, with no other responsibilities than Title I, and with compensation to come solely from Title I funds. We may assume arguendo that the source of funds for teacher compensation does not, in itself, affect the accrual of tenure status. As the amicus brief submitted by the New Jersey School Boards Association points out, however, it is not the source of funding but how that source of funding necessarily alters the character of the employment that is the crucial factor here. The record in this case shows that the actual receipt of approved Title I monies can be delayed and sporadic. Each school district must annually make a new application for the amount of Title I funding allotted to it; and for this and similar reasons boards of education generally feel obliged to employ personnel for Title I programs only on a temporary basis and contingent upon the receipt of Federal funding. Under these circumstances it would be unreasonable and unfair to hold that a board of education could not appoint Title I personnel on a temporary and contingent basis and thereby protect itself against the unpredictable character of the funding for Title I.

In order to be able to run a thorough and efficient school system, a board of education must enjoy flexibility in the establishment and termination of special programs which may have a spasmodic nature and a doubtful future. Such flexibility would be severely hampered if the Board had to bear the seniority and other burdens which would result if teachers hired temporarily for such a program were to obtain tenure and the program itself were thereafter discontinued.

We do not hold that under no circumstances can teachers paid from Title I funds accrue tenure while being so compensated. For example, tenure would accrue to a teacher employed as a regular staff member for the required statutory period, even though during a part or all of this probationary time the teacher was assigned to a Title I program.

We do take the view that when, because of uncertainty in the source of funding, a local board in good faith hires a professional employee on a basis plainly understood to be temporary, such appointment does not give the employee the status of teaching staff member. Wherever the nature of the employment is in dispute and does not clearly appear in the board's records, all relevant factors will have to be considered in determining the question of tenure accrual.

The State Board believes that the Commissioner erred in holding that since Petitioners had achieved tenure in part-time positions, they are "entitled to those prorated salaries and prorated benefits which existed during the years of their employment." (Decision, page 9). However, in view of our holding that

Petitioners have not acquired such tenure, we need not discuss further the matter of other entitlements.

For the foregoing reasons, the request for oral argument is denied and the Commissioner's decision is reversed insofar as it awards tenure, seniority and other entitlements to the Petitioners, and the petition is dismissed.

William Colon abstained.

Attorney Exceptions are noted.

January 10, 1979

Pending N.J. Superior Court

RAMSEY TEACHERS ASSOCIATION, A NEW JERSEY TEACHERS CORPORATION, AND CECELIA O'TOOLE,

PETITIONERS-APPELLEES,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 5, 1978

For the Petitioners-Appellees, Goldberg and Simon
(Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Sullivan and Sullivan
(John J. Sullivan, Esq., of Counsel)

For Amicus Curiae, The New Jersey School Boards Association, David W. Carroll, General Counsel (Nathanya G. Simon, Attorney at Law)

This controversy poses again the question whether a local board of education has the authority to make a blanket provision, by rule or negotiated contract, for extended sick leave on a uniform basis. The Commissioner in his decision herein has held in the affirmative, although precedents decided by this Board and by the Appellate Division of the Superior Court have held otherwise. The Legal Committee recommended that the Commissioner's determination below be reversed and that the State Board of Education reaffirm the settled proposition that extended sick leave may be granted only on an individual case-by-case consideration.

The sick leave policy in question provided in its pertinent portion that upon complete utilization of accumulated sick time, an ill teacher would receive up to 100 additional days of leave with full salary less the pay of a substitute; and that after 100 days any teacher with at least 10 years experience could be allowed further absence with loss of half pay for the time in excess of 100 days, except that no such leave should extend beyond the end of the school year in which the absence occurs. The Petitioner, a teacher with more than 10 years experience, became ill during the 1971-72 academic year. Thereafter she missed 19 days of work during that academic year, 129 days during 1972-73, 106 days during 1973-74, and 62 days during the 1974-75

academic year up to December 5, 1974. In March of 1974 the Board terminated Petitioner's sick leave benefits, claiming that its sick leave policy was ultra vires and void in that it provided benefits not permitted by statute and that the Board could not abdicate its statutory authority to grant extended sick leave on an individual basis. The Commissioner determined that the policy provision for 100 days of leave was valid because it applied uniformly to all employees, but that the policy was faulty with respect to the leave it granted beyond 100 days because the latter provision did not apply uniformly to all persons in the Board's employ.

The two sections of the statute which must be interpreted here are the following:

> N.J.S.A. 18A:30-6. "When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary."
>
> N.J.S.A. 18A:30-7. "Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year."

The Commissioner has previously determined in Hutchenson v. Board of Education of Totowa, 1971 S.L.D. 512 and in Marriott v. Board of Education of Hamilton Township, 1949-50 S.L.D. 57, that in granting sick leave beyond the accumulated and annual leave allowed pursuant to law, the Board "must consider each individual case", and therefore

> "A blanket rule of a board of education to pay for a certain number of days the difference between a teacher's salary and her substitute's without considering the individual cases is inconsistent with law. *** The Board members are free, and indeed, it is their duty, to decide each individual case on its merits." (1949-50 S.L.D. at p. 60)

Both of the foregoing decisions were affirmed by the State Board of Education, Marriott at 1950-51 S.L.D. 69, and Hutchenson at 1972 S.L.D. 672. Despite these precedents, the Commissioner uttered a dictum in Woodbridge Township Federation of Teachers v. Board of Education of Woodbridge Township, 1974 S.L.D. 1201, that "a local board of education may grant sick leave in excess of 15 days on a uniform basis to all employees" (p. 1208). The Hearing Examiner in the instant case noted that the quoted dictum was in conflict with the decisions in Marriott and Hutchenson, both of which were affirmed by the State Board of Education, and he therefore recommended that the Commissioner modify that language when deciding the present controversy. Instead, the Commissioner re-examined sections 18A:30-6 and 18A:30-7, and citing the dictum from Woodbridge held that a local board "may grant as many additional days to all employees as it deems appropriate in a blanket rule applicable to all, the sole restriction being that no more than 15 days of sick leave may be accumulative."

The Commissioner reasoned that after Marriott was decided, Chapter 58 of the Laws of 1956 (hereinafter examined) was enacted as a liberalization of sick leave entitlements, providing an opportunity for local boards to provide by rule or by individual consideration for a grant of sick leave days over and above the minimum number. He opined that the 1956 Act had not been adequately considered in Hutchenson.

We respectfully disagree with the Commissioner's view and would hold to the precedents laid down by the State Board's affirmances in Marriott and Hutchenson. We read N.J.S.A. 18A:30-7, in the light of its entire statutory history, as vesting two alternative powers in the local board of education: (1) "to fix either by rule or by individual consideration the payment of salary in cases of absence not constituting sick leave", and (2) "to grant sick leave over and above the minimum sick leave as defined in this chapter***." The first alternative appeared in Chapter 142, P.L. 1942 (R.S. 18:13-23.5) in the following form:

> "5. Nothing in this act shall affect the right of the board of education to fix either by rule or by individual consideration, the

> payment of salary in cases of absence not constituting sick leave."

The 1956 amendment added to sections 1 and 5 of the 1942 law so that they would read in their pertinent portions as follows:

> "1. ...If any such person requires in any school year less than this specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.
>
> "5. Nothing in this act shall affect the right of the board of education to fix either by rule or by individual consideration the payment of salary in cases of absence not constituting sick leave or granting sick leave over and above the minimum sick leave as defined in this act."

The statement to the bill effecting these changes provided:

> "The purpose of this bill is to clarify the language of the present statute to conform with the intent of the present law so that no more than 10 days of sick leave shall be accumulative during any school year."

In our view the foregoing addition to section 5 did not change or modify the provision in section 4 (R.S. 18:13-23.4, now 18A:30-7) which required individual consideration of each application for extended sick leave; the amendment was intended only to make it clear that the Board could still grant sick leave above that which could be accumulated pursuant to the statute. The entire matter was further clarified when the education law was recodified into Title 18A and section 18A:30-7 assumed its present form as above noted.

Furthermore, regardless of our own views on this subject, we are controlled by the recent decision of the Appellate Division of the Superior Court in Piscataway Board of Education v. Piscataway Maintenance and Custodial Association, 152 N.J. Super. 235 (App. Div. 1977). The issue there, as here, was the validity of a contract provision which granted extended sick leave to employees according to a blanket uniform schedule. The contract provided a comprehensive formula under which benefits could be paid for up to 260 working days, with the further proviso that the board "may, in its discretion, extend the above sick leave policy in individual cases." The Board maintained that the

awarding of benefits of absences because of illness or injury beyond the allowed annual and accumulated sick leave periods was a matter which the statute vests in its discretion, to be exercised on a case-by-case basis; consequently, the contractual provision granting such extended benefits to any qualifying employee as a matter of right exceeded its authority and was void. The Appellate Division agreed with the Board, holding that the Board's discretion under 18A:30-6 was not negotiable and could not be bargained away. The Court said (152 N.J. Super. at p. 246-247):

> "By granting its employees extended total disability leave benefits as a matter of right, the board in this case surrendered its statutory obligation to deal with each case on an individual basis. We are convinced that in adopting the Employer-Employee Relations Act the Legislature did not contemplate that local boards of education could or would abdicate their statutorily imposed management responsibilities. Cf. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n., supra, 64 N.J. at 25. As we recently held in In re Englewood Bd. of Ed., 150 N.J. Super. 265 (App. Div. 1977), where the subject matter sought to be negotiated or arbitrated is left to the managerial discretion of the school board by legislative mandate, any agreement to the contrary is invalid and unenforceable."

Thus the Appellate Division has reaffirmed the requirement of N.J.S.A. 18A:30-6 that the local board of education must exercise its discretion in each individual case when determining how much extended sick leave to grant to an ill employee. Neither N.J.S.A. 18A:30-7 nor the duty to negotiate under the Employer-Employee Relations Act override the discretionary power and duty vested in the Board, or authorize it to provide by rule or contract provision for extended sick leave on duty other than an individual basis.

We also note that in a similar case the Public Employment Relations Commission arrived independently at the same conclusion. In re Rockaway Township Board of Education, 3 NJPER 325 (1977)

For the foregoing reasons the State Board of Education reverses the decision of the Commissioner insofar as it is inconsistent with this opinion, and directs that the petition herein be dismissed.

Attorney Exceptions are noted.
January 10, 1979

Pending N.J. Superior Court

"S.W." AND "D.W.",	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, June 10, 1977

Decided by the State Board of Education, September 7, 1977

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

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

On March 1, 1978 the State Board in light of the Appellate Division's remand and the State Board's Decision in Diaz v. Board of Education of Roxbury, remanded this case back to a Hearing Examiner for a de novo determination of the Classification of "S.W.", based on the evidence previously presented. A Classification Officer's Decision was rendered February 5, 1979. Petitioners in a letter dated February 20, 1979 to the Commissioner, regarded the Decision of February 5, 1979 as a hearing examiner's report making exceptions, objections and replies to that report.

Respondent in a letter dated February 22, 1979 concurred with the decision of the Classification Officer.

On May 10, 1979, a motion was made to the State Board for an order voiding the Classification Officer's Decision. On June 12, 1979 assistant to the Legal Committee of the State Board responded to Petitioners-Appellant's motion, stating that "when the matter was remanded on March 1, 1978 the State Board did not retain jurisdiction in the matter." Accordingly Petitioners-Appellants were advised that the proper procedure would be to file an appeal with the Commissioner of Education pursuant to N.J.S.A. 6:28-1.11.

However, in a letter dated July 13, 1979 Assistant Commissioner Zach denied request for oral argument and affirmed the Hearing Examiner's Report (Classification Officer's Decision) of February 5, 1979. As a result of the July 13, 1979 letter Petitioners-Appellants filed a notice of appeal to the State Board.

Although, pursuant to N.J.A.C. 6:28-1.9 et seq. Classification Officer Decisions are normally appealable to the Commissioner of Education, in this case the Classification Officer, consistent with our remand, was sitting as the Commissioner's hearing officer. Petitioners filed exceptions to the report (decision) of the Classification Officer and Respondent has provided reply. There has as yet been no final decision of the Commissioner in this matter. The State Board does not regard the July 13, 1979 letter to the Assistant Commissioner as a decision of the Commissioner of Education. Accordingly, the State Board remands this case without prejudice to any future appeal to the Commissioner for a final determination.

September 6, 1979

DELORES SHOKEY,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 29, 1978

For the Petitioner-Appellee, Joel S. Selikoff, Esq. (Steven R. Cohen, Esq., on the Brief)

For the Respondent-Appellant, Brown, Connery, Kulp Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

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

David Brandt opposed.

April 4, 1979

JOHN A. SMITH, III,

Appellant,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education November 10, 1977

Decided by the State Board of Education April 5, 1978

Submitted: December 18, 1979 - Decided: December 28, 1979

Before Judges Crane, Milmed and King.

On appeal from the State Board of Education.

John A. Smith, III, pro se.

John J. Degnan, Attorney General of New Jersey, attorney for respondnet (Erminie L. Conley, Assistant Attorney General, Of Counsel and M. Kathleen Duncan, Deputy Attorney General, On the Brief).

PER CURIAM

This is an appeal from a decision of the New Jersey State Board of Education which affirmed the November 10, 1977 decision of the Commissioner of Education for the reasons expressed therein. Petitioner-appellant, a tenured English teacher, contended before the Commissioner that his attainment of a Juris Doctor degree entitled him to advance standing on the Board's salary scale.

The local Board of Education's policy standards provided that "all degrees or academic credits must be in the field of education, except that degrees or credits in other fields will be accepted if they are closely related to the field in which the teacher is certified." We agree with the Commissioner that, while appellant-petitioner's pursuit of higher education is commendable, the local Board's decision not to recognize the Juris Doctor as an advanced degree in education or closely related thereto was neither arbitrary, capricious nor unreasonable in this situation. The decision was for the local

Board to make under the controlling statute and the negotiated salary policies. See N.J.S.A. 18A:29-4.1; N.J.S.A. 18A:29-6; N.J.S.A. 18A:29-7.

The decision of the State Board of Education is affirmed substantially for the reasons stated in the written opinion of Commissioner Burke dated November 10, 1977.

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE BOROUGH: STATE BOARD OF EDUCATION
OF TINTON FALLS, MONMOUTH : DECISION
COUNTY. :
:

Decided by the Commissioner of Education, April 10, 1978

For the Petitioner-Appellant, Raymond Waters, Pro Se

For the Respondent-Appellee, Reussille, Cornwell, Mausner, & Carotenuto (Martin M. Barger, Esq., of Counsel)

The State Board reverses the determination of the Commissioner herein and directs that the 1978 annual school election in the Borough of Tinton Falls be set aside because of statutory violations and ensuing confusion which vitiated the voting process beyond acceptable limits.

This difficult case calls for a more extensive review of the applicable principles of law than is found in the Commissioner's decision. Furthermore, stricter compliance with the statutes must be required in future school elections if the results thereof are to be sustained as an adequate expression of the will of the people.

In the case before us the polls for the school election were supposed to open at 3:00 P.M., but not one of the five machines to be used in the district was ready before 5:40 P.M.; and the last one was not ready until about 7:20 P.M. The Board Secretary had failed to have the official ballots printed for use in the voting machines as required by N.J.S.A. 18A:14-41. This and other errors resulted in the failure to have the machines ready for use when the polls opened.

As the Commissioner's opinion noted, early voters were turned away because the machines were not ready. Although the names and telephone numbers were taken from those persons who could not vote, the record is not clear as to what percentage of those voters did in fact return later to cast their ballots. It further appears from material submitted by Petitioner that the average number of voters in school elections in the district during the five years prior to 1978 was 593.4; that in 1977 the voters numbered 575, and that in 1978 only 352 citizens voted

--223 less than the previous year and 241 less than the 5-year average. Petitioner received 162 votes while the candidate with the next lowest number of votes received 222, or a difference of 60 votes. Accordingly, if over 200 more ballots had been cast and the machines had at all times been in proper working order, Petitioner might well have overcome that 60-vote deficit.

Petitioner was unable to prove that the election would have turned out differently if the machines had at all times been in proper working order. Cf. Magura v. Smith, 131 N.J. Super. 395 (Law Div. 1974). We believe, however, that a contestant should not have to perform the almost impossible task of adducing such proof when, as here, the violation of the election laws has been so gross that almost half the usual number of voters did not cast ballots and there is a substantial possibility that if they had voted, the contestant would have won.

N.J.S.A. 18A:14-45 provides for the hours of opening and closing the polls at school elections as follows:

> "The polls shall be and remain open between the hours of five and nine P.M. and during any additional time which the board may designate between the hours of seven A.M. and nine P.M. and shall remain open as much longer as may be necessary to permit those present at the time so fixed for the closing of the polls to cast their ballots."

For the Tinton Falls election now in question the Board of Education had determined that the polls should be open from 3:00 P.M. to 9:00 P.M. in order to provide the electorate with a reasonable opportunity to cast their ballots. Because of the malfunctioning machines, the polls were in fact open for less than one-half the time prescribed by the Board. Moreover, they were not even open for a substantial portion of the four-hour minimum period mandated by the above quoted statute. This failure to have the polls open for so great a portion of the prescribed hours may well have effectively deprived a considerable number of voters of the opportunity to express themselves in the election. So grave a violation of the rights of the voters cannot be tolerated.

N.J.S.A. 19:29-1 would appear to apply to elections under Title 18A in respect to the use of voting machines (see N.J.S.A. 18A:14-42); and in any event, the principles laid down in that statute should be applied by analogy to school elections. Under 19:29-1 an election may be contested upon any of several grounds including a "[m]alconduct *** on the part of the members of any district board *** sufficient to challenge the result" and "[w]hen illegal votes have been received, or legal votes rejected at the polls sufficient to change the result***."

Following the precedent of Magura v. Smith, supra, we hold that the inoperability of the voting machines for a substantial portion of the time the polls were open resulted in a "rejection" of legal votes within the meaning of the statute and that the failure of the election officials to have the machines in proper operation for the entire period from 3:00 P.M. to 9:00 P.M. comprised "malconduct" on their part. We believe that the first violation (vote rejection) was "sufficient to change the result" and that a fortiori the second violation was "sufficient to challenge the result". These quoted phrases, in our view, do not require definite proof that the error actually did change the result, especially under circumstances like the present which showed conclusively a failure to have the polls open when they were supposed to be and a far smaller number of votes were actually cast than had been the case with the last few previous elections. If it had been the intention of the Legislature to require in such cases definite proof that deprivation of voting rights actually changed the result of the election, the statute would have so provided in plain language as it did in subparagraph (f) of N.J.S.A. 19:29-1, which authorizes a contest for certain errors by the board of canvassers "if such error would change the result".

The foregoing views find some support in the decision of the Appellate Division in the case of In re Application of Abbott Low Moffat, 142 N.J. Super. 217 (App. Div. 1976), which also involved a defect in a voting machine. The malfunction there prevented the recording of votes for the contestant; 138 ballots could not be accounted for, and the difference between the contestant and the next highest vote-getter was 92 votes. Although the contestant could not prove that he would have received most of the votes unaccounted for, there was a "glaring disparity" between the hundred votes for his running mate and the one vote which he received on the defective machine. From these facts the Appellate Division found "a compelling inference that a substantial number of votes for Moffat were not recorded", and that he might have emerged the victor if he had received, "as seems likely", at least as many votes as the other Democratic candidate. The court accordingly applied the rule that "Where irregularities are such 'that the court cannot with reasonable certainty determine who received a majority of the legal votes, the election should be set aside.'***" (142 N.J. Super. at 226).

So here it seems to us that one cannot with reasonable certainty determine who would have received a majority of the legal votes if none had been rejected, wherefore the election should be set aside. We would have preferred stronger proof of this proposition from the testimony of pollwatchers or other sources. Under the peculiar circumstances here, however, we have concluded that the proof of the election law violations, together with the statistical data and the vote differential between the contestants, was sufficient to require the election to be voided.

Members 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. We are deeply concerned over the numerous cases of election irregularities which have come before the Commissioner in recent years. We urge the Commissioner to take suitable measures to reduce election law violations and irregularities, including referring to the appropriate prosecutor any case where such violations or irregularities are sufficiently serious or occur in the district with such frequency that criminal prosecution may be indicated.

In our opinion the will of the people was not adequately expressed in the 1978 school election in Tinton Falls because of serious failure to provide the electorate with adequate opportunity to express its will. Where a substantial number of citizens have in effect been deprived of their sacred right to vote, the election is not worthy of the name. The election here should accordingly be vacated.

N.J.S.A. 18A:12-15 provides for the filling of vacancies on a board of education. We think that this case is governed by subparagraph (d) of that statute, which directs that a vacancy be filled

> "***(d) By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with the procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes***."

The annual school election for 1979 will be held on April 3, 1979. We believe that the basic intent of the law will be best carried out by allowing the electorate to vote at said election for a candidate to fill the unexpired term for which there was a failure to elect in 1978.

Ms. Montgomery abstained in the matter.

February 7, 1979

EDITH E. TRAUTWEIN,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, April 28, 1978.

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

For the Respondent-Appellant, Westling & Lime (William P. Westling, Esq., of Counsel)

In this case the Board of Education withheld a teacher's increment because of excessive absences. The Commissioner reversed the Board's action and directed that the increment be paid.

The State Board affirms the decision of the Commissioner of Education. However, we believe that the Commissioner erred in holding that the Board could not count Petitioner's absences from February through June 1975 in determining whether or not Petitioner's absenteeism was excessive.

It is our view that a teacher's entire record of absenteeism may properly be considered by the Board, although as time recedes into the past the earlier record becomes less relevant to the present. Particularly with respect to the time elapsing between the previous grant of an increment (presumably in February or March of the previous year) and the determination of the Board in the current year, the absences of the teacher should be counted. Otherwise, as Appellant's brief points out, a teacher could absent herself at will during the remainder of the previous school year after the award of an increment without having this fact weigh against her chances of receiving an increment in the current year. This result does not withstand the test of reason or logic.

An analogous situation was presented In the Matter of the Tenure Hearing of Joseph A. Maratea, 1966 S.L.D. 77, affirmed by State Board of Education 106, affirmed by Appellate Division 1967

S.L.D. 351. The first charge against the Respondent in that case was misappropriation of monies from the cafeteria - miscellaneous receipts fund over a period of two school years. These came to light in February of the following year. At that time the board of education decided not to press charges against the Respondent but to continue his employment with the hope that the mistake would not be repeated. Other charges were brought against the Respondent for misconduct in years subsequent to the misappropriations. The Commissioner determined that since the Respondent had demonstrated his unfitness through a series of incidents over a period of time, "the Board should not be estopped by its earlier forbearance from citing the gamut of his failings." 1966 S.L.D. at 105. In affirming the Commissioner's decision, the Appellate Division remarked (1967 S.L.D. at 352):

> "An examination of the other charges which the Commissioner found supported by the evidence clearly shows that the episode contained in charge number one was only one of many demonstrating appellant's unsuitability to serve in the office of superintendent.
>
> "An individual's unfitness to retain a position as a school district official may be demonstrated by a single incident, if such is sufficiently flagrant. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). However, such unfitness may also be established by proof of a series of related events, each of which taken individually would not support an action for dismissal. 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)."

So in the case of withholding an increment, past conduct over a reasonably relevant period of time may properly be considered by a board of education in determining whether or not a teacher's increment should be withheld.

Accordingly, we would base our decision on the proposition that while the Petitioner's absences for the 12 months or more preceding the Board's action of April 6, 1976 were unusually numerous and should be considered material, each one of them was legitimate and excused, in the case of Petitioner's personal illness, by a certificate from her physician. In the light of

this and other relevant circumstances, the absences were not so numerous as to justify the withholding of her increment for the ensuing school year.

Attorney Exceptions are noted.

March 7, 1979

Pending N.J. Superior Court

MARILYN VAN HASSEL,	:	
RESPONDENT-CROSS-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	APPELLATE DIVISION
APPELLANT-CROSS-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education July 29, 1977.

Decided by the State Board of Education April 5, 1978.

Submitted January 30, 1979 -- Decided March 13, 1979.

Before Judges Matthews, Kole and Milmed.

On appeal from a final decision of the State Board of Education.

Messrs. Scafuro & Gianni, attorneys for appellant-cross-respondent (Mr. Albert O. Scafuro, on the brief).

Messrs. Goldberg & Simon, attorneys for respondent-cross-appellant (Mr. Theodore M. Simon, of counsel; Mr. Sheldon H. Pincus, on the initial brief; Mr. Louis P. Bucceri, on the reply brief).

Mr. John J. Degnan, Attorney General of New Jersey, attorney for the State Board of Education, filed a Statement in lieu of brief on behalf of the State Board (Mr. Mark Schorr, Deputy Attorney General, of counsel and on the Statement).

PER CURIAM

These are cross appeals from a decision of the State Board of Education (State Board) which affirmed a decision of the Acting State Commissioner of Education (Commissioner).

The essential facts may be briefly summarized. Respondent-cross-appellant Marilyn Van Hassel commenced employment with appellant-cross-respondent Board of Education of the Northern Highlands Regional High School District (Board) in January 1973 as a classroom teacher of mathematics. She worked the balance of

the 1972-73 academic year and was reemployed by the Board for the 1973-74 and 1974-75 academic years. By letter of March 25, 1975, the Board's Superintendent of Schools informed her that

> As you are probably aware, the town councils have asked for a cut of $200,000 from the originally proposed budget.[1] The Board of Education has not agreed and plans to appeal to the Commissioner. Because of this uncertainty we will not be able to offer you a contract for the 1975-76 school year.
>
> This means several teaching positions will be eliminated. Because at this time we do not have accurate enrollment figures in our elective courses we cannot determine where these position eliminations will be made. Therefore, I am sending this letter to all non-tenured teachers and some tenured teachers to comply with both our agreement with the NHEA which calls for notification by April 1, and the law which calls for notification by April 30.

By letter of May 5, 1975, the Superintendent gave Mrs. Van Hassel "official notification" that

> because of staff reductions necessitated by the budget defeat and cut you will not be reemployed by the Northern Highlands Regional High School District for 1975-76.

Responding to the notice, Mrs. Van Hassel, by letter of May 9, 1975, asked the president of the Board for a letter from the Board stating why she was not to be reemployed. She also asked for a hearing with the Board to discuss the matter. By letter of June 2, 1975, the Board's president answered:

> The decision not to re-employ you was made by the Board after the budget defeat and the consequent need to drop one math teacher.
>
> After consultation with the administration and department chairman you were the person selected by this group to be dropped because it was their opinion that although you are a

[1] It appears that the proposed 1975-76 school budget was defeated by the voters.

> good teacher you were less effective than any other non-tenured teacher.
>
> Your request for a hearing is denied. Nothing in the law or in our contract with the teachers mandates such a step.

Thereupon Mrs. Van Hassel petitioned the State Commissioner of Education (Commissioner) "for an order renewing her 1974-75 contract for the 1975-76 school year, together with any back pay which may be due her, together with such other and further relief as the Commissioner may deem in order." She alleged that she knew "of her own knowledge that the [Board] is hiring another new math teacher in her place," and that "[a]ccordingly, the reasons provided to her [i.e., the *** need to drop one math teacher ***,] are untrue and the actions of the Board of Education [in] failing to renew her contract for the 1975-76 school year are arbitrary, capricious, invidious and a constitutional abuse of the discretionary grant of power in violation of Title 18A." She also complained of the Board's denial of her request for a hearing. The Board denied her charges. The matter was "referred directly to the [Acting] Commissioner of Education on the record, including the pleadings, briefs of the parties in support of their respective positions, exhibits, and affidavits."

The [Acting] Commissioner found that (1) Mrs. Van Hassel's letter of May 9, 1975 constituted "a legitimate request for an opportunity to be heard by the Board on the reasons why it determined not to reemploy her," and that "[s]uch a request should have been honored by the Board to meet its obligations as stated in" Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974); (2) "the Board did not conclusively determine [Mrs. Van Hassel's] status with respect to non-reemployment for the 1975-76 academic year until April 9, 1975," and since "[she] was not notified of the Board's determination until May 5, 1975, five days beyond the statutory time [April 30] for such notification," the Board failed to comply with the provisions of N.J.S.A. 18A:27-10; (3) the relief which would have been available to Mrs. Van Hassel under N.J.S.A. 18A:27-11 because of such non-compliance by the Board[2] could not be granted because of

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[2] In such situation, the statute (N.J.S.A. 18A:27-11) provides that the "board of education shall be deemed to have offered to [her] continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

her failure to exercise the option provided her by N.J.S.A. 18A:27-12;[3] (4) "the Board made a legitimate determination on on April 9, 1975 not to reemploy petitioner" and (5) the Board gave "no sound reason why it refused to grant [Mrs. Van Hassel] an informal appearance as an opportunity to dissuade the Board members from their prior determination." He concluded that he would mold "his own relief" for the improper action of the Board and, accordingly, directed "the Board to pay [Mrs. Van Hassel] the equivalent of sixty days' compensation at the rate she would have received during 1975-76, mitigated by any moneys she otherwise earned during that time."[4] The State Board of Education (State Board) affirmed the (Acting) Commissioner's decision "for the reasons expressed therein." The Board of Education of the Northern Highlands Regional High School District appealed contending that (1) the Acting Commissioner and the State Board "failed to follow 'stare decisis' in the case," their decision being inconsistent with a prior decision by the Commissioner, affirmed by the State Board[5] and (2) "[t]he only relief, if any, which the Commissioner should grant to [Mrs. Van Hassel] would be to order the Board to grant [her] an informal, private appearance before the Board." Mrs. Van Hassel cross-appealed. She contends that (1) the Commissioner and the State Board did not provide an adequate remedy for the failure of the appellant-cross-respondent Board to comply with N.J.S.A. 18A:27-10 and its failure to grant her a hearing; (2) the reasons given "for her dismissal were false in fact"; and (3) "[t]he decision in Mary Ann McCormack et al. v. Boards of Education of the Northern Highlands Regional School District and the Borough of Fair Lawn, Bergen County, is not stare decisis in the matter sub judice."

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[3] To notify the Board by June 1, 1975 of her acceptance of the "continued employment" provided in the circumstances by N.J.S.A. 18A:27-11.

[4] He added: "This determination does not provide petitioner with additional employment experience with the Board to have accrued a tenure status," and dismissed her petition "in all other respects."

[5] In the case of Mary Ann McCormack, Robert R. Yundzel et al. v. Boards of Education of the Northern Highlands Regional High School District and the Borough of Fair Lawn, Bergen County, 1976 S.L.D. 754 This court, in an unreported opinion of April 7, 1978 (Docket No. A-2022-76), affirmed the decision of the State Board in the case "substantially for the reasons stated in the Commissioner's decision."

From our review of the record in this case we are satisfied that the Acting Commissioner's findings could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). See also Chappell v. Commissioner of Education of New Jersey, 135 N.J. Super. 565, 572 (App. Div.), certif. den. 69 N.J. 84 (1975). We discern no reason for disturbing them. State v. Johnson, 42 N.J. 146, 162 (1964). However, we find no sound basis for his ultimate determination which directs "the Board to pay [Mrs. Van Hassel] the equivalent of sixty days' compensation at the rate she would have received during 1975-76, mitigated by any moneys she otherwise earned during that time." In the totality of the circumstances disclosed in the record the only remaining relief available to Mrs. Van Hassel was "an informal appearance" proceeding to be conducted by the Board. See Donaldson v. Board of Education of North Wildwood, supra, 65 N.J. at 246; N.J.A.C. 6:3-1.20.

Accordingly, the decision of the State Board of Education under review is reversed and the matter is remanded to the Board of Education of the Northern Highlands Regional High School District. The Board is to afford Mrs. Van Hassel a full informal appearance proceeding, in accordance with the provisions of N.J.A.C. 6:3-1.20, any change in the Board's prior determination not to reemploy her to be effective for the school year 1979-1980. We do not retain jurisdiction.

In view of our determination, we find no need to comment on any of the remaining contentions of either party.

IN THE MATTER OF THE TENURE	:	
HEARING OF KATHY WINDSOR, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
WASHINGTON, GLOUCESTER COUNTY.	:	
	:	

Decided by the Commissioner of Education, August 16, 1978

For the Petitioner-Appellee, Hyland, Davis & Reberkenny (William D. Hogan, Esq., of Counsel)

For the Respondent-Appellant, Joel S. Selikoff, Esq.

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

February 7, 1979

SUSAN ZINK,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,	:	APPELLATE DIVISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, October 11, 1977.

Decided by the State Board of Education, May 3, 1978.

Argued February 6, 1979 -- Decided February 22, 1979.

Before Judges Ard and Antell.

On appeal from New Jersey State Board of Education.

Mr. Joel S. Selikoff argued the cause for appellant.

Mr. William C. Horner argued the cause for respondent.

PER CURIAM

Petitioner brought this proceeding before the Commissioner of Education seeking reinstatement to her teaching position in the school district of the City of Salem. She appeals from the decision of the State Board of Education affirming the Commissioner's order for summary judgment in favor of respondent.

Petitioner was a nontenured school teacher employed by respondent for the academic years 1973-74 through 1975-76. By letter dated March 26, 1976 she was notified that her contract of employment would not be renewed for the academic year 1976-77. At her request she was furnished, by letter of April 6, 1976, a statement of reasons for nonrenewal of her contract, and an informal hearing of the kind suggested by the Supreme Court in Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236, 246 (1974), was held April 26, 1976. She was allowed to offer her refutation of the reasons given, but respondent's position remained unchanged. This petition to the Commissioner followed.

In substance, petitioner alleges that respondent's reasons are baseless, and are contrived to mask the fact that her nonretention was decided upon in retaliation for her having filed

a grievance protesting respondent's procedures in filling a vacancy for the position of vice-principal. She later withdrew her grievance at the suggestion of her principal, but nevertheless claims that nonrenewal of her contract under these circumstances constitutes a violation of her constitutionally protected right of free expression. Winston v. Bd. Ed. So. Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), certif. den. 64 N.J. 582 (1974).

Respondent's motion for summary judgment was supported by the affidavit of its Superintendent of Schools. This, in effect, reaffirmed that the reasons for petitioner's nonretention were as stated in respondent's statement of reasons dated April 6, 1976 and enlarged upon the financial pressures that were crucial to respondent's determination to accomplish reductions in staff. It specifically recited that neither affiant nor the Board members were ever even aware of the grievance allegedly filed by petitioner during the preceding school year; it added that at no time during the informal hearing of April 26 was the grievance mentioned by petitioner, nor did she ever suggest to the Board that the real motivation for respondent's action might be found in its desire, or in the desire of her school principal, to punish petitioner for exercising her right of free speech. In reply, petitioner relied upon her verifying affidavit accompanying the petition which contained the conclusory allegation that "I believe the true basis for the Board's action was my having filed a grievance in January, 1976." Her affidavit thereafter projects the inference that the timing of the unfavorable reports concerning her teaching performance upon which respondent's statement of reasons partially rested, in contrast to earlier favorable evaluations, verifies her statement of belief as to the true basis for respondent's action.

As we observed in Winston v. Bd. Ed. So. Plainfield, supra at 143, the discretion vested in a local school board in determining whether a nontenured teacher shall be retained is extremely broad. It is not confined to unsatisfactory classroom or professional performance. Donaldson v. Bd. of Ed. of No. Wildwood, supra at 241. Although this broad discretion is subject to the limitations of the First and Fourteenth Amendments to the Constitution of the United States, we are satisfied from our careful examination of the record that no genuine issue of material fact exists with respect to petitioner's allegation that nonrenewal is precluded by First Amendment considerations. Her claim of a causal relationship between filing her grievance and nonrenewal of her contract is supported only by proof that one followed some three months after the other. This does not suffice. The circumstances are materially distinguishable from those treated in Winston v. Bd. Ed. So. Plainfield, supra, where the petitioner's adverse evaluation report contained certain "Administrator's remarks" which specifically focused on the fact

that petitioner had been "overly critical" of administrative policy and action.

Affirmed.

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